THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 28

Case No. 16,426 — Case No. 17,059

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U. S. v. SWEENEY—WALING

Case No. 16,426—Case No. 17,059

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FEDERAL CASES.

BOOK 28.

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

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

Case No. 16,426.

UNITED STATES v. SWEENEY.

[1 Biss. 309.] [1]

District Court, D. Wisconsin. Oct. Term, 1859.

SHIPPING—ENROLLMENT AND LICENSE—REVENUE LAWS—COMMERCE IN DISTILLED SPIRITS.

1. The act of March 2, 1831 [4 Stat. 487], regulating the foreign and coasting trade on the northern, north-eastern, and north-western frontiers, in effect extended the act of February 18, 1793 [1 Stat. 305], to the western lakes.

2. Whenever a vessel was enrolled or licensed under this act of 1831, it became under the protection of the laws of the United States, and bound to observe the revenue laws.

3. In the act of February 18, 1793, domestic distilled spirits are placed in the same category with articles of foreign growth or manufacture, they being at that time subject to tax, and the object of the act being the protection of the revenue. But by act of April 6, 1802 [2 Stat. 148], this tax on spirits having been discontinued, the object of the provisions of the act of February 18, 1793, so far as they relate to domestic distilled spirits is superseded, and the requirements of the act in regard to them are no longer to be enforced.

4. The distilling of liquors in the United States having been left entirely free of duty, the spirits became as free an article of commerce as any other article of domestic manufacture.

Declaration in debt for a penalty. It charges that the defendant [Barney Sweeney] was the master or commander of a steamboat called the "Traveller," licensed for carrying on the coasting trade; and that he navigated said boat and arrived with said boat from a district in one state to a district in an adjoining state on a navigable river and water communication, to wit: from the port of Chicago in the state of Illinois, to the port of Milwaukee in the state of Wisconsin. And that the defendant on his arrival at the port of Milwaukee from the port of Chicago, had on board more than five hundred gallons of distilled spirits in casks, to wit: thirty barrels of alcohol, which he had brought on said boat from the port of Chicago. And the defendant did, at Milwaukee, unlade said distilled spirits without delivering to the collector a manifest of the cargo of said boat, certified by either the collector or surveyor of the district of Chicago, or any duplicate manifest of said cargo, and before and without offering to affirm or swear to any such manifest, and before and without having a permit to unload any part of said cargo. And he neglected and refused to deliver any manifest of the cargo of said boat, to the collector at Milwaukee, at the time and in the manner directed by the act of congress, approved February 18, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," &c. (1 Stat. 305).

The defendant demurred to the declaration.

D. A. J. Upham, U. S. Dist. Atty.

H. W. Blodgett, for defendant.

MILLER, District Judge. The declaration is drawn under the fifteenth section of the act of February 18, 1793, which directs, "that the master or commander of every ship or vessel licensed for carrying on the coasting trade having on board either distilled spirits in casks exceeding five hundred gallons, wine in casks exceeding two hundred and fifty gallons, &c., * * * or foreign merchandise in packages as imported, exceeding in value four hundred dollars in goods, wares or merchandise, consisting of such enumerated or other articles of foreign growth or manufacture, or of both, whose aggregate value exceeds eight hundred dollars, and arriving from a district in one state at a district in

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

the same, or in an adjoining state, on the sea coast, or on a navigable river, shall previous to the unlading of any part of the cargo of such ship or vessel, deliver to the collector, &c., the manifest of the cargo certified by the collector or surveyor of the district from whence she sailed, &c. Whereupon the collector or surveyor shall grant a permit for unlading, &c. And if the master shall neglect &c., he shall pay one hundred dollars." It is provided in section eighteen of the act, "that nothing in this act contained shall be so construed as to oblige the master or commander of any ship or vessel licensed for carrying on the coasting trade, bound from a district in one state, to a district in the same or an adjoining state, on the sea coast, or on a navigable river, having on board goods, wares, or merchandise of the growth, product, or manufacture of the United States only (except distilled spirits), or distilled spirits not more than five hundred gallons, &c., (the articles as enumerated above,) in section 15, to deliver a manifest thereof or obtain a permit previous to her departure, or, on her arrival within such district to make any report thereof; but said master shall be provided with a manifest, by him subscribed, of the lading of what kind soever, which was on board such ship or vessel at the time of his departure from the district from which she last sailed; and if the same, or any part of such lading consists of distilled spirits, or goods, wares, or merchandise of foreign growth or manufacture, with the marks and numbers of each cask, bag, box, chest, or package, containing the same, with the name of the shipper and consignee of each, which manifest shall be by him exhibited for the inspection of any officer of the revenue, when by such officer thereunto required."

Two points are presented by the demurrer: (1) That the operation of the act is restricted to the sea coast and navigable rivers. (2) That the act has particular reference to the protection of a revenue arising from internal duties on domestic distilled spirits, which was subsequently discontinued. "An act to regulate the foreign and coasting trade on the northern, north-eastern and north-western frontiers of the United States, and for other purposes," approved March 2, 1831 (4 Stat. 487), in effect extended the act of February 18, 1793, to these lakes. The third section is: "That from and after the passage of this act, any boat, ship, or other vessel of the United States, navigating the waters on our northern, north-eastern and north-western frontiers, otherwise than by sea, shall be enrolled and licensed in such form as may be prescribed by the secretary of the treasury, which enrollment and license shall authorize any such ship, or other vessel, to be employed either in the coasting or foreign trade; and no certificate of registry shall be required for vessels so employed on said frontiers."

Whenever a vessel was enrolled or licensed under this act, it became under the protection of the laws of the United States and bound to observe the revenue laws. A vessel arriving at the port of Detroit, or any other port in a navigable river, connecting the lakes, would come literally under the requirements of the act of February 18, 1793. Lake Michigan is not a navigable river, but I do not think that such a strict construction should be put on the act as contended for on behalf of the defendant. This is a suit for the recovery of a penalty for the violation of a duty, official in character, required of the master by the legal conditions of the license under which he navigated his boat. But although this is an action for a penalty, yet the intention of the legislature must govern; and the act should not be construed so strictly as to defeat the obvious intention of the legislature. U. S. v. Wiltburger, 5 Wheat. [18 U. S.] 76. In addition to the above quotation from section eighteen of the act of February 18, 1793, it is further provided in said section: "And if the master of such ship or vessel shall not be provided, on his arrival within any such district, with a manifest, and exhibit the same as herein required, if the lading of such ship or vessel consist wholly of goods, the produce or manufacture of United States, (distilled spirits excepted,) he shall forfeit twenty dollars; or if there be distilled spirits, or goods, wares, or merchandise of foreign growth or manufacture on board, excepting what may be sufficient for sea stores, he shall forfeit forty dollars; and if any of the goods laden on board such ship or vessel, shall be of foreign growth or manufacture, or of spirits distilled within the United States, so much of the same as may be on board such ship or vessel, and which shall not be included in the manifest exhibited by such master, shall be forfeited." This provision, as well as the whole act, places domestic distilled spirits in the same category with articles of foreign growth or manufacture. The object of the act was for the protection of the revenue.

Duties on spirits distilled within the United States were imposed by the act of congress approved March 3, 1791 (1 Stat. 199), and collected under the management of the supervisors of the revenue. Before the spirits could be removed from the distillery, the casks were to be branded; and those not branded were liable to forfeiture. And an act concerning the duties on spirits distilled within United States, approved May 8, 1792 (1 Stat. 267), further regulated the duties on domestic distilled spirits. Those duties were recoverable by virtue of these acts at the date of the act of February 18, 1793, under which this suit is brought, and explain the reason for incorporating distilled spirits in the several sections of said act with foreign articles. If no duties were collectible, spirits distilled in the United States would not have been included in the description of articles in the several sections of the acts. By an act to repeal the internal taxes, approved April

6, 1802 (2 Stat. 148), the internal duties on stills and domestic distilled spirits are discontinued, and all acts and parts of acts whatever relative thereto are repealed. The several provisions of the act of February, 1793, seem to have particular reference to the protection of a revenue which is repealed and discontinued. The object of the provisions of the act, so far as they relate to domestic distilled spirits, is superseded or annulled by the act discontinuing the duties; and these requirements of the act in this particular one are no longer to be enforced. The repealing act of April 6, 1802, left the distilling of liquors in the United States as free of duties as the manufacturing of any other article; and virtually left spirits distilled within the United States as free an article of commerce as any other article of domestic manufacture. The penalties prescribed by the act of February 18, 1793, as claimed in the declaration, should not therefore be recovered. For this reason the demurrer will be sustained.

Case No. 16,427.

UNITED STATES v. SWETT et al.

[2 Hask. 310.] [1]

District Court, D. Maine. Feb., 1879.

CRIMINAL JURISDICTION OF FEDERAL COURTS—CONSPIRACY—MISCONDUCT OF JUROR—BURDEN OF PROOF.

1. The federal courts have jurisdiction only of crimes and offenses created by acts of congress and when conferred by statutes of the United States.

2. An indictment, charging a conspiracy to have a bankrupt account for his property by falsely pretending that he had given a valid mortgage thereon to secure a consideration, a part of which he should falsely pretend to have been stolen, sets out an offense under section 5440, Rev. St., as a conspiracy to attempt to account for property by fictitious losses.

3. The burden rests upon the party charging misconduct of a juror during a trial to prove it.

4. A verdict will not be set aside when a juror who joined in it had during the trial indiscreetly made a remark out of court showing no bias, but only what impression he had received from the evidence.

Indictment for conspiracy under section 5440, Rev. St., to attempt to account for the property of a bankrupt by fictitious losses.

Both defendants [George W. Swett and John O. Winship] were found guilty upon the sixth count, and thereupon they moved that judgment be arrested, in that the count upon which they were convicted did not charge any offence enacted by act of congress, and for a new trial by reason of the misconduct of a juror.

Wilber F. Lunt, U. S. Dist. Atty.

Charles E. Clifford, for Swett.

Bion Bradbury and Charles F. Libby, for Winship.

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

FOX, District Judge. The jury having found the defendants guilty upon the sixth count in this indictment, they have filed a motion in arrest of judgment thereon.

The federal courts have not jurisdiction to punish offences against the United States, which have not been previously defined and a specific punishment affixed by some statute of the United States. The crime must be so declared by act of congress and jurisdiction conferred on the court, and such statutes should not be extended, by judicial construction, to cases not clearly and unmistakably within the provisions of the act. Interpreting the averments found in the sixth count as they would be ordinarily understood, giving the language of the count its usual, customary meaning, are these defendants thereby charged with any offence against the United States?

This count, after setting forth that one Thomas A. Holland, July 26, 1876, was a person, respecting whom proceedings in bankruptcy had been commenced, alleges that Holland, with Swett, Winship and one William H. Leavitt, on July 26th, conspired to commit an offence against the United States, to wit: that Holland, on August 25th, in said proceedings in bankruptcy in the district court of the United States for the district of Mainc, should then and there attempt to account for his property by fictitious losses and expenses, to wit, by then and there pretending that he, the said Holland, had on the 3d day of July, 1876, received from Swett and Leavitt the sum of $6000 as part of the consideration of two promissory notes for the sum of $5000 each, for which a mortgage was given by Holland to Swett and Leavitt to secure the payment thereof to them, which mortgage bill of sale contained certain of his, said Holland's, goods and chattels, viz: certain wool and shoddy stock of the value of $13,000, which mortgage bill of sale bore date as of May 4, 1876, and was then and there made by Holland and delivered to Swett and Leavitt, the consideration therein alleged being the sum of $10,000; and also, that he, said Holland, in said proceedings in bankruptcy in said district court, at said Portland, should testify and pretend, that said $6000 had been feloniously stolen from him said Holland, in Boston, July 4, 1876, with intent to defraud Perkins & als., creditors of said Holland. [See Case No. 6,603.] It avers, that the $6000 was not paid to Holland and was never stolen from him, all of which the defendants well knew; and that Holland in pursuance of this conspiracy and to effect the object thereof, on August 26th, did attempt to account for his property by fictitious losses, by falsely testifying and pretending that said $6000 was so paid to him by Swett and Leavitt as a part of the consideration of the notes purporting to be secured by said mortgage, and that the same was so stolen from him.

Rev. St. U. S. § 5440, declares that if two or more persons conspire, either to commit an offence against the United States, or

* * *, and one of such persons does any act to effect the object of the conspiracy, all the parties shall be liable, &c. The offence against the United States, which these defendants are charged with having conspired to commit, is set forth in section 5132, which enacts that every person against whom proceedings in bankruptcy are commenced, who attempts to account for his property by fictitious losses or expenses shall be punished.

The principal objection to the sixth count is, that the allegations therein contained do not set forth and describe the offence contemplated by section 5132; and in the language of the brief, "the count is fatally defective in this, that it does not allege that Holland was the owner or possessor of any property for which he attempted to account by fictitious losses, or that he attempted to account for any property which was ever in existence; that the indictment is guilty of the absurdity of charging that a man can be guilty of keeping his property from his assignee by pretending to have and lose what he never had at all."

The contention is, that, as the count states he never had the $6000, he, as a matter of course, could never have lost it; that there could never be a fictitious loss of this property, and that he could not, under such circumstances, be guilty of the offence of attempting to account for his property by fictitious losses. If, to constitute the offence, it is necessary that the property which the bankrupt claims to have lost, he should at some time have actually owned, and if the only allegations in the count had been, that not being the owner of the $6000, he was to pretend he had lost the same, it may possibly be that this objection would have been valid, and that one material averment in the count would have been so repugnant to others that the count would be bad. For reasons hereinafter given, it is not necessary for any definite ruling upon such an objection; but, as at present advised, the court is not without considerable doubt as to its validity.

While one can not actually lose that which never existed, or which he never possessed or owned, may it not be, that under the bankrupt law, when attempting to account for his property, he may affirm that he had certain property that had been stolen from him, when in fact he never had the property? The offence denounced by section 5132 is not the concealing by the bankrupt of his property from his assignee, but, it is an attempt to account for his property by fictitious losses.

What are the constituents of this crime under section 5132?

First there must be the attempt by the bankrupt to account for his property. Does this require that at some previous time he should actually have owned the property, or that he should assert his having been the owner, and thereupon, as his property, attempt to account for it? If he asserts that on a certain day he had such and such property, which he goes on and accounts for as lost, is it or not, within the law, an attempt by him to account for his property? Of what matter is it, whether he held an absolute or contingent title, or whether he had any interest in the property, provided he accounts for it as his, and asserts that it was his?

Secondly, the alleged loss must be fictitious; that is, there must not have been any loss. Certainly, this requirement is met as fully when there was no property to lose, as when it has actually been stolen from him. The purpose of the bankrupt, by such false statements, is to deceive and mislead his assignee, or the court; and by pursuing this course, and asserting that he once had the property, of which he had thus been deprived, he, for the time, succeeds in accomplishing his object. This objection has been presented by both of the learned counsel with much force, and while it is by no means free from doubt, my opinion is rather inclined to the conclusion that the offence designated would be committed by a bankrupt, if, in attempting to give an account of his property, he declares that a portion of his property consisted of certain articles which had been stolen from him, when in fact he never had such property.

The validity of this count is not dependent on the correctness of this construction of the law, as other material averments are therein contained, which entirely obviate the objection as here presented. The conspiracy therein charged is not simply that Holland, in the course of the proceedings in bankruptcy, should attempt by a fictitious loss to account for the six thousand dollars which he never had; but it is, that he, on the twenty-fifth day of August, at Portland, in said proceedings in bankruptcy, in the district court of the United States for said district of Maine, should then and there attempt to account for his property by fictitious losses and expenses, to wit: by then and there pretending that he had, on the third day of July, A. D. 1876, received from Swett and Leavitt, the sum of $6000 as part of the consideration of two promissory notes for the sum of $5000 each, for which a mortgage was given by said Holland on certain wool, &c., of the value of $13,000; and also, that in said proceedings in bankruptcy, said Holland should testify and pretend that said $6000 had been stolen in Boston on the fourth of July. The allegations here made are definite and specific, that the conspiracy was that Holland should attempt to account for his property by pretending that he had given Swett and Leavitt a valid mortgage for $10,000 on his wool and other property, valued at $13,000, and that he should also pretend that, in part of the consideration of the notes for $10,000 so secured upon the stock, he had received $6,000 which had been stolen from him. This conspiracy as set forth in this count covered the entire proceedings, not only the pretence that he received the $6,000 and it had been stolen, but that it also constituted a part of the consideration of the mortgage, giving validity to it in this respect, and that the wool

and other property in his possession was legally subject to this incumbrance. He was, therefore, thus to account for his property, his wool and shoddy, and to claim that he in good faith had given a valid mortgage upon it, a part of the consideration of which had been stolen from him.

In the language of Blumensteil: "The bankrupt was to attempt to explain the deficiency in his property, by giving false reasons therefor, and by enumerating alleged losses which had not occurred, an act which is not only fraudulent and opposed to that full disclosure which is essential to be made by every bankrupt, but also involves the crime of perjury."

It was agreed between the conspirators that Holland, when called upon in the bankrupt court to disclose about his property, its state, title and condition, should testify that he had been the owner of this specific property, the wool, &c., but that the same was encumbered by a valid mortgage for a loan received by him, and which had been stolen from him. This certainly was a conspiracy to account for this property, and, by so accounting, to explain how and why he was no longer its absolute owner, and, by pretence of a fictitious loss, to attempt to satisfy the court that he had received and lost a portion of the sum, as security for which he had encumbered it. In the opinion of the court, these averments in this count bring the case within both the letter and spirit of the act, as a conspiracy to attempt to account for his property by a fictitious loss.

There is also a motion to set aside the verdict for alleged misconduct of S. F. Piper, one of the jurors, on two occasions:

First: In conversing with one of the witnesses, in a room in this building in the basement adjoining the water closets, Leroy S. Sanborn testified: "I was a clerk in the post office and was in the water closet December eighteenth, when the trial was about half through. The door of the closet was partly open, so that I could see into the room. Heard a voice say, 'One is as guilty as the other.' Looked out the door and saw three men come in. One was Thomas Brackett, the other two I did not know. One had on a hat, the other did not. Heard the man without the hat say to Brackett, 'I saw you on the stand, didn't I?' Brackett replied, 'Yes, I was.' Then the man asked, 'Did you lose anything by Swett or Holland?' and Brackett replied, 'We did.' The man with the hat on said to Brackett, 'What kind of a fellow is Swett?' and Brackett replied, 'He is a tricky bugger, but people have a good deal of sympathy for him since he came out of the army.' The same man then says to Brackett, 'Holland is a pretty good fellow, ain't he?' I did not catch the reply. During the time these men were there, Tobias Eastman and Samuel Dingley came in. The man without the hat I afterwards saw on the jury. Informed Winship of this conversation the day the verdict was rendered." On cross examination, witness stated: "I have known Winship as long as I can remember, went to school to him, have been on very friendly terms with him, expressed my sympathy for him during the trial and my hope of his acquittal. I knew Brackett. He shook his head to the inquiry about Holland being a pretty good fellow. I was twelve or fifteen feet from the men while they were talking."

Tobias Eastman testified: "I was in the room where the water closets are the day after Brackett testified. Recognized Brackett there and two of the jurymen. Could not say whether they were talking together and did not pay any attention."

Isaac D. Waterman testified: "I was one of the jury, and went with Piper to the water closets and was near him all the time he was there. Don't think I heard any conversation between Brackett and Piper. Heard some talk; something about slapping in the face. Piper made no conversation with Brackett that I know of. I did not hear all the talk; within my hearing Piper made no conversation with Brackett."

Samuel F. Piper testified: "I was one of the jurors. Went to water closet with Waterman. Asked a gentleman who resided in Gorham or Windham what kind of a man Swett was. He said people out there had a good deal of sympathy for him, and that was all that was said by him; nothing else said by Brackett. I asked the question because I had seen a man on crutches at White Rock yearly meeting and thought it might have been Swett. I did not inquire about Holland, as I knew him when he lived in Limerick. The man did not say that Swett was a tricky bugger. I have stated all that I heard said. Waterman was about two feet from me at the time of this conversation."

Thomas Brackett testified: "I do not think I had any conversation with Piper; did not know the man till to-day. I answer positively that I never said Swett was a tricky bugger—never said any such thing."

To authorize the court to set aside a verdict for misconduct of the jury, such misconduct must be satisfactorily established, the burden being upon the moving party. Sanborn's testimony certainly tends to show that one of the witnesses, in conversation with one of the jurymen during the trial, made statements prejudicial to the character of Swett, and calculated to impair the confidence of the juror in him as a witness. Such statements should appear to have been made in the hearing of the jury to affect the verdict. Sanborn was apparently a fair, candid and intelligent witness, and the only reason for questioning the correctness of his statement is his sympathy for Winship and the friendly relations between them.

Brackett positively denies that he used the

expression attributed to him by Sanborn. Piper admits he conversed with Brackett, and that Brackett remarked, "people out there had a good deal of sympathy for Swett;" but he swears "Brackett did not say Swett was a tricky bugger." Waterman did not hear any conversation between Piper and Brackett, although they went together to the water closet and were near each other; and Eastman, called by defendants, says the jurymen were there with Brackett, but could not tell whether they were talking together. Two witnesses, therefore, are found contradicting the statement of Sanborn, and testifying that Brackett did not use this language, and the court, having seen Piper upon the stand as a witness, does not feel justified in believing him to have been guilty of wilful falsehood, although he certainly deserves reprehension for conversing with any one about the case while on trial, against the urgent injunction of the court. If such language was used by Brackett, it certainly did not attract the attention of any one but Sanborn, as it was not heard by either Piper, Waterman, or Eastman, as they testify; and the defendants, therefore, could not have been prejudiced by any remarks of which the jury were not cognizant, although made in their presence.

Secondly: It is also alleged that Piper conversed with Edwin L. Dyer while travelling on the cars of the Grand Trunk Railroad on Saturday afternoon, the case for the government having been in progress some four or five days. Dyer is an attorney at law, quite lately admitted to the bar, and formerly a student in the office of Drummond and Winship. His testimony is, "I took a seat alongside of Piper knowing he was a juror, and entered into conversation with him. Piper said, they had a pretty interesting case; it was a long job. I replied 'Yes.' Piper then said he thought there was a good deal of rascality there, and that Winship knew something about it, and he should receive no mercy at his hands. Told him he ought to be careful what he said. Did not inform Winship of this till day before yesterday."

Piper admits he had a conversation with Dyer in the cars, but denies that he said Winship should have no mercy at his hands, and insists that it was Dyer who called Winship the rascal. With this conflict between the witnesses, and with the burden on defendants, the court is not satisfied that Piper did use the language attributed to him by Dyer; if he had, it would not afford sufficient cause for a new trial.

Such remarks do not indicate that there was any bias or prejudice in the mind of the juror previous to the trial, but only disclose the impression he was then under, caused by the testimony he had heard. At the time of this interview, the testimony of the witnesses in behalf of the government, if they were believed by the jury, established the guilt of these defendants. Unintentionally the minds of jurors, as they listen to the evidence, do receive impressions more or less positive, but they frequently are effaced as the cause progresses. Experience teaches that few persons can keep their minds unbiased when hearing a strong one-sided statement.

No case has been found which would authorise the court to set aside a verdict for such conduct on the part of a juror; but on the contrary, in Harrison v. Price, 22 Ind. 168, the court refused so to do where it appeared that, during the time of hearing the evidence, a juror, while at dinner, asked a stranger how he thought the case would go, to which the reply was, "from outside rumor the jury ought to find for defendant; but from the appearance of the jury, he thought it would find for plaintiff," to which the juror made answer, " 'Yes, by God, I know it will.' " The court, in refusing the motion said, "The juror could not help the involuntary action of his own mind; but he indiscreetly uttered the remark before the trial was completed.

Motion in arrest, and for a new trial, overruled.

In conclusion, Judge FOX said that, at the suggestion of the defendants' counsel, he had consulted with Judge LOWELL of the circuit court, and that he was authorized to say that Judge LOWELL, after a careful examination of the written opinion, concurred in the decision.

At a later day the defendants being set at the bar, and sentence being moved for, the court said:

FOX, District Judge. George W. Swett and John O. Winship, the court cannot but regret that it is now obliged to pronounce that sentence which the law requires me to award against you for the very serious crime of which you have been found guilty.

You, Swett, in defence of your country, became maimed and crippled for life; but your friends and neighbors had such confidence and sympathy for you, on your return home, that you were appointed postmaster, and have accumulated a little property, all of which, it is said, has been lost in attempting to aid an associate in a most bold and wicked attempt to defraud his creditors. You joined in this conspiracy to transfer to you and your confederate, by various false and fraudulent conveyances, property of the debtor of great value; and, as difficulties gathered around the transaction, in accomplishing your fraudulent purposes and deceiving the creditors, you at last, under the sanction of a solemn oath, asseverated the truthfulness of your statements and the fairness and honesty of your dealings with the debtor in your examination before the register in bankruptcy. You swore to many state-

ments which you then knew were false; and that you might be successful in your fraud, you committed wilful, corrupt perjury.

Your associates, by their oaths, corroborated the truthfulness of your statements, so that these persons, who had heretofore been of fair reputation in this county, by concert and express agreement between them, each swore to wilful falsehood, and subjected themselves to the disgrace and shame and penalties of the crime of perjury.

The other prisoner, John O. Winship, has for some years been an attorney of this court, of more than ordinary endowments and ability, and was associated for some time with a gentleman of the highest standing and character, who was in no way cognizant of Winship's misconduct, and whom the court, with the greatest satisfaction, thus publicly exonerates from any imputation by reason of his relations with Winship.

The evidence tended to show that the other conspirators employed Winship as their attorney to draft for them, from time to time, these fraudulent conveyances, four in number; but the jury were not satisfied that Winship actually joined and participated in the conspiracy with the others prior to the fictitious mortgage by Holland of his wool and other stock for $10,000 to Swett and Leavitt; but, by their verdict, they do find that, after that, Winship did conspire with the others that it should be pretended that Swett and Leavitt had paid the $6000 to Holland as part of the consideration of this mortgage, and that Holland should pretend to have lost this sum, and should afterwards so testify in the proceedings in bankruptcy. At the time you joined in this conspiracy, you, Winship, well knew that this amount was never so loaned to Holland, and was never lost by him; and yet, you attended as the counsel for all the other conspirators before the register in bankruptcy in their examination under oath, and you provided Holland with a copy of his false testimony, in relation to this matter, as given by him before the district judge on a prior occasion, in order that there should be no conflict in his statement. You listened to this false testimony, of these your fellow conspirators, given in accordance with the agreement between you, and which you and they knew was false; and you thereby sanctioned and promoted this wicked fraud, thus sustained by the wholesale perjury of all of them. The pretence that your relation of counsel to these parties justified your conduct is so monstrous, that the simple statement affords its complete refutal. Conspiracy and subornation of perjury have not become a part of the duty incumbent upon an attorney in behalf of his client. Such conduct can only be denounced as a most base and detestable crime, especially on the part of an attorney, in whom the court has imposed confidence as one of its officers. Such crimes deserve and will receive condign and vigorous punishment, that others, who may be exposed to like temptations, may profit by this before and be delivered from committing the offence.

For this crime, the statute declares that the punishment shall be by fine of not less than $1000, nor more than $10,000, and imprisonment not exceeding two years.

The court has entertained serious doubt whether it would be justified in not requiring the imprisonment to be in the state prison; but, considering that this is the first conviction under this statute in this district, and that it will be understood that if others should be hereafter convicted of similar offences, the punishment, in all probability, will be to the full extent allowed by the law, I have concluded to impose upon each of you an imprisonment in jail, as being less odious and disgraceful, and not so likely hereafter to prove prejudicial to you, if by your future conduct you shall manifest sincere repentance for your crime. The term of imprisonment will be for as short a duration as I have imposed in another district upon parties convicted of offences under this section of the statute.

Fine $1000 each, one year imprisonment in jail, Portland.

NOTE. Both defendants were committed in execution of their sentence Feb. 8, 1879, and both were pardoned by President Hayes. Both were released by virtue of the pardon; Winship, June 25, 1879, and Swett, Jan. 12, 1880.

UNITED STATES (TABER v.). See Case No. 13,722.

Case No. 16,428.

UNITED STATES v. TAINTOR.

[11 Blatchf. 374;[1] 19 Int. Rev. Rec. 4; 1 Thomp. Nat. Bank Cas. 256.]

Circuit Court, S. D. New York. Nov. 22, 1873.

EVIDENCE — EMBEZZLEMENT BY NATIONAL BANK OFFICER.

The defendant was indicted, under the fifty-fifth section of the national banking act of June 3, 1864 (13 Stat. 116), for embezzling, abstracting, and wilfully misapplying the moneys and funds of a bank of which he was cashier, with intent to injure and defraud the bank. On the trial it was shown that he took moneys and funds of the bank, and used them in stock speculations carried on in his own name, by depositing them with a stockbroker, as margins. The defendant offered to prove that such acts of his were known to the president and some of the directors of the bank, and were sanctioned by them, and that such dealings of his with the funds of the bank were intended for the account and benefit of the bank, and were believed by him to have been sanctioned by the president and some of the directors, although there was no resolution of the board of directors authorizing or sanctioning them. The evidence was offered only to disprove the averments in the indictment, that the acts were done "with intent to injure and de-

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

fraud" the bank. The evidence was excluded. *Held*, that the evidence was properly excluded. [Cited in Reeves v. State (Ala.) 11 South. 162.]

The defendant [Frank L. Taintor] was indicted under the fifty-fifth section of the national banking act of June 3, 1864 (13 Stat. 116), for embezzling, abstracting, and wilfully misapplying the moneys and funds of the Atlantic National Bank, of which he was cashier, with intent to injure and defraud the association. The indictment contained numerous counts designed to cover numerous distinct transactions, and the several transactions were, by means of distinct counts, charged as embezzlements, abstractions, and misapplications. It was averred, in each count of the indictment, that the acts were done with intent to injure and defraud the association.

On the trial, before BENEDICT, District Judge, evidence was given to show that the defendant took moneys and funds of the bank, and used them in stock speculations carried on in his own name, by depositing the same with a stock-broker, as margins for stocks bought, or represented to have been bought, on his account, which were to be held by the broker subject to his order, so long as he kept with the broker a margin of ten per cent. The defendant offered to prove that these, his acts, were known to the president and some of the directors of the bank, and were sanctioned by them, and that all his dealings with the funds of the bank, of which evidence had been given, were intended for the account and benefit of the bank, and were believed by him to have been sanctioned by the president and some of the directors, although there was no resolution of the board of directors authorizing or sanctioning them. These offers were not made for the purpose of contradicting the proof of the commission of the acts about which testimony had been given, but only to disprove the averments in the indictment, that the acts were done with intent to injure and defraud the association.

The evidence offered by the defendant was excluded, and the suggestion being made by the court, that, in case the defendant should be advised to move for a new trial, to test the correctness of the ruling, Judges WOODRUFF and BLATCHFORD would be requested to take part in the hearing of such motion, a motion for a new trial was accordingly made and heard by the three judges.

George Bliss, U. S. Dist. Atty.

A. Oakey Hall and James C. Carter, for defendant.

Before WOODRUFF, Circuit Judge, and BLATCHFORD and BENEDICT, District Judges.

BENEDICT, District Judge. The ruling called in question upon this motion involved two propositions, namely, that the guilty intent charged in the indictment was shown by the proof of the acts done by the defendant; and, further, that the facts offered to be proved by the defendant would not, in law, avail to negative that intent. It has hardly been doubted, upon this motion, that the first of these propositions is correct. The correctness of the second is strenuously denied, and is now to be determined.

It is a general rule of law, that a man must be held to intend the necessary consequences of his acts. This rule is applicable as well to cases of crime as in civil causes, for, whatever proves intent anywhere proves it everywhere. It has often been so applied. Furthermore, in certain cases, and these criminal, the proof of guilty intent afforded by evidence of acts knowingly done has been held to be conclusive, and not overthrown by proof of any other facts; and this class of cases has not been limited to acts mala in se, nor to crimes at common law. On this argument, it was conceded, that, by virtue of the rule in question, the guilty intent is conclusively shown by proof of the act done, where the nature of the act is such that a general guilty intent is so clearly manifested thereby as to admit of no question. It appears to us, that the rule, even thus limited, covers the present case and justifies the decision made at the trial. For, the act done by the defendant was clearly unlawful, and he is precluded from denying knowledge that it was so. He was an officer of an association created under a statute which does not permit any person to make such a use of the funds of the association as was here made. Futhermore, the act of the defendant rendered the association liable to a forfeiture of its charter. Still further, it cast upon the bank a risk which attached at the instant of the doing of the act, and this a risk notoriously great, extraordinary in character, and outside the bounds of proper commercial use. It placed the capital of the bank beyond the control of the officers of the association, and it was an unlawful dealing with the money of a corporation belonging to a class of institutions whose welfare is intimately connected with the public welfare, which are liable to be depositaries of the public moneys, and which cannot justly be considered to be merely private pecuniary trusts. The act of the defendant, therefore, necessarily involved injury, not only to the association, but also, in a proper sense, to the public. An act having such characteristics, and involving such consequences, when knowingly done, discloses moral turpitude, and cannot be innocent. It may, therefore, well be held, that proof of such an act proves conclusively an intent to injure, because, when knowingly done, it affords no opportunity for justification or legal excuse, and manifests so clearly a general guilty intent as to make it of no consequence what other particular intent co-existed therewith, and to preclude enquiry as to such other in-

tent, or into the motives which impelled to its commission. A generous motive is not inconsistent with a guilty intent, and proof of the one does not disprove the other. Our opinion, therefore, is, that the circumstances offered to be proved by the defendant would not tend to disprove the guilty intent charged in the indictment.

But it is contended that the phraseology of the statute under which the indictment is framed, requires proof of something more than the general guilty intent necessarily involved in such a misapplication of the funds of a national bank, inasmuch as it couples with the words "embezzle, abstract and wilfully misapply," the words "with intent to injure or defraud the association," and thus requires the presence of a corrupt motive, a design to cheat the association out of money, in order to constitute the offence. It is unnecessary to determine whether the latter words, as here used, are intended to be taken in connection with the words "embezzle, abstract or wilfully misapply," because this has been assumed by the prosecution, and the indictment, in each count, charges an intent to injure and defraud the association. The question presented, therefore, is as to the effect produced upon the words "embezzle, abstract or wilfully misapply," by the addition of the words "with intent to injure or defraud the association."

In considering this phraseology, it will be noticed, that, while the word "embezzle," and, perhaps, also, the word "abstract," refers to acts done for the benefit of the actor as against the bank, the word "misapply" covers acts having no relation to the pecuniary profit or advantage of the doer thereof. A design to make criminal acts done without reference to personal advantage is thus clearly disclosed, and it appears that the intention of the statute was to cover cases of unlawful dealing with the funds of the bank by its officers, although without a corrupt motive. This intention, manifested by the insertion of an emphatic and significant term in the commencement of the section, it cannot be supposed was intended to be defeated by the subsequent use of the words "with intent to injure or defraud." Nor can such effect be given these words without treating the word "injure" as synonymous with "defraud," and as referring to a misapplication for the benefit of the doer. But, if the signification of the word "defraud" be limited to a malicious dealing with property for the personal advantage of the doer—and it is not always to be so limited—the word "injure" is not of such limited application, and was doubtless inserted to cover cases of misapplication causing injury to the association without benefit to the offender. The guilty intent required by the statute would, therefore, still exist, although it be shown that no personal pecuniary benefit was anticipated by the defendant, and the requirement of the statute is fulfilled by proof of general guilty intent involved in the act knowingly committed.

The phrase "intent to injure or defraud" is the same one used in indictments for forgery. There it refers to a general guilty intent, and such indictments are held conclusively proved when the act is proved to have been knowingly committed. The phrase should be considered to have the same meaning in this statute, and to be proved in the same way. Nor does this construction render the words nugatory. On the contrary, they are given precisely the same effect which they are held to have in indictments where their presence has been considered to be necessary. A similar effect has been given to this same phrase in other statutes. Thus Lord Chief Justice Tindal has observed, that, "where a statute directs that, to complete an offence, it must have been done with intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law, when a man wilfully does that which is illegal, and which, in its necessary consequence, must injure his neighbor." 5 Car. & P. 266, note; 2 Russ. Crimes, p. 575; Com. v. Snelling, 15 Pick. 340. It is, indeed, true, that this construction of the statute under consideration imputes to the legislature the policy of making some acts criminal which may not have been before classed as crimes; and if, as it seems to be here suggested, the moral sense of the business community has become so blunted that such acts as this defendant is conceded to have committed have come to be considered "innocent or even praiseworthy," the urgent need of the adoption of such a policy affords good ground for supposing that its adoption was intended by the statute.

Our opinion, therefore, is, that no error was committed in rejecting the evidence offered by the defence upon the trial of this cause; and the motion for a new trial must, accordingly, be denied.

Case No. 16,429.

UNITED STATES v. TALLMAN et al.

SAME v. PIKE.

[10 Blatchf. 21.][1]

Circuit Court, S. D. New York. June 3, 1872.

CRIMINAL LAW — QUASHING INDICTMENT — SELECTION OF GRAND JURY—STATE LAWS.

1. The decision in U. S. v. Reed [Case No. 16,134], cited and approved.

2. A motion to quash an indictment was heard on an agreed statement of facts, without putting the defendant to plead the matters alleged as grounds for the motion.

3. The provisions of the Revised Statutes of the state of New York (2 Rev. St. p. 724, §§ 27, 28), are, by the act of congress of July 20, 1840

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

(5 Stat. 394), made applicable to the federal courts, and no challenge to an array of grand jurors, or to any person summoned to serve as a grand juror, and no objection to the competency of any person summoned to serve as a grand juror, can be allowed, other than an objection to a grand juror, before he is sworn, on the ground that he is the prosecutor, or complainant, on a charge, or is a witness on the part of the prosecution, and has been subpœnaed, or been bound in a recognizance, as such.

[Cited in U. S. v. Coppersmith, 4 Fed. 199; Brewer v. Jacobs, 22 Fed. 234.]

4. Irregularities in the summoning of grand jurors do not entitle a party indicted, as matter of law, to avoid the indictment.

5. Where the accused shows that he has been prejudiced by irregularity or fraud in designating, summoning, and returning the grand jury, he has his remedy, by motion to the court, for relief.

6. The rule of this court, of November 11, 1867, in regard to the designation and selection of jurors, is a proper provision.

7. It not being shown that the officers acting in this case, under that rule, had not acted in good faith, in compliance therewith, and no fraud being alleged, nor any prejudice to the accused, a motion to quash the indictment, on the ground of alleged irregularities in selecting the grand jurors, was denied.

[Approved in U. S. v. Tuska, Case No. 16,550.]

[Cited in People v. Lauder, 82 Mich. 135, 46 N. W. 964.]

8. A grand jury selected and drawn in accordance with that rule, is not irregularly or illegally selected or drawn.

9. The act of July 20, 1840, does not require literal conformity to the mode of selecting and drawing jurors prescribed by the state laws, but only substantial conformity, and that only as far as is practicable.

[Cited in U. S. v. Richardson, 28 Fed. 69.]

10. What is thus practicable, defined.

These were motions to quash indictments [against John C. Tallman and others and Samuel C. Pike], on the ground, that, in selecting and designating the persons forming the grand jury by which the indictments were found, the mode practised in the highest court of law of the state of New York, in selecting and designating grand jurors to serve therein, was not followed. The provision on the subject, in the laws of the United States, is the act of July 20, 1840 (5 Stat. 394), in these words: "Jurors to serve in the courts of the United States, in each state respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter, from time to time, have and be entitled to, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practised, and hereafter to be practised, therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof; and, for this purpose, the said courts shall have power to make all necessary rules and regulations, for conforming the designation and empannelling of juries, in substance, to the laws and usages now in force in such state, and, further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective states for the state courts."

Noah Davis, U. S. Dist. Atty.

Edwards Pierrepont, William Stanley, and Thomas Harland, for defendants.

WOODRUFF, Circuit Judge. We are of opinion that the decision of Justices Nelson and Hall, in this circuit, at a term held for the Northern district of New York (U. S. v. Reed [Case No. 16,134]), disposes of the questions raised by the motion to quash the indictments in these cases; and in that decision we fully concur. It was there distinctly held, that the provisions of the Revised Statutes of the state of New York (2 Rev. St. p. 724, §§ 27, 28), prescribing the objections that may be taken to the organization of grand juries, are, by the act of congress of July 20, 1840 (5 Stat. 394), made applicable to the federal courts; and, therefore, that "no challenge to the array of grand jurors, or to any person summoned to serve as a grand juror, shall be allowed in any other cases than such as are specified" in the twenty-seventh section of the state statute. Those provisons are as follows:

"Sec. 27. A person held to answer to any criminal charge, may object to the competency of any one summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been subpœnaed, or been bound in a recognizance, as such; and, if such objection be established, the person so summoned shall be set aside.

"Sec. 28. No challenge to the array of grand jurors, or to any person summoned to serve as a grand juror, shall be allowed in any other cases than such as are specified in the last section."

There is no allegation or claim, in the present cases, that the objections which may be made to grand jurors, under the twenty-eighth section, are or can be urged against the grand jurors by whom these indictments were found.

It was further held, in the case cited, that causes of challenge to the array, which might have been urged if the statute of the state had not applied to the federal court, no longer sustained such a challenge; that irregularities in the summoning of grand jurors do not entitle the party indicted, as matter of law, to avoid the indictment; that, for such causes, the challenge to the array is wholly abolished; and that something more than irregularity must exist, to entitle the party to avoid the indictment. What that must be is plainly indicated as follows: "It by no means follows that the accused has no remedy in a case where there has been any improper conduct on

the part of the public officers employed in the designating, summoning and returning of the grand jury. If there has been any improper conduct on the part of those officers, in performing that service, or if any fraud has been committed through their instrumentality, in the drawing, summoning or organization of the grand jury, of course, the accused who may be prejudiced thereby, has his remedy, by motion to the court, for relief, in consequence of such irregularity or fraud. Because, the selecting, summoning and returning of grand jurors are proceedings which are always under the general supervision and control of the court, and the court will guard them, and will see to it that no one shall be prejudiced thereby. The court has general power to preserve the pure administration of justice, and its sound discretion will always be exercised freely for the purpose of securing that end." * * * "It will, therefore, look into the facts presented, on which a charge is made against the regularity of the proceedings in the selection and summoning of grand jurors in a given case, and will hear the explanations on the other side, and its judgment will be determined accordingly. If it sees that there has been improper conduct in the public officers, which has resulted prejudicially to the party accused, it is bound to set aside all the proceedings. On the contrary, although there may be technical objections to the proceedings, in point of strict regularity, yet, unless the court is satisfied that they have resulted, or may result, to the prejudice of the party accused, it will not set them aside, because its interposition in the case will not be required on the ground of justice either to the accused or to the public." These views are reiterated by Mr. Justice Nelson, in the opinion of the court in the case referred to, and are applied where no order for a venire, except a verbal one, was made, and where, in fact, a grand jury was convened without a venire having been issued at all. That this was an irregularity was not doubted.

We have heard the argument of the question here upon a motion to quash, founded upon an agreed statement of facts, at the solicitation of counsel for all the parties, without putting the accused to plead the matters alleged. Where there is no conflict respecting the facts, it is, doubtless, in the power of the court to dispose of the subject in this form.

Applying the opinion of Mr. Justice Nelson to the facts agreed upon in these cases, it is clear, that the motion should be denied. There is no allegation or claim that, in the selecting, summoning and empannelling of the grand jury, the clerks of the courts did not act in the utmost good faith, and in obedience to an express rule of this court, imposing upon them the duty, which they performed according to their interpretation of its purport and intention. That rule was made November 11, 1867, and is in these words: "It having been found impracticable to obtain jurors for the courts of the United States in this district, from the jury boxes used by the authorities of the state of New York, in the city and county of New York, for the procuring of juries for the courts of said state, in said city and county, it is now ordered, that the clerk of this court and the clerk of the district court of the United States for this district, make out and file in the office of the clerk of this court, a list of persons to serve as jurors in the courts of the United States for this district, and that such list be made out in the same manner as, by the laws of the state of New York, the public officers charged with the duty of making out the list of jurors to serve as jurymen in the courts of said state, in and for said city and county, are required to make out such list; and it is further ordered, that the said clerks, from time to time, correct and revise such list as they may deem it necessary so to do, to the end that such list may be made and kept, so far as practicable, in conformity with the laws of the state of New York; and it is further ordered, that from the list so made and filed, grand and petit jurors shall be selected, and shall be drawn by lot, in accordance, so far as practicable, with the laws of the state of New York, by the said clerks, as, from time to time, the same may be ordered by the courts of the United States in this district, and a list of the persons so drawn, certified by said clerks, shall be attached to the writ of venire issued to the marshal for the summoning of such jurors; and it is further ordered, that, as to all matters relating to the selecting, drawing and summoning of jurors for said courts, the said clerks follow, so far as practicable, the provisions in respect thereto contained in the laws of the state of New York." There is no allegation or claim of fraud in the matter, or on the part of any officer concerned therein; and, finally, it is not alleged or claimed that the accused have been prejudiced by any supposed want of conformity to the laws of the state in the proceeding, or that, whether strictly regular or irregular, any irregularity has resulted prejudicially to the accused. This being the case if we deemed the manner of selecting and drawing the grand jury to be liable to the objection of want of due conformity to the state laws, we must, nevertheless, say, in the language of the opinion cited, that "the interposition of the court is not required on the ground of justice either to the accused or to the public."

We do not, however, mean to be understood as deciding that the grand jury was irregularly or illegally selected, drawn or empannelled. It is sufficient to rest the decision upon the ground above stated. But we desire further to say, that the objections urged upon us seem to overlook, in a large

degree, that literal conformity to the mode of selecting and drawing jurors prescribed by state laws is not required by the act of congress. Substantial conformity, and only so far as that is practicable, is, in any view, necessary to strict technical regularity. If this court were permitted to draw petit jurors and grand jurors from the boxes containing the names of persons selected by the state officers under the state laws, a near approximation to the mode of proceeding in the state courts might be made; and, no doubt, the adoption of the selections made by the state officers authorized to inquire into the qualifications of jurors and make selection of grand jurors, would be competent. Formerly, the federal courts in this district were permitted to do this. Courtesy to the federal tribunals, and respect for the requirement of the act of congress designed, as nearly as might be, to conform, in this respect, to the state laws, and mainly for the benefit of citizens of this state, and enacted out of deference to state policy, was then deemed to warrant the permission. But other counsels have prevailed, and the federal courts have no longer, in this city, any such aid, in procuring suitable and qualified jurors for service therein.

The rule of this court under which the grand jury now in question was drawn, is founded upon, and declares, the impracticability of obtaining jurors selected under the state laws; and the question was one of interest, and was anxiously considered, when the rule was adopted, which, on the argument of this motion, was more than once suggested by us to counsel, urging that the motion should be granted for want of conformity to the state laws: "What should the court do to conform more nearly to the state laws, and how can they do it?" The law, at most, requires substantial conformity, and only what is practicable. What is practicable must be (1) what congress have furnished the court with the means of effecting; (2) what the court has the power to effect; (3) what can reasonably be done in consistency with the due discharge of the other duties imposed upon the court and its officers. The United States have no commissioner of jurors, in form nor in substance. The court has no power to create such an officer, or to invest any one with the authority which the laws of New York confer upon that officer. The court has no power to call the citizens before itself, or before any other person or officer, for examination, to test these qualifications, preparatory to the making a list of jurors. There is no board, nor can the court create one, which, when a list is made, shall select therefrom some who shall serve as grand jurors. The duties involved in such a mode of selecting jurors, grand and petit, the court cannot compel any person to perform; and, if it was competent to authorize such performance, no one could be found to perform them gratuitously, and this court has no fund from which to pay therefor. Doubtless, we may require the assistance of the clerk of the court, and reasonably expect that he will devote all the time which is possible, to the service, but we could not confer on the clerk the powers, or impose on him the duties, of the state commissioner of jurors; and if it was attempted, it is not clear that his acts would derive any efficiency therefrom. Doubtless, the list of jurors could, as a physical act, be divided into two lists. But there is no board in existence, and we can create none, to make such separate list, in the exercise of discretion, from among those designated in the other list. Doubtless, it would sometimes be possible for a judge to be present at a drawing of grand jurors, but, in general, that would be impossible. Absence from the city, in other districts, and actual engagement in the duties of the court, would, in general, prevent; and, sometimes, jurors may properly be drawn from the several other counties in the district. This impracticability has been adjudged by this court, by its enactment of successive rules, for more than thirty years past, and similar considerations have led to dispensing with publication of the notice of drawing.

We might pursue this still further, and we should return to the inquiry: "With the means which the court has at command, with the power that is vested in the court or its officers, in view of the fact that jurors are not necessarily drawn from one county only, in short, in all the circumstances under which the court is acting, what is practicable, in the reasonable sense in which that term is used in the act of congress, that the rule of court does not provide for, to effect a substantial conformity to the state laws?" So long as the court maintains the control over the subject, stated in the opinion of Mr. Justice Nelson, so long as even irregularity is not permitted, when it operates to the prejudice of an accused, we think that the requirement of the state laws themselves, as well as duty both to the accused and to the public, forbids the interposition of the court which is invoked in these motions.

Case No. 16,430.

UNITED STATES v. TANNER.

[6 McLean, 128.] [1]

Circuit Court, D. Ohio. Oct. Term, 1854.

VIOLATION OF POSTAL LAWS—TAKING LETTER FROM OFFICE—PROPERTY IN LETTER.

1. If a letter written to a certain individual was intended for the person to whom it was directed, and also for another person; and such other person is authorized by the writer to take the letter out of the post office and read it, by so taking out and reading the letter, there is no violation of the post office law.

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

2. The person who writes a letter has a right to control its use, as it is his property.

[Cited in U. S. v. M'Cready, 11 Fed. 231.]

3. The writer of a letter is entitled to an injunction to restrain the improper use of the letter, by the person to whom it is directed.

Mr. Morton, U. S. Dist. Atty.

Swayne & Barber, for defendants.

OPINION OF THE COURT. This is an indictment against the defendant, for taking a letter from the post office at Toledo, in Ohio, addressed to another person, with the view to pry into the secrets of such person. There is also a count for opening the letter. Works Blum, lived in Toledo four years. In 1853, witness was in Toledo, went to Cleveland from Toledo, beginning of September. He expected a letter at Toledo, from St. Louis, after he left. In eight days he received the letter at Cleveland. Witness says the letter had been opened by Tanner, but witness never authorized him to open the letter, when he received it from the post office. The witness never authorized the defendant to take the letter out of the post office. On complaint being made by witness, defendant was arrested, but was discharged by the committing magistrate. Mr. Young advised witness to pursue the case further. Mr. Snatcher saw the letter in the hands of his sister, who brought it to the house of witness. Defendant, when before the commissioner, admitted that he took the letter out of the post office.

Defendant's witnesses: Mr. Jamner, is acquainted with Blum, and with Myers, the writer of the letter. they both lived with witness. Myers and defendant talked about a letter to be written by Myers. Judge Fitch stated, that Myers, the writer of the letter, before he left Toledo, said he would write a letter to Blum, for both defendant and Blum. Several witnesses proved the good character of the defendant.

THE COURT instructed the jury that the writer of the letter had a right to control the use of it, it being his property; and that if they shall be satisfied the letter was written with the view that the defendant should read it, as well as the person to whom it was directed, the defendant is not guilty of a crime in taking the letter out of the post office, and opening it. Although the letter was directed to Blum, if Myers before writing it requested the defendant, or authorized him, to take the letter out of the office and read it, he had a right to do so, and the defendant is guilty of no violation of the post office law. Parties may correspond under assumed names, without any violation of law.

The jury found the defendant not guilty.

Case No. 16,431.

UNITED STATES v. TAPPAN et al.

[10 Ben. 284.] [1]

District Court, S. D. New York. Feb., 1879.

SUCCESSION TAX—PERSON LIABLE—BENEFICIARIES—TRUSTEES.

The person liable to pay a tax on a "succession" under sections 126 to 137 of the act of June 30, 1864 (13 Stat. 287), is the person beneficially interested in the property, and not the trustee or executor in whom the legal title is vested, or to whom a power in trust is given for the benefit of such person.

[This was an action by the United States against Frederick D. Tappan and others to recover certain taxes.]

E. B. Hill, Asst. U. S. Dist. Atty.

Davies, Work & McNamee, for defendants.

CHOATE, District Judge. This was an action brought to recover succession taxes. The defendants demur to the complaint on the ground that it states no cause of action. The complaint alleges that Ann Eliza Cairns died March 18th, 1866, having made her will, appointing the defendants her executors; that by her will she devised all her real estate at Roslyn, in Queens county, New York, to her three grandchildren in fee, and empowered and directed the defendants as her executors to lease the real estate and receive the rents and profits and apply the same in divers ways in the will specified, until the eldest of the grandchildren should attain the age of twenty-one years or marry, whichever event should first happen; that by said will the defendants became entitled in possession to said real estate in behalf of the devisees thereof, none of said devisees being of the age of twenty-one years or married, and that the defendants entered upon the real estate and leased it and received the rents and profits, and applied the same as directed by the will; that the value of the real estate was $25,000, and that the tax or duty of one per cent thereby became due from defendants. For a second cause of action the complaint alleges that the testatrix gave and devised to her three grandchildren real estate in the city of New York, for the term of their natural lives; that by the will the defendants, as executors, were empowered and directed to let or lease the same and receive the rents and profits, and apply the same in divers ways by the will directed; that thereby the defendants became entitled in possession to this real estate on behalf of said devisees: that they entered upon and leased it, and received the rents and profits, and applied them as directed by the will, and are still in possession thereof and still continue so to receive and apply the rents and profits; that each of said devisees, the grandchildren, succeeded to a life estate in one-

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

third of the rents and profits of the same, the values of said life estates amounting in all to $373,108, and that the defendants became liable to pay the succession tax thereon at the rate of one per cent, amounting to $3,731.08.

It is insisted on the part of the defendants that on these facts stated in the complaint the devisees, and not the executors, are the parties liable, under the statute, to pay the succession tax. The provisions of law in relation to taxes on successions to real estate are contained in sections 126 to 150 of the act of June 30th, 1864 (13 Stat. 287–291.) By section 126 a "succession" is defined as denoting "the devolution of title to any real estate." By section 127 it is declared "that every past or future disposition of real estate by will, deed or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate or the income thereof upon the death of any person dying after the passing of this act, shall be deemed to confer on the person entitled by reason of any such disposition a succession;" and the term "successor" shall denote "the person so entitled." By section 129 it is provided "that where any persons shall take any succession jointly they shall pay the duty chargeable thereon by this act in proportion to their respective interests in the succession." Section 133 provides for the rate of the tax, varying with the relationship of the successor to the person from whom the succession is derived from one per cent in case he is the lineal issue to six per cent in case he is a stranger to the blood. This section says: "There shall be levied and paid to the United States in respect of every such succession, the following duties." It does not expressly declare who shall pay the duty. Section 134, which is designed to meet the case of a succession passing from one person to another before it comes into possession, declares that one duty only shall be paid "and shall be due from the successor who shall first become entitled in possession," and also that such duty "shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them." Section 137 provides that "the duty shall be paid at the time when the successor or any person in his right or on his behalf shall become entitled to his succession or to the receipt of the income or profits thereof, etc." Sections 138 and 139 declare that the conversion of real estate into money, or money into real estate under any trust created therefor, shall be deemed a succession chargeable with duty under the act; that the duty shall be paid "by the trustee, executor or other person having control of the funds." Section 140 entitles a successor to a return in certain cases "of a proportionate amount of the duty paid by him." So section 141 provides that in a certain case "the successor shall be entitled to a return of so much of the duty paid by him as will reduce the same to the amount which would have been payable by him, if such duty had been assessed in respect of the actual duration or extent of his interest, provided that if the estate of the successor shall be defeated in whole or in part by its application to the payment of the debts of the predecessor, the executor, administrator or trustee so applying it shall pay out of the proceeds of the sale thereof the amount so refunded, and provided also that if the estate of the successor shall be defeated in whole or in part, by any person claiming title from and under the predecessor, such person shall be chargeable with the amount of duty so refunded," etc. These sections clearly imply, if they do not expressly provide, that except in the cases provided for in sections 138, 139 and 140, in all of which a conversion of a fund of money into land or of land into a fund of money, and the possession of such fund by an executor or trustee, are contemplated, the successor himself is the party chargeable with and who is expected to pay the duty. The same inference may be drawn from expressions used in sections 142, 143, and 144. Section 147 provides "that any person liable to pay duty in respect to any succession shall give notice to the assessor of his liability to such duty," with an account thereof and statement of various details. Section 148 declares penalties for neglect to give such notice, and provides "that if any person liable under this act to pay any tax in respect of his succession shall, after such duty shall have been finally ascertained, wilfully neglect to do so within ten days after being notified, he shall be liable to pay, etc." Section 149 gives an appeal to "any party liable to pay duty in respect to his succession, who shall be dissatisfied with the assessments," etc.

It is clear from all these provisions that the "successor" is the party beneficially interested in real estate the title of which is devolved in the requisite manner. There is nothing whatever, not a single expression in the act, going to show that an executor or trustee, holding the title for such person so beneficially interested, or empowered to collect the rents and profits for the benefit of such person, is to be regarded as the "successor" or treated as such, except in the particular cases above referred to, where a fund of money in the hands of an executor or trustee is expressly made the subject of the tax. It is urged by the counsel for the United States that the notice and statement required by section 147 cannot be supposed to have been intended to be made by an infant or person non compos mentis; that a fair construction of that section in view of its being intended that the notice and statement should be effectual, requires that it should be made by a trustee, if there be one, and so that it must be presumed that the person controlling the income was intended to be the person who should pay the tax properly payable out of it. But however convenient and suitable such an arrange-

ment would be, it is enough to say that there is nothing in the act to warrant such a construction. On the contrary, the expressions indicating the contrary purpose are too numerous and too clear to have been used inadvertently. If section 147 does not provide for the notice and statement being made for a successor who is under a disability, it is simply an imperfection in the law as a system of taxation. And in this connection it is to be observed that the government did not rely solely on a personal liability for securing the payment of the succession duty, but also upon a lien upon the property, which continued five years. And if it was the duty of the trustee of a successor under disability to discharge such lien out of the rents and profits in his hands, the obligation was one which he owed to his cestui que trust only, and created no personal liability to the United States. Nor do the provisions of the same statute respecting the legacy tax, (sections 124 and 125), aid the construction claimed by the United States. On the contrary, those sections so carefully provide for an accounting for and payment of the tax by executors and trustees, that the very absence of any similar provisions in the sections which follow, and which regulate the succession tax, strongly support the defendants' claim as to the true construction of those sections.

Upon a consideration of the whole statute, it is, I think, free from doubt that the tax is payable by the successor himself, and not by his trustee, if he have one. In the present case it is claimed that under the statute law of New York these executors took no title as trustees, but only powers in trust. But the revenue laws of the United States were not drawn with any reference to nice distinctions in the state laws of this character, and it can hardly be claimed that if the intent of the statute was to make a trustee liable for the tax, he would be chargeable in one state where, by the local law, he was held to take a title in trust, and not chargeable under the same will in another state by whose local law he was held to be vested merely with a power in trust. The defendants' demurrer is sustained independently of any such distinction.

Judgment for defendants on demurrer.

UNITED STATES (TAPPAN v.). See Case No. 13,749.

Case No. 16,432.

UNITED STATES v. TARDY.

[1 Pet. C. C. 458.] [1]

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

CRIMINAL LAW—EVIDENCE.

How far the acknowledgment of a prisoner as to a crime meditated to be committed, may be given in evidence to connect it with the offence for which he is on his trial.

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

This was an indictment for murder on the high seas, by means of poison.

The only point of law decided was upon the admission of evidence. The district attorney called a witness, and stated that he proposed to prove the following facts: That the prisoner, after his arrival in Philadelphia, and after the alleged murder had been committed, told the witness in a private conversation that he had projected a plan to take his passage on board of a vessel from Philadelphia to Baltimore, with his servant and other persons engaged in the plan, and advised the witness to take his passage also; and that when at sea, he would mingle arsenic in the food of the officers and crew of the vessel, which would make them vomit and be very ill, and that of course they would apply to him as a doctor for medical assistance, when he would administer more poison and so destroy them, when they would go off with the vessel;—adding, that he had had experience of it. The district attorney stated, that he should offer this evidence as an acknowledgment that the defendant had before administered poison under similar circumstances, and had been so applied to for medical advice; and as it did not appear that any case similar to that proposed had happened, except the one for which the prisoner was now on trial, he should contend to the jury that this amounted to an acknowledgment of the crime charged in the indictment.

THE COURT decided that the evidence was proper in this point of view. That whether it amounted to an acknowledgment or not, was proper for the decision of the jury; and that as the expression, "that he had had experience of it," could not be made intelligible without connecting them with the plan, which would otherwise be improper to be given in evidence, the whole must of necessity be stated by the witness, but that it was to be regarded by the jury only in reference to the question, whether it amounted to an acknowledgment, or not, and ought not in any other way to prejudice the prisoner.

The jury found the prisoner not guilty.

Case No. 16,433.

UNITED STATES v. TARLTON.

[4 Cranch, C. C. 682.] [1]

Circuit Court, District of Columbia. March Term, 1836.

LARCENY—COMPETENCY OF WITNESS.

The act of Maryland of 1715, c. 26, § 2, which excludes the owner of stolen goods from being a witness for the prosecution in the county courts is not applicable to prosecutions for larceny in the circuit courts of the District of Columbia. This court does not derive any part of its jurisdiction from the laws of Maryland

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

which give jurisdiction to their courts. The jurisdiction of this court is given by act of congress.

Indictment [against Lewis Tarleton] for larceny.

Mr. W. L. Brent, for defendant, objected to the testimony of the owner of the stolen goods, because excluded by the act of Maryland 1715, c. 26, § 2, which gives the county courts jurisdiction of "all thieving and stealing of any goods and chattels whatsoever, not being above the value of one thousand pounds of tobacco, (robbery, burglary, and house-breaking excepted,)" and to cause every person "legally convicted of any such thieving and stealing, except before excepted, by testimony of one sufficient evidence, not being the party grieved, before any such county court as aforesaid, by paying fourfold of the value of the goods so thieved or stolen as aforesaid, and the stolen goods returned to the party or parties grieved thereby, and by putting in the pillory and whipping," &c.

By the act of 1785, c. 87, § 7, the jurisdiction of the county courts was extended to all criminal cases, unless particularly directed by law to be tried in the general court.

But THE COURT (MORSELL, Circuit Judge, absent,) overruled the objection; and CRANCH, Chief Judge, said that this court did not derive any part of its jurisdiction from the laws of Maryland which gave jurisdiction to the courts of that state. Our jurisdiction is given by the act of congress. The Maryland act of 1715 was applicable only to the county courts; it was a limitation of their powers only; it did not prevent the owner of the goods from being a witness in the provincial court.

Case No. 16,434.

UNITED STATES v. TARR et al.

[18 Leg. Int. 214; 4 Phila. 405.]

District Court, S. D. Pennsylvania. 1861.

COUNTERFEITING—ACCOMPLICES—EVIDENCE.

1. If persons are engaged in making counterfeit coin in the house of one who, knowing their guilty purpose, has procured, or facilitated its execution by harboring them in the house, he is, under the twentieth section of the act of congress of March 3, 1825 [4 Stat. 121], guilty of assisting in making such coin.

2. On the trial of a person indicted for this offence, after proof that counterfeit pieces of coin, and certain machines, implements and materials were found in his house in places where they probably could not have been unseen by him, a detective police officer testified that his observation in many other cases in which he had arrested persons in places where counterfeit coins had been found, enabled him to know the purpose to which such machines, implements and materials could be applied. The witness was rightly allowed to testify that they could all be used in making such coin, and that although each one separately might be otherwise used, there was, in his belief, no other use to which they could collectively be applied.

3. The house had been demised to the defendant for a month, and afterwards from month to month, at a certain monthly rent, payable in advance. On signing the lease he paid a month's rent and received the key of the house. Ten days afterwards the house was discovered to have been used by persons engaged in making counterfeit coins. From this time it was vacated, and remained unoccupied until the end of the month. At the end of the month —the defendant not having been as yet arrested—an unknown person brought the same key which the defendant had received to the same place at which he had received it, and returned it there to the same person from whom he had received it. This having been proved without objection, proof that the bearer of the key said, on returning it, that he was directed to leave it there, was admissible.

The defendants [Daniel Tarr and William B. Tarr], father and son, were prosecuted, under the twentieth section of the act of March 3, 1825, for procuring counterfeit coin to be made, or assisting in making it. Numerous pieces of such coin, finished and unfinished, were found in a house in Philadelphia, in which a man was detected almost in the act of making other pieces. This counterfeiter was then in company with a woman, who must have known what he was doing. Neither of the defendants was then in the house. The defendant William B. Tarr had, about ten days before, rented it for a month, and afterwards from month to month, at a certain monthly rent payable in advance. His father, the other defendant, who occupied a room in it, was approaching it at the time of the detection of the above mentioned counterfeiter, and was arrested at a short distance from it. No counterfeit coin, or other suspicious thing, was found upon the person of the father, or in the room which he occupied. Counterfeit pieces, and machines, implements or materials which might be used in making them, were discovered in every other occupied apartment of the house, in places where they could scarcely have been unseen by any other inhabitant of it. Any one of the machines, implements and materials might, separately, have been used in some innocent employment. But, in their connection with one another, and with the finished and unfinished counterfeit pieces, no reasonable doubt of their purpose or adaptability could be entertained. The son's name was William Barton Tarr. He had subscribed to the lease of the house the name W. Barton. Shortly before leasing it, he had, in company with the same woman found in it as above, twice visited the parties from whom he rented it, calling her his wife; saying that he was going away, and wished to see her permanently settled before his departure. He received, in person, the key of the house when he signed the lease. He then paid a month's rent in advance. A brother of this defendant testified, on his behalf, that he was unmarried; that, in their former correspondence, he sometimes had signed his letters W. Bar-

ton; that these letters were all destroyed; that the two brothers had latterly been engaged together at Camden, New Jersey, in the business of dyeing and scouring; that this business had been finally closed between them on the day after that of the date of the lease, of which lease however this witness knew nothing, and that the defendant, on the day after their business was thus closed, left Camden for New York, to be absent two days. One of the persons from whom the house had been leased proved, for the prosecution, that the house was new, that unexpected delays in the plumber's work had prevented the introduction of the hydrant water, and that, three or four days after the date of the lease, this defendant, then in Philadelphia, complained of the delay; saying that he found it inconvenient to go across the street for water. Upon this evidence, it was contended for the prosecution that the defendant, William B. Tarr, had, upon his return from New York, become the actual occupant of the house; that he could not afterwards have been ignorant of the counterfeiting carried on in it, and that the inference of his guilt was fortified by the circumstance that he had subscribed a fictitious name to the lease. There was also evidence tending to show that, from the time at which the guilty use of the house had been discovered, he disappeared, and was not seen in Philadelphia until his arrest about three weeks later. The house had, in the meantime, been closed and unoccupied until the end of a month from the date of the lease, when the same key which he had received was brought back to the same place at which he had received it by a boy who told the landlords that he was directed to leave it there.

THE COURT instructed the jury that there was no sufficient evidence against Daniel Tarr to show that he had the legal or actual possession, or control, of any part of the house, except the single room, in which no proof of guilt or complicity had been found, and that, consequently, the testimony would not warrant his conviction. The jury found him not guilty. As to William B. Tarr, the court said that if the jury believed him to have actually occupied the other parts of the house, there was evidence from which they might find that he procured or facilitated the use of the house by other persons, for the purpose of making counterfeit coin of the denominations mentioned in the indictment; that if he, knowing persons to be engaged in such business, promoted the execution of their guilty purpose by harboring them in his house while thus engaged, he was guilty of assisting in making the coin, but that he should be acquitted if there was any reasonable doubt of his knowledge of their guilt, or of his participation, thus defined.

The jury found him guilty.

In the course of the trial, a deputy marshal who had assisted in making the discoveries in the house, and had, for several years, been engaged in the performance of such official duty, and had before been similarly employed as a detective police officer in the city of Philadelphia, having examined the machines, implements and materials found in the house, deposed in chief as follows: "From my observation in many cases, during ten or twelve years in which I have arrested parties in places where counterfeit money has been found, I have become capable of knowing to what purpose articles like these, all of which I have seen in such places, can be applied." The defendants' counsel, interposing by leave of the court, cross examined the witness as to the particulars and means of his knowledge, which appeared to be limited to his official experience. The same counsel then objected to any testimony from this witness, as to the purpose to which the articles were adaptable. The court having overruled the objection, the witness testified that they could all be used in making counterfeit coin, and that though each one separately might be applied to some other use, he believed there was no such other use to which they could, collectively, be applied. On a motion for a new trial it was contended that this evidence had been improperly received.

THE COURT, after an argument by counsel in support of the motion, said:

This question, in modified forms, has often arisen in prosecutions of this class. No special artistic, or professional, or scientific experience is required in order to make an expert as to the subject of the testimony. The coins of the United States cannot be lawfully made elsewhere than at the mint and its designated branches. Public statutes determine what coins may be lawfully struck; and prescribe the respective weights, forms and impressions of the genuine pieces. The mechanical appliances in use at the mint are simple, and their alternatives are well known. The chemical processes and their substitutes are also familiar. The subject is one which intelligent, well-informed jurors often understand sufficiently, without the testimony of an expert. A rule excluding all persons except officials of the mint from testifying on the subject as experts, would be inconvenient, and, on other grounds, objectionable. Unless this narrow rule should be adopted, the testimony of any person whose attention has been, from any cause, particularly directed to the subject, and whose observation has been, in any mode, particularly bestowed upon it, must be received. The latter appears to be the just rule. Where the witness is a detective police officer, the force of his testimony may sometimes, perhaps, be lessened by the consideration that his experience, from its having been confined to

cases of imputed or suspected guilt, may have rendered him liable to unfavorable prejudices. This objection may, or may not, be removed, in particular cases, by opposing considerations. But the objection, though not thus removed, applies only to the weight of the testimony, without affecting the question of its competency. The force of such an objection was for the consideration of the jury, and not of the court. The testimony was, therefore, admissible.

Another question of evidence, argued on the motion for a new trial, arose upon the testimony of a witness from whom the defendant had rented the house and received the key. This witness testified as follows: "At the end of a month, the key was handed to me by a small boy, who said he was directed to leave it at the office." The defendants' counsel, not objecting to the testimony that the key was returned at the end of the month, objected to the reception of evidence of the message by which it was thus accompanied. The court admitted the evidence on the ground that the message was a part of the act of returning the key; remarking, moreover, that, as the return of the key might be deemed a symbolical surrender of possession of the house, the bearer of the key should, perhaps, be regarded as a messenger impliedly authorized thus to define the purpose of its return.

THE COURT, after hearing the argument in support of the motion, said that although there was no reason to be dissatisfied with the finding of the jury, the case was one in which the verdict should be set aside if any point, even one apparently trivial, had been wrongly decided at the trial against the defendant. But, on this point, the court retained the opinion expressed at the trial, citing the remark of Coleridge, J., in 8 Car. & P. 105, that "many things which pass by words are really acts;" adding that words may, in some cases, be part of an act, and may, in other cases, be demonstrative of its character, that an act might often, therefore, be described imperfectly, without proof of what had been said in performing it; and that in this case, if proof of the return of the key was admissible, a point which was undisputed, the accompanying message was an inseparable part of the act.

New trial refused.

Case No. 16,435.

UNITED STATES v. TA-WAN-GA-CA.

[Hempst. 304.] [1]

District Court, D. Arkansas. Nov., 1836.

COURTS — TERRITORIAL JURISDICTION — CRIMES IN INDIAN COUNTRY.

1. Congress specifically defined the boundaries of the state of Arkansas, and by giving the district court thereof such powers only as were conferred on the district court of Kentucky by the judicial act of 1789 [1 Stat. 73], necessarily excluded jurisdiction beyond the boundaries of the state of Arkansas; and, therefore, a crime committed in the Indian country west of Arkansas, is not triable in the district court.

[Cited in Ex parte Crow Dog, 3 Sup. Ct. 396, 109 U. S. 560.]

2. A person indicted for murder in the late superior court, and not tried, cannot be committed nor tried in the district court on that charge, the latter not being the successor of the former, and the business of the superior court not having been continued over to the district court by act of congress.

3. The courts of the United States are of limited, though not inferior jurisdiction, and cannot exercise any jurisdiction which is not expressly or by necessary implication conferred by law.

[This was an indictment against Ta-wanga-ca, or Town-Maker, an Osage Indian, for murder.]

Chester Ashley, U. S. Dist. Atty. pro tem.

William Cummins and Samuel S. Hall, for prisoner.

OPINION OF THE COURT. The prisoner was indicted for murder at a term of the superior court of the late territory of Arkansas. That court was competent to try him for the crime, as a law of the United States had conferred upon it jurisdiction of capital crimes committed in that part of the Indian country west of Arkansas. The superior court of the territory ceased to exist, and no trial in this case was had. The district attorney pro tempore now moves the court to commit the prisoner to jail, and produces, as evidence of the commission of the crime sufficient to authorize the committal asked for, the original indictment found against the prisoner in the superior court of the territory.

The first question which arises is, whether this court has jurisdiction of the offence. The act of congress, establishing the Arkansas district court, gives it "the same powers that by law are given to the Kentucky district court by an act establishing the judical courts of the United States." The act referred to was passed in 1789 (1 Story's Laws, 53 [1 Stat. 73]), and gave to the Kentucky district court no power to hear, try, or determine any matter arising beyond the limits of the state of Kentucky. All the laws giving to the circuit and district courts of the United States jurisdiction of crimes committed in the Indian country, have been passed subsequent to 1789. The courts of the United States are courts of limited, though not of inferior jurisdiction ([M'Cormick v. Sullivant] 10 Wheat. [23 U. S.] 192), and they can take no jurisdiction and possess no powers, except such as are expressly given by acts of congress, or are necessarily implied therefrom. The law establishing this court refers expressly to the law of 1789, and gives to this court all the powers which by that law were given

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

the Kentucky court. This court, in defining its own powers and limiting its own jurisdiction, has no other guide than the law of 1789. Congress has conferred upon it no other powers, and a jurisdiction no more extended, than by that act were given to the Kentucky court. The special grant of particular powers in this case excludes the possibility of assuming any powers not expressly granted. This court cannot assume to itself any of the powers, or clothe itself with any of the jurisdiction, granted to the Kentucky court by law subsequent to the act of 1789.

Congress has specifically defined the boundaries of the state of Arkansas, and by giving to this court only the powers given to the Kentucky district court by the act of 1789, it has given this court no jurisdiction beyond those boundaries. Several laws were passed subsequent to 1789, giving the different United States courts jurisdiction over crimes committed in the Indian country. The provisions of none of these laws are declared by congress to apply to this court. It is referred solely to the law of 1789, and the possibility of taking jurisdiction by virtue of any subsequent law is absolutely excluded.

Nor is this court the successor of the superior court of the territory. That court has ceased to exist. This is a new court, established by a special law, and having specific and limited powers. Congress has neglected even to continue over to this court the business of the United States pending in the late superior court. They have not day, nor are they triable here. This court neither succeeds to the business nor to the powers of that. The powers of that court were far more extensive than of this; and much as this court may regret that it has not the power, still it is clear in the opinion that it can claim no jurisdiction beyond the limits of the state. Upon this ground, the prisoner will be discharged. Ordered accordingly.

Case No. 16,436.

UNITED STATES v. TAYLOR.

[4 Cranch, C. C. 338.] [1]

Circuit Court. District of Columbia. Sept. Term, 1833.

MURDER — DYING DECLARATIONS — NEW TRIAL — CHANGE OF VENUE.

1. The dying declarations of the deceased, made in contemplation of death, may be given in evidence.

2. A new trial was granted, after conviction of murder, upon newly-discovered evidence, and the venue was changed.

Indictment for murder.

The dying declarations of the deceased were given in evidence against the prisoner (nem. con.), it having been proved that the surgeon had informed the deceased that he believed the wound to be mortal; and the deceased, having desired to see a priest, and declared he had received his death-wound.

After conviction, upon newly-discovered evidence that the deceased had a dirk, and said, if it had not been for that, this affair would not have happened, a new trial was granted, and the trial removed to Alexandria, where the prisoner was found guilty of manslaughter.

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

Case No. 16,437.

UNITED STATES v. TAYLOR.

[4 Cranch, C. C. 731.] [1]

Circuit Court, District of Columbia. Oct. Term, 1836.

QUASHING INDICTMENT—PRACTICE—CRIMINAL STATUTES.

1. In a criminal prosecution the court will not hear a motion to quash the indictment until the defendant has been taken.

2. When a statute creates an offence, and directs the particular mode of prosecution, that mode must be pursued.

The defendant [William Taylor] was indicted for playing at cards in a public place, contrary to the statute of Virginia, of December 8, 1792, § 5, which imposes a fine of $20 upon conviction before a justice of the peace, to be levied by distress and sale of the offender's goods by warrant from the justice.

Mr. Neale, for defendant, at the last term, before the defendant was taken, offered to move the court to quash the indictment.

But THE COURT (THRUSTON, Circuit Judge, contrà) refused to hear the motion until the defendant should be taken.

The defendant being now taken, Mr. Neale moved the court to quash the indictment, upon the ground that the only mode of recovery of the penalty prescribed by the statute is by a conviction before a justice of the peace; according to the case of U. S. v. Simms, 1 Cranch [5 U. S.] 252.

And upon that ground THE COURT quashed the indictment.

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

Case No. 16,438.

UNITED STATES v. TAYLOR.

[1 Hughes, 514.] [2]

Circuit Court, E. D. Virginia. Sept. 8, 1874.

POST OFFICE LAWS — EMBEZZLING LETTER — CONSTRUCTION OF STATUTE—INDICTMENT AND VERDICT.

Section 279 of the revised postal laws of 1872 (17 Stat. 298, c. 335, § 114, of the acts of congress for that year; now section 5467 of the Revised Statutes of the United States), created two distinct offences, to wit, first, the

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

embezzling, etc., of a letter carried in the United States mail, and second, the stealing of its contents; and, therefore, an indictment charging merely the embezzlement is sufficient to sustain a verdict of guilty, on motion in arrest of judgment, and to warrant judgment and sentence

[Cited in U. S. v. Baugh, 1 Fed. 785; U. S. v. Coppersmith, 4 Fed. 205; U. S. v. Byrne, 44 Fed. 189.]

This was an indictment against the defendant [E. R. Taylor], as a postal-car clerk, engaged in the postal service of the United States, on the mail route from Washington City to Lynchburg, Virginia, on the Orange, Alexandria & Manassas Railroad, for embezzling a letter intrusted to him which was intended to be conveyed by mail and to be delivered at the town of Charlottesville, the letter having been addressed to John T. & Henry McColly at the University of Virginia, and having contained fourteen coupons, each for $35, aggregating to $490 in value; the letter having been deposited at the post-office at Huntsville, Alabama, and having never been delivered at Charlottesville, Virginia.

The jury brought in a verdict of guilty, and most of them accompanied the verdict with a paper recommending the prisoner to the clemency of the court.

The counsel of the prisoner, through Mr. Alfred Morton, moved for an arrest of judgment, on the following grounds: Section 279 of the act of congress, "to revise, consolidate, and amend the statutes relating to the post-office department," approved June 8, 1872, is so worded as to seem to make one offence of the several acts, which it describes, and in its latter clause, to employ a different phraseology from that which was used in section 21 of the statute of March 3, 1825 [4 Stat. 107], of which it is a revisal. The section as it now stands declares that any person employed in the postal service, who shall secrete, embezzle, or destroy any letter coming into his possession, which was intended to be conveyed by the mail, containing any agreement for the payment of money; any such person who shall steal or take such contents out of any letter coming into his possession in the regular course of his official duties, provided the letter shall not have been delivered to the person to whom addressed, every such person shall, on conviction thereof, for every such offence, be imprisoned at hard labor not less than one nor more than five years. Upon this section, thus worded and punctuated, the question arises whether the embezzlement of the letter is itself a complete offence under the section, subjecting the embezzler to the penalty denounced; or, whether the embezzlement of the letter and the stealing of its contents are not two acts, both of which are necessary to constitute the offence created by this section of the statute. In the original law the phrase in the latter clause of the section, "or if any such person," is used; whereas in the new law this disjunctive form of expression is abandoned, and the explanatory form, "any such person" is substituted. If the disjunctive form of the old law had been preserved in the new, then a different person might be punished for stealing the contents from the one who had embezzled the letter itself; and two distinct offences would have been created by the section. But the present language of the section is such as to seem, in the phrases "any person who shall secrete, embezzle, or destroy," and "any such person who shall," and "every such person shall," to refer throughout to the same person; and to require that this same person, in order to conviction, shall have embezzled the letter and stolen its contents also. If such be the proper construction of this section, if it really intends that the offence provided for shall consist of the embezzling of the letter and the stealing of its contents, then, of course, the indictment, in order to be good, must, in each count, charge the embezzling, and also charge the stealing. In the case of Taylor the indictment does not contain a charge of the stealing of the contents of the letter. It charges only the embezzlement of the letter. Nor is there a second count charging the stealing. If these two acts be necessary to constitute the offence created by section 279, then there can be no sentence pronounced upon a verdict of guilty, found on an indictment charging only the embezzlement. The judge said, that as there had been no decision upon the section in its new form, and it was important that it should be decided deliberately and correctly, in order that district attorneys should know with certainty upon what construction of the section to draw their indictments in future cases, he would entertain the motion in arrest of judgment until the adjourned term of the court, to be held at Richmond, on the 8th of September next, and would put the defendant under bail to appear there on that day to answer the judgment of the court, which was accordingly done.

L. L. Lewis, U. S. Atty.

L. H. Chandler, Alfred Morton, and B. W. Hoxsey, for defence.

HUGHES, District Judge. Section 279 of the revised postal laws, divested of the words which are inapplicable to the offence charged in the indictment in this case, is as follows: "Any person employed in any department of the postal service of the United States who shall secrete, embezzle, or destroy any letter intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried by any person employed in any department of the mail service, and which shall contain any banknote, bond, draft, promissory note, or agreement for the payment of money; any such person who shall steal or take any of the things aforesaid out of any letter which shall have come into his possession, either in the regular course of his official duties, or in

any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, every such person shall on conviction thereof, for every such offence, be imprisoned at hard labor not less than one nor more than five years." This section contemplates and recites two distinct acts, that of embezzling the letter, and that of stealing its contents, and the question arising upon it is, whether it intends to make each of these acts punishable by the imprisonment it imposes, or, whether it intends that both acts shall be necessary to constitute one offence. If the two acts are necessary to constitute the offence punishable under the section, then this indictment is defective because it charges only the embezzling of the letter, and contains no charge of the stealing of the contents, and the verdict of guilty which has been found on the indictment, and which therefore finds only the embezzling, is not sufficient to warrant a judgment and sentence for embezzling and stealing. It is hardly necessary to premise that (with a very few exceptions) there are no offences against the United States cognizable by the national courts, except such as are made so by express law of congress, and that any such offence, in order to be punishable, must be brought by the indictment strictly within the terms of the express law, and that no law of congress can be held to embrace an offence against the United States merely from the fact, that, otherwise, the offence would go unpunished. The offence must be expressly created by law, and must be distinctly charged in the indictment.

At the trial of this cause I was strongly of opinion that section 279 of the amended law of 1872, was at least ambiguous, and that the motion in arrest of judgment might be sustained on that ground alone, for there is no more obvious principle of natural justice than that the laws creating offences, mala prohibita, ought to be plain, clear and unequivocal. As this case will constitute an important precedent, and it was desirable that it should be decided upon mature deliberation, I adjourned the motion and the term of the court over until this occasion, partly in the hope that the circuit judge might be present, and aid in settling the question arising upon the law for this circuit. The question, as before stated, raised by the motion in arrest of judgment, is, whether section 279 makes the act of embezzling the letter, and the act of stealing its contents, each punishable by imprisonment for from one to five years; or, whether, under the peculiar language of the section, both acts are necessary to constitute the offence made punishable. It was contended in argument, that the whole of the first part of the section, down to the phrase "any such person," is descriptive of the person chargeable with the offence, and that the words any such person refer to the person who has secreted, embezzled or destroyed the letter described, and not merely to a person "employed in any department of the postal service." If this be so, then every indictment framed upon this section must recite the embezzling, and also charge the stealing, and the verdict must find both facts, in order to warrant a judgment and sentence of imprisonment.

This construction, however, cannot be adopted by the court. It is plain from the whole context, that this part of the section retains, since the amendment, the meaning which it had before, and which it has been construed to have, ever since it was adopted into our penal code from that of England, in 1825. The object of this first part of the section is, not to describe a person, but to define an offence, that of secreting, embezzling, or destroying a letter intended to be conveyed by mail, and coming into the possession of the postal employé in the regular course of his official duties. The word "such" in the phrase "any such person," has always been held, and must still be held, to refer only to an employé in the postal service; and has never been, and cannot now be, held, to refer comprehensively to an employé who has embezzled a letter intrusted to him in the course of his official duty. A proper means of testing the true meaning of the whole section, is by inquiring whether the section makes it necessary that the same person who embezzles the letter shall also steal its contents, and that the letter be the same as the one whose contents were stolen, in order to complete the offence made punishable. The person who embezzles and the one who steals, must in either case, be an employé of the department of the postal service. The letter embezzled and the letter whose contents are stolen, must each be intended to be conveyed by mail, and must not have been delivered to the person to whom addressed. So far, the person and the letter may be the same in each case. But the section evidently contemplates that the employé who embezzles may be other than the employé who steals, and that the letters may be different, in providing that the embezzled letter must come into the possession of the employé in the course of his official duties; while it provides that the letter whose contents are stolen, may come into the employé's possession, either "in the regular course of his official duties," or "in any other manner whatever." That the employé who embezzles may be a different person from the one who steals, and that the letters may be different, is also implied in the whole tenor of the two clauses of the section. This being so, the section in first reciting that any employé who embezzles, and then reciting that any employé who steals, without coupling the two clauses by the conjunctive word "and;" and in finally following up the two distinct recitals with the declaration that "every such person," "for every such offence" shall be imprisoned, etc., seems to put to rest all doubt of its intention and to create two dis-

tinct offences, each punishable by imprisonment. This reasoning is rendered conclusive by the reflection, that if the section in its amended form had been intended to make the embezzling and the stealing together, one statutory offence, it would have adopted the direct method of doing so, by uniting the two acts in the same clause, and declaring that any employé in the postal service who shall secrete, embezzle, or destroy a letter containing a thing of value, and steal its contents, shall be punished, and would not have first elaborately defined the offence of embezzling, and then, in a different clause, as elaborately defined that of stealing..

For these reasons, and others which might be adduced, I am bound to conclude that congress, in revising the postal laws in 1872, did not intend to destroy the original meaning of the section of which the present section 279 is a revisal, which made two offences of embezzling a letter, and stealing its contents, each punishable by imprisonment. As the indictment, therefore, sufficiently charges the embezzlement, and a verdict of guilty has been found upon it, and as the statute makes the embezzling alone punishable by imprisonment, the motion in arrest of judgment must be overruled, which is accordingly done.

Case No. 16,439.

UNITED STATES v. TAYLOR.

In re SEIFERT.

[20 Leg. Int. 284.]

District Court, D. New Jersey. 1863.

UNITED STATES ARMY—ENLISTMENT OF MINOR—DISCHARGE.

[Under Act Feb. 13, 1862, § 2, providing that no person under the age of 18 shall be mustered into the service, but that the oath of enlistment taken by the recruit shall be conclusive as to his age, such oath is conclusive on an application by a parent or guardian for the discharge of his son or ward as being a minor, even though the enlistment was without the parent's or guardian's assent.]

[This was a hearing on a return to a writ of habeas corpus, issued to procure the release of a minor from his enlistment in the army.]

FIELD, District Judge. The writ in this case was allowed upon the application of Henry Barlow, who alleges himself to be the uncle and acting guardian of the prisoner. Admitting the allegations set forth in the petition, and the statements made by the prisoner under oath, to be true, the facts would seem to be substantially as follows: Albert Seifert was born on the 20th day of May, 1847, at Mayence, in the duchy of Darmstadt, Germany, where his parents still reside. Some time in the month of May, 1861, he arrived in the city of New York, having been previously recommended by his parents to the care of an uncle, Henry Barlow, of Newark, N. J. He met his uncle in New York; accompanied him to Newark; resided with him for about three months; then found employment in Newark; and after some time went to the city of New York, in quest of something to do. While there, and on the 11th of August, 1862, he enlisted in Company K of the Thirty-Ninth regiment of New York volunteers, without the knowledge or consent of his parents or uncle. He has been in the service ever since; was in the battle of Gettysburg, where he received a slight wound in one of his hands, from which he has in a great measure recovered; and on the 19th of July last was brought to the United States Hospital at Newark, where he now is, in the charge and under the control of Dr. George Taylor, medical director. The prisoner admits that no deception was practised upon him at the time of his enlistment; that no persuasion was made use of to induce him to enlist; that the act upon his part was entirely free and voluntary. He admits, too, that he represented himself to the recruiting officer as older than he really was, but states at the same time, that he said he was under eighteen. Nevertheless he was enlisted; he received his bounty money, and took the oath of enlistment. He has served, so far as appears, with fidelity, and acknowledges that he has been kindly treated, and has nothing to complain of. The petitioner now claims that, as his uncle and acting guardian, he is entitled to the custody of the prisoner, and that the contract of enlistment having been entered into by a minor under the age of eighteen, ought to be deemed void.

By the fifth section of the act of congress of Sept. 28, 1850 [9 Stat. 507], it was made the duty of the secretary of war to order the discharge of any soldier of the army of the United States, who, at the time of his enlistment, was under the age of twenty-one years, upon evidence being produced to him that such enlistment was without the consent of his parents or guardian. In time of peace, such an act might have been a proper one, and its provisions very salutary. But every one can understand how, in a period of war, and more especially in such a contest as that in which we are now engaged, its operations might be most disastrous. Accordingly it was found, that it imposed upon the secretary of war, whose time and energies were already taxed to the uttermost, an immense amount of labor, and that its tendency was to derange and disorganize the whole military service. The applications for discharge became so numerous, that it was impossible to bestow upon each the care required, and the consequence was, that frauds and impositions without number were practised, and persons who were of full age at the time of their enlistment were almost daily discharged under the pretence of their having been minors. The evil was becoming very serious and embarrassing. As a remedy for this state of things, congress

passed the act of February 13, 1862 [12 Stat. 339], by the second section of which it is enacted, "That the fifth section of the act of 28th September, 1850, providing for the discharge from the service of minors enlisted without the consent of their parents or guardians, be, and the same hereby is repealed: Provided, that hereafter no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age."

The language of this proviso would seem to be too clear to admit of any serious doubt as to its meaning. Recruiting officers are prohibited from mustering in the service of the United States any person under the age of eighteen. If they do so knowingly, they violate the law, and are liable to punishment. But, at the same time, it was foreseen, that there might be great difficulty in ascertaining what the age of a person offering himself as a recruit really was; and if, upon representing himself to be eighteen, he should be mustered into the service, and were then allowed at any time to claim his discharge, upon the ground that he had deceived the recruiting officer as to his age, this would have been to introduce an evil of precisely the same kind as that which it was the design of this very section to cure. Therefore it was provided that the oath of enlistment taken by the recruit should be conclusive as to his age.

But it is said that however this may be, so far as the recruit himself is concerned, it never could have been the intention of congress to preclude all inquiry as to his age, when the application for a discharge is made by his parent or guardian. This is a new and important question. It is the first time that I have been called upon to give a judicial construction to this act of congress. And moreover, there are many other cases likely to arise, involving the very same principle. I have therefore examined with some care, the debates in the senate of the United States, when this section was under consideration, and propose to refer to what fell from those who took a leading part in the discussion, in order, if possible, to clear away any doubt that may exist as to what was the design of congress in the passage of this proviso.

Mr. Wilson, in introducing the section as an amendment to the bill before the senate, observed: "Many minors enter into the service of the United States. By existing law the secretary of war is compelled to discharge them when application is made. It makes a vast deal of labor, and causes disorganization in the service. The proposition is to repeal that act, but to provide that in the future minors under eighteen years of age shall not be mustered into the service, and that the mustering oath shall be conclusive on that subject. This point has been discussed in the military committee, and the section has been unanimously agreed to by the committee. I hope it will be adopted by the senate." Mr. Powell objected to that part of the amendment which provided that the oath of enlistment should be final as regards the age of the minor. "I think," he said, "it would be manifestly improper to insert such a proviso in the law. A youth under eighteen, who wished to leave his father, might go and swear that he was eighteen years of age, and that would prevent his being discharged. It will lead to false swearing and disobedience of parents." Mr. Hale said: "I think that making the oath of the minor conclusive on him is a very slight punishment for the perjury he commits. If he swears that he is eighteen when he is not he commits perjury, and may be punished by indictment; but if, instead of that, you make his oath conclusive on him, and hold him in the army, I think it is very slight punishment." Mr. Wilson, in further explanation of the amendment, said: "We propose to require an oath as to their age. They are to be given to understand that the law forbids their admission into the army, if they are under eighteen years of age; that they must take an oath in regard to their age, and that this oath is to be conclusive in regard to their age. If young men take this oath that they are eighteen years of age, and then get sick of the service, they cannot complain if when they enlisted they understood that their oath was conclusive as to their age. Unless you make that provision you might as well not act at all. I know that during the last few months men have been discharged from the service of the United States as minors, who were twenty-four or twenty-five years of age. There is no doubt about it." Mr. Powell said: "The point to which I object, is, that if a youth under eighteen shall corruptly swear that he is over eighteen years of age, his father is not to be permitted to reclaim him from the army. I do not think it right or proper to hold out this premium, as it may be called, to indiscreet and wild young men to commit perjury for the purpose of getting clear of paternal influence." Mr. Nesmith was in favor of the provision. "I believe," he said, "it will cut off very great abuses, and save us a great deal of trouble. In all these cases, where young men have enlisted, and now represent themselves as minors, and desire to procure their discharge, great expense has been incurred by the government. They have been uniformed, armed, drilled and equipped in every point as soldiers, and brought to the field at a great expense to the government; but when they arrive there, they are taken with a desire to retire from the service, and all the expense which the government has incurred in bringing them in face of the enemy is a total and entire loss. * * * Now, the question of the parent's losing the services of the young man, I do not think amounts to a great deal. It is a time when every man

who is capable of bearing arms is called upon to render service to his country. A young man who runs away from his father, and is induced to enlist, and subsequently obtains his discharge, if he violates the parental control which was over him in the first place, and joins the army, is not likely to be of much service to his parents thereafter; and I think the very best school and the very best place for him is the army, and I am in favor of returning him there."

There can be no doubt, therefore, as to what the intention of congress was in the passage of this law. It is my duty to give effect to it. The oath of enlistment is conclusive as to age. I cannot go behind it. But without reference to this act of congress, I do not see upon what ground I could, with propriety, discharge the prisoner from his enlistment, or order him into the custody of the petitioner. His parents reside abroad. The application is not made on their behalf. The petitioner is not his guardian in any sense of the term. He has no legal control over him. He is not entitled to his services. And as to the young man himself, he has no right to complain. The enlistment upon his part was a voluntary act. Nor is the service into which he has entered an unprofitable or a degrading one. On the contrary, if ever the profession of a soldier was honorable and ennobling, it is in such a war as that to which our brave volunteers are now summoned; a war waged for the Union, for the constitution, for the very life of the nation. There are worse schools, too, than the camp. Whatever its dangers and temptations may be, they can hardly be greater than those to which a youth is exposed in such a city as New York. Nor is any distinction to be made between our native-born citizens and those who, coming from abroad, have sought an asylum in our land, and enjoy the protection of our laws.

Let the prisoner be remanded to the custody of the defendant.

Case No. 16,440.

UNITED STATES v. TAYLOR et al.

[3 McLean, 539.] [1]

Circuit Court, D. Indiana. May Term, 1845.

CONSTITUTIONAL LAW—ISSUANCE OF DISTRESS WARRANT BY TREASURY AGENT—RIGHT OF JURY TRIAL.

1. The validity of the act of 1820 [3 Stat. 592] which authorises the agent of the treasury to issue a distress warrant against a defaulting officer, and his sureties, may well be doubted.

2. The judicial power is vested, by the constitution, in the supreme court and in such inferior courts as congress shall establish.

3. The issuing of the warrant is a ministerial act, but to decide in what case it shall issue partakes more of a judicial than a ministerial power.

4. The right of trial by jury is secured to every citizen, where the amount in controversy exceeds twenty dollars.

At law.

Mr. Cushing, U. S. Dist. Atty.
M. G. Bright, for defendants.

McLEAN, Circuit Justice. This is an action of debt brought on the official bond of [G.] Taylor as marshal of the district of Indiana, assigning for breach of the condition of the bond, that a warrant of distress was issued by the solicitor of the treasury of the United States, against one James T. Pollock, receiver of the land office at Crawfordsville, and his sureties, for the defalcation of said Pollock, as receiver, directing said Taylor, as marshal, to seize the goods, chattels, lands and tenements of said Pollock and his sureties, &c. The warrant, being in due form, was received, 28th of April, 1838, for $40,498.87, and duly came to the hands of Taylor the —— day of May ensuing, but was never served. To the declaration a general demurrer was filed and joinder. The question was submitted, without argument, whether the law which authorises the procedure be constitutional.

Doubts are entertained as to the constitutionality of this law; but as it has been acted under since its enactment, and no question raised as to its repugnance to the constitution, the court would not hold it void, at least without an argument. But two or three suggestions will be made, the accuracy of which may be tested by certifying a division of opinion, or by writ of error, should the decision eventually be a final one. The act in question was passed the 15th of May, 1820, and is entitled "An act providing for the better organization of the treasury department." The second section provides that "any officer who shall have received the public money before it is paid into the treasury of the United States, shall fail to render his account, or pay over the same in the manner, or within the time required by law, * * * the amount due shall be certified by the comptroller to the agent of the treasury, who is required to issue a warrant of distress against such delinquent officer and his sureties," &c. The third article of the constitution provides, "that the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may, from time to time, ordain and establish." And in the seventh article of the amendments to the constitution it is declared, "that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

Now, the statement of an account is a ministerial duty, and also the issuing of a warrant, but the exercise of a judgment whether the case comes within the statute can scarcely be held a ministerial act. There are indeed many acts required to be done

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

by treasury officers, which partake more of a judicial than a ministerial character. Treasury officers, of necessity, decide on claims, on the evidence produced. We will not stop here to inquire whether congress may not, under the power to establish inferior courts, authorize the treasury to decide certain claims. Practically, the treasury officers who act upon these, exercise judicial powers—not in form, but in substance. No formal pleadings are filed, but the claim is stated for property purchased by the government, or for services rendered, and a final decision is made. There is no appeal except to congress, as the government cannot be sued. No one has ever doubted this power. But the nature of the power under consideration is very different from this. A warrant is authorised to be issued against the defaulter, without notice and without investigation, except merely turning to the books of the treasury, and ascertaining the amount charged. And under the warrant, the goods and chattels, lands and tenements, of the defaulter, are taken and sold on short notice; and if the sale of these be insufficient to pay the amount due, his body is taken and imprisoned. And this warrant also authorises the marshal to take the goods and chattels, lands and tenements, of the surety, and sell them on short notice. Here is no inquiry as to the due execution of the bond by the surety, or the amount which his principal owes. He may have claims of set-off against a part or the whole of the sum claimed.

This procedure deprives the citizen of the right of a trial by jury. It is a most harsh and unnecessary proceeding, and must always be injurious, if not ruinous, to the parties against whom it is instituted. In a judicial proceeding, unless the defendant had actual or constructive notice, a judgment is treated as a nullity. And it would seem to be the dictate of natural justice, that no individual should be prejudiced by any proceeding, judicial or otherwise, without notice. But, as the courts of the United States have sustained jurisdiction, on a treasury warrant, and as the question is a very important one, with the consent of the parties and at their request, the court will certify to the supreme court the question of jurisdiction, and will not now decide it.

The case was not carried to the supreme court.

Case No. 16,441.

UNITED STATES v. TAYLOR.

[5 McLean, 242;[1] 8 West Law J. 481.]

Circuit Court, D. Ohio. April Term, 1851.

STEAM VESSELS—EXPLOSION—CRIMINAL RESPONSIBILITY OF OFFICERS.

1. Any officer of a steamboat through whose negligence or ignorance, an explosion takes place which is destructive of life, is guilty of manslaughter.

2. An officer assuming to act as engineer, is presumed to be well acquainted with the duties he assumes to discharge, and ignorance is no excuse.

3. In such cases the strictest attention, and a perfect knowledge of the business, are necessary to the discharge of the duty.

4. A steam agency is attended with dangers.

This is an indictment which charges the defendant [John B. Taylor] with negligence, as an engineer on board of the Virginia, a steamboat plying between Steubenville in Ohio and Wheeling in Virginia, through which an individual by the name of Rose, and other persons whose names are unknown, were killed by the explosion of the steamboat boiler.

A jury being sworn, Mr. Bowls was called as a witness by the prosecution, who stated, that for twenty years he had been employed on steamboats. He was first cabin-boy, then steward, cook, second mate; acted as pilot two years. The Virginia was finished the 2d May, 1848. He had charge of the boat on the day of the explosion, the — March, 1849. The boat started from Steubenville, her downward trip, stopped first at Wellsville, where some passengers were put out, and freight. Then proceeded down the river, next place at Warren, then Wheeling. On the return trip, stopped at the gas works, took in a passenger at the ship yard, a carpenter; had a flat boat in tow from Wheeling. Stopped at Litton's Landing on the Ohio side; not certain whether the boat was made fast; some passengers and freight were discharged there; did not remain more than five minutes. About the time the boat was ready to start, rang the alarm bell for the engineer to ship the engine, that is, to get ready. This the last witness recollects. A dead sound or crash followed, but he was not conscious. After he became conscious he looked for his wife; found a woman in the water, wounded; tried to lift her out, but was not able. He saw on the wreck a man and his wife, wounded. Saw the clerk of the boat in the water, from which he was rescued. The boat remained at the landing five minutes; no steam was let off. Does not recollect whether the steam was high; the engine was not worked at the landing. About an hour before the explosion, saw the engineer sitting near the engine. Witness said to him, we are getting up the river faster than usual, but does not recollect what reply was made. The engineer still continued reading. Witness does not know that there was a supply of water in the boiler. He thinks there was more weight on the safety valve than usual. The explosion took place about five o'clock in the evening. When the boat lands, the steam should be worked off, or be permitted to escape. The weights on the safety valve were not usually hung there.

William Burke was acquainted with the machinery. Witness built small engines. He has acted as engineer. Made two or three

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

trips on the Virginia. The last trip he made on her was about a month before the explosion. The boilers were said to be new, and they had that appearance. And the engine seemed to be in good condition. Six weeks or two months before the explosion, witness thought the boilers were number one; bore one hundred and twenty-seven pounds to a square inch. This without the extra weight. Want of water in the boiler produces explosion. It is the business of the engineer to see that there is a sufficiency of water in the boiler.

Mr. Litton stated the explosion took place at his wharf. He was in his warehouse when it took place. Four or five persons were taken out of the river. Three dead bodies were recovered from the river.

Mr. McCully says the cause of the explosion was a want of water in the boiler.

On the part of the defendant, the following witnesses were examined:

Capt. Dormon: Says for the last three years he has been running a boat as captain, between Wheeling and Steubenville. Was a passenger on board the Virginia. He handled the pump as other men. The ice was running—defendant was engineer, and did well. Witness has been steamboating thirty-five years.

Capt. Wosley: Was captain on the boat; defendant engaged as engineer eighteen months or two years. He considered the defendant a careful man.

Mr. Fox: Has been an engineer ten years; has known defendant six years as an engineer, and he considers him a careful man. Some of the pieces of the boiler which witness examined, appeared to have been defective.

The District Attorney of the United States for Ohio.

Before McLEAN, Circuit Justice.

In their instructions to the jury, THE COURT said: This prosecution is brought under the 12th section of the act of 7th July, 1838 [5 Stat. 306], which provides "that any captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, or negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labor for a period not more than ten years."

The numerous disasters which have occurred to steamboats on our lakes and rivers, destructive to the lives of passengers, became so frequent, as to call for legislation by congress, in whom is vested the commercial power in regard to our commerce with foreign nations, and among the several states. Many of these occurrences were believed to happen through the ignorance or want of attention of the officers on board the vessel. And the above act was passed to punish any misconduct, negligence, or inattention of the officers on board of any steamboat or other boat propelled by steam, through which life was destroyed.

The first thing to be observed in regard to this law is, that every one who assumes to perform certain duties, as captain, pilot, or other responsible duty on board a steamboat, is made responsible for any act done, through ignorance or negligence, without reference to his fitness for such duty. This is proper. Any individual who is incompetent to discharge the duties of engineer, is guilty, though the act which destroys life was done through ignorance. It is no mitigation of the offense that the engineer erred through a want of knowledge. He should not have engaged in a duty so perilous as that of an engineer, when he was conscious that he was incompetent. The explosion which took place in the case before us was perhaps, more destructive of life than any other which has occurred, when the small number of passengers on board the Virginia is compared to other explosions. The question you are to try is, Did it occur through the ignorance or carelessness of the engineer? No other person on board the boat is implicated. From the evidence it appears that there was an unusual pressure of steam, on ascending the river from Wheeling. Weights were hung on the safety valve. This was unusual. One of the witnesses being near the engine, saw the engineer sitting in a chair, reading. He observed to him that the boat was running more rapidly than usual. No reply was made. On the trip up the river, stopped frequently. About one hundred and fifty yards below the place of explosion, the boat rounded to the shore, where it remained about five minutes; the steam was not worked off at that place, nor was it permitted to escape. At Litton's wharf, the boat remained about five minutes; no steam was let off. The boat, on landing, it is said, by one of the witnesses, ran on the ground, which caused her to careen, the side of the boat aground being higher than the other side. This necessarily threw the water in the boilers to the lower side. The fires were continued, no steam escaped, and when the wheel made a few strokes of backwater, which drew the boat from the ground, it assumed a level position, and the explosion instantly took place. Several of the witnesses said the explosion occurred because there was not a sufficient quantity of water in the boilers. When the boilers have their full complement of water, a boiler very rarely, it is supposed, bursts. But when there is a deficiency of water, and the vessel is careened, the upper side of the boiler must soon become heated to the utmost extent, and when water is suddenly thrown against the red heat of the boiler, as it must be, when the vessel is afloat, there is great dan-

ger of an explosion, as the water, in coming in contact with the red heat of the boiler, is immediately converted into gas, and an explosion generally follows.

Now, gentlemen, it is for you to say, whether the engineer was not bound to ascertain the quantity of water in the boilers; and, especially, whether it was not his duty to let off the steam, whenever the boat lands or stops, and especially, when the steam is high. If, in this respect, or in any other, the engineer was guilty of negligence, your verdict will be, guilty. It is true, the punishment of the engineer, if guilty, will not restore the dead, or mitigate the sufferings of the wounded. But the example will be salutary to prevent like occurrences in future. This is one of the great objects of punishment. I am disposed to think that very few persons consider the dangers of steamboat travelling. Every passenger sleeps and treads upon a fiery volcano, governed by the fixed laws of the most dangerous and powerful agent in nature. And if he, under whose superintendence this fiery agent shall be placed, is ignorant of its laws, or does not strictly attend to them, an explosion is certain, and a destruction of life more than probable. Custom often familiarises us with dangers, until they are but little regarded. But when the agent is charged and restrained beyond the point of endurance, its bonds are broken, and destruction follows. It is your province, gentlemen of the jury, to weigh the evidence, and decide on the probabilities of guilt. Guilt in such cases as this, is seldom susceptible of clear demonstration. We have to act on the highest degree of moral certainty. If you are satisfied, in such a view, of the guilt of the defendant, you will so find; but if your minds are not led to this result, you will find the defendant not guilty.

After being out a considerable time, the jury returned a verdict of not guilty.

[NOTE. The report of this case as published in 8 West. Law J. 481, is somewhat different in form and in some respects is more complete. It is as follows:]

This was a prosecution under the act of July 7, 1838, against the defendant as engineer of the steamboat Virginia, which burst her boilers on the Ohio river, between Steubenville and Wheeling, at Litton's Landing, on the 30th of March, 1849. This act provides: "Sec. 12. That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board of said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any circuit court of the United States, shall be sentenced to confinement, at hard labor, for a period of not more than ten years." The indictment consisted of three counts. The first charged the defendant with misconduct, negligence, and inattention to his duties as engineer of the steamboat Virginia, navigating the Ohio river, in allowing the steam to accumulate in such excess as to burst the boiler of the boat, by reason of which bursting, and the issuing of steam and hot water therefrom, one A. B. was mortally wounded, bruised, burned, and scalded, by reason of which he died, concluding with the charge of manslaughter in usual form. The second count charges the bursting to have been caused by deficiency of water in the boiler, occasioned by the unlawful neglect and inattention of the defendant as engineer, whereby several persons unknown were wounded, bruised, and pushed into the water and drowned. The third count charges the bursting of the boiler to have been caused by the negligence and misconduct of the engineer, in creating and allowing to be created, an undue quantity of steam, and not permitting the same to escape, which occasioned the explosion and "destroyed the life of a person on board said vessel whose name is to the jurors unknown.

The prosecution was conducted by Samson Mason, Esq., U. S. Dist. Atty.

Baber & Nobel, for defendant.

The only witness, who was on board of the boat, called, was Robert Boals, pilot. He testified that the boat was placed under his command in Steubenville, on the morning of the 30th March, A. D. 1849, by the captain, William T. Dawson, who was to get off at Warren. The boat Virginia was a regular packet between Steubenville and Wheeling, on the Ohio. That he ran her down that day to Wheeling, leaving the captain at Warren. Stopped frequently on the route to land passengers and take ir goods. The boat arrived at Wheeling about noon, the usual time. She left Wheeling, on her return trip, at a few minutes before two o'clock. She stopped twice in the immediate vicinity and towed a flatboat a short distance. She stopped about eight times between Wheeling and the place of explosion, about eleven and a half miles above. The last place, previous to the explosion, was at Rush Run, about one hundred and fifty or two hundred yards below Litton's Landing, where she laid about five minutes. He did not recollect to have heard steam let off here, or worked off through the engine; thinks he did not notify the engineer that they intended to stop again at Litton's; moved from Rush Run to Litton's; stopped here again about five minutes; rang the alarm bell to prepare to back, when the explosion occurred—all he recollects, except a dull heavy sound—until he came to, as he was coming down the bank. There were about thirty-five passengers and six or seven of the crew on board. Himself and wife were in pilot house; both hurt captain and son, clerk, and engineer, not killed; several passengers killed—the top works or cabin nearly all blown away—one boiler was torn to pieces and scattered on shore; the other had the heads blown off and a hole in one side; this was thrown into the river. The bodies which the witness saw were blackened, as was also the boat. They appeared as if covered with some black substance. The boat was run up to the landing at Litton's, where the road came down the bank to the water, the side of the road was composed of rocks. The landing is shallow in low water. The boat was narrow, with heavy upper works. She had two boilers, thirty-six inches in diameter, twenty-two feet long, with two internal flues each of about twelve or fourteen inches in diameter of one-fourth inch iron. He also stated that about an hour before the explosion, he left the wheel in the hands of a passenger and went below to engine-room for a drink, and found the defendant sitting on a chair between the engines with his face towards the boilers, reading a pamphlet. He remarked to the engineer that "they were skipping up the river a little faster than usual." He did not know how long he was reading. After the explosion, he found one of the engines shipped up to back. The boat was built with new boilers in May, 1848. The witness said "he did not know whether the boat careened" at Litton's Landing. It was also proved that the boat was

only about seventeen or eighteen feet wide, by about one hundred and five feet long, with heavy upper works—was seen by several witnesses to careen more than boats usually do. It was also proved that a wrench of about three pounds weight was attached to a rope running from the end of the lever of the safety valve, to hold it down. This lever was about thirty-two or thirty-four inches long from the fulcrum. The valve attached to the same lever, about four inches from the fulcrum, and about three and a half inches in diameter. The regular weight for the safety valve was one hundred and twenty-seven pounds to the square inch. It was also proved that the engineer had been employed in that capacity for seven or eight years; was capable and expert in discharging his duties; that he was extraordinarily careful, and sober. The modes in which explosions are supposed to take place by deficient supply of water, by excess of pressure, and the effect of careening in producing explosions, were explained by experts. It was stated that the usual rate of the packets on this route was about six miles an hour.

Mr. Mason urged that the case was an important one to both the public and to defendant. The testimony was to be derived from persons on board and they were usually all destroyed. These explosions are appalling on our western waters, yet nobody is to blame; this is wrong. This law is to fix the blame and to secure the public. The law is open as to punishment to the discretion of the court, and therefore the evidence required should not be of the strictest character. He then examined the facts, and the idea of the boat careening—denied there was any proof or any probability of this. Claimed the explosion to have occurred by too little supply of water. That it was the result of negligence, he considered established, sufficiently by the fact, that the boilers were new, the machinery good, no steam permitted to escape, and the boilers burst. It was mere accident that any positive evidence as to deficient supply of water could be obtained. He then dwelt upon the proof of the various modes of death alleged in the indictment.

Mr. R. P. L. Baber, made the following points for the defense:

(1) That there was no evidence under the first and third counts of the indictment, because the witnesses adduced by the prosecution as experts, had sworn expressly that no explosion could occur from the causes alleged in those counts. There was no positive proof under the second count, and the government had failed in proving the charge of manslaughter as laid in the indictment.

(2) In cases of this sort the rule of law laid down in 1 Greenleaf on Evidence (section 34) peculiarly applies, that "when a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion;" indeed, "this presumption of innocence is so strong, that even where the guilt can be established only by proving a negative, that negative must be in most cases proved, by the party alleging the guilt, though the general rule of law devolves the burden of proof on the party holding the affirmative." Id. § 35, and cases there cited as to offenses created by statute. Therefore to convict the prisoner, the offense created by the law of congress being of a quasi negative character, the prosecution must show, that as engineer he was not diligent, was not attentive, and that his conduct was not proper.

(3) Some personal act of omission or misconduct in his duties must be proved against the prisoner. Rex v. Allen, 7 Car. & P. 153; Rex v. Green, Id. 156, 32 E. C. L. 549, 550. A person is not responsible for a mere error of judgment (see cases as to physicians,—Rex v. Van Butchell, 3 Car. & P. 629; Rex v. Williamson (Midwife's Case) Id. 635; 4 Car. & P. 398–407; Com. v. Thompson, 6 Mass. 134), but only for "the grossest ignorance and criminal inattention" (Lord Ellenborough, in 19 E. C. L. 444). But in these cases the rule is laid down differently as to civil responsibility, and their distinction of the common-law is recognized by the act of congress itself, which in the 13th section of the law makes the fact of explosion "full prima facie" evidence of negligence in all civil actions.

(4) Explosions may occur from too great pressure of steam, which at 212 deg., is equal to 15 lbs. per square inch, and at high temperature for every 30 deg. of heat, the pressure doubles itself, so that between 345 deg., the point of safety, and 468 deg., the point of bursting on our common western steamboilers, there is only 123 deg. See Dr. Locke's report on the explosion of the Moselle, commencing on page 154, of the Family Magazine of 1839. The report contains many valuable facts on the subject of steamboat explosions in which it is remarked that no error is more common among western engineers than that a boiler can not burst with plenty of water in it, and none is more fatal in its consequences; and the theory of gaseous explosions is denied. The point of safety in a boiler is calculated thus: multiply the thickness of the boiler in inches into twice the number of pounds of pressure necessary to break a square inch of the material of which the boiler is composed, and divide the product by the number of inches in the diameter of the boiler, the quotient will be the number of pounds pressure to a square inch, that will burst the boiler, and one-fourth of that amount will be the limit of safety. The formula as laid down in Dr. Locke's report on the Moselle explosion is 2 P. multiplied by A. divided by D. is equal to B. Therefore S. is equal to B. divided by 4, and on the supposition that iron will bear a pressure of 60,000 lbs. per square inch, this rule in the case of the Virginia would give 2 multiplied by 60,000, multiplied by ¼, divided by 36 is equal to 888; therefore, point of safety, 222 lbs., and the evidence shows that at no time did the pressure on the boiler ever with the extra 3 lbs. weight, exceed 131 lbs. per square inch, much below the average pressure the worst iron would bear. The average given as the result of Prof. Jones & Johnson's experiments is 45,000 lbs. per square inch. See 7 Sen. Doc. (405) of 1842, 1843, page 51.

(5) There is no evidence to convict, yet if necessary, it can be shown from circumstances, that the explosion occurred from the careening of the boat. The testimony of Boals is to be received with caution, as he could not be expected to criminate his own conduct as pilot, yet he only says "he does not know whether the boat careened," and the evidence shows that he was negligent in performing his own duties. The landing is proved to have been very rough, and the boat of narrow beam and heavy upper works, and in the habit of lurching much, the larboard boiler burst first and was most shattered; and as to the effects of keeling, see Professor Johnson's remarks in Journal of Science, vol. 20, p. 309, where he shows every nine pounds of iron makes one pound of steam, and that the amount of pressure produced in a boiler 20 feet by 30 inches, would be 906 lbs. per square inch,—a point of inevitable explosion,—a fortiori the same result would follow sooner in the Virginia, if the boat was the least out of level as the boilers were much heavier. See, also, Ewbank in reports of Franklin Institute, vol. 9, p. 363.

(6) Again, the defective materials of a boiler, such as flawy iron, is a frequent cause of explosions (Journal of Science, vol. 35, p. 317; Prof. Renick, Id. vol. 20, p. 339; Prof. Sullivan, Id. vol. 19, p. 144), but not gas formations, as is asserted by one of the experts (see Dr. Locke's report on the Moselle explosion).

(7) The engineer is liable to be deceived by

the safety-valve on which no dependence can be placed (Journal Franklin Institute, vol. 7, p. 291; Journal of Science, vol. 19, p. 148), and also the gauge cocks (Ewbank in Franklin Institutes, vol. 9, p. 366), by blowing "hoarse" with foam (see Dr. Locke's report on the Moselle explosion). Hence, the government has directed a series of experiments for the better protection of steam boilers. 7 Sen. Doc. (405) of 1842, 1843, p. 3. The Virginia, when she blew up on the 30th November, 1849, had none of these improved protections invented by Evans, Bache, etc., or fusible plugs. Frank. Inst. p. 89. Therefore, if on any reasonable hypothesis, the explosion occurred from any of these causes, the prisoner must be acquitted according to the rule laid down by Greenleaf in weighing circumstantial evidence in criminal cases, or on the ground of doubt at least, especially as the testimony of all the witnesses concur in the fact that he was a very careful and sober man—never touching a drop of intoxicating liquor—certainly a good sign considering the general character of men in his exposed situation, as well as the fact of his being engaged in reading (instead of playing cards, like some river men) which the prosecution have wholly failed in proving an act of inattention.

By H. C. Noble, for defendant, it was urged:

(1) That the mere fact of explosion was not, as a presumption of law, prima facie evidence of guilty neglect. For in all criminal charges the guilty neglect, the gist of the crime, must be proved as alleged. This rule in England prevails in civil cases, and it is held there that such neglect must be proved beyond a doubt to be the cause of the accident. 11 E. C. L. 119, 120; 14 E. C. L. 497; 19 E. C. L. 198, 919; 24 E. C. L. 391. In the law under consideration, it is true that the rule has been changed (section 13) in civil cases, but the necessity of this clear proof in criminal cases is left unaltered. The proof therefore of neglect should be clear and positive; any doubt should be resolved in favor of defendant. 1 Greenl. Ev. pp. 40–42; Whart. Cr. Law, 190.

(2) Though there is no presumption at law that an explosion is prima facie evidence of neglect, this is the prevailing opinion in many minds. We think this wrong.

First. Because of the nature and energy of steam itself. Steam varies in pressure from 15 lbs. or one atmosphere to the square inch, to 8320 atmospheres or 124,800 lbs. to the square inch (36 Journal of Science, 242); and one boiler of the dimensions of the Virginia, with steam at 127 lbs. to the square inch—her gauge—would contain more than 3,000,000 lbs. of pressure on the outer cylinder alone.

Second. While steam is used in France and England at low pressure, not averaging in the English marine over 10 lbs. to the square inch, and in the eastern states at a pressure of from 16 lbs. to 40 or 50 lbs. to the square inch, the usual pressure in our western boilers is from 100 to 200 lbs. to the square inch. This is to some extent necessary on our shallow rivers, but it is carried to excess, is encouraged by our people and permitted by congress.

Third. The danger of explosions is increased by the imperfect control over steam by means of our ordinary machinery. Boilers are often defective in their iron, in their mode of construction, especially on account of internal flues, in the force pumps, gauge cocks, safety valves, and in the shape of the boat and arrangement of the boilers. And particularly in not having some accurate means of measuring their heat, as it is laid down by Dr. Locke, that the addition of 1123 lbs. of heat changes the state of steam from safety to certain explosion.

These are some of the defects and dangers inherent in steam navigation in the west, dangers and defects sanctioned by the public, unregulated by congress and entirely independent of the care, skill, or negligence of engineers. Is it not, therefore, unjust to presume every explosion the result of carelessness or negligence without proof of the facts of such negligence or misconduct. We claim therefore that there being no positive and clear evidence of neglect in this case, and no presumption at law or fact arising from the explosion alone, the defendant should be acquitted. But it may be asked, how do we explain this explosion? How do we suppose it took place? without admitting that we are required to explain it or in any way to exculpate our client, or without referring you to the many causes above enumerated as capable and likely to produce this explosion, we think the explosion can be clearly explained by the careening of the boat at the shore where it landed, the consequent changing of the water from one boiler to the other, the heating the boiler or flues thus left bare and the return of water and sudden creation or "flashing up" of steam in so large a quantity as to burst the boilers. This is our explanation, and now let us look for a moment at the facts of the case, and see how they sustain this view. We must either receive this or one of three other theories of the explosion; namely, that it exploded by defective material (of which there is no proof) by too little water or too much pressure of steam. The phenomena of an explosion by too little water and by careening would be the same. Let us look first at these.

It is proved that Litton's Landing was bad, shallow, and rocky. The boat was coming up stream, and of course put in with her bow inclined to the shore; if she ran on a rock or on shore, being long and narrow with heavy upper works and in the habit of careening, it is highly probable she careened. If she did but three inches it was sufficient to expose the flue nearest shore, and if more, more surface would be exposed. Is it not probable she was ashore? Why did the pilot ring the alarm bell to prepare to back her. But if ashore with the flues exposed they would become heated, and if the pilot after ringing his bell, turned his wheel and threw the boat around, and it righted, it would have occurred just when it did and just as it did. But if the boat did not move thus, it did not move any other way, for the engine was still, was only being prepared to start. How then explain the explosion by there being too little water? Only by water coming from the pumps. But the pumps were attached to the engine, and it was still. If, therefore, the boat moved (as it must have done, to explain the explosion by too little supply of water, as well as by careening), it could only have been in the way which explains clearly the explosion by careening; and where there are two theories equally reasonable, the jury must choose the one that acquits rather than convicts. The only other explanation of the phenomenon is by excess of steam. But the boilers had a safety valve loaded with but 127 lbs. to a square inch, and about 3 lbs. extra. The boilers are said by the prosecution witnesses to have been A No. 1. Admit this. It is proved by other witnesses that such boilers are safe while lying still with 135 or 140 lbs. to the square inch. Now if the steam was excessive, that is, above a safe point, it could have raised the valve and have escaped. There is no evidence or reason to believe that there was any excess of pressure by steam gradually accumulated. The blackened bodies and boat so mysteriously drawn out, not being explained, we suppose was caused by the coal soot being scattered over them. While the idea of the people being burnt to death by some mysterious agent or gas, and that there was not enough water left to scald them, is absurd; when we know that five minutes before the boilers had enough to carry the boat without an explosion about two hundred yards up the river. There is no fact in the case inconsistent with the supposition of the careening of the boat, while every fact tends to support it. If, therefore,

you think the prosecution has proved enough to put us upon our defense, that defense, clearly proved we claim, is that the explosion was caused by the unavoidable accident of careening.

Mr. Mason replied.

McLEAN, Circuit Justice (charging jury). This, gentlemen, is a case arising under the 12th section of the act of congress of the 7th July, 1838, "for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." It provides "that every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person on board of said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any circuit court of the United States, shall be sentenced to confinement at hard labor for not more than ten years." Under this statute the defendant has been indicted as engineer on board of the steamboat Virginia, and that by his misconduct, negligence, and inattention to his duties, on a trip from Wheeling in Virginia, to Steubenville, in Ohio, the boilers of said boat exploded, which caused the death of several passengers on board of said boat, named, and of others not named. The word "engineer" is used in the statute to designate the individual who acts in that capacity, and the law holds him responsible as such. If he assumes to perform the important duties of an engineer, without the proper qualifications, his ignorance is no excuse, but rather an aggravation of his offense. Congress could not have supposed that any one would be employed in so important a trust, who did not possess the requisite qualifications. There is no situation which requires a more accurate knowledge of the power of steam, or a more matured experience, than that of engineer on board of a steamboat. I regard every steamboat as a floating volcano, freighted with human beings, which, from any want of attention by the engineer, is liable to explode, and to hurl them into eternity without a moment's warning. There are no elements in nature more destructive of life than those which are carried in the bosom of a steamboat. It overcomes the force of currents, the winds and the waves, impelled by a fiery agency, which, unless kept in subjection, destroys everything within its reach. How fearful is the responsibility of every one, who undertakes to govern a vessel thus propelled! His skill should be undoubted, his attention and vigilance unceasing. In case of an explosion, he can only be held guiltless by having done everything to avoid it, which a skillful engineer could have done, under the same circumstances. If he be guilty of misconduct, of negligence, or inattention, by which means life has been sacrificed, he is punishable under the law. The law deals with him, as one competent to perform the duties he has assumed, and he is required to exercise the skill of an instructed and vigilant engineer. But we do not understand that want of skill is relied upon as a defense in this case. I shall not refer to the facts in detail as stated by the witnesses, but the principal facts are admitted by the parties or stand uncontradicted. The explosion was more destructive of human life, in proportion to the size of the boat and the number of passengers on board, than any other, I believe, upon our western waters. But few escaped unharmed. Many were killed, their mangled bodies and separated limbs being thrown upon the land and upon the water, and others were seriously injured. Some of the survivors were thrown into the air and were found in and rescued from the water, others were found on the shore. The boat was made a perfect wreck. Its boilers were broken into fragments, some of which were found a great distance from the boat on the land, others fell in the water. The hull of the boat immediately sank. To produce such consequences the steam must have been generated to its utmost height. It is for you, gentlemen of the jury, to inquire whether this explosion resulted from the misconduct, negligence, or inattention of the engineer. The proper determination of this question is of the utmost importance to the public, as well as to the prisoner. The safety of the traveling public on our western waters, demands that the evidence and the circumstances in all cases of this sort, should be most carefully investigated. While the innocent should be protected, the culpable instruments of such immeasurable calamity should not go unpunished. The fact of explosion is not prima facie evidence against the defendant, but it is part of the res gestæ essential to the prosecution, and without which it cannot be maintained. But in addition to this some inattention, negligence, or misconduct by the defendant, must be proved to authorize his conviction. On the part of the prosecution it is contended that as the boat stopped several times in eleven and a half miles from Wheeling the point of departure, to the landing where the explosion occurred, that greater care was necessary in letting off the steam than where the stoppages were less frequent. The force of this argument is sustained by experience. Rarely, if ever, do boilers explode when a boat is under way, unless the force of the steam be increased by extraordinary means.

One of the witnesses, Boals, stated that having occasion to go below, he found the defendant sitting between the boilers engaged in reading. This was near an hour before the explosion took place. He was, however, in full view of the machinery. The witness observed to him the boat was making greater speed than usual. The boat landed about one hundred and fifty yards below the place where the boilers exploded, and remained there five minutes. At that place no steam was let off. The fires were kept up. The boat then proceeded to the fatal landing, where it remained about five minutes before the engine was put in motion when the explosion occurred. There is no evidence that the steam was permitted to escape on the way from the last landing, or at the landing where the explosion took place. An attempt has been made to show that the boilers of the Virginia were defective, and that its structure, it being top heavy, rendered it unsteady, and liable to careen. And that in landing the bow of the boat may have been run on the shore, which would naturally incline the vessel to the side opposite the shore, and that on making back water to force the vessel from the shore, she would resume her erect position, which would throw the water into the heated, and measurably exhausted boilers, on the other side, which, probably produced the explosion. There is no evidence on which this conjecture is founded. If the bow of the boat, at the last landing, was run upon the shore, there is no proof of the fact.

It is also insisted that the boilers of the boat were defective. There was no competent evidence offered to prove this fact. Fragments alleged to be of the boilers were offered, and the statements of persons who had examined them, but they were not identified to be parts of the boilers of the Virginia. Some evidence has been given, which you will duly consider, tending to show the good conduct of the defendant on former occasions, while acting as an engineer on a steamboat.

Congress, by legislation on this subject, have endeavored to add somewhat to the security of passengers in traveling upon steamboats. They may not have done all that could be done by legislation. Under the commercial power they possess the exclusive authority to regulate steamboats and other vessels which are used in carrying on a commerce between two or more states. And if they shall fail to do what may be done by the exercise of legislative power, to advance this commerce and give safety to the traveling public, they are justly amenable to

public opinion. Whatever may be thought of other subjects which more immediately address themselves to the feelings and interests of congress, there is no subject connected with our western commerce more vitally interesting to the country.

The defense in this case has been ingeniously made. If the danger of steamboat traveling were more generally known and appreciated, less safety would be felt in that mode of traveling. But, gentlemen, we are not responsible for any defect of legislation on this subject. Our functions are exercised in giving effect to the law. And in the present case, if on a full and deliberate consideration of the facts and circumstances of this case, you are led to the conclusion that the calamity so much to be deplored, was occasioned by any misconduct of the defendant, by want of skill, negligence, or inattention on his part, you will render a verdict of guilty. And, particularly, if you shall believe that it was his duty, as a careful and skillful engineer, to let off the steam at either or both of the last two landings, and that such failure caused the explosion, he is guilty under the statute. On the contrary, if you shall think, on weighing the evidence, that his duty was faithfully discharged, you will find him not guilty.

The jury returned a verdict of not guilty.

Case No. 16,442.

UNITED STATES v. TAYLOR.

[2 Sumn. 584.] [1]

Circuit Court, D. Massachusetts. May Term, 1837.

SEAMEN—MALICIOUS ASSAULT BY MASTER—"MALICE" DEFINED—AUTHORITY OF MASTER AND SUBORDINATE OFFICERS.

1. Act Cong. 1835, c. 40, § 3 [4 Stat. 776], for the punishment of certain maritime offences, provides, that "if any master or other officer of an American ship or vessel, &c., shall, from malice, hatred or revenge, and without justifiable cause, beat, wound or imprison, any one or more of the crew of such ship or vessel," &c., he shall be punished in the manner stated in the act. *Held* that "malice," in the sense of the act, signified wilfulness, or a wilful intention to do a wrongful act; and, that to authorize a conviction under this act, two things must be shown—First, malice, or hatred, or revenge; and, secondly, a want of justifiable cause to inflict the injury.

[Cited in Wiggin v. Coffin, Case No. 17,624; U. S. v. Harriman, Id. 15,311.]

2. The master, when on board, has generally the sole authority to authorize punishment to be inflicted on any of the crew; and if he is present, when any punishment is inflicted by a subordinate officer, and can prevent it, and does not, he is personally responsible for the act. And neither the mate, nor any subordinate officer, has authority to punish any seamen, even for improper behavior or misconduct to himself personally, when the master is on board, except by the authority, express or implied of the master, or when the necessities of the ship's service require instantaneous punishment, as by blows or otherwise, to compel a seaman to do his duty.

[Cited in The Dubuque, Case No. 4,110. Approved in Murray v. White, 9 Fed. 564. Cited in U. S. v. Trice, 30 Fed. 492; Cole v. Tollison, 40 Fed. 304.]

[Cited in dissenting opinion in Draper v. Commercial Ins. Co., 21 N. Y. 385. Cited in Thompson v. Hermann, 3 N. W. 582, 47 Wis. 609.]

3. In the absence of the master, the next highest officer on board succeeds to his rights and authority pro tempore, so far as they are necessary for the due performance of the ship's duties.

Indictment upon the statute of 1835, c. 40, § 3, against the defendant [Otis Taylor], the master of the American brig Maria Theresa, for maliciously and without justifiable cause, beating and wounding one John Wilson, a seaman, belonging to the same ship. Plea, not guilty.

J. Mills, U. S. Dist. Atty.

A. H. Fiske and B. Rand, for defendant.

STORY, Circuit Justice, in summing up to the jury, said: This is the first case, which has come before the court upon the construction of the recent act of congress (Act 1835, c. 40) for the punishment of certain maritime offences; and the arguments of counsel and the facts of the case have led us to the consideration, what is the true interpretation of the terms of the act. The third section of the act provides, "that if any master or other officer of an American ship or vessel on the high seas, or on any waters within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound or imprison any one or more of the crew of such ship or vessel," &c. &c., he shall be punished in the manner stated in the act. The question, which arises, is, what is the true meaning of the word "malice," as used in the act? Does it mean (what is the common popular sense) a brutal malignity of conduct, resulting from bad passions and a wicked and depraved heart, such (to use the language of an eminent judge in speaking of that malice, which constitutes a material ingredient in the crime of murder) as indicates a heart regardless of social duty and fatally bent on mischief? Fost. Crown Law, pp. 256, 257. Or does it import only, what, in a general sense, is deemed in law malice, viz. a wilful or wanton intention to do a wrongful act, regardless of or in known violation of duty? The latter is the usual and ordinary sense, in which the word is interpreted in all cases of statutes, and other cases at the common law, in which it constitutes an ingredient in any offence, or tort. In cases of murder, where it has acquired a more intense sense, there is an accompaniment, indicative of its being used in that more intense sense; for in such cases, there must not only be malice, but "malice aforethought." Yet in strictness of law, the term malice by itself, perhaps, has no more than its usual sense in law, even in such cases. Thus, it has been said, "If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse." Bromage v. Prosser, 4 Barn. & C. 255. Malice, then, in the true sense of the law, at least in all cases, except that of murder, signifies no more than a wilful intention to do a wrongful act.

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

On one occasion, it was said with pregnant brevity by an English judge, that malice is wilfulness. On another occasion, where the subject underwent a thorough discussion, it was said, by the court; "Malice, in common acceptation, means ill will against a person; but in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse." Bromage v. Prosser, 4 Barn. & C. 255. See, also, 2 Starkie, Ev. (2d London Ed.) "Malice," p. 486; Philip's Case, 1 Moody, Cr. Cas. 264, 273; Blunt v. Little [Case No. 1,578]; Dexter v. Spear [Id. 3,867]; U. S. v. Ruggles [Id. 16,205]; 1 Russ. Crimes, 422 (last London Ed.) note; Id. (1st Am. Ed.) p. 614; U. S. v. Coffin [Case No. 14,824].

It is plain, that the act of congress uses the word in this last sense, which is its true sense; for the words of the act are, "malice, hatred, or revenge," not malice and hatred, or revenge; thus taking a distinction such as really exists, between the import of the different words; malice indicating the mildest form of wrongful intention, and hatred, or revenge, the more intense form resulting from bad passions, and gross malignity and depravity of heart. If the offence were not punishable, unless there were bad passions in the case, then hatred or revenge would have been the only appropriate words. As the language stands, the word "malice" has a substantial meaning, and covers all cases of intentional wrong, not included in the other words.

The other part of the statute is equally important to be considered. There must be a want of justifiable cause for the beating, as well as the existence of malice, or hatred, or revenge. If the party inflicts the injury, however maliciously; still, if he has a justifiable cause, the statute offence is not committed. Both then must concur to authorize a conviction, first, malice, or hatred, or revenge; and secondly, a want of justifiable cause to inflict the injury.

Verdict, Guilty.

In the course of the trial, it appeared, that the mate (who was a witness,) had himself also tied up and whipped the same seaman with a cat, as a punishment for his previous misbehavior to himself personally. This was done, when the captain was on board, but without any authority from him.

Alluding to this testimony, STORY, Circuit Justice, said:

The witness has very frankly stated his own acts. But I wish to give him notice, that he has no authority, nor has any subordinate officer, to punish any seaman for his improper behavior and misconduct to him personally, when the master is on board, except by the authority, express or implied, of the master. The master has generally the sole authority when on board, to authorize punishment to be inflicted on any of the crew; and if he is present, when any punishment is inflicted by a subordinate officer, and can prevent it, and does not, he is personally responsible for the act, and by his acquiescence adopts it, as done by his authority. When the master is not on board, of course the next highest officer on board succeeds to his rights and authority pro tempore, so far as they are necessary for the due performance of the ship's duties. When I say, however, that the mate or subordinate officer has no authority to inflict punishment on any seaman, when the captain is on board, I do not mean to say, that he has not a right to compel a seaman by blows or other force to do his duty at the time, when the immediate exigency of the service requires it to be done. But that is not so much a punishment for the offence of disobedience, as a necessary means of compelling the performance of duty at the very moment, when it is necessary to enforce prompt and immediate obedience. In many cases, the safety of the ship may require instant obedience to a command (as for example to take in sail), without waiting for any direct authority from the master to compel obedience. But the master cannot delegate to any subordinate officer a general authority to inflict punishment at his own pleasure for any offence of the crew. The authority of any subordinate officer to punish exists only, when it is at the very moment absolutely required by the necessities of the ship's service to compel the performance of duty. The master stands in this respect in the relation of a parent to the seamen, and is bound to exercise his own judgment, as to the time, the manner, and the circumstances, under which punishment is to be inflicted on the crew for any past misdemeanors, or any present misdemeanors, not immediately and materially affecting the ship's service or security.

UNITED STATES v. TAYLOR. See Case No. 15,878.

Case No. 16,443.

UNITED STATES v. TEFFRY.

[3 Int. Rev. Rec. 67.]

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

VIOLATIONS OF CUSTOMS LAWS—FAILURE TO PRODUCE MANIFEST.

[Fine imposed upon the master for failure to produce manifest as required by the act of 1791, § 26 (1 Stat. 205).]

This was a suit against the defendant, who was master of the brig Flight, to recover the penalty prescribed by the 26th section of the act of congress of 1791, providing that if the master of any vessel bound to the United States, shall not, on arrival within the district where the cargo is to be discharged, produce to the proper officer the manifest

required by the statute, and deliver copies as required, he shall forfeit a sum not exceeding $500. The Flight was bound from Mantanzas to New York, and on her arrival she had no manifest, and was put in charge of custom-house officers. The capias in the case was returned this morning. The defendant appeared and read affidavits in mitigation of the offence, which it was not denied that he had committed. The affidavit of the defendant stated that he was not aware that it was necessary by law to have his manifest ready to deliver to the officer when he came on board; that, when the officer demanded it, he told him that it was not ready, but his consignees would make it out on his arrival, which the officer said would do just as well, and that on his arrival his consignees made it out, and it was sent to the barge office next morning; and that he had no knowledge or intention to disobey the law.

Mr. Courtney, Asst. U. S. Dist. Atty., stated to the court that the department had sent instructions that this class of cases, which had caused a great deal of trouble and annoyance to the custom-house officers, should henceforth be prosecuted and the law strictly enforced.

Mr. Courtney, for the Government.
Hawkins & Cothren, for defendant.

THE COURT (BENEDICT, District Judge) said that the law must be strictly obeyed, and that, as far as the court was concerned, its enforcement would be strictly carried out. Under the circumstances of this particular case, the penalty would be fixed at $50; but it must be understood that so light a penalty would form no precedent for subsequent cases.

Case No. 16,444.

UNITED STATES v. TEN BARRELS AND THREE KEGS.

[11 Int. Rev. Rec. 5.]

District Court, N. D. Florida. 1869.

INTERNAL REVENUE — DISTILLED SPIRITS—STAMPS AND MARKS—OBLITERATION—UNLAWFUL SEIZURE.

Held, that when the clerk of a wholesale liquor dealer had emptied some barrels, carried them to a room where such were kept, and was in the act of effacing the stamps and obliterating the marks, the stamps and brands having been obliterated on two or three, and before he could proceed further the whole stock was seized by the revenue officer, and so he was prevented from effacing the stamps and marks on the remainder, in contemplation of law, the stamps and brands were effaced and obliterated, and the barrels would not be liable to a seizure.

Before FRASER, District Judge.

[Nowhere reported. The records of the court having been destroyed by fire May 18, 1891, the opinion is not now accessible.]

Case No. 16,445.

UNITED STATES v. TEN BARRELS DISTILLED SPIRITS, ETC., AT 294 CHERRY ST.

[6 Int. Rev. Rec. 203.]

CONTINUANCE—ABSENCE OF WITNESS.

In an action for the forfeiture of a distillery, counsel for claimants applied to the court for postponement on account of the absence of a material witness.

THE COURT said the excuse was insufficient, and that the case must go on.

After the calling of the jury, counsel for claimants consented to condemnation, waiving a trial.

[Nowhere more fully reported; opinion not now accessible.]

Case No. 16,446.

UNITED STATES v. TENBROEK.

[Pet. C. C. 180.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1815.[2]

INTERNAL REVENUE—WHO ARE DISTILLERS.

1. Information for a penalty, under the excise law.

2. A rectifier of spirits distilled from domestic materials, is not a distiller of spirituous liquors within the meaning of the act of congress of July 24, 1813 [3 Stat. 42].

[Error to the district court of the United States for the district of Pennsylvania.]

This case came up from the district court, upon a writ of error. The only question was, whether a rectifier of spirits, is a distiller, within the meaning of the act of congress of July 24, 1813, laying duties on licenses to distillers of spirituous liquors. 4 [Bior. & D.] Laws, 572 [3 Stat. 42].

C. J. Ingersoll, for the United States.
R. Peters, Jr., for appellee.

WASHINGTON, Circuit Justice. This is an action of debt, brought in the district court, for the penalty given by the act of congress of July 24, 1813, for using a still, for the purpose of distilling spirituous liquors; without having first taken out a license, according to the provisions of that law. To the charge of the district court, the attorney of the United States took an exception, and a verdict and judgment having been rendered for the defendant, the cause has come up to this court, upon a writ of error.

It appears by the charge of the judge of the court below, and by the evidence given to the jury, which by agreement is to be considered as part of the charge; that the defendant employed his still, not in distilling spirituous liquors from raw materials,

[1] [Reported by Richard Peters, Jr., Esq.]
[2] [Affirmed in 2 Wheat. (15 U. S.) 248.]

but in purifying, or rectifying (as it is more commonly and technically termed) spirituous liquors, previously distilled from grain or other raw materials; that the nature of the two trades is considered altogether different; the process different; and that in the year 1801, no duties were demanded from rectifiers, by any of the officers of the treasury department, under the then existing laws, imposing duties on licenses to distillers.

I entirely concur in the opinion delivered by the judge of the district court, in his charge to the jury; that the mere rectifying of spirits, distilled from domestic materials, is not distilling spirituous liquors from domestic materials; either within the meaning of the act of congress, in correct language, or in the common understanding of mankind. The legislature most clearly intended to impose but one tax, upon the production of spirituous liquors by distillation; and yet, if the construction contended for, by the district attorney, be correct, every operation performed for purifying, or even raising the proof of distilled spirits, would be subject to a tax; and that whether it were repeated by the original distiller, or by any other person. The word "material" in this law, clearly means the raw or original material, from which the spirituous liquor is produced, and not the produce of the raw material. Judgment affirmed.

The United States entered an appeal in this case, and this decree was affirmed in the supreme court March 17, 1817. 2 Wheat. [15 U. S.] 248.

Case No. 16,447.

UNITED STATES v. TEN CASES OF MERCHANDISE.

[2 Hunt, Mer. Mag. 259.]

District Court, S. D. New York. Feb. 12, 1840.[1]

CUSTOMS DUTIES—VIOLATION OF LAWS—FORFEITURE OF GOODS.

1. The fourteenth section of the act of July, 1832 (4 Stat. 593), is to be construed in connection with the act of 1830 (4 Stat. 409), of which it is amendatory. The second clause of said fourteenth section does not provide for a forfeiture of the whole package, but merely of any article in the package which is omitted from the entry.

2. If the omission of an article from the entry (which is a ground of forfeiture of that article under the second clause of section 14) is accompanied with circumstances of concealment, or other matters showing that the package or invoice was made up fraudulently, it would be a cause of forfeiture of the whole package, under clause 3, which provides for the case of an invoice made up with intent to evade or defraud the revenue.

3. An information charging that the invoice was made up with intent to evade or defraud the revenue, in the language of clause 3, is, in form, sufficient, and is not too vague and uncertain to support a forfeiture.

4. A mere misdescription of shawls as "worsted shawls," which are made of cotton and worsted, is not of itself competent evidence of a fraudulent intent, such as will warrant a forfeiture of the goods under section 14 of the act of 1832.

This was an information for the forfeiture of the goods under the three clauses of the penal part of the 14th section of the act of July, 1832 [4 Stat. 593]. It contained three counts: 1. That the goods on inspection did not correspond with the entry. 2. That the package contained articles not mentioned in the entry, inasmuch as none of the goods in the package were specified in the entry. 3. That the package and invoice were made up with intent to evade or defraud the revenue. The entry and invoice produced upon the entry were read, in which the goods were described as worsted shawls; also the letter of the shippers to the claimants [Hadden & Co.] was produced by them and read on the part of the United States, stating that, in great confidence of the integrity and high standing of the claimants, the shippers had opened a business with them, by the consignment of ten cases worsted shawls, and a case of printed cotton handkerchiefs. The evidence for the prosecution farther showed that upon inspection the goods were shawls composed of cotton and worsted; all the goods were of the same kind; and the materials were palpably to be discovered, and nothing in the way of concealment appeared. THE COURT then suggested, that as it had been decided by the circuit court that the act of congress did not contain words imposing any forfeiture for the goods not corresponding with the entry (owing apparently to the accidental omission of words of forfeiture in the law) there need be no discussion as to the first count, seeking the forfeiture on that ground. The claimants' counsel offered to waive any objection on this ground, and asked to have that question tried, as they were prepared to show that the goods were invoiced and entered under their usual and appropriate name in trade. They were therefore desirous, in the present suit, to have the law pronounced, that in case of the non-correspondence alleged, the goods were forfeited; but THE COURT said, that it was not at liberty to lay down law by consent contrary to the decision by which the court was bound. The claimants' counsel then contended that under the second count, charging that the package contained articles not in the entry, reference was had not to a misdescription of the whole contents of the package, but to an omission of some part of the contents in the entry; that a misdescription of the whole was the case intended in the first clause of the statute, and therefore was not included in the second. The district attorney insisted, that the misdescription of one arti-

[1] [Affirmed in Case No. 16,448.]

cle in a case was within the act, and much more a misdescription of every article.

THE COURT ruled that the act of 1832, in question, is to be construed in connection with the act of 1830 [4 Stat. 409], of which it is amendatory. By the act of 1830 the omission of an article in the package from the entry subjected the whole package to forfeiture; by the act of 1832 this was repealed, and the omission of an article only subjected that article to forfeiture; clearly showing that a forfeiture of the whole package was not intended by this clause of the act, but to have been contemplated in the first clause; and as the proposition in the present case was to forfeit every article, in other words, the whole package, not for any omission of a part, but a misdescription of the whole, the forfeiture could not be claimed under the second clause of the statute; and, therefore, that the second count of the information might be laid out of view.

The district attorney then claimed that the evidence was sufficient, unless contradicted, to claim a forfeiture under the third count, charging the invoice to be made up with intent to evade or defraud the revenue, since by the description in the invoice the goods would have passed free, while in fact they were liable to a duty of 25 per cent. The claimants' counsel insisted that, under this third clause of the statute, the information was too vague and uncertain to allow of a forfeiture, since it did not show in what that intent to evade or defraud existed, nor by what means it was attempted. They also contended that under the third clause of the act, the United States could not claim a forfeiture for the same faults as were embraced under the first or second clauses, by merely showing the intent in addition; since the two first clauses embraced the cases whether the intent were fraudulent or not.

B. F. Butler, U. S. Dist. Atty.

D. Lord, Jr., W. I. Morton, and A. Hamilton, for claimants.

THE COURT [BETTS, District Judge]. This third count alleges the offence in the words of the law, and that, in form, is sufficient. It is not clear, nor is the court of opinion that if the case fall within the second clause, and an article in a package had been omitted from the entry, appearing to have been thus omitted through a fraudulent intent, it would not create a forfeiture under this third clause of the act, and this count of the information grounded on it. The court considers, that if such omission were accompanied with circumstances of concealment or other matters, showing the package or invoice made up fraudulently, it would under this third clause forfeit the whole package. But here it is not the case of an omission; it is a description of the whole package; all the goods are entered, but, as is alleged, under a wrong description. This is not the offence contemplated in the second clause, nor is it punished with forfeiture in the first; and this misdescription, therefore, is not of itself competent evidence, without other proof of circumstances of concealment or art to disguise, from which the jury can legally infer fraud.

THE COURT, therefore, directed the jury that the evidence was not competent to warrant a conviction under the count charging fraudulent intent, and the jury acquitted the goods. The district attorney made a bill of exceptions to the several decisions.

[On appeal to the circuit court, this judgment was affirmed. Case No. 16,448.]

Case No. 16,448.

UNITED STATES v. TEN CASES SHAWLS.

[2 Paine, 162;[1] 4 Hunt, Mer. Mag. 264.]

Circuit court, S. D. New York.[2]

CUSTOMS DUTIES—FORFEITURES—CONSTRUCTION OF LAWS—EVIDENCE.

1. The 14th section of the act of July 14, 1832 [4 Stat. 593], as it stands, does not declare any forfeiture to attach upon the mere want of correspondence between the goods and the entry as a substantive and independent ground of forfeiture.

2. Possibly there may be an omission of some words by which it was intended to declare a forfeiture in such case, but as it is a penal statute they cannot be supplied by intendment.

[Cited in brief in Illinois Cent. R. Co. v. People, 143 Ill. 437, 33 N. E. 173; Lancaster Co. v. Lancaster City, 160 Pa. St. 419, 28 Atl. 854.]

3. But more probably it was designed as an alteration of the 4th section of the act of May 28, 1830 [4 Stat. 410], by subjecting the article and not the whole package to forfeiture, when the package is found to contain an article not described in the invoice. "And" cannot be construed to mean "or" in a penal statute.

4. Where there is a misdescription of the whole package, it is not a cause of forfeiture under that clause of the 14th section of the act of July 14, 1832, which declares that if any package shall be found to contain any article not entered, such article shall be forfeited.

5. Under a count alleging that a package was made up with intent to evade and defraud the revenue, the plaintiff's evidence was, that the goods were invoiced and entered as worsted shawls, but were, in fact, part cotton and part worsted, but, that there was no attempt at concealment, and the cotton could be detected without difficulty; *held*, that this was competent, but so insufficient that its exclusion was no ground for reversal.

Error from the district court of the United States for the Southern district of New York.

An information was filed in the court below, against ten packages or cases of shawls, imported and entered at the cus-

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Affirming Case No. 16,447. Date not given. 2 Paine includes cases decided between 1827 and 1840.]

tom-house in New York, and seized as forfeited by the collector, under the 14th section of the act of July 14, 1832. There were three counts in the information. The first count stated that said goods, being composed wholly or in part of wool or cotton, were entered at the custom-house by the invoice; that the collector caused the packages containing them to be opened, examined and appraised, and that thereupon said goods were found not to correspond with the entry. The second count stated, that upon such examination and appraisement, each package was found to contain articles not entered, that is to say, no one of the articles found in any of the packages had been entered. The third count stated, that upon such examination and appraisement, each of the packages was found to have been made up with intent to evade and defraud the revenue. On the trial, the entry and invoice were produced, from which it appeared that the goods were invoiced and entered as worsted goods. A witness was then called, who testified that he was the appraiser who examined the goods, and that they were all shawls of one kind, made of cotton and worsted. He further testified that there had been no attempt at concealment; everything was open, and he had no difficulty in detecting the cotton in the shawls. Upon this evidence, the counsel for the claimants requested the court to charge the jury that the claimants were in law entitled to a verdict in their favor. The court thereupon charged, that the first count presented no ground of forfeiture whatsoever, inasmuch as the particular clause of the fourteenth section of the act of congress of the 14th July, 1832, upon which this account was founded, was incomplete and ineffectual, no penalty being annexed to that clause; that under the second count, the entire package could not be forfeited on the ground that all its contents were misdescribed in the entry, the clause of the statute on which this count was founded being confined to those cases in which one or more articles not entered are found in a package; and, as to the third count, that the fact of the shawls in question being in part cotton, was not, in itself, competent evidence tending to prove that the packages were made up with intent to evade or defraud the revenue. To this charge the counsel for the claimants excepted, and the jury found a verdict for the claimants. [Case No. 16,447.]

THOMPSON, Circuit Justice. This case is brought up on a writ of error from the district court for the Southern district of New York. It was an information filed in the court below, alleging a forfeiture of the goods in question,[3] under the 14th section of the act of congress of the 14th of July, 1832, 8 [Bior. & D.] Laws, 701 [4 Stat. 593]. The information contained three counts, to meet the three classes of cases supposed to be embraced within that section of the law. That section declares, "that whenever, upon the opening and examination of any package or packages of goods composed wholly or in part of wool or cotton, in the manner provided by the 4th section of the act of the 28th of May, 1830, the said goods shall be found not to correspond with the entry thereof at the custom-house; and if any package shall be found to contain any article not entered, such article shall be forfeited; or if the package be made up with intent to evade or defraud the revenue, the package shall be forfeited; and so much of the said section (Acts 1830, § 4) as prescribes a forfeiture of goods found not to correspond with the invoice thereof, be and the same is hereby repealed." The first count in this information assumes that, under the 14th section of the act of 1832, a forfeiture of the goods attaches, if, upon the examination, it shall be found that the goods do not correspond with the entry at the custom-house; and this presents the question whether such is the construction to be given to this branch of the section. Looking to the provisions in the act of 1830, on this point, an alteration or amendment of which was intended by the act of 1832, it is not improbable that some mistake has occurred. But as the act now stands, it does not declare any forfeiture to attach upon the mere want of correspondence between the goods and the entry, as a substantive and independent ground of forfeiture. The effect or consequence of such want of correspondence is not declared; and if this was intended as a distinct ground for forfeiture, there must be an omission of some words indicating such

[3] "For the protection of its commerce," says Mr. Benedict, "for the collection of its revenues, and for the enforcement of all the regulations of its police in navigable waters, the United States, like all other commercial nations, find it necessary to impose penalties and forfeitures on goods afloat and on vessels, in relation to which the laws of trade, navigation and revenue, have been violated. In a great variety of such cases, the vessels and the goods are the only things within the reach of the courts and their process. Whenever, therefore, a penalty or forfeiture is attached to a ship or vessel, or goods on board of her, it is enforced by a seizure of the thing, and the proceeding to condemn it is a suit in the district court, in the name of the United States or other party, in whose favor the penalty or forfeiture is imposed." "It is the place of seizure, and not the place of committing the offence, which decides the jurisdiction. If the seizure be made in a foreign jurisdiction, or on the high seas, the district court of the district to which the property is brought has the jurisdiction. If the seizure be made within a judicial district of the United States, the district court of that district has the jurisdiction. If the seizure be unlawful, the party has his redress by a suit in personam in the admiralty; and the jurisdiction in this class of torts is coextensive with the jurisdiction of the seizure, and exists whether the seizure be on the high seas, in ports and harbors, or on the lakes and rivers of the interior."

intention, and which cannot be supplied by intendment in a penal statute. By the 4th section of the act of 1830, it is provided that if, upon the examination, any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent to defraud the revenue, the same shall be forfeited. The disjunctive particle "or" being used, the forfeiture declared may attach to the want of correspondence, as well as to the fraudulent intent; but in the act of 1832, the conjunctive particle "and" is used in the like connection, and which, in a penal statute, cannot be construed "or." But, independent of this consideration, if the want of correspondence is a distinct ground of forfeiture, it will include the second class, and render that provision entirely unnecessary; for if the package contained any article not entered, there would certainly be a want of correspondence between the goods and the entry. But although this section of the law is somewhat inartificially drawn, I am inclined to think there has been no omission or mistake in the phraseology. This 14th section of the act of 1832, was intended as an amendment or alteration of the 4th section of the act of 1830. Under that section, if, on examination, any package was found to contain any article not described in the invoice, it worked a forfeiture of the whole package; but, under the act of 1832, the forfeiture only attached upon the article not entered; and if, under the act of 1832, the want of correspondence is a distinct ground of forfeiture, it would work a forfeiture of the whole package, and defeat the alteration intended to be made in this respect; and I think the construction to be given to this 14th section of the act of 1832 is, that the collector is to make the examination required by the act of 1830,, and, if the goods shall be found not to correspond with the entry at the custom-house, then the article or articles not entered, and which occasioned the want of correspondence, shall be forfeited. I think, therefore, that the decision of the district court upon this point was correct. The ruling of the court was placed upon the decision of this court, in the year 1834, in the case of U. S. v. Five Cases of Linen Tablecloths [Case No. 15,111]. I have not been able to find the opinion given in that case, and do not recollect the grounds on which it was put, and have accordingly considered it as a question now for the first time raised.

The ruling of the court on the second count in the information, was, I think, correct. That count claims the forfeiture by reason of a misdescription of the whole package; whereas the 14th section of the act of 1832 looks to the case where certain articles contained in the package were not entered, and attaches the forfeiture to such articles only. Under the act of 1832, if the package be made up with intent to evade or defraud the revenue, the whole package shall be forfeited. The entry of the goods was of worsted shawls, and the evidence was, that they were part cotton; this, I think, was competent evidence under the count charging the package to have been made up with intent to evade or defraud the revenue. The evidence, however, was not excluded; and the opinion of the court with respect to it, was only an opinion upon the fact, that the shawls being part cotton, was not in itself competent evidence tending to prove that the package was made up with intent to evade or defraud the revenue. It might have been more correct for the judge to have told the jury that the evidence was not, in his opinion, sufficient to establish the fraud. But as this was the only evidence tending in any manner to show a fraudulent intent, and was so obviously insufficient to establish the fraud, I think the judgment ought not to be reversed on this ground. The judgment must, accordingly, be affirmed.

Case No. 16,449.

UNITED STATES v. TEN EYK.

[4 McLean, 119.] [1]

Circuit Court, D. Michigan. June Term, 1846.

UNITED STATES MARSHALS—ADVANCES OF MONEY FOR TAKING CENSUS.

1. A marshal who in taking the census advances money to pay the expense, after repeated attempts to obtain it from the proper department, may retain the amount thus paid, of the public money, in his hands.

2. And this may be done although the government has paid the deputies a second time, it having had previous notice of the payment by the marshal.

3. These facts being found by the jury, they found, under the instructions of the court, a verdict for the defendant, who was sued, as late marshal.

At law.

Mr. Bates, U. S. Dist. Atty.

Mr. Romeyn, for defendant.

McLEAN, Circuit Justice. This action is brought by the United States against the defendant [Ten Eyk], as late marshal, to recover a balance of public money alleged to be in his hands. From the evidence, it appears that while the defendant was marshal, the census was taken. He appointed his deputies, and the work was completed. But the government made no advance to him on that account. He raised the money and paid the deputies, of which he informed the government. Until he had made repeated efforts to obtain the money from the government, he did not borrow to pay his deputies. The defendant was removed from office, and his successor was appointed, who, although notified of the payments made by the defendant, went on under the instructions of the department to pay the deputies over again. There was nothing made to appear that the late marshal had acted unfairly or improperly, in

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

the discharge of his duties. If he was at all censurable, it was for indulging in a higher solicitude for the public service, and for the compensation of men who had labored for the government, than appears to have been felt by his superiors at Washington. The instructions to pay the deputies, who had been paid by the late marshal, of which the department had notice, were reprehensible.

THE COURT instructed the jury, that if the payments were made to the deputies who took the census, by the defendant, and the government, as well as his successor, had notice of such payments, it was the duty of the government to see that no more than was due, was paid to the deputies.

The jury found for the defendant.

Case No. 16,450.

UNITED STATES v. TEN THOUSAND CIGARS.

[2 Curt. 436.] [1]

Circuit Court, D. Maine. Sept. Term, 1855.

CUSTOMS LAWS — FORFEITURES — OMISSION FROM MANIFEST—SMUGGLING.

1. Under the 24th section of the collection act of 1799 (1 Stat. 646), an importation without a manifest is complete, when the goods are brought within the limits of a port of entry, with the intention of landing them there, and no manifest of them has been made out. The forfeiture is not saved by making a manifest after the arrival of the vessel within such a port, though before it is demanded by an officer of the customs.

[Cited in The Missouri, Case No. 9,652; Id., 9,653; McLean v. Hager, 31 Fed. 606; Kidd v. Flagler, 54 Fed. 369; The Coquitlam, 57 Fed. 718.]

2. Under the same section, the master who takes goods on board without any bill of lading or invoice, with the intention to smuggle them or duly enter them as he may elect, must be deemed the consignee, though the goods were to go to the use of a third person.

[Distinguished in U. S. v. Hutchinson, Case No. 15,431.]

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

Mr. Rand, for appellant.

Mr. Shepley, U. S. Dist. Atty.

CURTIS, Circuit Justice. This libel of information was filed in the district court, founded on a seizure, made by the collector of the customs for the port of Portland, of a quantity of cigars, alleged to be forfeited for a violation of the 24th section of the collection act of 1799 (1 Stat. 646). The district court having decreed a forfeiture, the claimant appealed. The evidence satisfactorily shows that these cigars were put on board in Cuba, with the expectation that the master would smuggle them, and deliver them to one Davis, at Portland, the port of destination of the vessel; that they were not shipped under any bill of lading, or accompanied by any invoice; that after the vessel arrived at the wharf in Portland, and a custom-house officer came on board, the master, for the first time, entered them on the manifest. The 24th section of the collection act provides, "That if any goods, wares, or merchandise, shall be imported or brought into the United States, in any ship or vessel whatever, belonging in whole or in part to any citizen or citizens, inhabitant or inhabitants, of the United States, from any foreign port or place, without having a manifest, or manifests, on board, agreeably to the directions of the foregoing section, or which shall not be included or described therein, or shall not agree therewith; in every such case the master, or other person having the charge or command of such ship or vessel, shall forfeit and pay a sum of money equal to the value of such merchandise not included in the manifest or manifests, and all such merchandise not included in the manifest, belonging or consigned to the master, mate, officers, or crew of such ship or vessel, shall be forfeited." The next preceding section, which is thus referred to, directs the manner in which the manifest shall be made, and the particulars it shall contain. The next following section (25th) requires the master, on his arrival within four leagues of the coast, upon demand by any officer of the customs first coming on board, to exhibit a manifest or manifests of the cargo; and the 26th section inflicts a penalty for the failure so to do. It was argued, in behalf of the United States, that these sections show it was the duty of the master to complete his manifest, before arrival within four leagues of the coast. This may be so; and at all events, he incurs a penalty, if, in consequence of his not having completed his manifest, he fails to comply with the demand described in the 25th section. But under the 24th section the question is not whether the master has done his entire duty as to making and exhibiting a manifest, and giving a copy thereof, but whether goods have been imported into the United States, without having such a manifest thereof on board, as is described in the 23d section. And I am of opinion that this case is within this prohibition. The vessel had arrived within the limits of the port of Portland, which was her port of destination and entry, where these cigars, as well as the residue of her cargo, were to be landed. An importation is complete when the goods are brought within the limits of a port of entry, with the intention of unlading them there. U. S. v. Vowell, 5 Cranch [9 U. S.] 368; Arnold v. U. S., 9 Cranch [13 U. S.] 104; Brown v. Maryland, 12 Wheat. [25 U. S.] 453; Meredith v. U. S., 13 Pet. [38 U. S.] 494; Harrison v. Vose, 9 How. [50 U. S.] 381; U. S. v. Lyman [Case No. 15,647]. These cigars were therefore "imported or brought into the United States, from a foreign port or place, without having a manifest on

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

board;" and as the vessel is admitted to have belonged to citizens of the United States, the forfeiture was incurred, if they were "consigned to the master," within the meaning of the act. There was no regular consignment of the goods, made by a bill of lading and invoice; but it cannot be that the omission of these documents saves the goods from forfeiture. All that is required is, that the master should in fact be the consignee. By what means he is made so is not material. It is argued that Davis, for whose use it is supposed the cigars were to go, and not the master, was the consignee. But it does not make Davis the consignee, that the cigars were for his use. He had no title to them under which he could have received and entered them at the custom-house; nor, indeed, under which he could have exercised any control over the property, save through the permission and acts of the master. The latter had the entire possession and control of the property, on its arrival, and he alone can be deemed the consignee. His own account of the transaction is, that he did not promise the shipper to smuggle them; that his final intention was not to do so; and, accordingly, he entered them on the manifest. He had the possession and control therefore, not merely as master, for their transportation and the collection of freight, but for their entry here, or their delivery to Davis unlawfully, as he should elect. He must be deemed the consignee within the meaning of the act. The decree of the district court is affirmed.

Case No. 16,451.

UNITED STATES v. TEN THOUSAND CIGARS.

[Woolw. 123.] [1]

Circuit Court, D. Iowa. Oct. Term, 1867.

COMPETENCY OF WITNESSES—"CIVIL ACTIONS"—FORFEITURES UNDER INTERNAL REVENUE LAWS—REPEALS BY IMPLICATION.

1. The phrase "civil action," in the 3d section of the act of July 2, 1864 (13 U. S. Stat. 351), includes all cases of a civil, as contradistinguished from those of a criminal, nature.

[Cited in The Poland, Case No. 11,242.]

[Cited in Fenstermacher v. State, 19 Or. 504, 25 Pac. 143; Smith v. Burnet, 35 N. J. Eq. 320.]

2. A seizure of property for violation of the internal revenue law, and the controversy arising upon a claim interposed thereto by a third party, is within the act.

3. The claimant is a competent witness in his own behalf.

4. Only a necessary and irresistible implication will be held to operate a repeal of a statute.

[Cited in Root v. Shields, Case No. 12,038.]

5. A general law was passed admitting interested parties to testify as witnesses in all cases; afterwards a special law was passed, admitting interested parties to testify in a certain contingency. *Held*, that the later did not repeal the earlier provision.

6. The act of July 2, 1864, the 2d section of the act of Feb. 28, 1865 [13 Stat. 442], and the 9th section of the act of July 13, 1866 [14 Stat. 146], construed.

This was a writ of error to the district court of the United States for the district of Iowa. The property had been seized by the proper officers, and Robeson interposed a claim thereto. The issue was tried to a jury, when the claimant offered himself as a witness. He was admitted by the court to testify, under the exception of the district attorney. The trial having resulted in a verdict for the claimant, the government brought the case here by writ of error.

Mr. Browning, U. S. Dist. Atty.

MILLER, Circuit Justice. This is a writ of error to the district court. The property which is the subject of this controversy was seized for a violation of the internal revenue laws. Robeson Brothers filed their claim as the owners of the property, denying its liability to condemnation. In the course of the trial, the claimants offered themselves as witnesses in their own behalf, and were admitted against the objection of the district attorney. The ruling of the district court upon this objection is alleged for error, and presents the question for our determination here.

The proviso to the 3d section of the act of July 2, 1864 (13 Stat. 351), declares, "that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions, because he is a party to, or interested in, the issue tried."

This enactment was intended to effect in the federal courts the same change in the law of evidence as had been made by many of the states, namely, to admit the testimony of witnesses previously incompetent on account of interest, or of being parties to the suit. The phrase "civil actions" includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved, whether between private parties, or such parties and the government. It is used here in contradistinction to prosecutions for crime.

The suit before us is a civil action within the meaning of the statute. It is prosecuted according to the usual course in admiralty. It is an inquiry into a right of property. The provision cited, therefore, will allow these claimants to testify, unless it has been repealed or modified by some other act of congress.

The 2d section of the act of February 28, 1865 (13 Stat. 442), enacts, that "any officer or other person entitled to or interested in a part or share of any fine, penalty, or forfeiture incurred under this or any other law of the United States, may be examined as a witness in any of the proceedings for the recovery of such fine, penalty, or forfeiture by either of the parties thereto, and such examination shall not deprive such witness of his or her share or interest in such fine, penalty, or forfeiture."

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

And by the 9th section of the act of July 13, 1866 (14 Stat. 146), it is provided, "that whenever, in any civil action for a penalty, the informer may be a witness for the prosecution, the party against whom such penalty is claimed may be and shall be admitted as a witness on his own behalf."

These two acts confer upon a claimant, in this special class of cases, competency to testify. It is urged. that because they are directed to such cases specially, they should be held to operate as a limitation upon the previous general provision of the statute—that is, that they work its repeal pro tanto. Of course, if it were not for the general enactment, the claimant would be incompetent, except in the particular event mentioned in the special statute for that case. The common law rule would in all other cases obtain. To avoid the general statute, and continue the common law rule as operative, we must hold that the later provision repealed the earlier by implication. It is well settled that no repeal by implication will be allowed, unless it be a necessary and irresistible implication. The statutes must be so inconsistent that, if the later stands, the former must thereby fall. Such is not the case with those before us. The act of 1866 provides that a certain class of persons may be witnesses in a given contingency. The act of 1864 says that such persons shall be witnesses without regard to such contingency. They are not necessarily in conflict.

The truth seems to be, that the provision of the act of 1866 was introduced to remove the supposed advantage given to the informer by the act of 1865, in ignorance or forgetfulness of the more general enactment of 1864. It is very improbable that congress intended to repeal or limit the effect of that act by others looking in the same direction.

I am therefore of opinion that the act of 1864 authorized the introduction of the claimant in this case as a witness in his own behalf, although the prosecutor was not sworn; that it is not repealed or modified by the subsequent acts referred to.

The judgment of the district court is affirmed. Judgment affirmed.

See 2 Pars. Shipp. & Adm. 437, note 4, in which a ruling of Mr. Justice Clifford, in Robinson v. Mandell [Case No. 11,959], is given upon one clause of this statute. The learned author also suggests that it is uncertain how far the rule would be adopted in admiralty.

Case No. 16,452.

UNITED STATES v. TERREL.

[Hempst. 411;[1] 1 West. Law J. 245.]

Circuit Court, D. Arkansas. April, 1840.

CRIMINAL JURISDICTION OF FEDERAL COURTS — ROBBERY ON LAND.

1. There is no law of congress punishing the crime of robbery, as such, committed on land; and judgment on an indictment therefor will be arrested.

2. As to jurisdiction of the United States courts in criminal cases.

The indictment charged in proper form that Moses Terrel, a Cherokee Indian, on the 29th of November, 1839, in the Indian country west of Arkansas, feloniously assaulted John Ballard, a white man, "and in bodily fear and danger of his life then and there feloniously did put the said John Ballard, and one bowie-knife of the value of ten dollars, one pocket-knife of the value of fifty cents, and one pistol of the value of ten dollars, the goods and chattels of the said John Ballard, from the person and against the will of the said John Ballard then and there feloniously and violently did steal, take, and carry away." The defendant plead not guilty, and the case was tried before the Hon. BENJAMIN JOHNSON, District Judge, holding the circuit court.

The jury found the defendant guilty in manner and form as alleged in the indictment, and he filed a motion in arrest of judgment, on the principal ground that there was no law of congress punishing robbery committed on land, and that the court had no jurisdiction of the offence; and this motion was argued by the counsel respectively.

William C. Scott, U. S. Dist. Atty.

F. W. Trapnall and John W. Cocke, for defendant.

THE COURT (JOHNSON, District Judge) said, it was not to be doubted that the only authority which this court had to try and punish offences was derived from acts of congress; for although the courts of the United States might, in the absence of statutory provisions, look to the common law for rules to guide them in the exercise of their powers, in criminal as well as civil causes, yet it is to the statutes of the United States, enacted in pursuance of the constitution, that these courts must resort to determine what constitutes an offence against the United States, and whether committed on the land or the "high seas." The United States have no unwritten criminal code, to which resort can be had as a source of jurisdiction, but as was said in U. S. v. Hudson, 7 Cranch [11 U. S.] 32, 2 Pet. Cond. Rep. 406. "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence," before cognizance can be taken of it. Referring to the statutes of the United States to ascertain what offences on land are punishable, it will be perceived that they are few, and that the crime of robbery is not among them. This is an indictment for robbery. Of larceny, this court has cognizance (Gord. Dig. 939); and although it is true that every robbery includes a larceny, yet it would be quite impossible to uphold this proceeding

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

on that ground, because the indictment is for the crime of robbery as such, and the finding of the jury, responsive to it, is that the defendant is guilty in manner and form as charged in the indictment. There is no alternative after verdict but to treat it as a case of robbery. Doubtless the party might have been legally indicted and found guilty of larceny; but of robbery, as such, this court has no jurisdiction, and judgment must be arrested. Judgment arrested.

[NOTE. The opinion of Judge Wells of Missouri, published in Hempst. 413, as a note to above case, has been reported as Case No. 447.]

Case No. 16,453.

UNITED STATES v. TERREL et al.

[Hempst. 422.] [1]

Circuit Court, D. Arkansas. April, 1840.

ASSAULT IN INDIAN COUNTRY—FEDERAL JURISDICTION.

Assault with intent to kill, or an assault and battery when committed in the Indian country, are not punishable by the courts of the United States.

The defendants [Moses Terrel and Daniel Newman] described as white men, were indicted in the circuit court for an assault with intent to kill, committed on John Ballard, also a white man, in the Indian country west of Arkansas, on the 29th of November, 1839, and they plead not guilty; and on trial before the Hon. BENJAMIN JOHNSON, District Judge, holding the circuit court, the jury found them "guilty of an assault and battery, but not with the intent to kill." The defendants moved in arrest of judgment, on the ground that there was no law of the United States to punish an assault with intent to kill, or an assault and battery committed in the Indian country.

F. W. Trapnall and John W. Cocke, in support of motion.

William C. Scott, Dist. Atty., against it.

OPINION OF THE COURT. This case stands on the same footing as the one against Moses Terrel [Case No. 16,452] and the same reasons for arresting the judgment apply.

There is no law at present to punish the offence when occurring upon land; and it rests with congress to provide a remedy. Assault with intent to kill, if committed on the "high seas" or within any place within the admiralty jurisdiction, and out of the jurisdiction of any particular state, is undoubtedly punishable in the courts of the United States, by fine and imprisonment, and confinement to hard labor. That is the only law on the subject, and it has no application to this case. Gordon, Dig. 939. Judgment arrested, and defendants discharged.

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

Case No. 16,454.

UNITED STATES v. TERRY.

[1 Cranch, C. C. 318.] [1]

Circuit Court, District of Columbia. June Term, 1806.

SLAVES AS WITNESSES.

Slaves are competent witnesses for free negroes indicted for assault and battery.

[Followed in U. S. v. Shorter, Case No. 16,284. Cited contra in U. S. v. Gray, Id. 15,252.]

Indictment [against the negress Terry, a free woman] for assault and battery on Mr. Foxon. A slave was offered as witness for the traverser.

Mr. Jones, for the United States, objected. By the Maryland law of 1717, c. 13, § 2, "no slave shall be received as evidence in any cause wherein any Christian white person is concerned."

THE COURT permitted the slave to be sworn.

Verdict, not guilty.

Case No. 16,455.

UNITED STATES v. TESCHEMACHER et al.

[Hoff. Dec. 84.]

District Court, D. California. Sept. 21, 1866.

MEXICAN LAND GRANT—EVIDENCE—ARCHIVE TESTIMONY.

[1. A petition, appearing in an expediente, on behalf of four persons for 32 leagues, cannot be considered as preliminary to a grant of 16 leagues to two of such persons.]

[2. An expediente not placed among the records till 1855 is not archive testimony such as is indispensable to the confirmation of an alleged grant.]

[This was a claim by Henry F. Teschemacher, Joseph P. Thompson, George H. Howard, and Julius K. Rose for a tract of land known as "La Laguna de Lup Yomi." The board of land commissioners rejected the claim, but, on appeal to the district court, their decision was reversed, and the claim allowed. See Case No. 13,843. An appeal was taken to the supreme court, where the decree of the district court was reversed,—22 How. (63 U. S.) 392,—and the cause remanded for further evidence and examination.]

HOFFMAN, District Judge. On the 4th January, 1853, the claimants petitioned the board for a confirmation of their claim to the place known as Lup Yomi, containing fourteen square leagues, more or less. In support of this claim a grant was produced, dated September 5th, 1844, purporting to be signed by Manuel Micheltorena, and conveying to Salvador and Juan Antonio Vallejo the land known as the Laguna de Lup Yomi,

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

to the extent of sixteen square leagues, "as shown by the respective map." On the map which accompanied this grant, a large district of country, embracing the whole of what is now known as Clear Lake, together with a considerable tract around it, was rudely delineated. No evidence whatever from the archives was offered, and the memorandum at the end of the grant, to the effect that note of it had been taken on the proper book, was found on consulting the book to be false. The proofs of possession and occupation were also unsatisfactory. The decision of the district court was therefore reversed, and the cause remanded for further testimony. It is now submitted on the testimony that has since been taken in this court.

It is contended that the archive evidence, the absence of which was one of the chief reasons assigned by the supreme court for refusing to confirm the claim, has since been supplied. It appears that in 1855 one José Santos Berreyesa deposited in the surveyor general's office an expediente purporting to contain a concession, and the proceedings preliminary thereto, of the place called Lup Yomi. This document is stated by Vicente P. Gomez to have been in the office of the secretary of state, at Monterey, from its date up to July, 1846, when it was taken to the custom house, with other papers. It then passed into the possession of the witness (but how, or by what right, is not explained), and so remained until 1854, or 1855, when Mr. Domingo Marks, at the instance, as he said, of José Santos Berreyesa, procured the loan of it. Before giving it to Marks, Dias, as he says, tore off the signature of Manuel Micheltorena to the decree of concession. The only reason he assigns for so doing is, that "he very much feared he would never see it again." The document thus mutilated was no doubt soon after deposited in the archives by Berreyesa.

The expediente thus presented to our notice contains: 1st. A petition signed Salvador Vallejo, and dated May 23d, 1844, soliciting for himself, and for Don Juan Antonio Vallejo, Rosalia Olivera and Marcos Juarez, "who join with him in the petition, the tract of land situated to the south of the lake, which lies at the distance of forty leagues, a little more or less, to the north of this place" (Sonoma), and he asks, that as these individuals are in company with him, there be granted eight square leagues to each, "omitting for the present to furnish the corresponding map, it being impossible to have one correctly made for want of the necessary knowledge of the land." On the 31st of May, 1844, this petition was referred to the secretary, with directions to obtain the necessary informes. It was accordingly passed by Jimeno, on the 20th of June, 1844, to the second justice of Sonoma, for his report. On the 24th July, 1844, the justice, Cayetano Juarez, reported in favor of the petition of "the citizens Salvador Vallejo, Juan Antonio Vallejo, Rosalia Olivera and Marcos Juarez." On the 21st August, Francisco Arce, chief clerk, Jimeno being ill, as the report states, transmits these informes to the governor with a recommendation that the grant be made. Then follows in the expediente a decree of concession, dated August 30th, 1844, purporting to grant in property to the petitioners, the lands they ask for "according to the map." This decree is in the handwriting of Vicente P. Gomez, and the signature of the governor, if ever attached to it, has been torn off.

Such are the contents of the expediente, now for the first time offered in evidence. Two questions are thus presented: 1. Is the expediente admissible in evidence? 2. What is its effect as proof in the case?

1. The claim presented to the board and afterwards submitted to the supreme court was for fourteen leagues of land, alleged to have been granted to Salvador and Juan Antonio Vallejo on the 5th September, 1844. The land thus granted was stated by Salvador Vallejo himself to be a well known tract, embraced within great natural boundaries, which he had pointed out to a surveyor, and which were found to contain twelve leagues. This claim was the only one presented to the supreme court. That tribunal, finding the evidence unsatisfactory, remanded the case for further proofs. The expediente now produced shows, if it shows anything, a concession made, not on the 5th of September, but on the 30th of August. The grantees are not the Vallejos alone, but two other persons besides, and the land granted is not sixteen square leagues, but thirty-two. So far from this evidence being further evidence in support of the claim and titulo presented to the supreme court, it seems almost incompatible with the genuineness of the latter. If, on the 30th of August, the governor made a concession of thirty-two leagues to the Vallejos, Rosalia Olivera and Marcos Juarez, it seems highly improbable that a few days afterwards he would have granted one-half of the same land to the Vallejos alone. No explanation of this circumstance is offered by Vallejo, who, in his deposition, taken in support of the titulo of September 5th, speaks of a petition by himself and his brother, and a grant to them of sixteen leagues, omits all mention of his application for thirty-two leagues for himself and his brother, Olivera and Juarez, of the proceedings thereon, and of the alleged concession found in the expediente. These facts serve to corroborate the testimony of Mr. Hopkins, who swears that in his opinion (and it is entitled to great consideration, the signature of Micheltorena to the grant of September 5th is spurious. It appears to be thought by the counsel for the claimants that the expediente can be treated as the record of the proceedings preliminary to the grant of September 5th. I am unable to perceive how it can be so regarded. Vallejo distinctly asserts that he petitioned for

himself and his brother, and obtained the grant of September 5th for sixteen leagues. No such petition is found in the archives. The petition in the expediente is on behalf of four persons, and for thirty-two leagues of land, and that petition, if the expediente be genuine, was granted. I cannot see how these proceedings can be considered preliminary to a grant of sixteen leagues to the two Vallejos alone. The title, therefore, to which alone the expediente can give any support, would seem inconsistent with that heretofore presented. It differs from it in every particular. It bears a different date, is in favor of different persons, and is for a different tract of land. It may well be doubted whether, under the order remanding the cause for further proofs as to the genuineness of the title submitted to the supreme court, evidence can now be received of a new, independent, and apparently inconsistent title.

2. But it is not necessary to rest the case on this point, for it is clear that the expediente utterly fails to meet the requirement of the vigorous, but just and salutary, rule of the supreme court which exacts archive testimony as indispensable to a confirmation. The expediente in no sense can be called archive testimony. It was not placed among the records until 1855. It comes, therefore, from private custody, as much so as if now produced by Gomez himself. That it ever was in the secretary of state's office we have no evidence except the unsupported testimony of Gomez. No other witness pretends to have seen it there, and Salvador Vallejo, when testifying in support of the titulo of September 5th, suppresses all mention of it, or of the proceedings it purports to record. It is hardly necessary to observe that the character of Gomez is too notorious to permit the court to place any reliance upon his uncorroborated testimony. But, even if this expediente had been found in the archives, it would fail to afford the requisite evidence in support of the claim. That a petition for thirty-two leagues was presented, and some orders of reference and informes made thereon, may be admitted. But that these proceedings terminated in a decree of concession, the expediente furnishes but slight evidence. The signature of Micheltorena to the pretended decree of concession has been torn off. We cannot therefore ascertain its genuineness by inspection. The only evidence that it was ever attached to the concession is the statement of Gomez. But the whole decree is in Gomez' handwriting. The expediente, in all probability clandestinely abstracted by him from the archives, if it was ever there, remained in his possession during eight years. If, as is quite possible, it contained originally only the petition, orders of reference and reports, he could at any time have written the decree of concession and signed Micheltorena's name. That he did not do so we have only his own word; but the hypothesis may account for his tearing off the signature when he gave the document to Marks. The reason assigned by him, viz., that he was afraid he might never see it again, is absurd. We thus see not only that this expediente does not come from the archives, but that the genuineness of the document, without which the expediente is valueless as proof, rests upon the testimony of Gomez alone. If in addition to this we consider the total silence of Vallejo and other witnesses as to every fact supposed to be disclosed by this expediente, and that the claim to a confirmation was rested upon another grant, which must now be abandoned, together with the fact that no note of either exists in the Toma de Razon, Jimeno's Index, or any other document found among the archives, we are led to the conclusion that the proofs of the genuineness of the thirty-two league grant are at least as defective and unsatisfactory as those heretofore offered in support of the sixteen league titulo, and which the supreme court declared to be insufficient. Other objections to the confirmation of this claim might be urged. The evidence wholly fails to identify the thirty-two leagues now alleged to have been conceded, or to show in what part of the immense tract embraced within the limits of the diseño it is situated. These objections, however, are of minor importance, for on the grounds already stated it is clear that the claim must be rejected.

UNITED STATES (TESCHEMACHER v.). See Case No. 13,843.

Case No. 16,456.

UNITED STATES v. TETLOW.

[2 Lowell, 159; 14 Int. Rev. Rec. 205; 6 Am. Law Rev. 575.] [1]

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

IMPRISONMENT FOR DEBT—STATE LAWS—DEBTORS OF THE UNITED STATES.

1. The act of congress of March 2, 1867 (14 Stat. 543), adopts the modifications, conditions, and restrictions upon imprisonment for debt then existing by the laws of the several states, and the course of proceedings which may thereafter be adopted therein.

[Cited in Low v. Durfee, 5 Fed. 258; Mallory Manuf'g Co. v Fox, 20 Fed. 410.]

2. The United States, as plaintiffs in an action at common law, are not exempt from the provisions of that act by virtue of their prerogative.

[Cited in Re Sanborn, 52 Fed. 585.]

3. The process and forms of proceeding adopted by congress from the state laws are binding on the United States.

4. The act of 1798, authorizing the secretary of the treasury to discharge poor imprisoned debtors of the United States, does not prevent

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 6 Am. Law Rev. 575, contains only a partial report.]

the act of 1867 from being availed of by a debtor imprisoned at the suit of the government. The remedy is cumulative.

F. Dabney, for the United States

T. K. Lothrop and R. R. Bishop, for defendant.

LOWELL, District Judge. The defendant [James Tetlow] was arrested on mesne process at the suit of the United States, in an action of assumpsit for the amount of certain taxes assessed upon him as a manufacturer; and, having been surrendered by his bail, is now imprisoned on the writ. He duly applied to a commissioner of this court to take the oaths prescribed by Gen. St. Mass. c. 124; and the district attorney was duly notified, and attended the examination. The commissioner found him entitled to take the oaths, but refused to administer them, on the sole ground that a debtor to the United States is not within the act of March 2, 1867 (14 Stat. 543). This is the question now presented for decision.

The statute of February 28, 1839 (5 Stat. 321), enacted that no person should be imprisoned for debt in any state on process issuing out of a court of the United States, where, by the laws of such state, imprisonment for debt had been abolished; and that where, by a law of the state, imprisonment for debt should be allowed under certain conditions and restrictions, the same conditions and restrictions should be applicable to the process of the United States. By the act of January 14, 1841 (5 Stat. 410), the statute of 1839 was to be construed to abolish imprisonment for debt in all cases whatever, where, by the laws of the state, imprisonment for debt had been, or should be, abolished. These statutes were held not to be applicable to Massachusetts; because the poor-debtor law of that state of 1855 did not abolish imprisonment for debt, and so was not within the act of 1841, but was a law allowing such imprisonment under certain conditions and restrictions which brought it within the act of 1839, which was not prospective, and did not adopt future state laws. In re Freeman [Case No. 5,083]; Campbell v. Hadley [Id. 2,358]. It was further decided that a debtor who had been lawfully relieved from imprisonment upon his debts, under the general insolvent law of Massachusetts, was yet not entitled to have the execution modified so as not to run against his person; because the insolvent law of Massachusetts was neither a law abolishing imprisonment for debt generally, nor allowing it under certain conditions and restrictions, but one which abolished it only in its relation to certain individuals. Catherwood v. Gapete [Id. 2,513]. That case differed from Beers v. Haughton, 9 Pet. [34 U. S.] 329, in this, that the circuit court for the district of Ohio had adopted the insolvent law of that state, and our court had never adopted the law of Massachusetts. The decision in Freeman's Case [supra] likewise pointed out the objection which had prevailed in Palmer v. Allen, 7 Cranch [11 U. S.] 550, and in others, that the federal courts cannot exercise powers bestowed by state laws on state officers, nor can congress require or control their exercise by the state officers.

The act of March 2, 1867 (14 Stat. 543), on which this petitioner relies, was plainly and pointedly intended to apply to Massachusetts; for it addresses itself to the very points ruled in the cases just cited. It not only provides a federal officer to take jurisdiction of such cases, but adopts the modifications, conditions, and restrictions upon imprisonment for debt then existing by the laws of the several states, and the course of proceedings which shall thereafter be adopted therein; and provides for the discharge of any defendant arrested on mesne process or execution issuing out of the courts of the United States, who would be entitled to his discharge on like process from the state courts, thus obviating the precise difficulties, and all the difficulties, upon which the Case of Freeman [supra], and most of Catherwood v. Gapete [supra], were decided. It will not now be necessary to examine in detail the many and interesting cases which concern the application of state insolvent laws to United States process in general; because it cannot be doubted, and has not been questioned in argument here, that the poor-debtor law of this state, passed in 1855, and embodied in chapter 124 of the General Statutes, has been adopted by congress in the act of 1867, so far as it relates to private persons suing and being sued for debt in actions at common law. The point remaining for judgment, and which has received careful consideration at the bar, is, whether the United States, when they appear as plaintiffs in such an action, are within that statute. The argument of the district attorney is that the sovereign is not bound by a general act of the legislature, unless named in it. This is a maxim of English law; but the exceptions to it are neither few nor unimportant. In Willion v. Berkley, 1 Plowd. 223, this maxim was learnedly discussed, and a majority of the court decided that the king was bound by the statute de donis. It is said by learned writers that the king is impliedly bound by statutes intended to remedy a wrong, because, being the fountain of right, he cannot wish to persevere in wrong; and by acts for the public good, the relief of the poor, the general advancement of learning, religion, and justice, and the prevention of fraud. Bac. Abr. "Prerog." E, (5); Broom, Leg. Max. 51; Chit. Prerog. 382; and that he is not bound by acts which would divest him of any of his prerogatives, such as the statutes of limitation, insolvency, bankruptcy, and set-off. Broom. Leg. Max. 52. Mr. Chitty goes so far as to say that acts which would divest or abridge the king of his prerogatives, his interests, or his remedies, in the slightest degree, do not in general extend to or bind

him, unless he is expressly named. Chit. Prerog. 383. I am not prepared to admit this statement of the learned author, made in 1820, as expressing the true limitations of the doctrine at this day in England, nor as being entirely consistent with itself; for I have seen decisions in which statutes which appear to me to abridge the king's remedies have been held to extend to him, though not named. But I shall not stop to discuss this point. What I am concerned with is, that no such broad extent of prerogative exists in this country, in my opinion. It is true that the courts of most of the states, following an early decision in Massachusetts, have held that statutes of limitation do not bar the sovereign. Stoughton v. Baker, 4 Mass. 522; People v. Gilbert, 18 Johns. 227; Com. v. Baldwin, 1 Watts, 54; U. S. v. Hoar [Case No. 15,373]; and many other cases. Mr. Sedgwick traces the doctrine to feudal notions of prerogative not compatible with our polity, and commends the action of those states which have changed it by statute. Sedg. St. & Const. Law, 106. But the rule is too firmly established to be changed, excepting by legislation, which, however, has generally been called in to modify it. This exception of the sovereign from the statute of limitations has usually been defended in this country upon a reason equally applicable here as in England, that public remedies ought not to be lost by the laches of public officers. No such reason exists in the case of bankruptcy, insolvency, or set-off; and no such course of decisions has been made on those subjects. Set-off has always been allowed against the United States, by virtue, no doubt, chiefly of the act of March 3, 1797 (1 Stat. 512); it has never been refused on the ground of prerogative in any case not coming strictly within that statute, when it would have been allowed to a private person. The language of the judges certainly does not seem to countenance any such distinction. U. S. v. Ringgold, 8 Pet. [33 U. S.] 150; U. S. v. Macdaniel, 7 Pet. [32 U. S.] 1.

With regard to insolvency, the cases are not agreed. It has been held in New York and Pennsylvania that the sovereign is not bound, and, in Maryland, that he is bound. People v. Rossiter, 4 Cow. 143; People v. Herkimer, Id. 345; Com. v. Hutchinson, 10 Pa. St. 466; State v. Walsh, 2 Gill & J. 406. None of these cases appear to have been much argued or carefully considered. Against them I may well set, in this connection, the decision of Mr. Justice Thompson, of the supreme court of the United States, in Stearns v. U. S. [Case No. 13,341], who held, reversing the judgment of the district court of Vermont, that a defendant, sued by the United States in a state court, and committed to jail on execution, could be lawfully discharged under the poor-debtor law of Vermont. "The United States," says the learned judge, "are a body corporate, having a capacity to contract, to take and hold property, and, in this respect, stand upon the same footing with other corporate bodies; and if they will prosecute their suits in the state courts, and avail themselves of the state laws for this purpose, it is not perceived that any good reason can be given why such state process as they use, for the purpose of enforcing their right, should not be subject to the state law." He goes on to say that if the suit had been prosecuted in the courts of the United States, different considerations might have been presented. He alludes, of course, to the consideration whether the state law had been adopted by congress, which, I suppose, the law of Vermont then in question had not been, because the cause of action probably arose before the passage of the process act of 1828 [4 Stat. 278]; but, as no dates are given in the report of the case, I cannot affirm this with positiveness. That point is not important here; because the act of 1867, as we have seen, undoubtedly does adopt the poor-debtor law then, as now, existing in Massachusetts. What that case does decide, both necessarily and expressly, is, that the United States are not excepted out of the poor-debtor law of Vermont by virtue of any prerogative. I have seen but one case which says that a state is not barred by a discharge under the bankrupt act either of 1841 or of 1867. Com. v. Hutchinson, 10 Pa. St. 466, above cited. That case goes upon an entire misapprehension. The learned judge who delivers the opinion of the court says, very truly, that the king of Great Britain is not bound by similar acts; and, for the American law, he relies on U. S. v. King [Case No 15,536], decided on the bankrupt act of 1800 [2 Stat. 19], and says that he has compared that act with the law of 1841, and finds nothing to distinguish them in this particular. Now, it happens that section 62 of the act of 1800 expressly excepted "any right to or security for money due to the United States or to any of them;" and U. S. v. King [supra] merely gave the true and necessary construction to these words, while the act of 1841 contains no such exception. But the discharge of the person of a poor debtor, and a discharge of the debt, depend on very different considerations, and the laws of the United States have always so treated them.[2]

[That the United States and the several states considered as creditors holding ordinary debts are bound by the bankrupt act of 1867, and will be barred by the certificate, is entirely clear, because all provable debts are to be discharged, and provision is made that such debts may be proved and shall have a preference in the payment of dividends, and is shown by the very exceptions that the certificate shall not bar debts created by the defalcation of a public officer, and that the act shall

[2] It has now been decided that the United States are not bound by a discharge in bankruptcy. United States v. Herson, 20 Wall. [87 U. S.] 251.

not interfere with the assessment and collection of taxes by the United States or the states. I do not mean now to say what, if any, fines, penalties, etc., are debts with the bankrupt act, but to refer to such debts as were in judgment in Stearns v. U. S. [supra], and in many other cases. I conclude, therefore, that in this country there is no course of decisions exempting the sovereign by virtue of his prerogative from the operation of any general statutes, except those of limitation, and I think it doubtful whether that exemption would be now established here if the question were new. The modern and reasonable tendency is to limit rather than enlarge the prerogative, and to construe all statutes according to the intent, and by rules which really tend to ascertain that intent, of which this rule is not one. No doubt the sovereign may often be excluded by the subject matter; but the question ought to be decided upon each statute upon a just consideration of its language and intent.][3]

Again, prerogative, as now understood, does not extend to matters of process and remedy, excepting always the statute of limitations, which is held to touch only the remedy. "The crown," says Pollock, C. B., "is not bound with respect to its property or person, but is bound with respect to the practice in the course of the administration of justice." Attorney General v. Radloff, 10 Exch. 94. And so it has been held that the crown was bound by an act requiring all writs of error to be brought in the exchequer chamber. Rex v. Wright, 1 Adol. & E. 434. In the learned discussion by the plaintiff's counsel in that case, it is said that the rule of exemption applies only to the property or peculiar privileges of the crown. This decision was followed in De Bode v. Reg., 14 Jur. 970. In this country, a very able and learned argument was made by Nott, J., to prove that the United States are not bound by the acts admitting parties to be witnesses. Jones v. U. S., 1 Ct. Cl. 383. But the supreme court of the United States has decided that they are bound. Green v. U. S., 9 Wall. [76 U. S.] 655. Another case, which the counsel of the debtor rely on, is U. S. v. Knight, 14 Pet. [39 U. S.] 470, in which it was held that the United States are bound by the statutes of Maine, giving prisoners the privilege of jail limits. If any general rule can be laid down, it is that the United States are bound by laws of remedy and of process; though it really depends upon the intent of each act. Take, for example, the eleventh section of the judiciary act of 1789 (1 Stat. 79), which declares that no person shall be arrested in one district for trial in another in any civil action, and that no civil suit shall be brought against an inhabitant of the United States in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ: has it ever been doubted that the United States, as a party plaintiff in a civil action, is bound by both these restrictions? And yet the language of the act of 1867 is equally broad, that any defendant arrested, &c., shall be entitled, &c. It resembles entirely the language of the act of which Tindall, C. J., said, in Rex v. Wright, ubi supra (at page 447), "In the case, therefore, of an act of parliament, passed expressly for the further advancement of justice, and in its particular enactment using terms so comprehensive as to include all cases brought up by writ of error, we think there is neither authority nor principle for implying the exception of criminal cases on the ground that the king, as public prosecutor, is not named in the act." It may be said that this statute really deprives the plaintiff of a right. But to this it is answered, that the United States have no right or prerogative to arrest a debtor on mesne process in an action of assumpsit, excepting what is derived from the process acts of the state adopted by congress in 1789 and 1792 [1 Stat. 275]; and, therefore, when the practice of the state has been changed, and congress have assented to and adopted the change, the United States, like all other plaintiffs, must conform. It will hardly be maintained that the prerogative here extends to the limits once demanded for it in England, that the sovereign may take advantage of all acts of parliament, but shall not be bound by them. If the conditions and restrictions now imposed on imprisonment for debt had existed in 1789, it is perfectly clear that the United States would be bound, because it is under the state practice then adopted alone that it has any right of arrest; and the true way to look at the process act is, that the amendment is incorporated with it so as to make, as it were, but one statute; and so the result is clearly reached, that all process is included, whether for the United States or any other party. Another answer is, that the right to imprison a defendant ought not to be held to be a prerogative right, unless the statute expressly makes it so.

It is further contended for the government that congress has fully legislated upon this subject, by numerous acts, giving power to the president, the secretary of the treasury, and the postmaster-general, respectively, to discharge from prison poor debtors of the United States, in the manner and upon the terms pointed out by these acts. [Act of June 6, 1798, c. 49 [1 Stat. 561]; act of March 3, 1817, c. 114 [3 Stat. 399]; act of March 3, 1825, c. 64, § 38 [4 Stat. 113.][4] In the case of private persons, it has uniformly been held that the act of congress of June 2, 1800 (2 Stat. 4), is cumulative only; and so, even, as to the United States in respect to jail limits: U. S. v. Knight, 14 Pet. [39 U. S.] 301; Campbell v. Hadley [Case No. 2,358]. In Duncan v. Darst, 1 How. [42

[3] [From 14 Int. Rev. Rec. 205.]

[4] [From 14 Int. Rev. Rec. 205.]

U. S.] 309, Mr. Justice Catron says: "It is insisted for the defendant in error that the act of congress of 1800, c. 4, for the relief of persons imprisoned for debt, is the only law by which a discharge can be had from a ca. sa., awarded by a court of the United States. We do not think so." He then refers to the provisions of that act as being inconvenient in comparison with the state laws, and proceeds: "So there are other modes of discharge prescribed by the state laws that can be executed just as conveniently and properly by the federal courts and judges, in cases where the execution issues from the latter courts. State laws of this description have been adopted by the acts of congress as incident to the remedy: they are cumulative, and in addition to the act of congress of 1800, both being in force. As we have adopted in effect the same construction where property was to be levied on, in Amis v. Smith, 16 Pet. [41 U. S.] 312, it would be harsh to hold otherwise in restraint of personal liberty." The act of June 6, 1798, authorizing the secretary of the treasury to discharge the poor imprisoned debtors of the United States, is very analogous to the poor-debtor law of Massachusetts, and anticipates its wise and humane policy by some forty years. It is not, however, as convenient in its practical operation; and I can see no reason why it should not be considered cumulative, as well as the act of 1800, in relation to private debtors. This latter act excludes public debtors by name; but this, no doubt, was because they had already been provided for by the act of 1798. There is no such exception in the act of 1867. The act of March 2, 1831 (4 Stat. 467), and five acts passed to amend that act, and keep it alive, down to 1843, which were cited at the bar, do not relate to imprisoned debtors at all, nor to a release from imprisonment. The secretary of the treasury was already invested with power over that subject by the act of 1798. Those laws were for the discharge of the debts due the United States in certain cases when the debtors were insolvent, and resembled a bankrupt law. I have not overlooked the decision of Judge Hopkinson, cited and relied on by the government. [U. S. v. Hewes, Case No. 15,359.] [5] No one can differ from that learned and able jurist, without great doubts of the soundness of his own opinion; but there are some considerations affecting the case, which I may state. Judge Hopkinson relies largely on U. S. v. Green [Id. 15,258], in which Judge Story decided that the United States could sue in the district court as indorsee of a note, though the original holder could not have sued in such court. Judge Hopkinson cites this case as if it had turned on the point of the United States being bound by an act in which they are not mentioned, whereas Judge Story relies but little on that point, and expressly puts his decision on the act of 1815 [3 Stat. 245], which gives the district courts jurisdiction of all suits at common law in which the United States sue, and says he should have had very great doubt but for that act. Again, several of Judge Hopkinson's objections have been carefully met and obviated by the statute of 1867; for they were objections like those found in this circuit, and went to the application of the act in the federal courts, under all circumstances. Judge Hopkinson says his opinion is opposed to one given by Judge Betts in the Southern district of New York, of which I have seen no report. And, finally, I consider that congress, by passing the act of 1867, manifest an intent to persevere in the wise and humane policy of giving to debtors arrested under federal process the advantage of the state laws, notwithstanding the objections raised against it, though, at the same time, they try to obviate those objections as far as practicable. Defendant discharged.

[5] [From 14 Int. Rev. Rec. 205.]

Case No. 16,457.

UNITED STATES v. TEVEN.

[Cited in U. S. v. Millinger, 7 Fed. 187. Nowhere reported; opinion not now accessible.]

UNITED STATES (THACHER v.). See Case No. 13,851.

Case No. 16,458.

UNITED STATES v. THARP.

[5 Cranch, C. C. 390.] [1]

Circuit Court, District of Columbia. March Term, 1838.

ASSAULT WITH INTENT TO KILL.

Upon an indictment, under the penitentiary act for the District of Columbia [4 Stat. 448], for assault and battery with intent to kill, it is not necessary to show that the crime would have been murder, if death had ensued.

Indictment [against William Tharp] for assault and battery. The first count charged it to be with intent to kill one William Walker, against the form of the statute. The second count charged a common assault and battery at common law.

Mr. Coxe, for defendant, prayed the court to instruct the jury, upon the first count, that if the offence would not have been murder, in case Walker had been killed, it is not a case within the penitentiary act for the District of Columbia.

But THE COURT refused; MORSELL, Circuit Judge, saying that the point had been decided by this court in Alexandria (alluding to U. S. v. Lloyd) at October term, 1834 [Case No. 15,617].

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

Case No. 16,459.

UNITED STATES v. THIRTEEN PACKAGES OF PLATE GLASS.

UNITED STATES v. ELEVEN PACKAGES OF PLATE GLASS.

[N. Y. Times, Oct. 30, 1854.]

District Court, S. D. New York. Oct. 28, 1854.

CUSTOMS DUTIES—FALSE VALUATION—INFORMATION OF FORFEITURE.

[In informations of forfeiture for false valuation of imported goods, it is sufficient to make the averments in the words of the statute.]

These cases came up on demurrers to the informations filed by the United States district attorney against the goods to forfeit them for false valuation.

Mr. Joachimssen, for the United States.

Owen, Betts, & Vose, for claimants.

HELD BY THE COURT.—That counts of an information, when founded upon a statute like these, are sufficient when they set forth the words of the statute. That although some of the counts in these indictments, if considered alone, would no doubt be held bad, yet some of them are unquestionably sufficient, and, if one count was held sufficient, it comes to the same thing as if all were.

THE COURT will, for the purposes of this case, hold them all sufficient.

Demurrers overruled.

UNITED STATES v. THIRTY BARRELS OF DISTILLED SPIRITS. See Case No. 15,946.

Case No. 16,460.

UNITED STATES v. THIRTY-FIVE BARRELS OF HIGHWINES.

[2 Biss. 88; [1] 9 Int. Rev. Rec. 67.]

District Court, N. D. Illinois. Jan., 1869.

INTERNAL REVENUE—DISTILLERS' BONDS, BOOKS, AND TAX.

1. When a distiller has given the bond required by the 7th section of the act of July 20, 1868 (15 Stat. 125), in regard to excise duties, which bond has been approved by the assessor, the neglect to file the plans and descriptions prescribed in the 9th section does not bring him within the penalty of the 7th section for failure to give the bond required by law.

2. It was the duty of the assessor to see that the preliminary things were done, and, after he had passed upon the bond, the distiller was justified in proceeding upon the belief that the requirements of the statutes had been complied with.

3. Under the clause requiring that he should "make and execute a bond in form prescribed by the commissioner of internal revenue," until a form had been prescribed, it was sufficient for him to give a bond in the form and with the condition contained in the statute.

4. Under the 19th section, directing the keeping of books, etc., the distiller is bound, even though the commissioner has prescribed nothing as to the form, to keep books showing the facts prescribed by the statute; but, to bring him under the penalty, the failure or omission to keep books and make the proper entries must be with intent to defraud—which intent the prosecution must establish affirmatively.

5. The payment of the tax prescribed in the 59th section is not a condition precedent to commencing business, and the penalty is not incurred until after assessment, demand and refusal.

[Distinguished in U. S. v. Clare, 2 Fed. 56.]

Information for a forfeiture against thirty-five barrels of highwines, the property of Geo. P. Frysinger, and seized in his distillery at Rock Island, for alleged violation of the revenue laws.

Jesse O. Norton, U. S. Dist. Atty.

Wm. C. Goudy, George C. Bates, and Leonard Swett, for defendants.

DRUMMOND, District Judge. This is a proceeding under the act of July 20, 1868, which is entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes." It is the first prosecution that we have had in this court under this act. A seizure was made by the collector of the fourth district, of certain property used for the purpose of distilling, and thereupon an information has been filed in court, which alleges certain causes of the seizure. Those causes are set forth in the law as reasons for a seizure. The seventh section of the law provides that every distiller should, on filing his notice of intention to continue or commence business with the assessor, before proceeding with such business, after the passage of the act, make and execute a bond in the form prescribed by the commissioner of internal revenue, with at least two sureties to be approved by the assessor. The penal sum of the bond was to be not less than double the amount of tax on the spirits that could be distilled in the distillery for fifteen days, and in no case was to be less than the sum of $500. The condition of the bond was to be that the principal should faithfully comply with all the conditions of the law in relation to the duties and business of distillers, and should pay all liabilities incurred, or fines imposed upon him for a violation of any of the said provisions; and some other conditions were annexed.

The first of the reasons set forth in this information is that George P. Frysinger, who was running the distillery which was seized, and using the property therein for the purpose of distilling, carried on that business, and failed to give the bond required by law. The question to be determined under this part of the information is, whether he carried on the business of distilling without giving the bond required by law. The ninth section of the law declares that every distiller and person intending to engage in the business of distilling shall, previous to the approval of his bond, cause to be made, etc., an accurate plan and description of the distillery, etc. It is true that the assessor could require this to be

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

done, and it was the duty of the distiller to do that which the ninth section imposed upon him before the bond was approved; but the information is not for a violation of the ninth section, but for a violation of the seventh section, namely, the failing to give the bond required by that section. Has the claimant been guilty as charged in this part of the information?

The evidence on this point is substantially this: That on the 2d day of September, 1868, Mr. Frysinger applied to the assessor, giving notice of his intention to run his distillery, and also delivering to him a bond, in the penalty of $18,000, with certain parties as sureties, which bond, the assessor says, was satisfactory to him. The language of the assessor, Moses M. Bane, is: "Frysinger delivered to me, also, a bond which was satisfactory to me." The assessor also says that, whilst at Rock Island, where he was when this bond was delivered to him, he telegraphed to the commissioner of internal revenue, stating in substance that two distilleries at Rock Island, one of them Frysinger's, had, as he understood it, complied with the law, and inquiring whether they could then start their distilleries; that to this dispatch a reply was received on the next day, saying that they could not; that, on receiving the reply, he informed Mr. Frysinger that before starting he must await further orders from the assessor; that he informed Frysinger that when the bond was approved, he having already complied with the other requisites of the law, as he understood it, he would, in three days after such approval, be authorized to commence operating his distillery, and would be taxed from and after three days after the approval of said bond; that on the 15th day of September he wrote the following letter, addressed to the commissioner of internal revenue: "I send herewith plans and surveys of the distilleries of Terence Maguire and George P. Frysinger, in Rock Island county. Their bonds will be approved on the 21st instant, and on the third day thereafter they will be charged as distillers, under the act of July 20, 1868, unless orders to the contrary are received from your office. Very respectfully, M. M. Bane, Assessor." Having received no instructions from Washington, on the 21st day of September, 1868, he wrote the following letter, by his clerk: "George P. Frysinger, Esq., Rock Island: Sir: Your bond, as a distiller, under the act of July 20th, 1868, was approved to-day. Very respectfully, M. M. Bane, Assessor." It seems to me if those facts are established to your satisfaction, it can hardly be said that he failed to give a bond as required by law.

It is to be observed that this is a proceeding against Frysinger's property. He must have done some act which would cause a forfeiture, and thereby affect his pecuniary interest. He could only act under the information which was before him. No objection was made by the proper officer whose duty it was to receive and approve the bond. On the contrary, when it was handed to him on the second day of September, he said it was satisfactory to him; no criticism was made upon the form of the bond, penalty, security, or anything of the kind. Mr. Frysinger had been notified that when he received information that his bond was approved, he might proceed with his work, and that he would be assessed within three days thereafter. He was so notified and, therefore, it can scarcely be said, under this state of facts, about which there is no controversy, that he failed to give a bond as required by law. What did the law require which he had not done? It may be said that the law required him to do certain things under the direction of the assessor, in relation to his distillery, before the latter should approve of his bond, but he had given the bond, he had been notified that it had been approved, and after all this was done it would seem hard to forfeit his property because then he had not done what the officer whose duty it was to pass upon his bond had declared officially that he had done. If the court or jury could see that in the giving of the bond he had failed to comply with the law, or had given intentionally a different bond from what the law required, there would be some ground for claim of forfeiture of the property, because then the bond required by law had not been given; but, as I understand, nothing of this kind is shown or claimed. Whether, in point of fact, the bond had been approved or not, it seems to me, is immaterial; it would be the grossest injustice to forfeit a man's property because the assessor had failed to do that duty which he had informed him had been done—namely, the approval of the bond; as to him the bond was approved. Again, the seventh section declares that the bond should be in such form as was prescribed by the commissioner of internal revenue, and it does not appear that he had, up to this time, prescribed any form. Admit that to be so. The only effect of that, as I conceive, is this: that whenever the commissioner of internal revenue did prescribe a form of bond, then it would be the duty of the distiller to give it in that form, and until he did so prescribe, it was sufficient if the distiller gave a bond in the form and with the condition contained in the statute, and that was received by the competent officer, and the notification of its approval given to him.

So much for the first clause of seizure, as set forth in the information.

The second clause is, that the claimant, being a distiller, after the 20th of July, omitted to provide the books required by law, in which were to be set down his business transactions, with intent to defraud the United States. The nineteenth section provides that every distiller should from day to day make, or cause to be made, true and exact entry in a book or books to be kept by him, in such

form as the commissioner of internal revenue may prescribe, of the kind of materials, and the quantity of pounds, bushels and gallons purchased by him for the production of spirits, from whom and when purchased, and by what conveyance delivered, etc. This was to be done, also, in the form prescribed by the commissioner of internal revenue. It does not seem that any form was prescribed, and the court has held, heretofore, and now holds, that even where the commissioner of internal revenue does not prescribe the form, that does not excuse the distiller from providing books and making therein the entries demanded by law. The only effect of it is, that the commissioner of internal revenue may prescribe the form. When he does, that form is to be followed.

It is conceded that, as to this cause alleged in the information, the books were not provided, and entries were not made as required by law. The only question under this part of the information is whether this omission on the part of the claimant was with the intent set forth in the specification, namely, to defraud the United States. That is an affirmative fact, which it is necessary for the prosecution to establish. It is not enough that he failed to provide and make the proper entries in the book; that failure and omission must be with the intent to defraud the United States. If the intent is wanting, then this cause alleged in the information, falls as a proper cause for seizure.

The third cause alleged in the information is that the claimant, as a distiller, after the 20th of July, did not pay the special tax required by law. The position taken by the district attorney is, that the fifty-ninth section of the law, that the following special taxes shall be and are hereby imposed, that is to say distillers producing one hundred barrels or less of distilled spirits, counting forty gallons of proof spirits to the barrel within the year, shall each pay four hundred dollars, &c., * * * and that this payment was a condition precedent to the commencement of the business of distilling; in other words, that before a distiller could operate his distillery he must pay a tax of four hundred dollars. The question is, whether that is a fair interpretation of the law. Considering the severe penalties that are imposed by this law for the non-payment of the special tax, that it may involve not only a forfeiture of property but a loss of liberty, I think no court ought to construe it so strongly against the party to be affected by it, except on the construction of the language itself. I must say that I have failed to find that clear, unmistakable language in this law, to indicate that the distiller, before he starts his distillery, should go to the office and pay the $400, without a word being said to him, without any levy or assessment or demand, or anything of the kind. It would be competent, undoubtedly, for the law to require it. It would be competent for congress to impose such severe penalties, but unless the language of the statute is not capable of any other construction, I do not think that the court ought to draw such a conclusion from it. It may be that it is competent for the proper officer to demand this from a distiller, as a pre-requisite to beginning operations. It may be that it is competent for him, immediately after the distiller has commenced operations, to assess the tax against him and demand it, and on his refusal to pay it that the penalty would follow. But I think, on looking at the language of the law, before such a penalty could be visited upon the property or the person of the individual, that this assessment should be made, and that there should be a demand also upon the distiller, and a refusal by him. Nothing like that is shown in this case, and in the absence of anything of the kind being shown, it does seem to me that it would be an injustice to visit either the claimant or his property with such severe penalties.

I think this view of the case derives additional force from the fact that the language of the law as to giving the bond is clear and distinct. The bond must be given before the distiller can commence operations. That is clearly a condition precedent. But here all that the law says is, that the special taxes assessed shall be paid; that they shall be paid as required by law, and, if not, then certain consequences shall follow. Precisely when they shall be paid is not distinctly set forth in the law, and the presumption is, I think, that they are payable when demanded by the proper officer. Besides, the distiller has given a bond adjudged to be sufficient by the assessor, and on that bond he and his sureties are liable as well for all special as other taxes.

The last cause alleged in the information is, in general terms, that the claimant carried on the business of a distiller with intent to defraud the United States. So that the information may be divided into two parts: One that the claimant did not file a bond and pay the special tax as required by law; the other, that he carried on the business of distilling, and omitted to provide himself with books, and make the proper entries, with intent to defraud the United States—one being the omission to do what the law required; the other being the doing of certain acts, or failing to do them, with intent to defraud the government. A few observations on this fraudulent intent will close what I have to say to you upon the case. Fraud is not to be presumed. It must be established. But it may be established, indirectly, by circumstances, as well as by direct evidence. But those circumstances must necessarily tend to the conclusion that there is fraud. If they do, then they are often as satisfactory as positive evidence of the fraud. In relation to the omission to provide the books as re-

quired by law, it would seem, if you believe the testimony of one of the witnesses, that Mr. Frysinger spoke to him about the books, and that witness, who was an officer, told him to go on and keep the books as he had done under the old law. If this be so, it would hardly be contended, I think, that this omission was with the intention to defraud the government, unless there was an omission to make an entry with that view. If there was, then, as a matter of course, the case is made out, because it might be true that the claimant might not know precisely in what form the books were to be kept; might omit to provide himself with the proper books through ignorance, and yet if he did in point of fact, not knowing what the kind of books ought to be, make entries in the books he had, with intent to defraud the government, he would be guilty. So that the only thing, as it seems to me, that you have to inquire of on this part of the case is whether he has been guilty of a fraud, either in not providing books or in making or omitting entries in the books.

Various circumstances are relied upon by the prosecution as indicating a fraudulent intent, under the fourth cause set out in the information, that he carried on the business of distilling with such intent. These are the facts—in the first place, that the fermenting tubs did not contain marked upon them their proper capacity; that a portion of the machinery of the distillery was not constructed and located precisely as the law required; that the fences were higher than was required by law; that the proper bar required by law was not placed across the door, and that some of them had not the proper locks. This cause in the information, standing, as it does, before you, and proof being admitted under it, if there is any proof in the case which satisfies you that the fraudulent intent has been made out against claimant, then it would be your duty under this fourth charge to so say and find for the government; so that it may be proper for you to consider all these facts that have been introduced in evidence, and determine for yourselves whether the claimant was guilty of fraud. It is not sufficient, that the fermenting tubs or any other vessels in the distillery were wrongly marked; that the proper bars were not put across the doors, or locks supplied; that the fence was not of the proper height, nor that a portion of the machinery was placed different from what the law demanded. All these together are not sufficient; but there must be connected with them a fraudulent intent. Some one of them must have been done or omitted with the intent to defraud the United States, or there ought not to be a verdict for the government. If, looking at the whole or any part of this evidence, you are satisfied clearly that there was a fraudulent intent, then it is your duty to say so, under this last cause stated in the information.

The jury found for the defendant.

Case No. 16,461.

UNITED STATES v. THIRTY-FOUR BARRELS DISTILLED SPIRITS.

[13 Int. Rev. Rec. 188.]

District Court, D. Rhode Island. June, 1871.

INTERNAL REVENUE — WHOLESALE LIQUOR DEALERS—STAMPING PACKAGES.

1. The 25th and 47th sections of the statute of July 20, 1868 [15 Stat. 125], require a wholesale liquor dealer to cause to be done the things specified in those sections respectively.

2. Section 47 in its own terms prescribes a punishment for an infraction of its requirements, and section 96 is not therefore applicable to offences under it, inasmuch as it relates only to acts or omissions for which no specific penalty or punishment is provided elsewhere in the act.

[Cited in U. S. v. One Thousand Four Hundred and Twelve Gallons of Distilled Spirits, Case No. 15,960.]

3. Omissions and neglects of a wholesale dealer to stamp or mark packages containing more than five gallons, work a forfeiture of such packages by force of section 57, and therefore are not within the penalty prescribed in section 96, which applies, however, to packages containing five gallons exactly, neither more nor less.

[Cited in U. S. v. Two Hundred Barrels of Whisky, 95 U. S. 575.]

[This was an information of forfeiture against thirty-four barrels of distilled spirits, owned by John B. Hennessy.]

C. Hart and C. E. Gorman, for claimants.
J. A. Gardiner, U. S. Dist. Atty.

KNOWLES, District Judge. The questions presented by the demurrer in this case are not novel, though now for the first time raised for adjudication in this district. That they are, nevertheless, even yet, alike important and "nice," as characterized by bar and bench in other districts, must however be conceded. Still, inasmuch as in an official periodical accessible to all persons interested are found the opinions of several of the district judges upon the points presented, embodying substantially all the leading reasons for either an affirmative or a negative answer to the questions propounded, it seems inexpedient on my part here to do more than announce my conclusions, after a deliberate consideration of the statute, with the aid of reported judicial expositions and of the arguments of the learned counsel upon the elaborate briefs submitted by them. Nothing more is required, certainly; and to assume to do more, it is obvious, would result but in the repetition in effect of what has been heretofore promulgated from the bench in terms sufficiently lucid and emphatic, and (with the exception of one MS. opinion [Case No. 15,890] of the learned judge of the Massachusetts district) heretofore published in the Internal Revenue Record by authority.

In regard to a point raised in limine by the claimant and earnestly pressed, that in expounding penal and revenue laws a court is bound to accord to the claimant or defendant the benefit of all ambiguities, inaccuracies of

expression, and doubts, I care only to remark in this connection that in 7 Blatchf. 463, 464, the learned judge of the second circuit (Woodruff) epitomizes the law on the subject in terms which admit of no improvement by addition, subtraction, or qualification. [U. S. v. Thirty-Six Barrels of High Wines, Case No. 16,468.] Of the intent of the framers of the statute in relation to this point and its cognates, we find a pregnant indication in a clause of section 36, prescribing that "the burden of proof shall be upon the claimant to show that no fraud has been committed, and that all the requirements of the law in relation to the payment of the tax have been complied with."

The first question to which an answer is required, briefly stated, is this: Do the 25th and 47th sections of the statute of July 20, 1868, entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," require a wholesale liquor dealer to cause to be done the things specified in those sections respectively and referred to in the allegations to which the claimant demurs? To this my answer must be an affirmative—herein concurring in the rulings of four of the five learned judges in other districts, to whom the question has been submitted, and non-concurring in those of but one.

The second question is: If a dealer knowingly and wilfully omits, neglects, or refuses to comply with the requirements of section 25 or 47, does he incur a forfeiture of all the distilled spirits owned by him by force of the provisions of the 96th section of the act? The 96th section, I would say in reply, is, in my judgment, applicable only to acts or omissions for which no specific penalty or punishment is imposed by any other section of the statute; and inasmuch as section 47, by its own terms prescribes a punishment for an infraction of its requirements, I must adjudge that the 96th section, is inapplicable to that offence.

To infractions of the 25th section, it is not questioned that the 96th section is applicable, unless it can be shown that for such infractions some specific penalty or punishment is shown by some—"any" section of the act other than the 96th; and therefore, to show this, was a leading aim of the learned counsel of the claimant, in their argument in support of his demurrer. They contended that in the 57th section is found a provision of the tenor and import desired, in these words: "And all distilled spirits found after thirty days from the time this act takes effect, in any cask or package containing more than five gallons, without having thereon each mark and stamp required therefor by this act, shall be forfeited to the United States;" and in support of this position they cited a MS. opinion of the learned judge of the Massachusetts district (delivered April 17, 1871) [unreported], expressly and pointedly sustaining it. Upon the same point, however, it appeared that Judge Ballard, of the Kentucky district, more than a year since ruled adversely to the claimant, holding that the clause above quoted had relation solely to spirits in existence prior to July 20, 1868, and not to spirits in general, irrespective of their age, origin, or history, as adjudged in the MS. opinion of Judge Lowell.

To the reasonings of the several judges in support of their respective rulings, and to the arguments of the learned counsel upon the points involved, I have given prolonged consideration, with, however, no result more satisfactory than the conviction that the conclusion arrived at by my brother of the Massachusetts district seems, on the whole, in a barely appreciable degree, less irreconcilable with the letter and spirit of the statute than that of my brother of the Kentucky district. In his opinion, therefore, I am constrained to concur, so far as relates to all packages of spirits "containing five gallons or more." All such packages, he rules, if unstamped by the wholesale dealer, are forfeited under section 57; and for this construction, an authority (so to style it) is found in a letter of instructions from the late Revenue Commissioner Delano, to an assessor, under date of Sept. 10, 1869, promulgated officially in 10 Int. Rev. Rec. 97 [Case No. 16,559]. That officer in most explicit terms adopts this construction of the clause quoted, without remarking, so far as appears, what must strike every reader, that that clause is most infelicitously located if its intent really was what it is here held to be. Were the clause an independent and isolated section, and not simply a fragment of a sentence of a section, seemingly (at least to the cursory reader) framed with reference to spirits in existence at the date of the act, probably not a doubt of its intent or effect would ever have arisen in any mind of the bench or of the bar. I add in passing that the present commissioner, Pleasonton, gives to section 57 the same construction, as shown by an official letter dated May 30, 1871, published in the Internal Revenue Record of June 3, 1871.

Under this ruling, it is seen, all omissions and neglects of a wholesale dealer to stamp or mark packages containing more than five gallons, work a forfeiture of such packages by force of section 57, and therefore are not within the penalty prescribed in section 96. Otherwise, however, is it as to packages containing five gallons exactly, neither more nor less. Such the wholesale dealer may lawfully prepare and sell, provided he affixes the proper stamp, as required by section 25; but if he knowingly and wilfully omits, neglects, or refuses to affix such stamp upon such a package, he must be held to have incurred the penalty or punishment imposed by section 96. Such, by the way, is the view of the revenue department, as shown by the letter of instructions above cited, and I fail to see any sufficient reason for a dissent from that view on the part of the judiciary. A wholesale dealer as such, it is to be borne in mind, cannot legally sell a package which does not contain at

least five gallons, and all his stock must be stamped; and a retailer, as such, cannot sell a package which contains more than five gallons, and no stamping or marking is required on his part. I quote, as not impertinent in this connection, a passage from the commissioner's letter, with the single remark that it was published officially in the Revenue Record as early as September 25, 1869: "As the sales of wholesale dealers are confined to packages of not less than five gallons, and as every package filled on the premises of such a dealer is presumed to be filled for the purpose of sale, each of said packages must be gauged and stamped as required by section 25, third form; but if any of said packages contain ten gallons or more, these must be marked and branded as required by section 47. The absence of said stamps and marks or brands on packages so filled, containing more than five gallons, subjects the same to forfeiture under section 57. It will be observed, that although a package containing just five gallons is required to be gauged and stamped, yet the absence of such a stamp does not work its forfeiture under section 57, as that applies only to casks and packages containing more than five gallons; but the wholesale dealer who sells a package of just five gallons without gauging or stamping the same, as required by section 25, incurs the penalties of section 96 of the act of July 20, 1868."

The several reported opinions or decisions to which I have alluded are to be found in Quantity of Distilled Spirits [Case No. 11,495]; U. S. v. One Hundred and Thirty-Three Casks of Distilled Spirits [Id. 15,940]; U. S. v. Ninety-Five Barrels of Distilled Spirits [Id. 15,889]; 10 Int. Rev. Rec. 74, 97, 98, 154.

I must adjudge the demurrer sustained as to each and all of the allegations specified.

Case No. 16,462.

UNITED STATES v. THIRTY-FOUR BARRELS WHISKEY.

[9 Int. Rev. Rec. 169; 16 Pittsb. Leg. J. 54.]

District Court, D. Massachusetts. Nov., 1868.

INFORMERS — DEPUTY COLLECTORS.

A deputy collector of internal revenue happened to see improperly branded whiskey unloading at a warehouse, and gave information which led to its forfeiture. *Held*, that he was the informer, and entitled to his distributive share. U. S. v. One Hundred Barrels Distilled Spirits [Case No. 15,946], cited and affirmed.

[Cited in U. S. v. 278 Barrels of Distilled Spirits, Case No. 16,581; U. S. v. Simons, 7 Fed. 714.]

At law.

W. D. A. Whitman, for the informer.

W. A. Field, for the United States.

LOWELL, District Judge. Mr. Sanderson, a deputy collector under the internal revenue law, happened to observe some barrels of whiskey unloading at a warehouse in Boston, within his district, and that they were not properly branded. He detained them, and reported the facts to the collector, who, after examination, proceeded against a part of them, and those proceeded against have been forfeited.

In a recent case I had occasion to consider how far inspectors and some other officers of the internal revenue service may be informers. In that case (U. S. v. 100 Barrels of Distilled Spirits [Case No. 15,946]), after examining the question whether officers could ever be informers, and saying that they might be so, but not in competition with strangers who have really given them the clue to the discovery, I said: "In my view the cases in which an officer may be an informer are, when he incidentally, and not in the direct prosecution or course of his duty, or of any special retainer for that purpose, makes a discovery; as if an inspector put on board a vessel merely to keep the cargo safely, discovers smuggled goods concealed, or where an officer set to inquire into a particular charge discovers something entirely different and before unsuspected; or where he is told by some one as a friend, and not as an officer, of facts which his informant, not wishing to be known, refuses to bring forward himself, but tells him for the very purpose of enabling him to give information in his own name; in these cases an officer may be an informer. I do not at present think of any others." That case related to inspectors and assistant assessors, and it is now suggested by the district attorney that collectors are the officers charged by law with the general care and supervision of all matters arising under the internal revenue laws within their respective districts, and that it is their duty to prosecute for all forfeitures, and that all other persons having information of any breach of the law should report to them. In short, that they are the government so far as this subject is concerned, and cannot inform themselves, but are bound to prosecute upon their own knowledge as well as upon information derived from others. And that deputy collectors have, in subordination to the collectors, the like powers, duties and responsibilities.

Upon consideration I am not able to see that deputy collectors are in any worse position in this respect than other officers of the revenue service. The claims of all officers ought to be looked at with great care to see that neither the government nor any private persons are deprived of their just rights. I hold that no officer can become an informer by reason of his incidentally learning new facts touching the subject matter which his duty, general or special, has required him to investigate, nor by reason of facts communicated to him by private persons with a view to bringing the facts to the knowledge of the government. I intend to adhere to my former decisions upon this subject of which I have made at least three of like purport. But when a deputy collector comes

fairly within the rule applied to inspectors and other officers, I am of opinion that he may be an informer. The act of July 1, 1862, § 31 (12 Stat. 444), makes it the duty of collectors and deputy collectors, to prosecute for any sums which may be forfeited by virtue of the act, and they may be sued for in the name of the United States, or of the collector, and when recovered, one moiety shall be to the use of the United States, and the other moiety to the use of the person who, if a collector or deputy collector, shall first inform of the cause, matter or thing, etc. Section 59 of the same act imposes a penalty on persons who carry on certain trades without license, and gives one moiety of the penalty to the United States, and the other to the person who, if a collector, shall first discover, or if other than a collector shall first give information of the fact whereby said forfeiture was incurred. The next law upon the subject is section 179 of the act of June 30, 1864 (13 Stat. 305), and resembles section 31 of the former, excepting that the action is to be in the name of the United States, and never of a collector; but here, too, the only informers mentioned are collectors and their deputies. This section is amended by the act of March 3, 1865, § 1 (14 Stat. 483), by striking out the words, "if a collector or deputy collector" thus giving the moiety to the person who shall first inform, etc. The law now in force is that of July 13, 1866, § 9 (14 Stat. 145), which gives the secretary of the treasury power to make regulations concerning the amount, but in other respects is substantially like the law of 1864 as amended by that of 1865.

This view of the acts of congress seems to me to show that the legislature at first intended only to stimulate the zeal of those officers who were bound to prosecute, that is collectors and their deputies; but has since decided to throw open this prize to general competition. Under the law as it stood from 1862 to 1865, not only were these officers entitled to be informers but they were the only persons who could be informers, excepting in license cases, and if in taking away their exclusive rights, congress had intended to deprive them of all rights, they would have said so. The acts of 1862 and 1864 clearly include them under "persons" and the repeal of the condition that they are to be the only persons, as clearly leaves them within the general designation. Under the customs acts the informer is the person who first gives information to the collector, but under the internal revenue laws there is no such express definition. Under the customs laws the collector has ex officio a share in all forfeitures, and so have the naval officer and surveyor; and when the statute says that any person who, not being a surveyor or naval officer, gives information to the collector, he shall be deemed an informer, it is the natural and almost necessary construction that the collector himself to whom the information is given, and who, like the surveyor and naval officer is already provided for, shall be himself excluded. Neither the words nor the equity of the statute now under review require any such construction. The general provision of all our statutes favors officers, and it would be a harsh and unjustifiable construction of this act, considering its very general terms and its history, to shut out any class of officers from its benefits.

If I am rightly informed the treasury department has uniformly acted upon the rule contended for by the deputy collector. This consideration has the more weight in this case, because the contracts of deputy collectors concerning their compensation may be based upon it, and because the secretary of the treasury is by law authorized to decide the rights of informers when money has been paid without suit, or before judgment, so that his decision has the effect of a conclusive finding in those cases.

Upon the whole I am clearly of opinion that collectors and deputy collectors of internal revenue may, under proper restrictions such as this court will apply to all officers, become informers under the statute of July 13, 1866. It is admitted that Mr. Sanderson's case is clear of any suspicion or doubt upon its merits and I adjudge him to be the informer in this cause.

Case No. 16,463.

UNITED STATES v. THIRTY-NINE BARRELS OF SPIRITS.

[7 Int. Rev. Rec. 38.]

District Court, E. D. New York. Jan. 14, 1868.

INTERNAL REVENUE LAW—FORFEITURE OF SPIRITS—ABSENCE OF BRANDS—KEEPING OF BOOKS.

This was a proceeding for condemnation of certain spirits, a rectifying establishment, and the paraphernalia connected therewith. The same were seized on the ground that part of the spirits were not branded as required by law, that the tax had not been paid, and that the books had not been properly kept.

The evidence on the part of the government went to show that the seizing officer found at claimant's residence on the 12th of July last, twelve barrels of raw spirits not bonded, and some fifteen barrels that were bonded. A portion of claimant's residence, No. 406 Columbia street, is used as a porter-house and drinking-saloon, and in No. 408 he had, up to last fall, a distillery in the basement. The government showed that he had purchased, rectified and sold a large quantity of spirits during the past year.

For the defence it was sworn by Redmond Burke that the spirits seized as unbranded had just been drawn from his receiver, and had been put in there some nine or ten minutes before; that he had kept his books correctly, as supposed. and never intended to

defraud the government; that he had bought of other parties all his spirits, and supposed the tax was paid on them; that the spirits found there he had branded in September, 1866, and after being branded by general inspectors, had them put into receivers. General Inspector Knowlton branded some of the barrels of spirits, and J. C. Ward some more, but it seemed Ward was not a general inspector, but merely acted by order of a collector, so that he had really no authority to act as he assumed; therefore his brands were of no avail.

Mr. Hollis, for the defence, requested the judge to charge the jury that Burke had complied with the provisions of the law relative to spirits, by having them branded, and that the book was kept correctly.

The judge [BENEDICT, District Judge], however, charged the jury that the question for them was, whether or not the spirits seized were in Burke's possession before the 1st of September, 1866—if they were not in his possession then, and he had received them since, they must be condemned. If they were in his possession before the 1st of September, 1866, then they could not be forfeited, unless the jury found it was the intention of Burke to defraud the government in regard to these particular spirits. His honor also charged the jury that if they found the names of the parties from whom spirits were purchased, as entered on Burke's book, were sufficient to enable any one to know who they were, then they were to find whether the book was kept correctly; but if they decided the book was not kept correctly, then the spirits should be forfeited. The jury retired, and after a short absence returned into court with a verdict ordering the forfeiture of the spirits.

Assist. U. S. Dist. Attys. Tracy and Allen, for the Government.

Mr. Hollis, for the defence.

Case No. 16,464.

UNITED STATES v. THIRTY-NINE THOUSAND ONE HUNDRED AND FIFTY CIGARS.

[3 Ware, 324.] [1]

District Court, D. Maine. Feb., 1866.

CUSTOMS DUTIES—ENTRY WITHOUT INVOICE—AUTHORITY OF COLLECTOR—FORFEITURES.

1. By the act of March 3, 1863, § 1 [12 Stat. 737], the collector has no power to permit an entry of merchandise unaccompanied by an invoice, or a sufficient excuse for its absence, but it gives the secretary of the treasury that authority, and the same equitable power of remission, as in other cases.

2. By that act, when goods are refused an entry for want of an invoice, if the owner thereof attempts to procure an entry by any false and fraudulent practice or appliance whatever, the goods are forfeited.

[1] [Reported by Geo. F. Emery, Esq., and here reprinted by permission.]

At law.

G. F. Talbot, U. S. Dist. Atty.

Mr. Butler, for claimant.

WARE, District Judge. This is a libel against 39,150 cigars, seized May 25, 1864, on board the brig Gertrude, Chase, master, from Matanzas, in Cuba, to this port. It seems the custom-house officers, in Portland, were expecting this vessel about this time, and, in consequence of information communicated to them, were suspicious that cigars on board were intended to be smuggled from her. She was boarded, from the cutter, in the night time, less than a mile from the light. The officer went on board of her and examined her manifest, and found five cases of cigars upon it, and found no others in the vessel and left her. But as there was no invoice or bill of lading they were seized. Two grounds of forfeiture are alleged in the libel, and are now relied on. First, that there was no invoice to accompany the cigars, and that there was an attempt to procure an entry by a false and fraudulent practice and appliance. That there was no invoice on board the vessel is not disputed, and that goods cannot be entered without one, or a sufficient excuse for the absence of one, is certain. The collector has no power to permit such entry, but by the act of March 3, 1863 (section 1), the secretary of treasury may authorize an entry on such terms, and in accordance with such regulations, general and special, as he may prescribe. Mr. Knowlton was at Matanzas when the cigars were put on board the Gertrude, and about that time returned to this country, but not in that vessel. Finding, on his return, the cigars not admitted to an entry, but seized, he applied to the collector to admit them, and offered his excuse for want of an invoice. The collector told him that he had no power to permit an entry, but that he must apply to the secretary of the treasury. Notwithstanding this answer, he persevered in his attempt to persuade the collector to permit an entry, and, for this attempt, a forfeiture of the goods is claimed. By the act of March 3, 1863 (section 1), when goods are refused an entry for want of an invoice, if the owner of the goods attempts to procure an entry by any false and fraudulent practice or appliance whatever, the goods are forfeited, but it gives to the secretary of the treasury the power to allow an entry, and the same equitable power of remission, as in other cases. This attempt to induce the collector to permit an entry, after the claimant knew he had not the power, is claimed as working a forfeiture of the goods, and, I think, justly. The words of the statute are very general and comprehensive, and seem to have been selected with a view to prohibit every attempt, by any means whatever, to effect an entry except by an application to the secretary, for any attempt must be fraudulent towards the United States.

A second ground of forfeiture, alleged in the

libel, and relied on at the hearing, is that they were not entered on such a manifest as is required by the act of March 2,. 1799, § 24 [1 Stat. 646], the general collection law which has been in force and in constant use from the time that it was passed. The cigars were entered on a manifest deliverable to order, but it is plain that it was not a manifest containing all the particulars required by that law, and it was scarcely contended at the argument that it was. But the goods were on board the vessel without a bill of lading or an invoice, which alone would awaken very lively suspicions. According to the decision in The Larch [Case No. 8,085], in such a case, as to cigars they must be deemed consigned to the master, though entered as consigned to a particular person, much more when entered as consigned to order generally. But, besides, the entry on the manifest is suspicious on its face. It appears in a different ink from the general entry on the manifest, and seems to have been entered at a different time, and was so testified to by experts. If consigned to the master they are forfeited by that act.

There is a considerable amount of testimony taken in this case, with reference to what took place on the island of Cuba, both by the United States and the claimant, in the first instance to prove or render probable, a premeditated design to smuggle the cigars, and in the second place, to account for the want of a bill of lading and invoice for the cigars, from the circumstances under which the claimant became the owner of them. This testimony is, in some respect, contradictory. I have thought it unnecessary particularly to examine it, as I think there was a forfeiture under the count stated. It could not avail the claimant, even on his interpretation of it, except in an equitable view, and these considerations are addressed to another department and not to the court, and when fairly considered it leaves the claimant under a cloud of suspicion not very favorable to his claim. Decree of forfeiture.

Case No. 16,465.

UNITED STATES v. THIRTY-NINE TRUNKS.

[See Case No. 15,885.]

Case No. 16,465a.

UNITED STATES v. THIRTY-ONE BOXES, etc.

[Bett's Scr. Bk. 163.]

District Court. S. D. New York. July 7, 1833.

VIOLATIONS OF CUSTOMS LAWS—FRAUDULENT ENTRIES—FORFEITURES—FALSE DESCRIPTIONS—ANCHOR IRON, BOLT IRON, AND CABLES.

[1. In section 4 of the act of May 28, 1830 [4 Stat. 410], which declares, among other things, that if any package or invoice "be made up with intent, by false valuation or extension, or otherwise," to evade or defraud the revenue, the same shall be forfeited, the words "or otherwise" are to be construed as applying only to cases of the same character with those enumerated, and not to any of a different and independent description. They would include, however, an attempt to enter anchors or bar iron as "anchor iron," parts of chain cables as "links," and bolt iron as "straight links," if this were done with intent to evade or defraud the revenue.]

[2. Pieces of hammered iron two feet long, six and three quarters inches square at one end, and tapering to one and a half inches at the other, which are prepared in this form for the purpose of being welded together to make anchors, are not subject to forfeiture under the statute for being entered in the invoice as "anchor iron"; it being shown that they are known under this term in trade and commerce, and that they could not properly be described either as "anchors" or as "bar iron".]

[3. Pieces of round iron cut in suitable lengths, some being straight and others curved or bent to a U shape, and which are adapted to be formed into the links of cables, are properly invoiced as "straight, bent, and turned links," respectively, it appearing that they are known under those terms in trade and commerce.]

[4. In the description "cables and parts thereof" as used in the act of 1824, the words "parts thereof" apply only to parts of cables which retain the properties of complete cables, that is, to a number of links connected together, so as to form part of a chain, and not to single detached links, though complete as such; and especially not to pieces of round iron cut to the proper length, and which are either straight or partially bent into shape, but not welded together, so as to form completed links.]

[5. The statute of 1830 does not subject goods to forfeiture merely because the importer has attempted to enter them at a rate of duty less than that to which they are ultimately found to be liable, when there is in fact no false description of them with intent to defraud the revenue.]

[6. The fact that the public appraisers and two merchants sworn to assist in the examination of the goods report that in their opinion an importation and entry was fraudulently made with intent to evade payment of the proper duties, and recommend the seizure thereof, is sufficient ground for granting a certificate of probable cause of seizure, although it is held that there is no ground of forfeiture.]

[This was a libel of forfeiture against certain boxes and packages of imported articles, alleging a false and fraudulent invoice and entry, with intent to evade payment of the proper duties.]

These articles were imported in the Wm. Byrnes from Liverpool, and invoiced, 29 boxes bent links, 2 boxes straight links, 42 packages twin links, and 10 pieces of anchor iron, with their respective weights, cost, &c. The importer, by his attorney, John [F.] Sarchet, claimed to enter them at the custom house at 15 per cent. ad valorem under the act of 1816, as non-enumerated articles manufactured in part—and denied that they were a complete manufacture of iron, which pays 25 per cent. ad valorem. Attached to and forming part of the invoice, was the affidavit of the shipper at Liverpool that he was in the habit of receiving and giving orders for links and anchor iron, and that they were the articles

in commerce known by that name—and also the affidavit of the manufacturers that these were articles of commerce well known by those names, and fit for nothing but scrap iron, unless made into chains and anchors, and for these purposes much more valuable than bar iron. These affidavits were very full, detailing the proofs by which links and anchor iron are made from the raw material, and everything in relation thereto. These the importer submitted to the collector, attached to his invoice, who handed them to Mr. Mead, the appraiser, who made the following report: "Appraiser's Office, Jan'y. 18, 1833. S. Swartwout, Esq., Collector: The two invoices handed you herewith of Mr. Thomas Barrow of Liverpool, offered for entry, contain the following articles viz.: Bolt or chain iron of various diameters, cut up in ends of different lengths, for the making of links for chains. Some are straight, some bent thus U, and others of an oblong form, turned or twisted thus ∩, the ends tapering to a point and flat for welding. The straight ends are of the diameter of 72 inch, and cut in uniform lengths of 5 inches. The ends bent thus U are 72⅝ and $^{9}/_{16}$ of an inch in diameter and in length 5½, 6, and 7 inches. These, together with the straight ends before named, are simply cut from the bar or bolt iron while in a heated state—varying in length and in diameter according to the size or strength required. The oblong or turned links are $^{15}/_{16}$ of an inch in diameter and 11½ inches long, bent while heated, and in that state cut diagonally at the side by the aid of a machine called a 'mandrel,' and then packed for purposes of transportation on a round bolt of iron 10½ feet long and 1½ inches in diameter with a large head or flat piece of iron at one end of the bolt, sufficiently large to prevent the links from passing over, and at the other end by a key securing them from coming off. The two pieces called 'anchor iron' are two feet long 6¾ inches square at the large end, and tapering down to 1½ inches at the other end, and is in fact and truth hammered iron. It is unlike bar iron in every particular. Each piece besides is prepared separately by itself, and then welded together for anchors. I would particularly recommend to your perusal the oath or affirmation attached to this invoice of anchor iron. It sets forth in a clear and explicit manner the article in question—without a word from me—that it is intended for anchors, there cannot be a doubt—that they are not anchors there cannot be a shadow of a doubt, and that they are not manufactures of iron suited to any known purpose it is also equally clear and conclusive. The oath or affirmation attached to the invoice of bolt or chain iron is in the main equally clear and comprehensive as regards the facts therein set forth, save that part which draws deductions from premises not warranted by facts, which part is marked in the margin of the affirmation by inverted lines. I cannot but consider this a case where the object of the owner is to evade the payment of duties imposed by the laws, and one so clearly and palpably wrong as not to admit of any well grounded defence under any view of the case. They cannot in truth be considered as manufactures, within the intent and meaning of the law; that they are not chains, no one will be foolish enough to aver; but that they are intended for links for chains, no one will deny. Under what view of the case, then, can they be called 'manufactures of iron'? We might with the same propriety call a bar of iron, a manufactured article. I am respectfully, your ob't servant, (Signed) A. B. Mead. The bolt or chain iron, although cut up into pieces for links, should be classed for duty as 'bar or bolt iron, made wholly or in part by rolling,' and the anchor iron as 'hammered iron.' (Signed) A. B. M." The collector then, on suspicion that a fraud had been committed in making the entry, ordered the packages to be examined by Nicholas Saltus and Daniel Ayres, two merchants in New York City, who reported to the collector as follows: "Schedule D. New York, Jan. 21, 1833. David S. Lyon, Esq., Dep'y Collector of Port of New York—Sir: In answer to your letter of the 18th, requesting us to report to you our opinion of the iron entered by Mr. Sarchet in this custom house, imported in the ship Wm. Byrnes, beg leave to state that the said iron is what is represented in the certificates, viz. three descriptions of links well known to the trade as parts of chain cables, requiring but a small process to make them complete chain cables, and parts of anchors ready to be joined together. The tariff expressly states that chain cables, or parts of chains, shall pay 3 per lb., and anchors or parts of anchor 2 per lb. This was well known to Mr. Sarchet, and his attempt to enter them under any other form is an attempt of fraud on the revenue, and consequently in our opinion ought to be seized. Respectfully we are, &c. Nicholas Saltus. Daniel Ayres." The articles were thereupon libeled as bar and bolt iron—"short bars and bolts of iron, falsely denominated links and anchor iron"—and also for that "the invoice and packages were falsely made up with intent, by a false valuation, extension, or otherwise, to defraud the revenue"—that the goods were described as manufactured articles subject to 25 per cent. ad valorem, when they were iron in bars and bolts, and subject to a specific duty—that the packages contained articles not described in the invoice—that the packages were examined by two merchants and found to differ in their contents from the entry.

On the trial, the substance of the testimony was this: The entry clerk of the custom house testified that Mr. Sarchet came to his

desk, and proposed to enter this invoice at 15 per cent. ad valorem, but witness would not so enter it, and an entry was then made out at 25 per cent. ad valorem. He asked Mr. Sarchet what he wanted it charged at. He replied 15 per cent. Bonds were executed in blank.

Mr. Mead, United States appraiser, testified—that his report was correct, and he found this invoice, pieces of iron intended for links of chains, and he was bound to say that the papers attached to the invoice were correct in every particular, and squared with the information he received, and confirmed it. The straight links he considered braziers' rods, but in commerce they would not be known as such. That he had no experience in iron, but what he had acquired as appraiser.

Mr. Saltus, for the United States, said that he was an importer of iron, and signed the report with Mr. Ayres to the collector as above, which was correct,—that it costs about 2 to 3½ cents to make these links into chains—links are known in commerce as distinctive articles. In orders you merely give the diameter, and the manufacturer has rules for the length. The government advertise for straight and bent links, and witness has supplied them. Also for anchor iron in parts, but he never supplied anchor iron—chain cables are invariably imported 90 fathoms, in sections of 15 fathoms connected by shackles.

Mr. Ayres, for the United States, said that he signed the above report—and it is correct. He should think a link a part of a chain, and thinks the trade would so consider it—should think anchor iron parts of anchors. He sells links, and anchor iron—he invoices them as links and anchor iron—they are ordered by those names, and so known in commerce. He should order them by that name from abroad. Being asked if he so ordered, sold, bought and invoiced them, by what name he would enter them—the district attorney objected and the judge ruled he must not answer the question.

Mr. Ayres further said, to make the turned links into chains he thought would cost 2½ cents per lb. Imagines Sarchet's parts of anchors only wanted welding, a hole punched, and a ring, to make anchors of them.

Mr. Jacobs, clerk in the appraisers' office, said he knew very little of iron—supposed this anchor iron for the purpose of making anchors. Until this trial supposed a link considered by everybody a part of a chain.

Mr. Barker, collector of Philadelphia, said Sarchet in 1829 contended that the anchor iron was not parts of anchors, but anchor iron subject to 15 per cent.—But for the law of 1832, witness would have considered links parts of bolt iron, and so charged them. The treasury decided before 1832 that they were not parts of chains, and the anchor iron not parts of anchors. I had charged the links as bolt iron and the anchor iron as anchors, as I always fix the highest rate of duty where there is a doubt.

Mr. De Camp, custom house officer, made iron 30 years previous to 1818. He should call links parts of chains, welded or not, and the straight ones, braziers' rods cut up in pieces, fit for rabbet screws and many purposes. "The anchor iron I supposed pieces of anchors, and would be so considered by the trade. When these pieces leave the forge they are half made. If I wanted to make an anchor I should order the number of pieces, giving the weight, and I don't know how it would come invoiced. Never saw an invoice of it. I don't know whether it is an article of commerce, but I have seen small quantities come into port for 13 years past, like this. Never finished or made an anchor, but sold a great quantity of anchor iron to merchants, who sell to the anchor maker. If well drawn, not much to do but weld it."

On the part of the claimant, Mr. John H. Howland of New York, importer and dealer in iron for many years, testified that this invoice was not chains nor bar or bolt iron.

Mr. Cornell, a merchant, and five chain cable and anchor makers, including the most extensive in America, testified that links, straight, bent, and turned, and anchor iron, were an article of commerce well known by those names, and so ordered, bought, sold, and invoiced. That the anchor iron was equally finished with iron in bars and bolts, and the links more so. That both were more valuable for chains and anchors than bar or bolt iron, but if not used for these purposes they should sell the same for scraps. That these links are not a manufactured article, but partly manufactured, and are the raw material of the chain maker, as common bar and bolt iron is of the general smith, and as anchor iron is of the anchor maker. That links welded and finished separately, would be no part of a chain unless in a chain. That a chain or part of a chain is a series of links connected together, and these must be more than one. That the cost of making these straight links into chains is about $4 to $5 per cwt.—bent links 10 per cent. less, and turned $4.37½ to $5. That the general price of anchors is 11 to 12 cts. per lb.; and of anchor iron 5½ cts. That chain cable iron and anchor iron is a different kind of iron from bar or bolt iron, and much superior in quality, having no cinder in it, and higher in price, made in a particular way for the manufacture of cables and anchors. There is none in America suitable for the purpose, and experiments have proved it. The claimant also introduced the testimony taken in 1828, before congress, to show that congress in passing the law knew these articles as links, in which Mr. Keese' examination says, that at the Peru works they manufacture principally chain links and bar iron, and also the advertisements of the navy departments for links and anchor iron—to show that congress intended to leave these articles non-

enumerated, as bar iron could not possibly be imported in that form for any useful purpose, and as our own iron is not suitable, that the chain cable and anchor makers might have the advantage of a cheap raw material.

Much other testimony was taken, which, with the arguments of counsel, occupied the court six days; but our limits will not permit its insertion.

J. A. Hamilton, for the United States.
C. Walker and J. P. Hall, for claimant.

BETTS, District Judge. The forfeiture is claimed,—(1) Because, on inspection of goods, the invoice was found to have been made up with intent by false valuation, extension, or otherwise, to evade and defraud the revenue. There is no proof showing any erroneous valuation or extension in the invoice, and it is admitted by the district attorney that the forfeiture can only be sustained by force of the expression "or otherwise." He insists that the proof shows that the invoice was accompanied by a representation from manufacturers abroad, calculated and intended to induce the collector to allow the goods to be entered at a rate of duty lower than they were subject to by law, and that the inventory in correspondence with that proof was made up by a misdescription, a false denomination of the goods. The articles were entered as articles of manufacture subject to a duty of 25 per cent. ad valorem, and the affidavits of the manufacturers representing them to be so. It is contended on the part of the government that they were bar and bolt iron and anchors or parts of anchors, and liable to a specific duty, under the act of May 22, 1824, of 3 cents per lb. on the links and 2 cents per pound on the anchors. By the act of May 22, 1824, § 1, art. 5 [4 Stat. 25], a duty is imposed "on iron cables or chains or parts thereof" of 3 cents per pound, and "on anvils and anchors two cents per pound." By the act of May 19, 1828, § 1, art. 2 [4 Stat. 270], a duty is laid "on bar and bolt iron, made wholly or in part by rolling," of $37 per ton. The fifth article of the first section of the act of May, 1824, provides that "on all manufactures not otherwise specified, made of brass, iron, steel, pewter, lead, or tin, or of which either of these metals is a component material, a duty of 25 per cent. ad valorem shall be laid." The second article of the first section of the act of April 27, 1816 [3 Stat. 310], enacts that there shall be laid a duty of 15 per centum ad valorem on all articles not subject to any other rate of duty. The claimant insists that although he entered his importation as subject to duties under the act of 1824, yet that strictly it comes within the provisions of the law of 1816, and should be charged with only 15 per cent. duty.

To bring these articles within the scope of the libel under this branch of it, it must be found that they were subject to specific duties, and that the manner of charging them upon the invoice is comprehended in the interdiction "or otherwise" of the act of 1830. The point has been most pressed in argument, that the court should now decide, whether they are not entitled to entry on the payment of 15 per cent. instead of 25.

It does not appear to me that the point is necessarily raised for decision in this cause. The allegation is that the goods were subject to specific duties, and that the claimant attempted a fraud upon the revenue in entering them as liable only to an ad valorem duty. If the general proposition is decided in favor of the claimant and his goods acquitted, it would be entirely gratuitous on the part of the court to go further, and settle between him and the officers of the custom house the rate of duty he should pay. The present question is one of forfeiture alone, and whether the goods are liable to specific or ad valorem duties, is an enquiry which can have no relevancy except as showing the motive of the party in preparing his invoice. As he entered them there as liable to 25 per cent. duty, and offered to pay that, it would be a useless speculation to enquire what the evidence of a fraudulent motive might be, had he endeavored to pass them at the lower rate, thereby saving 10 per cent. more to himself. We can, in justice, do no more than estimate the influence of the act done, and there would accordingly seem to be no utility in carrying our regards to a more supposable state of facts. The term "otherwise" in a penal law is liable to serious objection for want of that precision and certainty the citizen has a right to expect in the language of a law which is to confiscate his property; and no court could go further in giving it meaning and application by construction, than the plain intent of congress, manifested in the context of the term, imperiously demanded. The fourth section of the act of May 28, 1830, declares "that if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation or extension or otherwise, to evade or defraud the revenue, the same shall be forfeited." Having designated three delicta by this clause, each of which shall work a forfeiture of the goods, the enquiry is whether some other substantive and distinct offence was intended to be provided against by the term "otherwise," and, if so, whether it is to be interpreted to embrace every other fraud or evasion that may be devised, other than the three specifically designated. It is believed no sound administration of penal law can permit a range so unlimited and hazardous to language of a very equivocal import. The expression ought rather to be construed as suppletory to those preceding it, and as having relation to the same subject-matter. Congress no doubt intended to specify the modes in which offences followed by a forfeiture of property should be proved to have been committed, but as the enumeration might possibly omit some of-

fence coming clearly within the general classification, tho' varying in some accidents of form and manner from those named, used a phraseology broad enough to bring such equivocal acts within the statute. The statute should therefore be construed as applying only to cases of the same character with those enumerated, and not to any of a different and independent description.

The offence described by the act is "making up the package or invoice" in a particular way. The term "valuation and extension," apply to the invoice, and the "otherwise," as immediately associated with them, by juxtaposition and grammatical connection, ought undoubtedly to be read as having reference to the invoice also. By what method of making up an invoice other than by valuation or extension, can this fraud be committed? By omitting articles, that offence is provided for in a previous part of the section. But effect may be given to the term by applying it to a fraudulent misdescription of the invoice; though true to certain intents, yet being false and fraudulent as to the matters of duties to which the real article would be entitled. For instance, as entering refined sugar as white clayed, &c., the description actually given, tho' true in terms, not being the whole truth, such as represents the exact character of the commodity, and if acted upon at the custom house will leave the goods to pass with a lower rate of duty than they would pay under full denomination. In the case before the court, anchors or bar iron entered as anchor iron—parts of chain cables, as links—bolt iron as straight links—if done with intent to evade or defraud the revenue, would be making up the invoice otherwise than by false valuation or extension, and in a way calculated to evade the payment of duties, and so to give application and significancy to this branch of the statute. It would thus become the false charges and the want of correspondence of the goods mentioned in the preceding part of the section, as all the articles of the libel proceed upon the allegation of a false denomination, or description of the goods imported.

This controlling question on the merits of the cause may as well be discussed under this branch of the case, as in connection with any of the other charges of the libel. The different forms in which the offence is stated in the libel so as to bring it under some of the prohibitions of the statute are comprehended in and depend upon the proposition that what is called in the invoice "anchor iron," is bar iron or anchors; and what are called "straight links," are bolt iron or braziers' rods; and what are called "bent and turned links," are parts of chain cables, or chains, and that these false descriptions are given with intent to evade the payment of duties. If this proposition is true, the goods would be subject to forfeiture under the branch of the libel now discussed; and if not true there is no matter set forth in any other part of the libel that would subject them to forfeiture. Without therefore waiting to arrange the proofs under the various charges of the libel, the most commodious and perspicuous mode of considering it will be to bring it in review under the head of the pleadings.

A critical examination of the evidence produced on the part of the government cannot fail to show that the allegations upon which the property was seized are too feebly supported to justify a condemnation for these causes alone, and if the proofs make out a case involved in some uncertainty and doubt, the doubt raised is not as to the accuracy of the invoice and entry (which would impose on the claimant the obligation of proving their correctness and bona fides [The Luminary] 8 Wheat. [21 U. S.] 411), but is whether a probable cause for seizure existed. The invoice and entry described the first item under consideration to be "ten pieces of anchor iron." The specific charge in the libel, applicable to this commodity, is, that it was iron in bars; although in the proceedings and argument it was considered to be anchors, or parts of anchors, and that it did not correspond with the invoice because of that misnomer. The only witness on the part of the United States personally conversant and experienced in the iron business, who considers these as parts of anchors, is Mr. De Camp. But he is exceedingly indistinct and uncertain in his judgment as to the denomination it has acquired in commerce, and he unites with the other experienced witnesses, on the part of the United States, in saying it is not known as "bar iron," that it is both more refined and of higher value than bar iron, and also is carried forward to a state of manufacture adapted to making anchors, and is more valuable for that use than any other.

Mr. Ayres says it is known in commerce as "anchor iron," is so imported, invoiced, and sold; and the general bearing of the proofs for the government is, that an order for anchor iron would be as distinct and well understood in business as for any other article in the iron trade. Under this proof, without adverting to the very full and satisfactory evidence on the part of the claimant in this behalf, it cannot be maintained that the article entered as anchor iron did not correspond with the invoice describing it as such. If it was not to be considered a manufacture, but the raw material for the trade and business of anchor making, yet it is put beyond all doubt by the proofs that it has acquired a settled and notorious denomination entirely distinguishing it from bar iron. So, also, it cannot be termed an "anchor," and be liable to a specific duty as such, because it has to undergo an important modification and manufacture to bring it from its present state into that of anchors. The act of 1824 imposed a duty on anchors, and not, as

is assumed in the report of the merchants who inspected this importation, on anchors and "all parts thereof." The latter provision is made in the act of July 14, 1832 (section 1, art. 9), but this importation does not come under the provisions of the latter statute.

So as to the other parts of this entry. The testimony of Messrs. Mead, Saltus, and Ayres, on the part of the United States, is clear and unequivocal, that the articles inventoried and entered as straight, bent, and turned links are well known in commerce by those denominations. They are manufactured and sold by these appellations; the straight and bent are common in our market, and pass by the name of "links"—the turned are an English fabric, and seem to have been imported solely by the claimant. All the witnesses however agree in terming it a "link," and the appraiser, using the same denomination, details the mode of its manufacture. This species of links and the bent ones were unquestionably within the general description of links, and whether they are more, and compose parts of chains, will be more particularly noticed presently. Those called "straight links" have the appearance of ordinary braziers' rods shortened to a standard length, fitting them for chain links. The rod is no other way changed than by cutting it into pieces. It has been strenuously argued that this is only a simulated manufacture, still leaving the raw material to answer many valuable uses to which it is ordinarily applied, and that the alteration is fraudulent; intended to introduce the article in its present form at an impost below what it is legally liable to. Altnough in the opinion of some of the witnesses, iron cut into these short pieces may be used to advantage for bolts, screws, spikes, &c., yet by far the greatest weight of evidence is, that, unless manufactured into links, it would be only marketable or useful in this form, as scrap iron. And the proof both of the witnesses on the part of the United States and the claimant, places the fact above question, that the article in this form is a well known commodity, manufactured here and imported from abroad, and bought and sold under the name of "straight links," and that it is in well established use for making chains, and is most valuable for that purpose. This proof is abundantly sufficient to show that the articles found in the packages correspond with the invoice, and that they were properly entered as links, if they are not something more than merely links.

The remaining enquiry then is, whether all the links are not subject to duty as parts of chains. There can be no doubt that in correctness of language every distinct component portion of an entire thing, is a part of that thing. In this sense a link is a part of a chain, as a wheel, spring, or chain is a part of a watch, each of them essential to the existence of the particular thing. The act of congress laying a like duty upon "cables or parts thereof," includes within the letter, the separate links, as well as the series united in a chain, and would accordingly be so applied, unless a different signification be given by usage, and is well known to those conversant with the particular article; or the connection in which the expression is used denotes that it is to receive a more comprehensive meaning. In seeking the proper interpretation of the phrase "parts thereof" as applicable to chain cables, we discover at the first step, that custom (norma loquenda of laws, as well as of society) has affixed a meaning to the first element of the subject (links) essentially variant from its acceptation in the strict sense of the term. A link, considered as a substantive article of manufacture, must unquestionably be finished, have every operation performed upon it required to fit it for the use it is destined for; whether round or oval, open or closed, it becomes the link only when the artisan has completed his labor upon it. The link which forms part of a chain cable must necessarily be closed; neither a straight piece of rod, nor bent at one end, nor turned so as to bring the two ends nearly into union, can in accuracy be said to compose that description of link. Usage, however, as it has been abundantly proved, does give the name of "links," to things intended to form chain cables, that cannot compose such cable without great additional labor and manufacture, and if in like way the expression "parts of chains" has obtained a meaning different from the literal import, the rule which adopts the customary appellation in the one case, ought also to give it the same force in the other. The evidence very satisfactorily shows that chain cables are imported entire and in fragments or sections of several fathoms in length, which can be united by shackle links, or opening an ordinary link so as to supply the length that may be required, and that such sections of the chain are known in commerce as parts of cables or chains, the part being complete as a chain of itself, but of less length than the cable commonly required. As this is the denomination the commodity receives from the dealer, the manufacturer, and those conversant with it, the presumption is exceedingly forcible that the law of 1824 contemplated those sections as the parts of chains which are made liable to the same duty as the entire chain. But whether this be so or not, it is very clear to my mind, that in the sense of the act of 1824, nothing can be deemed part of the chain that is not, as to itself, as finished and complete as the entire chain. It matters then very little in this case whether, in the interpretation of the act, single links should be accepted as parts of chains inasmuch as to acquire that quality, they must be finished and perfected as links. Nevertheless the construction I put upon the act, in view of the facts disclosed by the evidence in this cause, and which it is proper to avow, is, that parts

of chains and pieces of chain are synonymous, and mean a series of links comprising a section less than the chain as usually imported. In this view of the subject, the part may consist of several fathoms, or any less extent beyond individual detached links. It denotes a portion taken from the whole, and still retaining the properties of the whole, less only the extent. In either view of the subject these articles are not liable to condemnation for the causes alleged.

The district attorney has argued that the importer is bound to swear that the entry is true in all particulars, and that these goods being entered as manufactured articles, and subject to a duty of 25 per cent., if it is found that they cannot with justice be denominated "manufactured," or are subject to specific duties, they must be forfeited for those causes. The answer to this argument is, that the goods have not been proceeded against as improperly described in the entry, nor is any statute shown subjecting them to forfeiture for that cause. The allegation of the libel is, that the goods on examination and inspection were found not to correspond with the description in the invoice, and it is for that variance that the act of 1830 subjects property to forfeiture. And it may be further observed, that it is not shown that an erroneous claim at the custom house in respect to the duties payable upon imports affects the importation or entry, when the goods are correctly described. Probably it is of constant occurrence at the custom house, that merchants and the collector differ as to the rate of duties to be applied to an entry, when the goods are accurately and exactly denominated. The court know judicially, that such differences have sometimes occurred, and that the construction the merchants claim for the laws has been upheld in all the courts. Had it been invariably otherwise, congress would deal with most ungenerous severity with the citizen, by confiscating his property for a difference of opinion, which would do the revenue no harm, as the thing is placed undisguisedly in the hands of the public officers, for them to judge whether the merchant is correct, or not, in his estimate of the character of the commodity, and they have the power, in the first instance, of enforcing their construction of the laws by retaining the goods until he pays the duties they demand. In my opinion a misdescription of that character would not afford ground for forfeiture of the goods.

The following decree was entered. This cause having been brought to hearing upon the pleadings and proofs, and having been argued by Mr. Hamilton, the attorney of the United States, on the part of the United States, and by Mr. Walker and Mr. Hall, on the part of the claimant, and the premises having been fully considered by the court, it is considered and declared, that the charges in the libel, purporting that the goods specified in the entry were falsely described in the invoice mentioned in the pleadings, with intent to evade and defraud the revenue, are sufficient in law to subject such goods as were imported in boxes to forfeiture under the provision of the fourth section of the act of May 28, 1830. But it is considered and declared that anchors, or anchor iron imported in bulk, and not in packages or bundles, are not subject to forfeiture, under the provisions of the said section, and if they were so, it is further declared that it is established by the proofs in the cause, that "anchor iron" is a commodity well known in commerce and to artisans by that appellation, and is distinct and different from the article denominated "bar iron," or "iron in bars"; and that the commodity seized and articled upon in this cause corresponds with the description thereof in the invoice. And it is further considered and declared, that it is established by the proofs in the cause, that the articles described in the invoice as "straight links," "bent links," and "turned links," are articles well known in commerce, and to artisans, by those names and denominations, and are not, nor is either of them, "bar or bolt iron," within the acceptation of that term in ordinary usage in trade and commerce; that they have been subjected to a process of manufacture by machinery and manual labor, changing them from the raw material into articles of enhanced value, for the particular uses to which the change has adapted them; and that they correspond with the descriptions thereof in the invoice. And it is further considered and declared, that it is established by the proofs in this cause, that cables or chains, or parts thereof, as known and denominated in commerce and by artisans, consist of a series of finished links, and that one unfinished link or any indefinite number of unfinished links, are not denominated "cables or chains, or parts thereof," and are not known as such. Therefore it is considered, adjudged, and decreed by the court, and his honor, the district judge, by virtue of the power and authority in him vested, doth order, adjudge, and decree, that the goods, wares, and merchandise specified in the pleadings in this cause, and seized by the collector as forfeited, were not entered at the custom house in this port as charged in the libel, by a false denomination, or description; and that the packages or invoices thereof were not, nor was either of them, made up with the intent to evade or defraud the revenue, and that none of the said packages contained any article not described in the invoice thereof; and it is therefore further considered and decreed, that the goods, wares, and merchandises, described in the pleadings, be acquitted of the seizure thereof, and be forthwith delivered up to the claimant. But inasmuch as it is made to appear in the proofs that the public appraisers, and two merchants sworn to assist in the examination of the goods aforesaid, reported to the collector that, in their opinion, the importation and entry thereof had been fraudulently made

with intent to evade the revenue, and recommend a seizure thereof, it is ordered that a certificate of probable cause of seizure be allowed and entered.

From this decree the United States district attorney has appealed. [Case unreported.]

Case No. 16,466.

UNITED STATES v. THIRTY-SEVEN BARRELS OF APPLE BRANDY.

[11 Int. Rev. Rec. 125.]

District Court, D. Kentucky. 1870.

INTERNAL REVENUE — DISTILLERS FROM FRUITS — REGULATIONS PRESCRIBED BY COMMISSIONER — BRANDING OF BARRELS.

1. The 2d section of the act of July 20, 1868 [15 Stat. 125], authorized the commissioner of internal revenue with the approval of the secretary of the treasury, to make the regulation relative to distilleries from fruit, in the circular of April 22, 1869, and in the sense of the act the words "provisions relating to the manufacture of spirits," include provisions touching their removal, and all other provisions which prescribe the duties of distillers.

2. A removal of brandy from the distillery without having cut or burned on the barrels the name of the distiller, the name of the district or serial numbers, is not illegal if all other requirements of the statute have been complied with.

[Disapproved in U. S. v. Ninety-Five Barrels of Distilled Spirits, Case No. 15,890.]

3. Within the meaning of the 96th section of the act of July 20, 1868, it cannot be claimed that a distiller "omits, neglects, or refuses to do or cause to be done anything which the law does not require him but some other person to do."

[Cited in U. S. v. One Thousand Four Hundred and Twelve Gallons of Distilled Spirits, Case No. 15,960.]

4. It is the province of the legislature to declare in explicit terms how far the citizens shall be restrained in the exercise of that power over property ownership gives, and it is the province of the court to apply the rule only to the cases thus explicitly described.

[5. Cited in U. S. v. Two Hundred Barrels of Whisky, 95 U. S. 575, as ruling that section 57 of Act July 20, 1868 [15 Stat. 125], applies only to distilled spirits on hand when the act of 1868 was passed, and such ruling disapproved.]

[This was an information of forfeiture against thirty-seven barrels of apple brandy, Zack Sherley and T. J. Sherley claimants.]

BALLARD, District Judge. This cause, by agreement of parties, has been tried by the court without the intervention of a jury. The information contains three counts, which I shall notice and dispose of in their order.

The first count charges that "the said thirty-seven barrels of apple brandy were found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law." This count is founded upon 36th section of the act entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July 20, 1868 (15 Stat. 140), which provides, among other things, "that all distilled spirits found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law, shall be forfeited to the United States." The allegations of this count, and, in fact, the allegations of each count in the information, are controverted by the claimants. By the second section of the above-mentioned act it is provided that "the tax on brandy made from grapes shall be the same and no higher than that upon other distilled spirits, and the commissioner of internal revenue is authorized, with the approval of the secretary of the treasury, to exempt distillers of brandy from apples, peaches, or grapes exclusively from such other of the provisions of this act relating to the manufacture of spirits as in his judgment may seem expedient."

Under the authority of this provision the commissioner, with the approval of the secretary of the treasury, on the 22d April, 1869, issued the following regulation: "Distillers of brandy from apples, peaches, or grapes exclusively, are subject to the same taxes and rates of tax as other distillers. They must register their stills, give notice, and file the bond required of other distillers, but are exempted from the additional requirements imposed upon other distillers, who are not the owners of the fee of the distillery business, and will not be required to furnish the plan required by section 9. The survey must be made as required by section 10. They will be held subject to all the requirements of the law as to assessment, collection, or assignment of the tax due, and providing for the keeping of the books, and for returns, except that instead of making returns tri-monthly, they will make return on Form No. 15, on the first day of each and every month, and the tax on the spirits distilled by them during the period embraced in their returns must be paid at the time of making their return. The tax-paid stamps must be affixed before the spirits are removed from the distillery, and upon such as remain on hand at the time the return is made. They will not be required to provide a bonded warehouse, nor to remove the spirits produced by them from the distillery to a bonded warehouse, nor to erect receiving cisterns in the distillery." The testimony in the case shows, that the spirits in controversy were gauged by an internal revenue gauger at the distillery, that the tax was paid on them at the proper time and the proper "tax-paid stamp" affixed to the head of each barrel before it was removed from the distillery; that none of the barrels, however, were removed to a bonded warehouse; that none of them had branded or cut on them the name of the distiller or of the district in which the spirits were manufactured, and, perhaps, that none had branded or cut on them serial numbers, but that all the other brands are regular. The district attorney intimated, though he did not distinctly contend, that these spirits are forfeited because they were removed from the distillery not into a bonded warehouse, but he relies mainly that they are forfeited because they were removed without having cut or branded on them the name of the distiller, the

district, or the serial number. The regulation of the commissioner expressly exempts distillers of such spirits from the duty of providing bonded warehouses, and also from the duty of removing spirits produced by them from their distilleries to a bonded warehouse. It follows that if this regulation is authorized by law there is no forfeiture on the ground that they were not removed into a bonded warehouse.

I should certainly be reluctant to hold that the spirits were forfeited when they were removed in precise conformity with the regulation of the commissioner, but I do not see how I could escape the result, if the regulation itself is unauthorized. The 30th section of the act requires that all distilled spirits, after being drawn into casks and gauged at the distillery, "be immediately removed into a distillery warehouse." With this provision neither the commissioner of internal revenue nor the secretary of the treasury could dispense unless authorized by law to do so. The 36th section, as we have seen, forfeits all distilled spirits found elsewhere than in a distillery or in a distillery warehouse, which have not been removed therefrom according to law. Now, as these spirits were not found in either a distillery or a distillery warehouse, as they were not removed from the distillery into a distillery warehouse, and as these facts are appropriately alleged in the information, it inevitably follows that the spirits must be condemned, if the above-mentioned regulation is unauthorized, however reluctant I may be to adjudge a condemnation or the district attorney to claim one. But, in my opinion, the authority conferred upon the commissioner by the above-mentioned provision of the second section of the act of 1868, to make the regulation with the approval of the secretary of the treasury, is ample. It is true that he can exempt distillers of brandy from apples, etc., from only such provisions of the act as relate to the manufacture of spirits; and it is true that the provision which requires all distilled spirits to be removed to a distillery warehouse is a provision which, in strictness, relates rather to spirits after they are manufactured than to their manufacture; but I cannot resist the conclusion that all the provisions of the act which relate to spirits do, in the sense of congress, relate to their manufacture. It is the distillers, that is, the manufacturers of brandy, who are to be exempt, and they are to be exempt from such provisions of the act as relate to the manufacture of spirits, that is, such as relate to them as manufacturers of spirits, as the commissioner may deem expedient. There are no provisions of the act which relate directly to the manufacture of spirits. There are none which profess to prescribe the process of distillation. All or most of them relate to the duties of the distiller, commencing with those which appertain to him who intends to be engaged in the business of a distiller, continuing with those enjoined on him whilst he is actually distilling, and ending with those required of him when he has completed the process of distillation. All these provisions relate not only to the manufacturer, but to the "manufacture of spirits," in contradistinction to those which relate to the rectification or compounding of spirits, or to the dealing in them.

It is to be observed, too, that the commissioner is not authorized to exempt distillers of brandy from all of the provisions of the act which relate to the manufacture of spirits. This is plainly implied by the term "other," used in the very sentence in which the authority is found. If he may exempt such distillers from the other provisions of the act relating to the manufacture of spirits, this certainly implies that there is at least one provision of the act relating to the manufacture of spirits from which he cannot exempt them. Now, this provision from which he cannot exempt them, and which is, by the language employed, assumed "to relate to the manufacture of spirits," is that which imposes a tax on them. But manifestly the provision which requires a tax to be paid on spirits no more relates to their manufacture than does the provision which requires their removal from the distillery to the distillery warehouse. And it follows that if, in the sense of the act, the provision which imposes a tax on spirits is a provision relating to their manufacture, there is no violence done to its meaning by holding that the provision touching their removal, and, in fact, all the provisions which in any manner prescribe the duties of distillers, likewise relate to their manufacture. This construction seems also to accord with the supposed policy of the act. Distillers of brandy from apples, peaches, or grapes, are, from the nature of their business, confined in their operations to a small portion of the year. Their business is usually small and such as will not justify the large expenditures which a full compliance with all the provisions of the act imposes on ordinary distillers, such as the having of cistern-rooms and cisterns, warehouses, and the paying of storekeepers. If these are not the provisions of the act from which congress intended to authorize the commissioner to exempt distillers of brandy from fruit, their intention has been wholly misconceived by not only the commissioner, but by the whole public, and we should be at loss to conceive any motive for their legislation.

I come now to the second point relied on by the district attorney. He insists that the spirits are forfeited because the barrels were removed from the distillery without having cut or burned on them the name of the distiller, the name of the district or serial numbers. But I find no provision of the statute which makes it illegal to remove spirits which want these brands from a distillery, and I am not prepared to admit that there is any provision which renders it illegal to remove spirits that want them from a distillery warehouse. We have seen, that distillers of brandy are not required to have either cisterns or distillery

warehouses; and, as there are no provisions of the statute which contemplate the marking of casks containing spirits, except when the spirits are drawn from cisterns into casks, or when the casks are in the distillery warehouse, or when they are removed therefrom, it is not easy to apply any such provisions to brandy at all. All that the regulation of the commissioner requires, as a prerequisite to the removal from a distillery of brandy distilled from fruit, is that the tax-paid stamps must be affixed before the removal, and as this was done in this case, I cannot see in what respect the removal was illegal. But as the tax-paid stamp could not be affixed until the tax was paid, and as the tax could not be paid until the amount due was ascertained, and as the amount could not be ascertained until the gauger had gauged and proved the spirits, it might be insisted that brandy cannot be lawfully removed from a distillery until it has been gauged and proved nor until the tax has been paid on it, though it has the tax-paid stamps affixed. This might be conceded, but the concession would avail nothing in this case. The spirits in controversy were, before removal, gauged and proved; the tax was paid on them and the tax-paid stamps were affixed. They have thus complied with every provision of the statute from which they are not exempt, and with every regulation governing their removal. It follows that they are not forfeited for the cause alleged in the first count.

The second count is founded on the ninth section of the act of the 13th of July, 1866 (14 Stat. 98), but as there is no evidence to sustain the allegations of the count it is not necessary to state either them or the statute on which they are founded.

The third count is founded on the ninety-sixth section of the act of July 20, 1868 (15 Stat. 125), in connection with the twenty-third and twenty-fifth sections of the same act. This count alleges in substance that said distilled thirty-seven barrels of spirits were on the first of November, 1869, owned by a distiller whose name is to the district attorney unknown, who had theretofore distilled the same and placed them in certain casks containing more than twenty gallons wine measure each, and the said distiller did then and there knowingly omit, neglect and refuse to have said spirits gauged, proved and marked by an internal revenue gauger, and to have cut or burned upon the casks which contained the said spirits the name of the distiller, the district, the date of the payment of the tax, the quantity of wine gallons and proof gallons of the contents of such casks, and the number of the tax-paid stamp, before the said spirits were removed from the distillery, as required by the twenty-third and twenty-fifth sections of the act of July 20, 1868, and general regulations prescribed by the commissioner of internal revenue. The ninety-sixth section provides "that if any distiller * * * of liquors * * * shall knowingly and willfully omit, neglect or refuse to do or cause to be done any of the things required by law in carrying on or conducting of his business, or shall do anything by this act prohibited, * * * all distilled spirits or liquors owned by him, or in which he has any interest as owner, shall be forfeited to the United States." I waive the consideration of the question whether this count is good as it contains no averment that the omission or neglect was willful, because I am satisfied it cannot be claimed that a distiller, within the meaning of this section, omits, neglects or refuses to do or cause to be done anything which the law does not require him but some other person to do. Now the testimony in this case does not show that the distiller omitted, neglected or refused to do or cause to be done, anything enjoined on him to do or cause to be done, by the twenty-third or twenty-fifth section of the act, or, in fact, by any other section. What was omitted, I have before stated, when considering the first count, and it will be seen by reference to the said sections, that the things omitted are required to be done, not by the distiller, but by the gauger. The law nowhere requires the distiller to cut or burn, or to cause to be cut or burned, on his casks containing spirits, his name, the name of the district, the date of payment of tax, the quantity of wine or proof gallons, or the number of tax-paid stamp. All of these marks are required by either the twenty-third or the twenty-fifth section to be put on by the internal revenue gauger.

The district attorney has asked leave to file an amended information claiming a forfeiture under the fifty-seventh section of the above-mentioned act of 1868. This section after prescribing the duty of persons owning or having in their possession distilled spirits intended for sale, exceeding in quantity fifty gallons, and not in a bonded warehouse at the time when the act should take effect, to make return of the same to the collector of the district, and after prescribing how such casks containing such spirits should be marked, contains this further provision: "Any person owning or having in possession such spirits and refusing or neglecting to make such returns shall forfeit the same; and all distilled spirits found after thirty days from the time that this act takes effect, in any cask or package containing more than five gallons, without having thereon each mark and stamp required therefor by this act, shall be forfeited to the United States." If I thought there was a clear case of forfeiture under this provision, I would, in accordance with the settled practice of the court, allow the amendment to be filed. That part of this provision which declares a forfeiture for the neglect or refusal to make a return most indubitably refers to spirits on hand and not in a bonded warehouse at the time the act went into effect. The terms "such spirits" and "such return" leave no room for doubt on this subject; and, in my opinion, the remain-

ing portion of the provision likewise refers to such spirits. True, it declares that all distilled spirits found * * * in any cask containing more than five gallons, without having thereon each mark and stamp required therefor by this act, shall be forfeited; but the limitation, "found after thirty days from the time this act takes effect," shows that the spirits referred to are those which were on hand, and which were not in a bonded warehouse at the time the act took effect. These spirits the owner is allowed thirty days to have marked and stamped. Besides, although the language of this provision is somewhat general, and might be applied to all distilled spirits literally, the connection in which it is found limits its application to the spirits mentioned in the section. As to distilled spirits generally, other sections of the statute must be consulted to ascertain the duties of distillers and of others respecting them, and the forfeitures denounced against them. This section is confined by its spirit and terms to spirits intended for sale on hand when the act took effect, but which were not in a bonded warehouse. As the spirits in controversy are not such as the provisions of this section refer to, as they have been manufactured since the passage of the act of 1868, the amendment is not allowed to be filed.

Finally, I may repeat what I have often said before, that though the revenue statutes are not to be construed with the same strictness which is applied to criminal and penal laws generally, I am not willing to adjudge either a punishment against the person of the citizen or a forfeiture of his property unless the law explicitly requires it. "It is the province of the legislature to declare in explicit terms how far the citizen shall be restrained in the exercise of that power over property ownership gives; and it is the province of the court to apply the rule (only) to the case thus explicitly described." Schooner Pauline's Cargo v. U. S., 7 Cranch [11 U. S.] 61.

I have some doubt whether all of the opinions herein announced are correct, but being entirely satisfied that no forfeiture is explicitly declared by the act for any of the matters alleged, I shall decide that the claimants have made good their claim, and order a restoration of the brandy, but I shall also order a certificate of probable cause to be given to the seizing officer.

Case No. 16,467.

UNITED STATES v THIRTY-SEVEN BARRELS OF RUM.

[1 Woods, 19.] [1]

Circuit Court, D. Louisiana. April Term, 1870.

APPEAL AND WRIT OF ERROR — INFORMATIONS OF FORFEITURE—SEIZURES ON LAND.

1. When property is seized upon land and libelled as forfeited to the United States for violation of the revenue laws, the case belongs to the common law side of the court, and can only be reviewed by writ of error.

2. When such a case is appealed, the appeal will be dismissed.

This case was a seizure of property upon land for violation of the revenue laws. It was brought from the district court into this court by appeal, and was heard at the April term, 1870, on motion to dismiss the appeal.

A. B. Long, U. S. Atty.

J. R. Beckwith, for claimant.

WOODS, Circuit Judge. In this case a motion is made to dismiss the appeal on the single ground that the judgment appealed from was rendered on the common law side of the district court, and that it cannot be brought up for revision by appeal. The act of congress regulating errors and appeals from the district to the circuit court, provides: (1) That from final decrees in a district court in causes of admiralty and maritime jurisdiction, when the matter in dispute exceeds $300, exclusive of costs, an appeal shall be allowed to the next circuit court to be held in such district; and (2) that final decrees and judgments in civil actions in a district court when the matter in dispute exceeds the value of fifty dollars, exclusive of costs, may be re-examined, reversed and affirmed in a circuit court holden in the same district by a writ of error. These are the provisions of the judicial act (sections 21, 22, 1 Stat. 83, 84), and they remain the law today, except in this particular, that by the act of March 3, 1803, an appeal is allowed when the matter in dispute exceeds the sum or value of $50, exclusive of costs. By the terms of the law and by the construction put thereon by the decisions of the courts, appeals from the district to the circuit court are limited to cases of admiralty and maritime jurisdiction; all other cases are reviewed by writ of error. U. S. v. Haynes [Case No. 15,335]; U. S. v. Wonson [Id. 16,750]. An appeal is not allowed by the common law, nor is it a matter of right. When a party has had his cause adjudicated by a court of competent jurisdiction, that adjudication is final unless the statute gives an appeal, and where the statute fails to do this, the right of appeal does not exist. This case was a seizure made upon land. This fact is conclusive of the character of the action. Whatever it may be, it is not a case of admiralty or maritime jurisdiction, and no matter what form the proceedings take, the nature of the action is not changed. This case is a civil cause in the nature of a qui tam action, and is prosecuted on the law side of the court, and by the terms of the statute it must be brought up by writ of error and not by appeal.

For the reason therefor stated in the motion to dismiss the appeal, the motion is sustained, and the appeal dismissed.

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

Case No. 16,468.

UNITED STATES v. THIRTY-SIX BARRELS OF HIGH WINES.

[7 Blatchf. 459; [1] 12 Int. Rev. Rec. 40.]

Circuit Court, N D New York. June, 1870.

INTERNAL REVENUE LAWS — RULE OF CONSTRUCTION—WAREHOUSED SPIRITS.

1. Distilled spirits, while in such a distillery warehouse as is provided for by section 27 of the act of July 13, 1866 (14 Stat. 155), and under the lock of the inspector provided for by section 29 of that act, are still in the possession of the owner of such spirits and warehouse, within the meaning of section 48 of the act of June 30, 1864 (13 Stat. 240), as amended by section 9 of the said act of July 13, 1866, and liable to forfeiture for a violation of that section.

[Cited in U. S. v. Eighteen Barrels of High Wines, Case No. 15,033; U. S. v. Quantity of Tobacco, Id. 16,106.]

2. The proper rule stated, for the construction of revenue laws.

[Cited in U. S. v. Mynderse, Case No. 15,850; U. S. v. Thirty-Four Barrels of Distilled Spirits, Id. 16,461; U. S. v. De Goer, 38 Fed. 83.]

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

William Dorsheimer, U. S. Dist. Atty.

John Snow, for claimants.

WOODRUFF, Circuit Judge. The proceeding herein in the district court [case unreported] was for the condemnation of 36 barrels of high wines and 7 barrels of grape brandy, with other property, seized and claimed to have been forfeited to the United States, by reason of violations of the provisions of the internal revenue act of June 30, 1864 (13 Stat. 223), and the subsequent amendments thereof. On the trial, it was held, upon all the proofs, that the property seized, if forfeited at all, must be forfeited under the provisions of the 48th section of the said act of 1864, as amended by section 9 of the act of July 13, 1866 (14 Stat. 111). That section, among other things, provides, that "all goods, wares, merchandise, articles or objects on which taxes are imposed by the provisions of law, which shall be found in the possession, or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector, * * * and the same shall be forfeited to the United States." The act also points out the proceeding to be had to enforce the forfeiture.

The evidence showed, that the claimants hired or "rented," occupied, and carried on the business of distilling at a distillery in Lenox, Madison county, N. Y., and had distilled spirits liable to duty and tax under the internal revenue laws, for a period of six months prior to October 30, 1867, on which day the property described in the information was seized upon the distillery premises. Of the property seized, 36 barrels of high wines and 7 barrels of grape brandy were found and seized in the bonded-warehouse of said distillery, on the distillery premises, the bonded-warehouse being a building adjoining said distillery, on the same premises, under the government lock, and under the superintendence and control of the government inspector and store-keeper appointed under the internal revenue laws. Other proofs were given, tending to show the fraudulent acts of the claimants in furtively and surreptitiously removing from the distillery spirits on which the tax was not paid, and tending to show a fraudulent removal of spirits from the receiving room in charge of such inspector, by a concealed trap-door hidden from ordinary observation, and other fraudulent acts of removal of spirits distilled by them, at different times during the six months preceding the seizure, otherwise than to bonded-warehouses, and without the payment of the tax thereon, and also to show other acts of fraud and violations of the revenue laws relating to distillers, and to secure the due payment of the tax upon spirits distilled by them.

Under the instructions of the court, by which the jury were directed to confine their attention to the above-mentioned 48th section, under which alone, upon the proofs given, the United States were entitled to a verdict, the jury found for the United States, that the goods, property, &c., seized, were forfeited to the use of the United States, to the purport and effect in the information charged. But, under the further instruction of the court, which is brought under review by the writ of error herein, the jury excepted from their verdict the 36 barrels of high wines, and the 7 barrels of grape brandy, found, and seized, in the warehouse. This instruction was as follows: "You will recollect, that the evidence discloses the fact, that the 36 barrels of high wines, and the 7 barrels of grape brandy, were, at the time of the alleged seizure, in the bonded-warehouse. I charge you, that, under the evidence in this case, this property cannot be considered in the possession, or custody, or within the control, of these claimants, under the 48th section, so as to justify a verdict against the claimants, in reference to the 36 barrels of high wines, and the 7 barrels of grape brandy. If the person owning the property in the bonded-warehouse had fraudulent means of entering there, and thus had the control of this property, then, in my judgment, it might be forfeited, under the provisions of this section; but, there is no evidence, in this case, from which the jury could infer, according to my understanding of the case, that this bonded-warehouse, or the property within it, of any portion of it, was at all in the posses-

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

sion, or custody, or within the control, of these claimants; and, no matter what these claimants may have done, no matter what intentions they had, in my view of the case, this property, thus beyond their control, and out of their possession, is not subject to forfeiture, under the 48th section, before referred to." To these instructions the attorney for the United States excepted, and he requested the court to charge, that the property, while in the bonded-warehouse, was in the joint custody of the claimants, as owners and proprietors of such bonded-warehouse, and of the proper officer designated by the secretary of the treasury to take charge thereof; but the court declined so to charge, and exception was duly taken. Other language in the charge was excepted to, and, without reciting it further, it will suffice to say, that it imported, that the mere fact that the property was in the distillery bonded-warehouse withdrew it from liability to forfeiture, no matter what the owners had done, and no matter what were their intentions, unless they had some fraudulent or independent means of entrance.

I think that this is a too narrow and technical construction of the language of the act of congress. The words of the 48th section are, "shall be found in the possession or custody, or within the control, of any person," for the purpose of being sold, or removed, &c., in fraud of the revenue laws, or with design to avoid payment of said taxes. Clearly, the object of this provision is, to enable the government to anticipate and prevent the sale or removal, and to proceed to a forfeiture before the overt act of fraud is perpetrated; and it is enacted in view of the very great difficulty, if not impracticability, of following distilled liquors, after sale or removal, or of identifying them, if found, and, also, in view of the ease with which they may be passed into the hands of bona fide purchasers, themselves wholly innocent, and ignorant that the taxes have not been paid. The act, therefore, makes the ground of forfeiture the intent or design of the person in whom is the "possession," or custody," or "control," of the spirits, these being taken disjunctively; and the inquiry into the possession, or custody, or control, is not because possession, custody, or control is material for any purpose, except as the means of identifying the person whose fraudulent intent or design is the cause of forfeiture. The object of the statute is, to secure the payment of the tax, and prevent the accomplishment of meditated evasion and fraud. It should be construed, so far as a fair interpretation of its language will permit, in a manner adapted to effect the purposes of its enactment.

It is argued, that, because the statute imposes a forfeiture, it is to be construed most strictly against the government; and that, therefore, these spirits should be held to have been in the constructive possession, and in the actual custody, of the government inspector, and not at all in the possession, custody or control of the distillers, who were the owners and proprietors of the distillery warehouse and distillery premises. The statute should be construed reasonably and fairly, and not be made a trap, to deceive or catch the innocent and well-intentioned party, who endeavors to render full obedience to the law. But, I deny that the statute is to be construed strictly, in the sense that if, by any possible construction, it may furnish a chance of escape, and a means of evasion, to the guilty party, who is engaged in endeavors to defraud, with the intent and design which constitutes the ground of forfeiture, such construction shall be given to it. On this subject, Mr. Justice Story, in reviewing the charge to the jury, in a case from the circuit court of the United States for the Eastern district of Pennsylvania (Taylor v. U. S., 3 How. [44 U. S.] 197, 210), says, upon the point that revenue laws are not to be deemed penal laws, in the sense in which that phrase is sometimes used: "In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial. The judge was, therefore, strictly accurate, when he stated, that 'it must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them. It is in this light I view the revenue laws, and I would construe them so as most effectually to accomplish the intention of the legislature in passing them.' The same distinction will be found recognized in the elementary writers (1 Bl. Comm. 88; Bac. Abr. Statute I., 7, 8; Com. Dig. "Parliament R. 13, 19, 20); and it is also abundantly supported by the authorities." In the Case of Cliquot's Champagne, 3 Wall. [70 U. S.] 114, 145, the same rule of construction is declared by Mr. Justice Swayne, in giving the opinion of the court.

The distillery warehouse upon the premises of the distiller is authorized by section 27 of the act of July 13, 1866. That section enacts, that the owners of any distillery shall provide a warehouse, at their own expense, for the storage of spirits of their own manufacture only, or a secure room, in a suitable building to be used as such warehouse, and that the owners of such warehouse shall execute a general bond to the United States, with sureties, to be approved by the collector, in such form and with such conditions as shall be approved by the secretary of the treasury; and that, after the bond has been given, "such warehouse or room, when approved by the secretary of the treasury, * * * is hereby declared to be a bonded-warehouse of the United

States, and shall be used only for the storing of spirits manufactured by the owner * * * of such distillery, and shall be under the custody of the inspector, as hereinafter provided, and shall be kept locked up by the proper officer in charge, at all times, except when he shall be present, and the tax on the spirit stored in such warehouse shall be paid before removal from such warehouse." Section 29 of the same act provides for an inspector for every distillery, to take account of the materials used, and to inspect, gauge, and prove the spirits distilled, and declares that he "shall take charge of the bonded-warehouse established for the distillery in conformity to law, and such warehouse shall be in the joint custody of such inspector and the owner thereof, his agent or superintendent;" and his compensation is required to be paid by the distiller. Other provisions impose penalties for the illegal removal of spirits to any place other than the bonded-warehouse, or from the warehouse, and declare that all spirits found elsewhere than in a bonded-warehouse, not having been removed therefrom according to law, and the tax not having been paid, shall be forfeited to the United States. Here, then, for the protection of the government, to guard against an evasion of the tax upon distilled spirits, is interposed a government official, as a guardian and joint custodian of the warehouse; and this precautionary and participating custody of the warehouse was deemed by the district court to displace the possession, custody, and control of the spirits themselves by the owner, so that spirits in a warehouse could not answer the description in the 48th section, nor be forfeited, however plainly it was proved that the owner intended and was about to sell or remove them in fraud of the revenue laws, and with the design to avoid the payment of the taxes thereon.

The warehouse, in this case, was a part of the distillery premises, in the proprietorship of the claimants, and the spirits in question were their property. The act nowhere in terms provides that the government inspector shall have any possession, custody, or control of the spirits, but only a custody of the warehouse, jointly with the owner. This is giving to the inspector, through his participation in the custody of the warehouse, and by the discharge of his duty to keep the same locked when not personally present, a means of guarding against the illegal removal of spirits, but invests him with no legal possession thereof. Whatever custody or control he has over the spirits is purely incidental, or a consequence of his joint custody of the place where they may happen to be, and he has not, as a legal proposition, a custody of the spirits themselves. In point of law, the owner of the spirits, and the owner of the warehouse wherein they are stored, is in possession of the spirits; and I have no hesitation in saying that he could maintain any action known to the law, adapted to redress an illegal interference with his possession. Could it be successfully, or for a moment, contended, that the owner, in such case, could not, in his own sole name, maintain trover against any one who should wrongfully remove the spirits, or replevin in the cepit, or, under the Revised Statutes of New York, in the detinet, or trespass de bonis asportatis? I apprehend not. All that the statute has done is, to throw around his ownership, possession, custody and control a surveillance, and a joint custody of the warehouse, as an obstacle to the accomplishment of any fraud the owner may intend and desire to effect. If the participating custody of the warehouse had by the officer were to be deemed, by construction, to include the like joint custody of the spirits, there would still be possession, custody and control in the owner, though not sole possession, custody and control; and the proposition would then be analogous to that employed as a familiar rule of pleading at the common law, by which, where a joint promisor is sued in assumpsit without joining his co-promisor, and he simply pleads non-assumpsit, he cannot, under that plea, say that he did not promise and so defeat the action. The law says it is his promise, though not his sole promise. So, here, in my judgment, the owner of both warehouse and spirits has possession and custody and control, within the meaning of the act in question, even though, for the purpose of guardianship over the rights and interests of the government in the tax due thereon, the inspector be deemed to have a joint custody with him. As already observed, the section in question has respect to the intentions, purposes and designs of the party in the possession, custody or control. If, in law, such party have either, then his intentions, purposes and designs become the ground of the forfeiture. entirely irrespective of the difficulties which may lie in the way of accomplishing his intention. In addition to other precautions devised by the government to protect against such accomplishment, there is provided this additional security against any attempt to evade those precautions or render them nugatory

Once more, the theory of the charge on this trial was, that the government official had the possession, custody or control of these spirits, within the meaning of the statute, and not the owner. If that be so, if his guardianship excluded the possession, and the custody, and the control of the owner, as those terms are used in the statute, does it not follow that the conduct of the officer, without the knowledge, assent or complicity of the owner in any form, directly or indirectly, might subject the spirits to forfeiture, according to the express language of the statute? Suppose it could be established, by clear proof, that the officer had bargained for a fraudulent removal or sale of the spirits, or both, had arranged for and provided the vehicles for transportation, had, in the night season, availing himself of the possession of his key to the warehouse, visited the premises, with a view to such removal,

and had even laid hands upon the spirits and begun the work—all this as well in fraud of the owner, as, also, in fraud of the revenue laws, and to prevent the collection of any tax thereon—could it then be said, that the collector might seize the spirits, under this 48th section, and that, for these intentions, purposes and designs of the officer, the spirits could be condemned as forfeited to the United States? In my judgment, this could not be claimed. The officer has no legal possession, custody or control of the spirits, under that section; and owners of distilled spirits are not subjected to any such hazard of forfeiture by reason of the misconduct of the government official. If not, then there is possession, custody and control in the owner, within the just meaning of the law. Else, this anomalous condition results—there are spirits in the possession of no one whose purpose to dispose thereof and remove the same in fraud of the revenue laws, and with the design to avoid the payment of the tax, can subject them to forfeiture. The owner of the warehouse and spirits may place them in the warehouse for the purpose of selling and removing them secretly in fraud of the laws, and with the design, by such removal or sale, to avoid payment of the tax. That purpose and design may be shown to have begun with the very beginning of the manufacture, and to have constituted its chief motive, and to have accompanied the goods to their deposit. The proofs may establish that all preliminary negotiations for sale and removal, and arrangements therefor, are completed, and secret and forcible entry into the warehouse is about to be made, and yet, according to the doctrine contended for, such joint custody of the warehouse has been given to the government inspector, that no forfeiture of the spirits can be adjudged. Other considerations might be suggested, founded upon other provisions of the act regarding fraudulent removals, and other illustrations might be given, but I think enough has been said to show, that the ruling on the trial (where it could not receive the attention necessary to a deliberate examination of the whole subject), was erroneous.

Such a construction of the act is at war with its object. It defeats its purpose to anticipate the accomplishment of meditated frauds, difficult of detection and punishment when once carried into execution. It gives to the guardianship of the officer, which is interposed as a further security against fraud, an effect to prevent the efficiency of the law. It makes a merely consequential and physical control of the spirits, resulting from the officer's joint custody of the warehouse, the displacement of the legal possession of the owner of the spirits, himself in the like joint custody of the warehouse. It enables the fraudulent party to defeat the purposes of the enactment, and avoid the penalty, by a narrow construction of the terms of the act, not called for by their fair, natural and legal meaning. It is repugnant to the rule above adverted to, which requires us to construe the statute so as most effectually to accomplish the intention of the legislature in passing it.

It is a significant fact, and not unworthy of consideration, that the 48th section of the act of 1864 further provides, that all personal property whatsoever in the place or building, or within any yard or enclosure where such articles shall be found, shall also be forfeited. The jury have here found the forfeiture of articles found in the possession of the claimants, and upon the distillery premises, with the unlawful intent and purpose specified in the act. Such finding brought all other personal property whatsoever in the place or building, or within the yard or enclosure where such articles were found, into the same condemnation, by the express terms of the act, and thereupon a question arises, not considered on the trial, and not adverted to on the argument of the writ of error—Were not the spirits in the warehouse which was on the distillery premises, included in the forfeiture, under the provisions just referred to, independently of the question which I have above considered? This question not being in view of counsel on the trial or on the argument, and I having reached the conclusion above stated on the other point, I have not deemed it necessary to consider it further; but the terms, "all personal property whatsoever in the place or building, or within the yard or enclosure," are very comprehensive.

The judgment must be reversed, and a new trial ordered, as to the thirty-six barrels of high wines and the seven barrels of grape brandy, in question.

[See Case No. 16,469.]

Case No. 16,469.

UNITED STATES v. THIRTY-SIX BARRELS OF HIGH WINES.

[7 Blatchf. 469;[1] 12 Int. Rev. Rec. 41.]

Circuit Court, N. D. New York. June, 1870.

INTERNAL REVENUE—FRAUDS BY DISTILLER—EVIDENCE OF FALSE RETURNS—PRIOR SEIZURES.

1. Where property was seized on the 30th of October, as forfeited to the United States, for a violation of the provisions of section 48 of the act of June 30, 1864 (13 Stat. 240), as amended by section 9 of the act of July 13, 1866 (14 Stat. 111), *held*, that, in order to show an intent on the part of the claimants, in October, to defraud the government and evade the payment of the tax on spirits distilled by them, it was not erroneous to admit evidence showing that, in and through each of the seven months preceding October, down to the time of the seizure, the claimants made false returns of spirits made and materials used by them.

[Cited in U. S. v. Eighteen Barrels of High Wines, Case No. 15,033; U. S. v. Quantity of Tobacco, Id. 16,106; Tyler v. Angevine, Id. 14,306.]

2. The fact that nearly all of the same property had been seized a month previously, as for-

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feited for like fraudulent practices, and that a suit to enforce such forfeiture was pending and at issue, formed no objection to the reception of such evidence.

[In error to the district court of the United States for the Northern district of New York.]

William Dorsheimer, U. S. Dist. Atty.
John Snow, for claimants.

WOODRUFF, Circuit Judge. In this case, each of the parties has brought a writ of error to this court, from the judgment entered upon a verdict rendered for the plaintiffs in the district court. [Case unreported.] In my opinion upon the bill of exceptions taken by the plaintiffs to the alleged error of the court in excluding a portion of the property whereof condemnation was sought, from the consideration of the jury [Case No. 16,468], I have stated the case very fully. For the understanding of the case presented by the claimants' allegations of error, it will suffice to say, that the proceeding is for the condemnation of the property of the claimants, under the 48th section of the internal revenue act of June 30, 1864 (13 Stat. 240), as amended by section 9 of the act of July 13, 1866 (14 Stat. 111). The alleged cause of condemnation or ground of forfeiture was, that, the claimants being distillers, property mentioned in the information was found in their possession or custody, or within their control, in or upon the distillery premises, for the purpose of being sold or removed by the claimants in fraud of the said internal revenue laws, and with design to avoid payment of the taxes thereon, by reason whereof the same and the raw materials, tools, implements and personal property in the building or enclosure, &c., became and were forfeited to the United States. On the trial, the jury rendered a verdict for the plaintiffs, as to all the property except certain thirty-six barrels of high wines and seven barrels of grape brandy, which, being in the distillery warehouse, were held by the court to be exempt from forfeiture. The seizure of the property was made on the 30th of October, 1867. The grounds of condemnation alleged in the information were, that the property mentioned in the information was then in the possession, custody and control of the claimants, for the fraudulent purpose and design above-mentioned. On the trial, it appeared, that a seizure of nearly all of the same property was made by the collector on the 27th of September, 1867; that an information was filed; that a claim and answer was interposed by these claimants; and that the issue thereupon was pending and undetermined.

The only error alleged by the claimants, which their counsel has called to my attention, is the reception of certain evidence to prove the intent, purpose and design of the claimants, on the 30th day of October, 1867, when the seizure took place upon which the present information proceeds. That evidence consisted of acts of fraudulent violation of the revenue laws during the months of March, April, May, June, July, August, September and October, 1867, in this—that the claimants made false returns of the number of gallons of spirits manufactured, and of the quantities of materials used; that certain forty-nine barrels of high wines, upon which the tax had not been paid, were, on the 1st of July, 1867, found and seized under the barn of one of the claimants; and that they had committed other frauds upon the revenue prior to September 27th, 1867. The objection made and now insisted upon and discussed is, not that the evidence did not tend to prove acts of fraud upon the revenue laws, and attempts to evade the payment of the taxes imposed thereby, but that proof of such acts was inadmissible on these grounds: (1) That the pendency of the other information, and the issue thereupon, precluded inquiry into any such facts occurring prior to September 27th, 1867; (2) that the evidence on the part of the plaintiffs should have been confined to transactions subsequent to September 27th, 1867, because, independently of the pendency of such information and the issues thereupon, the earlier acts occurring in March, April, &c., were too remote to be admissible to prove the intents, purposes and designs of the claimants on the 30th of October, 1867, when the present seizure was made.

In the brief submitted by the counsel for the claimants, it is stated, that evidence was received of acts done by the claimants after the date of the present seizure, October 30th, 1867. I do not find, in the bill of exceptions, that any such evidence was offered, unless it be the tri-monthly returns for that very month; and it is not stated that those returns were made after the seizure. They may have been very important proof of the intent to avoid the payment of the taxes legally due, clearly operating during the whole month to which they related.

1. The pendency of the former information has no possible bearing on the inquiry whether the evidence was admissible. The purpose of the testimony was not to establish such previous forfeiture by adjudication, nor could the liability to the condemnation sought by the former information alter the character of those previous acts, in their tendency to prove the animus or intent of the claimants. Even if such issues had been tried and condemnation had, that fact, even though it absolved the claimants from other or future punishment for the antecedent acts, could have no influence upon the weight of those acts as evidence of the continued and persistent endeavors of the claimants to defraud the government and avoid the payment of taxes. To hold otherwise, would be to say that former and other acts of fraud and evasion of taxes may be received to prove the animus of the parties in the acts under investigation, if such former and other acts are successful, and fraud and evasion are accomplished with impunity, but that, if the government attempts

to punish therefor, it is ever after precluded from giving such acts in evidence. The property seized in the former and pending proceeding had presumptively, on the giving of bonds, or by other lawful means, come back to the possession of the claimants; and, if it is subsequently seized upon a new or distinct ground of forfeiture thereafter arising, the range of time within which it is proper to produce proof of acts showing the intent, purpose and design of the parties, is precisely such as it would be if no such prior seizure had taken place. Their character and their bearing and influence are just what they would be if the government had theretofore been ignorant, or had taken no notice, thereof.

2. The only inquiry, therefore, is, whether, as secondly insisted, it is incompetent to show like acts of fraud and evasion, or acts having the like purpose and intent to defraud and avoid the payment of taxes upon the same property, or the proceeds of the same continuing manufacture, for the purpose of showing the intent, design and purpose of the same parties, in the transactions in question; and, if so, whether the range of seven antecedent months is too broad, as a field of inquiry.

On the general question, the counsel for the claimants hardly insists that no proof of any such acts, other than those in question, can be received, but he does insist that this is true only of contemporaneous acts of like fraud. Even the cases upon which he relies hold, that proof of such acts "at or about" the time of the acts in question is admissible. What shall be the range of inquiry, and what its limitation, cannot be judicially declared, by a fixed rule to be applied to each case. In a large degree, it must depend upon the nature of the transactions, and the circumstances under which they are committed, and, to some extent, also, on their being continuous, in a uniform series or constant repetition, as each occasion therefor arises, down to the time of the acts in question. The period of time, and its limit, must be fixed in the exercise of the discretion of the court, in view of considerations arising on the trial, and of the nature and circumstances of the acts proposed to be proved, and of their relation to, or connection with, as the case may be, the transaction under immediate investigation. To show the animus of the claimants in October, in respect of an intent to defraud the government, and avoid the payment of the tax on spirits distilled by them, I think evidence that, from and including April, in and through each following month, down to the time of the seizure, the claimants persistently and continuously made false returns of the quantity of spirits produced by them, and of the materials used, not only competent, but very high evidence, excluding the idea that their last return was an oversight or mistake, and showing that they were deliberately acting under a constant and abiding purpose to defraud the government and avoid the payment of the legal taxes. Indeed, in such a case, I should not be disposed to exclude evidence, thus continuous, going back to the founding of their distillery, if that was not prior to the revenue law itself, though I might deem it, in a supposable case, discreet to stay the introduction of evidence merely cumulative, because unnecessary and burdensome to the case, and uselessly consuming the time of court and jury.

The cases in the courts of the United States, cited on behalf of the claimants, are quite conclusive as to the admissibility of the evidence, and it is unnecessary to multiply citations to the like effect. In Wood v. U. S., 16 Pet. [41 U. S.] 342, 361, proof of collateral facts tending to show a fraudulent intention are held to be admissible, whenever a fraudulent intention is to be established. There, an information had been filed claiming a forfeiture of certain goods, part of four importations entered in 1839. Proof was received of twenty-five other importations during 1839 and 1840, and the proof was held admissible. The court, not doubting that prior importations were competent, said also: "Fraud in the first importation may be as fairly deducible from other subsequent fraudulent importations by the same party, as fraud would be in the last importation from prior fraudulent importations." In Taylor v. U. S., 3 How. [44 U. S.] 197, proof of transactions six months before the one question was received; and a similar range was allowed in Buckley v. U. S., 4 How. [45 U. S.] 251. I have no doubt upon the subject.

The United States are entitled to judgment of affirmance, and for their costs on the writ of error.

Case No. 16,470.

UNITED STATES v. THIRTY-THREE BARRELS OF SPIRITS.

[1 Lowell, 239; [1] 1 Abb. U. S. 311; 7 Am. Law Reg. (N. S.) 365; 7 Int. Rev. Rec. 75; 1 Am. Law T. Rep. U. S. Cts. 47.]

District Court, D. Massachusetts. March, 1868.

INTERNAL REVENUE—ILLICIT DISTILLERIES—FORFEITURE OF TOOLS, ETC.

To warrant a forfeiture of tools, implements, instruments, or other personal property, under section 48 of the internal revenue act of 1864 (13 Stat. 240), as amended by the act of 1866 (14 Stat. 111), upon the ground that they are found upon premises where an illicit manufacture is carried on, it should appear that such property was used, or intended to be used in such manufacture, or was in some way connected with it.

[Cited in U. S. v. Sixteen Barrels of Distilled Spirits, Case No. 16,300; U. S. v. Curtis, 16 Fed. 189.]

This was an information filed against the contents of a building upon Central wharf in Boston, to enforce a forfeiture under the internal revenue law. The property was claimed by John Lombard. Upon the trial

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

it appeared that the building in question was of four stories in height. In the attic story there was a still, and here, as the evidence indicated, a business of distilling had been carried on in violation of the revenue law. The second and third stories contained barrels, chemicals, and other articles of a character adapted to the distilling business. The first floor was occupied by a retail grocery store, and contained a stock of goods such as are ordinarily kept for that business. The counsel for the government contended that all the property found in the building was forfeited; and the jury found a verdict condemning the entire property accordingly. The claimant now moved for a new trial and in arrest of judgment.

W. A. Field, Assist. U. S. Dist. Atty.
L. S. Dabney, for claimant.

LOWELL, District Judge. In this case there is a motion for a new trial, on the ground that the verdict is against the weight of the evidence; and a motion in arrest of judgment. The information, as amended, alleges in the fifth count that certain distilled spirits were found at number 45 Central wharf, Boston, in the possession, custody, and control of one John Lombard, for the purpose of being sold by him in fraud of the revenue laws; that two hogsheads of molasses were found at the same place in the possession of said Lombard, and were raw materials which he intended to manufacture into distilled spirits, for the purpose of fraudulently selling the same, and evading the taxes thereon, and that the other goods, wares, merchandise, and property seized, which appear to form the stock, furniture, and fixtures of a retail dealer in liquors and groceries, were tools, implements, instruments, and personal property found at the same time and in the same building with the spirits and the molasses, and in the possession, custody, and control of the said Lombard.

The other amended counts differ from the fifth count, in substance, only as to the person in whom the custody is alleged to be.

The law under which the information is brought is section 48 of the act of 1864 (13 Stat. 240, c. 173), as amended by the act of 1866 (14 Stat. 111, c. 184). As the act stood at first, all goods, &c, on which duties are imposed, which shall be found in the possession, &c., of any person for the purpose of being sold or removed in fraud of the internal revenue laws, may be seized and shall be forfeited; and so of raw materials intended to be manufactured for the purpose of being so sold; and also all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles are found, and intended to be used by them (i. e., the persons before mentioned) in the manufacture of such raw materials. The new statute amends the phraseology of this section in several other particulars, without perhaps much variation of the meaning, but omits altogether the qualifications of intended use of the tools, implements, instruments, and personal property, and upon a literal interpretation might seem to subject to seizure and forfeiture all goods and chattels and other things coming within the very general description of personal property, to whomsoever they may belong, if found in the same building, including out-buildings, yard, &c., with the offending goods. It is impossible to believe that any such sweeping condemnation is intended to be passed, founded upon mere proximity in place, upon the goods of all persons, innocent and guilty. In its application to a city or other busy place, where the same building is divided into numerous tenements, shops, offices, counting-houses, and warerooms, all being often found under one roof, and each occupied by a different tenant, the operation of such a law would work the most enormous and unheard of injustice. To take a single example: the money in the vaults of a bank might be forfeited for the fault of some petty trader in the attic of the banking-house. It is a rule of law as well as of natural justice, that statutes will not be understood to forfeit property except for the fault of the owner or his agents, general or special, unless such a construction is unavoidable. See Peisch v. Ware, 4 Cranch [8 U. S.] 347; Trueman v. Four Hundred & Three Quarter Casks of Gunpowder, Thacher, Crim. Cas. 14.

This information does indeed allege that the personal property sought to be confiscated was in the possession or under the control of the wrong-doer. But even if the statute be limited in that way, it will be most arbitrary and unjust in its operation, for the punishment will bear no sort of necessary relation to the offence. The crime is punished by the same section with a fine of five thousand dollars, or double the amount of tax; but this forfeiture may be indefinitely greater than either. But the more valid reason against this construction is, that nothing in the statute itself points to the possession or control of this personal property as deciding its status, but only the place where it is found. A forfeiture of the goods of the same owner, found with the unlawful goods, is not without precedent in revenue laws, and I was at first disposed to believe that such was the meaning of the statute, but upon a more careful inquiry, I am satisfied that the construction presently to be mentioned, is more consistent with its language. By reason and analogy, as well as by the context, we find that some real connection with the fraud is intended to be attached to the property that is liable to seizure. The taxed articles and the raw materials intended to be manufactured, are the principal things, and the tools, imple-

ments, instruments and personal property, are only the connected incidents. I am of the opinion that by the familiar rule of construction, called noscitur a sociis, we must restrict the general words, personal property, by the more particular and immediately preceding words, tools, implements, and instruments. Such a restriction has been adopted in many well considered cases. Thus, where it was enacted that no tradesman, artificer, workman, laborer, or other person whatsoever, should do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day, the court of king's bench held unanimously that this did not include drivers of stage-coaches. Sandiman v. Breach, 7 Barn. & C. 96. So any artificer, calico printer, handicraftsman, miner, collier, pitman, keelman, glassman, potter, laborer, "or other person" who shall contract with any person whomsoever, for any time or times, does not include domestic servants. Kitchen v. Shaw, 6 Adol. & E. 729, 1 Nev. & P. 791.

Other examples of a restricted construction of the general words of a statute are, Rex v. Manchester & S. Water Works, 1 Barn. & C. 630; Rex v. Mosley, 2 Barn. & C. 226; Coolidge v. Williams, 4 Mass. 140; Sprague v. Birdsall, 2 Cow. 419. And in the construction of deeds and wills, it is not unusual to confine general expressions by a regard to the context. Thus, "all my estate of what kind soever" being connected with words referring only to chattels, was held not to pass real estate. Sanderson v. Dobson, 1 Exch. 141. In the present case, the words "tools, implements, and instruments," are carelessly used, and are mere surplusage, if the general words "personal property" are intended to include them. Why mention tools and implements if every thing but real estate is to be confiscated? And if any specification is desired, why not specify the property much more important, and more likely to be found in such a connection; namely, the stock in trade, notes, money, &c., before the general words? It cannot be doubted that the tools, implements, and instruments here forfeited, are those with which the unlawful business is carried on; and if that is so, does not their enumeration exclude all other tools, implements, and instruments? If a carpenter's tools, a surgeon's instruments, or a dressmaker's sewing-machine are found in a distillery, can they be forfeited as tools, implements, and instruments? If not, and if they are tools and implements, how can they be swept in as "personal property"? It must be on the very ground that they are not connected with the fraud, and then the statute will read thus: "All tools, implements, and instruments of the unlawful business shall be forfeited, together with all other tools, implements, instruments, and personal property, which have no such connection." No fair, sensible, or reasonable construction can be given to the particular words, without supplying the qualification which I have adopted; and when you have supplied that, it restricts the operation of the more general words which follow, and the statute is read as forfeiting the tools, implements, instruments, and personal property connected with the illegal business, and found within the building, yard, or enclosure where that business is carried on. This construction gives effect to all the language, because there are often many things connected with a trade or manufacture which are not properly described as either tools, implements, or instruments; as, for example, fuel, fixtures, &c.

This construction entirely relieves the difficulty concerning the place or building, yard or enclosure, because it is reasonable that all things which are part of the unlawful business, and are found within the same enclosure, whether inside or outside of the building, should be forfeited, and that all articles appropriate to such business which are so found, should be prima facie presumed to be connected with the fraud. This interpretation makes the whole law just, harmonious, and intelligible. New trial granted.

Case No. 16,471.

UNITED STATES v. THOMA.

[2 N. J. Law J. 181; 25 Int. Rev. Rec. 171; 26 Pittsb. Leg. J. 180.]

District Court, D. New Jersey. May 19, 1879.

POST OFFICE—EMBEZZLING LETTER.

[The defendant took from the post office a registered letter addressed in his care to a person who was dead. He afterwards brought it back to the post office, and persuaded the assistant postmaster to open it and return it to him. He took out a draft which the letter contained, and claims to hold it against a debt the deceased owed him. The widow of the deceased afterwards took out letters of administration in another state, and claimed the draft. *Held*, that the defendant was not guilty of taking and embezzling a letter, under section 3792, Rev. St.]

[Cited in U. S. v. McCready, 11 Fed. 231; U. S. v. Safford, 66 Fed. 945.]

A. Q. Keasbey, U. S. Dist. Atty.

W. D. Holt, for defendant.

Before NIXON, District Judge. The defendant was indicted under section 3892 of the Revised Statutes, for taking and embezzling a letter which had been in a post office before the same had been delivered to the person to whom it was addressed.

A special verdict was found embracing the following facts: Jacob Schoch, now deceased, was a resident of Long Branch, New Jersey, at the time of his death, by suicide, October 1, 1877, and had been for several years before. The defendant was and had been a resident of East Long Branch, and was well acquainted with Schoch at the time of his death. The latter had formerly boarded

with him. About December 7, 1877, a letter was sent from Switzerland, containing a bill of exchange in favor of Schoch, drawn upon Drexel, Morgan and Co. of New York, for $155.66. It arrived in New York about December 23d, and was registered and forwarded by mail to Long Branch, addressed to Jacob Schoch, care of Charles Thoma, Long Branch, N. J. It was received at that post office and delivered to Charles Thoma by the postmaster—the defendant giving the ordinary receipt for it as a registered letter on the 26th of December, 1877. About a week afterwards the defendant returned to the post office with the letter and said that the late postmaster, Mr. Slocum, had advised him that the postmaster had a right to open the letter in the presence of witnesses; explained the circumstances of his receiving it to the assistant postmaster, stating that Schoch had told him he was expecting a letter from Switzerland containing money, and that he (Thoma) would have the first claim on it. He further stated to the assistant postmaster that he was about to administer on Schoch's estate, so that he might be able to collect his own claim, and others could also get their claims. The assistant postmaster then opened the letter and handed the envelope and contents to Thoma, who still retains the possession of the draft and insists on his right to hold it until he receives the payment of a bill of $41, which he holds against Schoch's estate. He has not taken out any letters of administration. Schoch left a widow, who lived apart from him in the city of New York, at the time of his death. She has taken out letters of administration there, and has repeatedly demanded the letter and draft of the defendant, who refuses to surrender the same without some security for the payment of his claim. The act of the defendant, as thus explained, brings him, I am inclined to believe, within the letter of the law, but not within its spirit. Penal statutes should be construed strictly; and the retention of a letter by a person who came lawfully into its possession, is not the misdemeanor that the congress had in view. The design of the section is to guard the inviolability and safety of communications through the mail from their start to their destination. Any tampering with a letter during that period either by an official of the department or by other persons with a design to obstruct the correspondence or to pry into the business or secrets of another, or any secretive embezzlement or destruction of the same, is carefully guarded against. But the delivery of the letter to the defendant terminated the action and authority of the post office department, over the subject matter. It was directed to the defendant's care. He was designated as the person to receive it from the postoffice. So far as the department was concerned, its responsibility ended with the delivery to him. Whether he retained it or passed it over to the legal representative of the deceased owner, or whether he had a right to retain it, as against their demands for it, are questions for the local laws to settle, just as they determine all other questions relating to the custody or ownership of property. It was suggested by the district attorney on the argument that the late distinguished judge of the Eastern district of Pennsylvania (Cadwalader) gave a different view of the section, holding in a recent case that a defendant was liable to its penalties, who opened a letter addressed to his care, to a female servant of his family—the letter having been delivered to him by the officials of the post office. The case is not reported and there may have been circumstances connected with it, that justified such a construction and which do not appear here. However that may be, the construction of the court here is fully sustained by the circuit court of the United States for the Southern district of New York (Nelson and Betts, JJ.), in U. S. v. Parsons [Case No. 16,000]; by the circuit court of the United States for the Northern district of Ohio (Willson, J.), in U. S. v. Sander [Id. 16,219]; and by Judge Lowell, in the Massachusetts district, in U. S. v. Driscoll [Id. 14,994].

Upon the special findings of the jury, a verdict of not guilty must be entered.

Case No. 16,472.

UNITED STATES v. THOMAS et al.

[Whart. St. Tr. 682.]

Circuit Court, D. Pennsylvania. 1800.

POLICE POWERS — SEIZURE AND OPENING OF LETTERS CARRIED BY MESSENGER.

In two indictments, one of which was returned ignoramus, and the other of which was never pressed, it was charged that defendants did "open and the contents thereof did promulgate and make known," two letters addressed by Mr. Liston, the British minister in Philadelphia, to Mr. Russel, president of the British frontier in Upper Canada. The evidence on which the prosecution rested appears to have been that the defendants, who were shown to have acted under the sheriff of Bucks county, who was armed with a bench warrant, arrested a man named Isaac Livezey (who was charged with horse-stealing, but who turned out to be a messenger from Mr. Liston to Mr. Russel), and broke open his trunk, from which the letters mentioned in the indictment were taken. That the proceedings against Livezey were bona fide, afterwards amply appeared, the stolen horses being found in his custody; and under the belief that the searching of his trunks and opening of the letters was but an ordinary case of police power, as well as from doubts as to jurisdiction, the prosecution was not carried on.

This case is only here introduced in consequence of the public interest excited by the

publication of the letters which the defendants were charged with opening. They were as follows:

"Philadelphia, 6 May, 1799.

"Sir: The government of the United States appears to be nearly in the same situation with regard to the Shawenese Indians, that that of Canada is with respect to the Mohawks. The Shawenese wish the United States to make some alteration of their limits, as fixed by the treaty of Grenville; and at the same time to confirm the sales of lands they have already made, and authorize future alterations. The American ministers, on the other hand, are determined not to grant this favour, and are embarrassed by the persevering importunity of the Indians. Advices lately arrived from Fort Wayne inform the administration that the Shawenese intend this spring to call a general council of the Nation (composed of representatives from several tribes), with a view to take such measures as may be thought best calculated to obtain some modifications of the Grenville treaty. And the information adds that this idea was first suggested by the late Colonel M'Kee, deputy superintendent of Indian affairs. The government considers this interference as unfriendly and injurious to their interests, and a complaint has been made to me on the subject by the secretary of state, with a request that I would make such representation of the matter to you as might produce a defeat of the project at present, and prevent all intervention of a similar nature in future. I informed the secretary of state that I could scarcely bring myself to credit the report respecting Colonel M'Kee; that, at all events, I could not conceive anything unfavourable to the United States could have been contemplated by a public officer in the service of Great Britain; but that I would of course make the representation requested; that I made no doubt of its having the desired effect, because I was confident that you were sincerely disposed to ward off every incident that could give just cause of misunderstanding between the two nations.

"The situation of public affairs in this country continues the same as at the date of my last letters, unless it be that the government has given a new subject of provocation to France, by encouraging, in conjunction with us, the negro chief Toussaint, in measures which appear ultimately to tend to a separation of the Island of St. Domingo from the mother country. Whether this affront will be pocketed by the directory, I do not pretend to decide; but I cannot persuade myself that it is probable. I have the honour to be, with great truth and respect, sir, your most obedient humble servant. Robert Liston."

"The Hon. President Russel—Sir: My last having been entrusted to a person who was not going directly to Upper Canada, I am uncertain whether it may yet have reached your hands, and therefore, take an opportunity of transmitting a duplicate. On public affairs I have scarcely anything to add. One step farther on the road to a formal war between France and the United States has been taken by the governor of Guadaloupe, who, in consequence of the capture of the insurgent frigate, has authorized French ships of war to capture all American vessels, whether belonging to the government or to individuals. But the resolution of the directory on the great question of peace or war is not yet known. Perhaps the new explosion of the continent of Europe may give them a degree of employment that may retard their decision. In the interior of this country, the declamations of the Democratic faction, on the constitutionality and nullity of certain acts of the legislature, have misled a number of poor ignorant wretches into a resistance of the laws, and a formal insurrection. This frivolous rebellion has been quelled by a spirited effort of certain volunteer corps lately embodied, who deserve every degree of praise. But the conduct of these gentlemen having been shamefully calumniated by some of the popular newspapers, they have ventured to take the law into their own hands, and punish one or two of the printers by a smart flogging; a circumstance which has given rise to much animosity, to threats, and to a commencement of armed associations, on the side of the Democrats (particularly the united Irishmen), and some apprehend that the affair may lead to a partial civil war. The portion, however, of the Jacobinic party, who could carry matters to this extremity, is but small; the government is on its guard, and determined to act with vigour; and I do not, on the whole, apprehend any serious danger. I have the honour to be, with great truth and respect, sir, your most obedient humble servant. Robert Liston."

The allegation in the first of these letters that the American government had co-operated with the British in setting on Toussaint to revolt against the mother country, was calculated to embitter against the administration not only the favourers of a French alliance, but the Southern states generally. The federal papers denied the charge, but it continued to be reiterated by the opposition with much effect, until the election. It is due to the administration, however, to say that no corroboration was ever found of Mr. Liston's statement; and that it may now be looked upon as arising from either diplomatic gasconade or personal misapprehension.

Case No. 16,473.

UNITED STATES v. THOMAS.

[2 Abb. U. S. 114;[1] 4 Ben. 370; 12 Int. Rev. Rec. 161.]

District Court, N. D. New York. Nov. Term, 1870.

SMUGGLING—REQUISITES OF INDICTMENT.

1. Merely importing goods subject to duty without having paid or secured the duties, is

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

not, in general, an offense. To constitute smuggling, for which an indictment may be sustained, there must be something in the manner of the importation which violates a statute defining the offense; such as secrecy or concealment, an intent to defraud the revenue, or the like.

[Distinguished in U. S. v. Nine Trunks, Case No. 15,885. Cited in Von Cotzhausen v. Nazro, 15 Fed. 899.]

2. An indictment for the offense of smuggling must allege the facts relied upon as rendering the importation alleged an offense, or state the particular illegality intended to be proved; and such allegation must be proved as laid.

[Cited in U. S. v. Claflin, Case No. 14,798; U. S. v. Nunnemacher, Id. 15,903; U. S. v. Kee Ho, 33 Fed. 335.]

Motion in arrest of judgment.

HALL, District Judge. The defendant was tried at the present term, and a verdict of guilty was rendered upon one count of the indictment against him. He thereupon moved an arrest of judgment on account of the alleged insufficiency of the count on which he was indicted. This count charged "that the said David H. Thomas, now or late of Niagara, in the county of Niagara, in the state of New York, heretofore, to wit, on the first day of September in the year of our Lord one thousand eight hundred and sixty-nine, at Niagara, in the county of Niagara, and state of New York, in said district, and within the jurisdiction of this court, did fraudulently, knowingly, and unlawfully receive and conceal certain goods, wares, and merchandise, to wit, five hundred pounds of nutmegs, after their importation into the United States contrary to law, knowing the same to have been imported contrary to law, in this, that the said goods, wares, and merchandise, so imported as aforesaid, were, at the time the same were so imported into the United States, subject to duty by law, the duties due and payable upon said goods, wares, and merchandise, not having been paid or accounted for, he, the said David H. Thomas, at the time he so received and concealed the said goods, wares, and merchandise, as aforesaid, well knowing that the duty due and payable upon said goods, wares, and merchandise, had not been paid or accounted for, contrary to the statute of the United States of America in such case made and provided, and against the peace of the United States and their dignity." The count was intended to be based upon the 4th section of "An act further to prevent smuggling and for other purposes," approved July 18, 1866 (14 Stat. 179), which provides "that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any goods, wares, or merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such goods, wares, or merchandise after their importation, knowing the same to have been imported contrary to law, such goods, wares, and merchandise shall be forfeited, and he or she shall, on conviction thereof before any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both, at the discretion of such court; and in all cases where the possession of such goods shall be shown to be in the defendant, or where the defendant shall be shown to have had possession thereof, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

It will be seen that the indictment in express terms limits the allegation that the nutmegs mentioned in the indictment were imported and brought into the United States contrary to law, by stating that the same, being subject to duty by law, were so imported and brought into the United States, without the duties due and payable thereon having been paid or accounted for; at least that is the substance of what it was intended to allege by the inartificial language used in the indictment. This makes it necessary to consider what is the true construction of the fourth section of the act of 1866, above recited, and whether the allegation made brings the case stated within its provisions. As a general rule it may be said that it is not contrary to law to import or bring into the United States goods subject to duty without having paid or accounted for such duties. In almost every case of importation the goods are not only brought into the United States, but are imported, in the true legal sense of that term as used in the revenue acts, before there is any obligation to account for or make payment of the duties. They are brought into the United States as soon as they are brought into its territory; and the act of their importation is complete when they are voluntarily brought into a port of delivery with intent to unlade them there (U. S. v. Lindsey [Case No. 15,603]); and if the goods are subsequently entered, and the other provisions of the law afterwards complied with, and the duties paid, no penalty or forfeiture is incurred.

Indeed, it is believed that there is no case in which a penalty or forfeiture is incurred, or can be enforced, or any crime or offense committed, simply because the duties on imported goods are not paid or accounted for before the importation was complete. It is by acts or omissions subsequent to the importation, that forfeitures and penalties are incurred, or crimes or offences committed, unless there is some law expressly declaring the importation itself, or the manner of making it, unlawful. Section 19 of the act of August 30, 1842 [5 Stat. 565], which provides for the punishment of any person who "shall knowingly, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares, or merchandise subject to

duty by law, and which should have been invoiced, without paying or accounting for the duty," makes the clandestine introduction or smuggling into the United States of dutiable goods, in cases therein provided for, a criminal offense, which is complete as soon as the goods are so clandestinely introduced or smuggled into the United States; but in such cases it is the secret and clandestine manner of the importation, with the intent to defraud the revenue, and not the non-payment of or accounting for the duties prior to the importation, which constitutes the gist of the offense.

There are many cases to which this fourth section of the act of 1866 was probably intended to apply, and to which it may be properly applied; but it is unnecessary to refer to more than two or three acts of congress to show what was probably the general intention of the national legislature in adopting the section under consideration. By section 5 of the act of July 10, 1861 (12 Stat. 257), the president was authorized, under the circumstances therein set forth, to declare the inhabitants of a state, or any section or part thereof, to be in a state of insurrection against the United States; and by the same section it was provided that thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States should cease and be unlawful so long as such condition of hostility should continue; and all goods and chattels, wares, and merchandise, coming from said state or section into the other parts of the United States, and all proceeding to such state or section by land or water, should, together with the vessel or vehicle conveying the same, or conveying persons to or from such state or section, be forfeited to the United States. Section 4 of the same act (page 256), authorized the president to close ports of entry in certain cases, and give notice thereof by proclamation; and declared that thereupon all right of importation and other privileges incident to ports of entry should cease and be discontinued at such ports so closed, until opened by the order of the president; and that if, while said ports were so closed, any ship or vessel from beyond the United States, or having on board any articles subject to duties, should enter or attempt to enter any such port, the same, together with its tackle, apparel, furniture, and cargo, should be forfeited to the United States.

By some of the revenue acts it is made unlawful to import certain articles except in the form or condition particularly described. Thus, by section 1 of the act of July 28, 1866 (14 Stat. 328), it is provided that no cigars shall be imported unless the same are packed in boxes of not more than five hundred cigars in each box; and that brandy and other spirituous liquors may be imported in casks or other packages of any capacity not less than thirty gallons; and that wine in bottles may be imported in boxes containing not less than one dozen bottles of not more than one quart each; and that wine, brandy, or other spirituous liquors imported into the United States, and shipped after October 1, 1866, in any less quantity than therein provided for, shall be forfeited to the United States. And see, for similar provisions in respect to the importation of beer, ale, and porter, and refined, lump, and loaf sugar, section 103 of the act of March 2, 1799 [1 Stat. 701]. It is to such and similar importations contrary to law, and to the importation of articles the importation of which is entirely prohibited, that section 4 of the act of 1866 was intended to apply; and, as applied to such cases, the rule of evidence, a presumption of guilt, declared in that section, may well be justified; while it would be very harsh and oppressive if the provisions of the section in which it is found were to be applied to every case in which goods were actually imported or brought into the United States before the duties were paid or accounted for,—that is, to ninety-nine cases out of every hundred of honest importations.

Perhaps it might have been suggested, if the question had been at all argued on the part of the United States, that the indictment states that the nutmegs therein mentioned were imported contrary to law, and that so much of the indictment as states in what the illegality of the importation consisted, may be rejected as surplusage. But the short answer to that is, that this is a part of the description of the offense, and cannot be rejected as surplusage, even if the indictment would have been good if the particular illegality of the importation had not been set forth; for if an indictment set out the offense with greater particularity than is required, the proof must correspond with the averments, and nothing descriptive of the offense can be rejected as surplusage. U. S. v. Brown [Case No. 14,666]; U. S. v. Howard [Id. 15,403]; U. S. v. Foye [Id. 15,157]. But it is believed that the indictment would have been bad, if the allegations of illegality of the importation had been simply that it was contrary to law, without showing the facts constituting such illegality, or stating the particular illegality intended to be proved.

Upon the whole case, it is very clear that the count on which the defendant was convicted is not sufficient to sustain a conviction; and the motion in arrest of judgment is therefore granted.

Order accordingly.

Case No. 16,474.

UNITED STATES v. THOMAS.

[2 Cranch, C. C. 36.] [1]

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

PAROL EVIDENCE—DEED FOR SLAVE.

In a criminal case, parol evidence may be given to explain the intention with which a deed

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

was made; and to prove that although it purported to convey a negro to the grantee, his executors and administrators forever, the grantor intended to convey only his own title.

Indictment for selling negro Flora as a slave for life, who was entitled to freedom at a certain age. To support the prosecution the United States produced in evidence a mortgage from the defendant, Thomas, to a trustee for the security of Edgar Patterson, including, among other property, three negroes; one of whom, Flora, was entitled to freedom in about three years from the date of the deed. The other two were slaves for life. The deed made no distinction between them. The habendum was to the trustee, his heirs, executors, administrators, and assigns forever; with a power to the trustee to sell in case of any default, and a general warranty against the claims of all persons. The defendant offered evidence that he had informed Mr. Patterson, the cestui que trust, before the execution of the deed, that Flora was not a slave for life.

Mr. Caldwell (who, in the absence of Mr. Jones, prosecuted for the United States) objected that parol evidence could not be given to contradict the deed.

But THE COURT (FITZHUGH, Circuit Judge, absent) said that, in a criminal case, parol evidence might be given to explain the intention, the quo animo, with which the deed was made, and to prove that the defendant only meant to sell his right to her service during the term.

Case No. 16,475.

UNITED STATES v. THOMAS.

[3 Cranch, C. C. 293.] [1]

Circuit Court, District of Columbia. May Term, 1828.

PERJURY—AFFIDAVIT.

Perjury may be committed in an affidavit to an account, for the purpose of getting it passed by the orphans' court.

Indictment [against Thomas D. Thomas] for perjury in making affidavit to an account of Barton against Bryan's estate, for $157 for five years' board of a child, for the purpose of getting it passed by the orphans' court.

The question submitted by Mr. Key, for defendant, and Mr. Swann, for the United States, was, whether the affidavit made by the defendant, on the 27th of December, 1827, before Robert Clarke, a justice of the peace, was perjury, if false.

Mr. Key contended that it was not in a judicial proceeding. The defendant had sworn, in that affidavit, that he knew the account to be just and true; and that the creditor (Barton) had boarded a child for Bryan for five years; and that Bryan had agreed to pay him $30 a year for the board of the child.

But THE COURT, upon consideration of the testamentary act of Maryland of 1798 (chapter 101, cl. 9, § 8), and the act of 1785 (chapter 46), was of opinion (nem. con.) that the affidavit was taken in a judicial proceeding, and if knowingly false, it might be perjury.

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

Case No. 16,476.

UNITED STATES v. THOMAS.

[1 Hayw. & H. 243.] [1]

Circuit Court, District of Columbia. March 8, 1847.

DEPOSITIONS IN CRIMINAL CASES—COMMISSIONS—COMPELLING ATTENDANCE OF WITNESS — JURISDICTION OF COURT—ATTACHMENT FOR CONGRESSMEN.

1. The court has no power to issue a commission in a criminal case, when the witness is within the jurisdiction of this court.

2. The jurisdiction of this court is co-extensive with the Union, and its coercive power extends to witnesses in Missouri or any of the states.

3. The court will not issue an attachment against a member of congress who declines to attend as a witness.

In the alleged bill of indictment it is charged that the defendant [Francis Thomas] published or caused to be published the following libelous matter: "That Colonel Benton and his family permitted Miss McDowell to be seduced by a certain individual, and that they knowing this procured her marriage with him."

Mr. Key, P. R. Fendall, and Waddy, Thompson & Crittenden, for the prosecution.

Walter Jones and Wm. P. Maulby, for the defence.

March 27, 1846.

Mr. Jones, for the defendant, moved the court that a commission be issued to take the deposition of Mrs. Linn of Missouri, an important witness in the case, who is unable to attend on account of indisposition.

The counsel for the prosecution objected to such a proceeding, on the ground that the court had no authority to issue a commission to take depositions in criminal cases unless by consent. Another motion was made that the trial be postponed until next term.

CRANCH, Chief Judge, refused the granting of a commission to take the deposition of the absent witness. In their opinion the court had no power to issue a commission in a criminal case, when the witness was within the jurisdiction of the court, and this court has coercive power in the state of Missouri and all over the Union.

Mr. Jones moved that time be given the accused to file an affidavit showing cause for a continuance.

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

Mr. Fendall moved for an attachment against the Hon. Mr. Rilfe, of Missouri, and asked if the court had any power to coerce the attendance of a member of congress?

Mr. Crittenden, in support of the power of the court to compel the attendance of the witness who had treated the process of the court with contempt. He contended that no member of congress could plead privilege as a matter of right, nor plead it as an excuse unless his legislative duties were so pressing and the public interest so important as to require his attendance to them.

THE COURT decided not to issue the attachment against the Hon. Mr. Rilfe, who has declined to attend as a witness.

May 7, 1846.

After argument by counsel THE COURT was of opinion that the defendant was entitled to a new attachment against Mrs. Linn, and consequently postponed the trial until the attachment could be returned.

Mr. Crittenden, on behalf of the prosecution, named the second Monday in November for the time of trial, and read a formal consent signed by the Hon. Mr. Benton and the district attorney, providing that a commission may be issued to take the testimony of Mrs. Linn before two justices of the peace in the city of St. Louis, within fifty days from the present date, three days' notice being given to Messrs. Lawliss, Grant & Guyer, of said city, attorneys.

March 4, 1847.

Mr. Maulby moved for a further postponement of the trial, on the ground of the unavoidable absence of the defendant at Annapolis, and the necessary absence of Mr. Jones, senior counsel, who was engaged in the supreme court.

The motion was resisted by Mr. Preston and Mr. Fendall.

THE COURT made the following decision: If the defendant or his counsel will admit the publication here of the supposed libelous matter charged in the indictment, and the publication of which would be admitted in a regular plea of justification, or agree to take the deposition of Mr. Hopkins immediately, and shall agree to file by Saturday next, at 10 a. m., a specification of so much of the supposed libelous matter as he intends to justify, the cause may be postponed to Monday next, at 11 a. m., when the cause must peremptorily proceed to trial.

March 8, 1847.

The counsel for the defendant asked leave to abandon all the purposes of the defendant of establishing the truth of his charges against the prosecution in this case.

The counsel for the prosecution congratulated the court on the termination of the cause, and tendered their acknowledgment to the counsel on the other side for the honorable and proper course they had pursued.

The counsel for the United States considering the object of the prosecution to have been fully accomplished, he thought it his duty to enter a nolle prosequi on the case.

THE COURT signified their approbation of the suggestion of the district attorney, and expressed their gratification that an end was put to the case. They directed the nolle prosequi to be entered, and it was so entered at the October term of the court.

Case No. 16,477.

UNITED STATES v. THOMAS.

[See Case No. 16,473.]

UNITED STATES (The THOMAS AND HENRY v.). See Case No. 13,919.

Case No. 16,478.

UNITED STATES v. THOMASSON et al.

[4 Biss. 99.] [1]

District Court, D. Indiana. July, 1866.

VIOLATION OF REVENUE LAW—PARTNERSHIPS—INTERPRETATION OF STATUTE.

1. Every partner is civilly liable for violations of the revenue law by his co-partners, whether he knew of, or consented to, such violations, or not.

2. The 91st section of the internal revenue act of March 3, 1865 [13 Stat. 475], must be so construed as to create a penalty of three hundred dollars for every violation of it.

3. Penal statutes not authorizing indictments are not within the rule of criminal law, that a man is not punishable unless he has been guilty both of a criminal act or omission and a criminal or unlawful intent.

John Hanna, U. S. Dist. Atty., A. G. Porter, and M. M. Ray, for the United States.

McDonald, Roach & Sheeks, for defendants.

McDONALD, District Judge. This is an action of debt on the 91st section of the internal revenue act of March 3, 1865 (13 Stat. 475). The declaration charges, that the defendants [John D. Thomasson and William P. Stults] were manufacturers of tobacco, at Bedford, Indiana; and that, with intent to evade the revenue duties, they fraudulently marked one hundred and twenty boxes of their manufactured tobacco with the proper inspector's marks, the same never having been either inspected or marked by said inspector.

The defendant pleaded the general issue; and by agreement a jury was waived, and the cause was tried by the court. At the request of counsel, the court found specially. This special finding was as follows: "That during the whole of the year 1865, the defendants and one Joseph Gravely (who was sued in this action, but not served with process) were partners in the business of buying, manufacturing, and selling tobacco in the town of Bedford, Indiana; that, during that year, and before the commencement of this action, they manufactured and put up in

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

boxes, in said town, more than five thousand pounds of tobacco in more than three hundred of said boxes; that, in that town, in the month of October, 1865, they fraudulently marked, in the likeness and imitation of the proper inspector's mark, fifty of said boxes of manufactured tobacco, then their joint property as such partners as aforesaid, with the intent to evade the duties thereon, in violation of the act of congress in such case made and provided; that said fifty boxes of tobacco were never inspected or marked by any proper United States inspector of tobacco; that said defendants then and there, as such partners as aforesaid, in the usual course of their trade and business, sold several of said boxes of tobacco, thus fraudulently marked as aforesaid; that said John D. Thomasson, however, had no actual knowledge of, and gave no actual consent to, the said fraudulent marking of said boxes of tobacco and the sale thereof till this suit was commenced; but that, under the circumstances in evidence on the trial, it was his duty, at his peril, to see that no such fraudulent marks were made on any of said boxes of tobacco. Therefore, the court finds the issue joined for the United States, both as against the said Thomasson and the said Stults, and assesses the plaintiff's debt at the sum of fifteen thousand dollars."

On the announcement of this finding, the defendants jointly moved for judgment thereon in their favor. At the same time, Thomasson separately moved for a judgment on the finding in his favor. And along with these motions, the defendants also moved in arrest of judgment.

Counsel agree that all these motions shall be considered and decided together. We therefore proceed to their consideration in the order above stated.

1. The joint motion for judgment on the finding in favor of the defendants, I think is entitled to very little consideration. There can be no doubt that the finding is sufficient to justify a judgment against Stults. And, as under the practice of this court, though perhaps contrary to the common law, this case might be dismissed as to Thomasson, and a separate judgment rendered against Stults, it is clear that this motion must be overruled.

2. The separate motion for a judgment on the finding in favor of Thomasson deserves more attention. It appears by this finding that Thomasson had no actual knowledge of the fraud charged, and gave no actual consent to it. And this circumstance involves the question, whether, as a partner, he is chargeable for the fraud of his co-partner touching a transaction of which he knew nothing and to which he never consented. In other words, as a partner, was he bound in law, at his peril, to prevent the fraud, or to suffer the penalty?

Without doubt, it is a general rule, that every partner is civilly responsible for the fraud of his co-partner perpetrated in relation to the partnership business. On the other hand, it is certainly a general rule that, in criminal law, no man is punishable unless he has been guilty both of a criminal act or omission and a criminal or unlawful intent. Without the latter there can in general be no crime. And it may be plausibly argued that the reason of this rule applies to all penal statutes. So far, however, as I can learn, penal statutes not authorizing indictments have never been considered as within the rule. The same reason which would apply the rule to such statutes, would also apply it to civil actions for libels. For every libel is a malicious defamation; and malice always supposes a wicked intent. Yet, in an action for a libel, published in a newspaper, against the proprietor, it has been held that he was liable, though it was published against his orders and without his knowledge, in his absence. Dunn v. Hall, 1 Ind. 344.

And in England it is held that the proprietor of a newspaper is answerable for the act of his agent or co-partner, not only civilly, but criminally, though there was no proof of personal knowledge of it on the part of the proprietor. Rex v. Walter, 3 Esp. 21.

The reason of the doctrine in all such cases must proceed on the ground that it is the duty of the proprietor of every newspaper, at his peril, to see that his publications contain nothing libelous; and that every omission of that duty is culpable negligence, equivalent to a malicious or unlawful intent.

"The same principles," says Collyer, "apply to breaches of the revenue laws." Colly. Partn. 306; Attorney General v. Stranyforth, Bunb. 97. And certainly, by the same reasoning, it would seem that when partners engage in the manufacture and sale of tobacco, which, by the revenue law, must be inspected and marked by a United States inspector, every one of them must, at his peril, take care that the revenue be not defrauded by any forged inspection marks on the boxes of tobacco manufactured and sold by the firm.

As well in the case of libels as in the case of revenue frauds, the act of an agent is the act of his principal. And, in such cases, the principal is liable under the rule, that "Qui facit per alium, facit per se." Now, every partner is an agent for all his co-partners. His acts bind the firm, and are, in legal contemplation, the acts of the firm. Cliquot's Champagne, 3 Wall. [70 U. S.] 114.

There are two decisions of the supreme court of Indiana apparently opposed to the foregoing reasoning. Hipp v. State, 5 Blackf. 149; Lauer v. State, 24 Ind. 131. These cases decide that when the agent of the owner of a drinking house, without his knowledge or consent, unlawfully retailed spirits, the owner was not indictable for it. The reason on which these decisions are founded is not very satisfactory. I should hesitate to follow it. I think it would be more rea-

sonable to hold that he who keeps a dram-shop is bound, at his peril, to take care that his agents, in carrying on the business, do not violate the law. But at most, these cases are not quite in point. They were cases of indictment under a criminal statute; this is an action of debt on a penal statute.

The true and just rule, in cases like the present, seems to me to be this: that any violation of the internal revenue laws incurring a penalty committed by a partner in the course of partnership business, is, in legal contemplation, the act of all the partners; and that, therefore, each one of them is liable to pay the penalty. This is the view that Judge Story took of the matter. He says that "if breaches of the revenue laws, by fraudulent importations, or smuggling, or entries at the custom house, are committed by one of the firm in the course of the business thereof, all the firm would be liable penally, as well as civilly, therefor." Story, Partn. § 166. The English authorities abundantly sustain the same view. Consequently, no separate judgment of acquittal can be rendered in favor of Thomasson.

3. The defendants move in arrest of judgment. This motion proceeds on the supposition that the internal revenue act, fairly construed, does not make it penal to forge inspectors' marks on boxes of manufactured tobacco. The 91st section of the act provides that "the penalties for the fraudulent marking of any box or other package of tobacco, snuff, or cigars, by changing in any manner the packages or the marks thereon, shall be the same as are provided in relation to distilled spirits by existing laws." This provision plainly refers us to another provision of the revenue laws, which declares that "any person who shall attempt fraudulently to evade the payment of duties upon any spirits distilled as aforesaid, by changing in any manner the mark on any cask or package, shall forfeit the sum of three hundred dollars for each cask or package so altered or changed." It is plausibly argued in the defense, that, since the last-cited provision does not provide a penalty for a complete forgery of inspection marks, but only for "changing" genuine ones, the case at bar is not within the act. And, indeed, it seems plain enough that under the last-cited provision of the act, a prosecution could only be sustained for "changing" genuine marks, and not for an outright forgery of inspection marks on packages which had no genuine inspection marks on them. But the 91st section, on which this prosecution is founded, does render penal "the fraudulent marking of any box or package of tobacco," and not merely the "changing" of genuine marks; and the only question is, what penalty, taking these two provisions together, is intended? The 91st section, which creates and defines the offense, does not refer us to any other part of the act for a definition. That were supererogatory. We are, therefore, only referred to another part of the act for the penalty. The definitions in the part of the act last above cited are consequently wholly unimportant to the point in question. Upon the whole, therefore, I do not doubt that, construing these two parts of the act together, the meaning plainly is this, that whoever shall be guilty of fraudulently marking any box of tobacco in violation of the internal revenue laws, shall forfeit the sum of three hundred dollars for every box so fraudulently marked. The motion in arrest is overruled, and final judgment is rendered for fifteen thousand dollars.

The members of a firm may be jointly indicted for making a fraudulent monthly return of tobacco manufactured, though only sworn to by one of them. U. S. v. Mountjoy [Case No. 15,828].

Case No. 16,479.

UNITED STATES v. THOMASSON.

[4 Biss. 336.] [1]

District Court, D. Indiana. May, 1869.

INTERNAL REVENUE — PENALTIES — PARDON — INFORMER'S MOIETY — STAY OF PROCESS.

1. Judgment for a penalty under the revenue laws was rendered against T.; at the same time it was adjudged that B. was entitled to a moiety of the judgment as the first informer. Afterward the president, by a pardon, remitted the whole penalty. *Held*, that the pardon operated to remit the moiety adjudged to the informer, as well as to discharge the portion coming to the United States.

2. If the pardon is issued after judgment for the penalty, the court may order a stay of proceedings and process.

Hanna & Knefler, for the informer.
Hendricks & McDonald, for defendant.

McDONALD, District Judge. This was an action of debt to recover penalties incurred under the internal revenue law of June 30, 1864. The 41st section of that act gave a moiety of the penalties to informers. 13 Stat. 239. Charles G. Berry was the informer in this case. At the May term, 1866, of this court, a judgment was rendered against the defendant for penalties amounting in the aggregate to fifteen thousand dollars,—one-half to the use of Berry, whom the court then ascertained and adjudged to be the first informer. [See Case No. 16,478.]

On the 19th of June, 1868, John D. Thomasson, one of the defendants, filed in this court a petition, setting forth the proceedings aforesaid, and stating that before any part of said judgment was paid, namely on the 2nd of April, 1867, the president of the United States, in due form, under his signature and the seal of the government, executed to said Thomasson a full and unconditional pardon of said penalties and judgment. The petition makes profer of the pardon; and it prays that, because an execution on the judgment is threatened by the

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informer, this court may order a perpetual stay of any execution or other process on the judgment. A demurrer has been filed to the petition; and the parties agree that, in deciding the demurrer, the complete record shall be regarded as before the court.

It is not disputed that the pardon, as pleaded, is a valid remission of all the interest of the United States in the judgment in question. But it is contended on the part of the informer that the pardon cannot affect his right to a moiety of the judgment. And it is agreed on all sides that the only question to be decided on the demurrer is, whether, after the rendition of the judgment, and after the court had adjudged a moiety thereof to the informer, the president could constitutionally by his pardon defeat the informer's right to that moiety.

The national constitution declares that the president "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The exception in this provision, according to a well-established maxim of law, strengthens its application to all offenses not excepted; so that we can certainly say that there can be no offense against the United States, except cases of impeachment, over which the president has not an absolute pardoning power. The only difficulty, therefore, in construing this constitutional provision, is as to what are to be deemed "offenses against the United States" within its meaning. On first view, it might seem that these "offenses" only include crimes and misdemeanors. But it is well settled that the term includes much more. According to Judge Story, "the power of pardon is general and unqualified, reaching from the highest to the lowest offenses. The power of remission of fines, penalties, forfeitures, is also included in it." "Instances of the exercise of this power by the president, in remitting fines and penalties, have repeatedly occurred, and their obligatory force has never been questioned." Story, Const. § 1504, and note 4.

According to this well-settled doctrine, it seems to be certain that the constitution of the United States absolutely impowers the president to remit the whole of the penalties in the present case, and all other penalties incurred for offenses against the United States. Of this it appears to me there cannot be a doubt. If, then, the president is clothed with this indisputable power by the constitution, can congress constitutionally, by any provision in acts providing for the infliction of penalties for offenses against the United States, in any respect or degree, limit or modify the constitutional power thus conferred on the president? To put the same question in another form, has congress the power to alter, limit, or modify any authority positively and unconditionally bestowed on any officer of the national government by the constitution? It appears to me clear beyond all doubt that congress has no such power; and that any act of congress assuming such power would be manifestly unconstitutional and void. A high authority has declared that "no law can abridge the constitutional powers of the executive department, or interrupt its right to interpose by pardon in such cases." Story, Const. § 1504. No lawyer would venture to assert that congress could constitutionally limit the president's exercise of the pardoning power within a specified period of time, or to persons resident within the United States. Congress alone can annex penalties, fines, and forfeitures to "offenses against the United States," and may doubtless provide that any designated part, or the whole of such penalties, fines, or forfeitures shall go to common informers. But having done so, the national legislature is, as to these matters, functus officio. And it has no power to say that as soon as his share has been adjudged to the common informer, that portion of the penalty, fine, or forfeiture is by legislation carried beyond the scope of the pardoning power. If such a thing can be constitutionally done, congress might by evasive acts practically deprive the president of his whole pardoning power relating to fines, penalties, and forfeitures. Suppose, for example, that congress should by act provide that in all cases of fines, penalties, and forfeitures incurred for crimes, misdemeanors and all other offenses against the United States, prosecuted either by indictment or penal action, the whole of the fine, penalty, or forfeiture shall go to the first informer, and shall, on the day on which he gives the information, become a vested right in him, so that the president shall cease therefrom to have the power to pardon the same. Under such circumstances, would any jurist hold that the president could not pardon the offense after the information had been given? And yet it would seem very clear that if congress has no power to pass a general law of this kind extending to all cases, there is no power to pass a law limiting its operations to special cases. Indeed, the claim of the informer in the case at bar must proceed on a construction of the act under which the present case was prosecuted, which prohibits a presidential pardon of the claimant's moiety after it has been adjudged to him. The act might admit this construction, were it not for the constitutional provision touching pardons. But it seems to me that such a construction would make the act unconstitutional, and is therefore inadmissible. Without great violence to the words of the act, it is capable of two constructions. One is that congress intended so to vest the right to the penalties in the informer by virtue of the judgment of the court in his favor as to destroy the presidential power of pardoning the offense. And this I understand to be the construction insisted on by the informer. The other construction of the act is that congress meant

to give a moiety of the penalty to the informer subject to the contingency of a presidential pardon, and that the informer was not absolutely vested with the right to the moiety by virtue of the judgment in his favor, but only on the condition that the informer should have a right to the moiety if the president should never pardon the offense. In my opinion, this last construction is as fair and reasonable as the first, even if it was not required by the constitution. Besides, it is a well-settled American rule of construing statutes, that when a statute is capable of two constructions, one of which would render it unconstitutional and the other of which is consistent with the constitution, the latter construction shall be preferred. This rule is only an illustration of a more general rule, that in all cases of writings, whether contracts or statutes, the interpretation must if possible be so made ut res magis valeat, quam pereat. This rule is, I think, eminently applicable to the statute under consideration. If we construe it as intending absolutely to vest in the informer a moiety of the penalty by virtue of the judgment in his favor so as to destroy the power of the president to remit the whole penalty, we must necessarily hold the act unconstitutional. For we have seen that no act of congress can limit, modify, or restrain the president's constitutional pardoning power. But if, on the other hand, we construe the act as only vesting a contingent interest in the informer, subject to be defeated by the president's pardon, we both sustain the validity of the statute and avoid a violation of the constitution. I hold therefore that the latter construction is by far the preferable one.

I believe the question under consideration has never been decided by the supreme court of the United States. In the case Ex parte Garland, 4 Wall. [71 U. S.] 333, the question, however, was alluded to; but it was not involved in the controversy. The point decided in that case related to the right of Garland to practice law in certain courts. And the learned judge who delivered the opinion of the court had occasion to inquire how far a presidential pardon had restored Mr Garland to that right; and he said that in general the pardoning power of the president is unlimited, and then added: "There is only this limitation to its operation,—it does not restore offices forfeited, or property or interest vested in others in consequence of the conviction and judgment." [Ex parte Garland] 4 Wall. [71 U. S.] 381. This remark is a mere dictum of the judge, entitled, indeed, to our respectful consideration, but certainly not binding on any of the national courts. If, by the phrase "property or interest vested in others," the learned judge meant property or interest absolutely and unconditionally vested, I should think he was right, if indeed there could be such a case connected with the question of the pardoning power; and I rather suppose it is just what he did mean. But if he meant to say, as is urged by the informer in the case at bar, that a judgment ascertaining the first informer in a penal action, and awarding to him a moiety of the penalty, takes that moiety out of the operation of the pardoning power, I must dissent from that view. For it is but saying that congress, by giving to an informer a part of a penalty incurred by an offense against the United States, can limit and even defeat, pro tanto, the pardoning power conferred on the president by the constitution. It is observable that in support of this dictum, the learned judge cites only some old English text-books, as Blackstone, Bacon, and Hawkins. On examining these authorities, I find they only maintain this doctrine, that the king cannot pardon "where private justice is principally concerned in the prosecution," nor in case of "offense against a popular or penal statute after information brought." 4 Black. 398, 399. Now it is certain that the case at bar is not one "where private justice is principally," or even at all, concerned. It is a prosecution for a violation of the internal revenue law. Nor is the act on which this suit is brought a "popular statute" in any sense in which the authorities cited employ that phrase. The English popular statutes were acts which provided penalties or forfeitures for certain offenses and provided that a part thereof should be to the use of any one who would prosecute the offender. The right to prosecute was given to everybody—to all the people—and hence these acts were called popular statutes. The informer carried on and controlled the prosecution. It was prosecuted in his own name. He was the only plaintiff. The declaration ran thus: "John Smith, plaintiff, who sues as well for our sovereign lord the king, as for himself in this behalf, complains," &c. 2 Chit. Pl. 13. The informer was liable for costs; but the king was not liable. In such a case, it was reasonable that after the informer had incurred liabilities and made himself responsible for costs, the king should not be permitted to remit the penalty sued for.

On the contrary, prosecutions for fines, penalties, and forfeitures under our internal revenue laws, are not "popular actions" in the English sense of that phrase. In the case at bar, and in like cases, the penalty must "be sued for and recovered in the name of the United States." 13 Stat. 239. The informer is not a party to the action. The government is the only plaintiff. The informer need not even be named in the declaration. And the whole thing is most unlike the popular actions mentioned in the English books. The fact, therefore, that the king could not remit the informer's share after a popular action was brought throws no light on the president's pardon-

ing power. The king's power arose from usage. It was not conferred by any written constitution, or supported by any act of parliament. Courts in construing the constitution, have frequently resorted to English common law Thus, the terms ex post facto law, habeas corpus, and the like, found in the constitution, are old technical terms of the English law; and we may very properly resort to that law for their meaning in defining the same terms as they occur in the constitution. But we have no occasion to resort to England to define the pardoning power vested in the president. The constitution defines it, and declares its meaning and extent. It extends it to all offenses against the United States, except in cases of impeachment. The power of the British sovereign to pardon offenses furnishes us no guide in determining the extent of the pardoning power of the president. In judging the former, we look to that ideal thing called the "British Constitution"; in judging of the latter we consult our national constitution. Nor are the powers of the two on this subject identical. The president cannot pardon impeachable offenses; the king can. According to 4 Black. 398, the king cannot pardon a common nuisance while it remains unredressed; but the president undoubtedly can whenever it is an offense against the United States.

We shall notice this matter further when we come to examine a late decision made by the judge of the district of Kentucky, which seems to be wholly based on the English limitation of the king's pardoning prerogative. It is very certain that the supreme court of the United States does not regard the case Ex parte Garland, supra, as settling the question now under consideration. For, in the later case of Armstrong's Foundry, 6 Wall. [73 U. S.] 766, the question was before that court, and was left undecided. And the chief justice said: "We think it unnecessary to express an opinion at present in relation to the rights of the informer."

It has been urged in favor of the informer that his is a vested right; and that, therefore, the president could not remit the moiety in question. But this is begging the question. For if the power of the president to remit the whole penalty remained after the judgment was rendered, the informer had not a vested right, but only a right contingent on the exercise of the pardoning power.

I find but one decision in the national courts directly bearing on the question under consideration. I allude to a decision made by Hon. B. Ballard of the Kentucky district. It was the case of U. S. v. Harris [Case No. 15,312], and it decides that "the federal executive has no constitutional authority to remit moieties adjudged to informers under the internal revenue act of June 30, 1864." I have a very high opinion of the legal learning of Judge Ballard; and it is painful to be forced to differ on a constitutional question from a gentleman of so exalted a judicial reputation. The opinion, too, is very handsomely expressed, and sustained by a course of most ingenious reasoning. But it is wholly based on the English doctrine touching the king's pardoning power; and it must be confessed that the learned judge has numerous and high authorities for construing the pardoning power of the president by the pardoning power of the British sovereign. Nor do I perceive that the learned judge claims that, aside from British precedents, our national constitution sets any other limitation to the president's pardoning power than the exception touching impeachments. His argument does not deny that the language of the constitution is wide enough to comprehend moieties of penalties adjudged to informers; but he insists that it must not be construed to comprehend them, because the British king had no such power. With all deference, this seems to me to be a non sequitur. I repeat that in cases of technical terms, occurring in the constitution and borrowed from English law,—such as bills of attainder, habeas corpus, ex post facto law, corruption of blood, impeachment and the like,—it is very proper in defining them to look to the sense in which the English lawyers used them before the constitution was adopted. But the present is not such a case. Here, indeed, the technical word, "pardon," is employed. But we have no dispute about the meaning of that word. The dispute is whether the president may remit the whole penalty incurred "for an offense against the United States," after half of it has, under an act of congress, been adjudged to an informer. And this question does not depend on the construction of any technical terms, but on the construction of the language of the constitution, which declares that the president "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Here, the constitution plainly declares, defines and limits the power. In its very terms it extends to all offenses against the United States—whether informers become interested in penalties incurred by these offenses or not—except only in cases of impeachment. And I repeat that the naming of this exception strengthens the application of the power to every case not excepted, on the rule that "enumeration weakens the application to things not enumerated, and exception strengthens the application to things not excepted."

I maintain, therefore, that in defining the extent of the president's pardoning power, we must look to the language of the constitution, and not to the language of the British jurist touching the pardoning power of the king. The constitution provides that "congress shall have power to lay and collect taxes." In order to judge of the extent of that power, would anybody institute

an inquiry into the power of the British parliament on the subject of levying and collecting taxes? Yet such an inquiry would be just as reasonable as to inquire into the king's pardoning power in order to judge of the extent of that of the president. I think that the pardon in question is operative as to the entire penalty; and therefore I overrule the demurrer.

Case No. 16,480.

UNITED STATES v. The THOMAS SWAN.

[19 Law Rep. 201.]

District Court, D. South Carolina. July 12, 1856.

STEAM VESSELS—SAFETY OF PASSENGERS—REGULATIONS—CARRIAGE OF SLAVES—INSPECTOR AS WITNESS.

1. The act of congress of August 30, 1852, c. 106, §§ 3–5 [10 Stat. 62], providing that vessels propelled by steam, and carrying passengers, shall be provided with certain pumps, life-preservers, &c., applies to a vessel so propelled which actually carries passengers, although not usually and regularly engaged in that business.

2. Negro slaves, shipped by their owner, are passengers, within the meaning of this act.

3. An inspector under this act, although he may be the informer, is not entitled to any part of the penalty (as he would have been under the act to which this is an addition), and is therefore not disqualified by interest from testifying in behalf of the libelants.

At law.

MAGRATH, District Judge. The questions which are raised in this case involve the consideration of certain portions of the act of congress, passed August 30, 1852, and also the act of congress passed July 7, 1838 [5 Stat. 304]. The object of both acts is to provide for the better security of the lives of passengers on board of vessels propelled in the whole or in part by steam. And the act of congress passed August 30, 1852, was evidently intended to embrace every provision which could be suggested as likely to assist in the accomplishment of an end so meritorious, and provide against the recurrence of accidents, so shocking as had been those which preceded, and induced its enactment. The 3d, 4th, and 5th sections of the act of 1852 are those of which, in this case, it is complained, there has been a violation. These sections provide that every vessel propelled by steam, and carrying passengers, shall have pumps of a certain description, to be placed in certain designated parts of the vessel, with suitable and well fitted hose attached to each; and pipes for the supply of these pumps passing through the sides of the vessel, so low as to be at all times in the water when the vessel is afloat; that every such vessel shall have at least two good and suitable boats, supplied with oars, one of which shall be a life boat, made of metal, fire proof, and in all respects a good substantial, safe sea boat, capable of sustaining inside and outside fifty persons; that every such vessel shall also have a good life-preserver, made of suitable material, or float, well adapted to the purpose, for each and every passenger, with buckets and axes. The steamer Thomas Swan, in the month of September, 1855, made a voyage from the port of Baltimore to the port of Charleston, having on board, according to her manifest, seven negroes belonging to Thomas Petigru. Those negroes, according to the receipt, were to be delivered to Robertson, Blacklock & Co., "paying the passage and other customary expenses, the danger of the sea and other casualties excepted." By a memorandum indorsed on this receipt, it is provided that the negroes in their transportation would be "at owner's risk of loss or injury." The libel charges that the steamer Thomas Swan is a vessel propelled by steam, carrying passengers, and has incurred the penalty provided in the act of congress, of 1852, because of the absence of the several provisions for the security of passengers, to which I have adverted.

On the part of the United States, Elias E. Hughes, an inspector under the act of 1852, was produced as a witness, and exception was taken to his competency on two grounds: (1) Because he was a party to the record; and (2) because he was interested in consequence of the act of July, 1838, to which the act of August, 1852, is an amendment, providing that the penalty in cases under it, shall be divided between the United States and the informer.

I have overruled the objection on both grounds. It is true, that the name of Elias E. Hughes is mentioned in the libel, but it is not necessarily there; is not connected with any part of the libel, and may have been altogether omitted. To the mention of his name, as it occurs in this libel, I attach no more consequence than, if this were an indictment for a misdemeanor, I would give to the fact, that the prosecutor's name was attached to the affidavit annexed to the warrant, and on which the indictment rested. It may be true that he gave the information, but this is not a prosecution in behalf of Elias E. Hughes, but of the United States. It is not the witness who asks the enforcement of the penalty, but the United States, whose laws are in this particular charged to have been violated. Nor am I able to find sufficient weight in the objection made to the witness on the score of interest, to exclude him on that ground. If I had come to the conclusion that the witness was entitled in case of conviction to the half of the penalty, I should even then have hesitated very long before I would, in sustaining the objection on that ground, defeat in a very great degree, if not altogether, the operation of this law. It is true that interest disqualifies, but it is also true that there are numerous cases in which, although the objection on the ground of interest is manifest, yet from ne-

cessity in such cases, the witness, although interested, is admitted to testify. The rule which applies to the admission of the testimony of an agent, although interested, is very familiar. I have not, however, any occasion to decide how far, in such a case as this, an informer who shares in the penalty is thereby rendered incompetent; because I do not perceive in what manner the interest of the witness is made to appear. It is true that the act of 1838 does provide, that the penalty declared in its provisions shall be divided, and one half shall be given to the informer. But I find no such provision in the act of 1852, and the questions raised in this case are really under the act of 1852. The act of 1852 declares, in the last section, that if a vessel is navigated without complying with the terms of this act (1852), the owners and the vessel shall be subject to the penalties contained in the 2d section of the act, to which this is an amendment—that is, the act of 1838. If I had to stop here, I should feel warranted in deciding that this declaration of the amount of the penalty to which the owner or vessel would be liable, by reference to another act, would not be the re-enactment of any division, which had been made, in such preceding act, of the penalty so to be enforced. But in fact the act of 1852 does not, in its subsequent provisions, leave room for argument on this branch of the question. By the 24th section, it is made the duty of the collectors, or other chief officers of the customs, and of the inspectors appointed under this act of 1852, to enforce the provisions of law against all steamers arriving and departing; and the omission of this duty, by such collector or other chief officer of the customs, or inspector, negligently or intentionally, subjects him to removal from office, and the penalty of one hundred dollars for each offence. The 33d section of the act of 1852, provides the compensation which shall be paid to the inspectors under this act; and the 37th section of the same act provides, that any inspector who shall, upon any pretence, receive any fee or reward for his services rendered under this act, except what is herein allowed to him, shall forfeit his office, and, if found guilty on indictment, be otherwise punished, according to the aggravation of the offence, by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both. These provisions of the act of 1852 would seem not only to make it clear that the inspector is not entitled, by virtue of this act, to claim a share of the penalty; but that such inspector, if he should receive more than the compensation declared by the act, would be subject to the very heavy penalties therein declared.

The witness was then examined, and proved that in the case of the steamer Thomas Swan, he examined her at the time of her arrival in this port, in September, 1855; that there was a clear violation of the act of 1852, in the omission to provide any of the articles set forth in the 3d, 4th and 5th sections of the act. The transportation of the negroes was proved by the testimony of Thomas H. Jervey, the deputy collector, who gave in evidence the admissions of the captain.

It was argued that the penalty did not attach, because the act of 1852 related to vessels propelled by steam and carrying passengers; and that in this case the steamer was not a vessel engaged in the business of carrying passengers; that the provision made for the security of passengers under the act of 1852, as appears by its numerous requisitions, was intended for such vessels as were employed in the business of transporting passengers, and was not intended for such as occasionally carried passengers. I can find nowhere in the letter of the act, nor in the mischief which the act was intended to relieve, any such exception as is contended for. The great object was to save human life; the means adopted were certain safeguards and precautions, which, in case of accident, would mitigate the horrors which attended the happening of those accidents then so frequent. I cannot consider that congress intended to say that these safeguards should be provided in certain vessels and not in others. It intended to protect human life, by these modes, so far as it could; and in all vessels which were subject to such accidents as these safeguards might avert, or at least mitigate in their consequences. Whenever a vessel propelled by steam, and therefore liable to these accidents, undertook to carry passengers, and, in doing so, exposed them to the dangers against which congress intended to provide, then, and in every such case, it was a vessel carrying passengers, within the letter and the mischief of the act, bound by all the provisions and subject to all the penalties which are expressed in the act. It is said that such a requisition on a vessel which does not generally carry passengers is oppressive. If it does so operate, the relief is very accessible—let it refuse to carry the passengers. But while it carries passengers, and receives hire for it, it must conform to such requisitions as are by law imposed on vessels propelled by steam with passengers on board.

It was further urged, that in this case the subjects of transportation were negroes; that they are recognized as chattels, and are not to be understood as included in that class described in the act of 1852 as passengers; that when transported they are taken as property; for them freight is paid, not passage money; that like other chattels they are under the protection of the owner, and congress has no right to legislate at all in relation to them.

When the argument is attempted to be strengthened by a reference to the difference between the term freight and passage money, as being in themselves sufficient to describe the subject to which they are applied, a significance is given to them much more important than is deserved. Freight, in the general legal sense of the term, means all reward,

hire or compensation paid for the use of ships. Abb. Shipp. (Story, Ed.). It adds to convenience in general use, to adopt the one term or the other, according to our wish to be understood as referring to persons or property. But we find numerous instances where freight of the person is the term used to designate the hire of the carriage of the person. I could not, therefore, if the fact was, as the argument assumes it to be, decide that negroes are not passengers under the act of 1852, merely because the hire of their carriage from the port of Baltimore was termed freight and not passage money. But it is not so. The receipt of the captain, produced in evidence, expresses the obligation of the owner to pay "the passage money and other necessary expenses." And did I give to the argument all the weight that is claimed, I should only, in so doing, provide the means for holding the owners to a contract, entirely different from that which they profess to have made. Although the negroes in this case were the property of an owner whose authority to hold, control, and dispose of them, is recognized and enforced by the laws of this state, I cannot perceive the inconsistency nor the impropriety, nor the interference which is said to be involved in extending to them all the protection that, in the act of 1852, is attempted to be provided against the carelessness or accidents of a carrier. Various laws provide in the case of the carrier for the security of property and life. But no rule of law, ever declared, which increases the security of property in the hands of a carrier, has been held to be an interference with the rights of the owner. His rights cannot be more fully recognized than in the multiplication of the securities which the law gives him for the protection of the property in which his rights are involved. It is said that the protection of the slave is committed to the master, and not to the congress of the United States. But the same thing may be said of any other chattel of which the owner is possessed. The rule of property in the case of the master and his slave is the same, unless limited in certain particulars, as I shall presently show, as is enforced in the case of a horse or a bale of goods. And to claim for a subject the incidents of property, including the right of ownership, is to affirm its right to such protection from laws made or to be made, as the legislative department of the government may deem proper. Indeed, it would be difficult to illustrate the fitness of this view more conclusively than by giving practical effect to the argument which is addressed to this part of the case by the respondent. Suppose that the act of 1852 contained an express provision that it should not be held applicable in any case where negroes should be the only persons carried. Would not such an enactment, as well on the ground of humanity as of right, be exposed to the severest censure? The owner would have an irresistible claim to a repeal of such legislation, as not only thus excluded his property from the protection which, in other cases, it gave to human life, but in such exclusion, from its peculiar qualities, afforded it in fact less protection than it gave to a bale of merchandise. For, in addition to all such other qualities as are in a bale of goods as property, in the negro, as property, there is life,—the essence of the right itself. Refuse protection to that, without which the right of property is valueless, and the subject of property to which such refusal extends, is less protected than another piece of property, which does not require that protection.

Although, according to the law of South Carolina, the negro is the property of the owner, and a sale or transfer, voluntary or otherwise, is made in the manner and according to the form that is used in reference to a chattel; yet the law of South Carolina, in many particulars, distinguishes between the negro as the subject of property and any other chattel. The owner of a bale of goods may destroy it if he is pleased to do so; but the owner has no such right in relation to his negro. A cruel beating of a slave is an offence against the law of the state of South Carolina; and if the owner shall take the life of his slave, he may incur the same penalty that awaits him who takes the life of one of his own class. The law of South Carolina does not regard the ownership in all respects as absolute, but in a case of life, and even in a case of cruel beating, subordinate to the provisions just referred to. And in this, the law of the state, and the law of the United States concur; for they are both enacted for the protection of life, and its security from such dangers as result from malice or neglect. But it is not only in such cases as I have alluded to that a discrimination is made between the negro, as the subject of property, and any other chattel. The will, which in the negro operates as a motive of action, is recognized in all cases where its effects are developed, as materially qualifying the liability of those who otherwise would be held responsible. A carrier who would otherwise be liable for the loss of a negro, as he would be of any other chattel committed to his care, is relieved of such liability when the loss is made to appear as the consequence of the exercise of his will, on the part of the negro. And even in cases where the negligence of an agent who is charged with the care of negroes is established, but the proximate cause of the loss, although connected with such negligence, is to be referred to some direct exercise of the will, the agent has been relieved from liability; when in the case of any other chattel, the same negligence, resulting in loss, without the intervention of any quality like that of the will, breaking the immediate connection between the negligence and the loss, would have fixed his liability. It seems to me, then, quite clear that, although the negro is regarded, in law, as but a chattel, yet the discrimination recognized by the same law, between the negro and any other chattel, is sufficient

to bring him within the definition of a passenger. "Every person who pays a stipulated sum for his passage, or is on board in any shape, even free of charge, and has neither interest in the cargo nor belongs to the ship's crew, is a passenger." Jac. Sea Laws.

It is therefore ordered and decreed, that the respondents pay to the libellants the penalty of five hundred dollars, provided in the act of congress of August 30, 1852, with the costs of these proceedings.

Case No. 16,481.

UNITED STATES v. THOMES.

[Hoff. Land Cas. 82.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANTS.

The validity of this claim undoubted.

[Claim of Robert H. Thomes for the Rancho Saucos, alleged to contain five leagues of land in Colusi county; confirmed by the board of land commissioners, and appeal taken by the United States.]

S. W. Inge, U. S. Atty.
E. O. Crosby, for appellee.

HOFFMAN, District Judge. In this case an appeal has been taken on the part of the United States, but no reason for rejecting the claim is mentioned by the district attorney, nor do there seem, on examining the record, to be any grounds for doubting its validity. The original grant is produced, as well as the expediente from the archives, with the record of approval by the departmental assembly. The conditions have been fully complied with, and the map and the description in the petition to which the conditions of the grant refer identify the land.

The claim of the appellee must therefore be confirmed.

Case No. 16,482.

UNITED STATES v. THOMES.

[Hoff. Land Cas. 83.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANTS.

The validity of this claim undoubted.

[Claim of Albert G. Thomes for the Rancho Rio de los Molinos, alleged to contain five leagues of land in Butte county; confirmed by the board of land commissioners, and appeal taken by the United States.]

S. W. Inge, U. S. Atty.
E. O. Crosby, for appellee.

HOFFMAN, District Judge. No additional testimony on the part of the United States has been taken in this court, nor has any reason for reversing the decision of the board been suggested—the case having been submitted on both sides without argument. On looking into the transcript we find the genuineness of the original title fully established by proof. The expediente is duly produced from the archives, containing the petition and usual documents, and also the approval of the departmental assembly. The conditions of the grant seem to have been substantially complied with, and the locality of the land is indicated with great precision by the descriptions in the grant and petition, and the delineations on the map which is found in the expediente. The decree of the board must therefore be affirmed.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Case No. 16,483.

UNITED STATES v. THOMPKINS.

[2 Cranch, C. C. 46.] [1]

Circuit Court, District of Columbia. June Term, 1812.

INDICTMENT FOR FORGERY.

The court will not quash an indictment because there was no previous presentment, or order of the court.

F. S. Key, for defendant, moved to quash the indictment because there had not been a previous presentment, or order of the court; nor was it found by the grand jury of their own knowledge, according to the Maryland act of 1722 (chapter 5).

But THE COURT (FITZHUGH, Circuit Judge, absent) refused.

Case No. 16,484.

UNITED STATES v. THOMPSON.

[2 Cranch, C. C. 409.] [1]

Circuit Court, District of Columbia. May Term, 1823.

WARRANT OF ARREST—SIGNATURE BY LEAD PENCIL—RESISTANCE TO ARREST.

1. A signature, in black lead pencil, of a warrant, by a justice of the peace, is not a sufficient signature in law.

2. If a warrant contains, on its face, a cause of arrest within the jurisdiction of the magistrate and purports to have been issued within his local jurisdiction, and is, in other respects, formal, the officer is bound to execute it, and resistance is unlawful, although, in fact, the offence was not committed within the local jurisdiction of the magistrate.

Indictment for assault and battery on Leonard Adams, a constable, who came to the assistance of R. Stevens, a constable, to take the defendant upon a warrant from N. S. Wise, a justice of the peace for this county, upon a charge, upon the oath of Samuel Thompson, of having violently beaten negro Griffin, the slave of Jonah Thompson. The

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

warrant was signed with a black lead pencil.

Mr. Taylor, for defendant, contended that the warrant was void, and did not justify the arrest, because the justice does not state that he acted within this county; because the county is not named in the warrant; nor does it state that the offence was committed in this county; nor that N. S. Wise is a justice of the peace; and because it was not signed by the justice, and Mr. Wise himself states that he omitted to take the oath of the complainant. The beating was proved, in fact, to have been in Virginia. The authority and the jurisdiction must appear upon the face of the warrant.

THE COURT (THRUSTON, Circuit Judge, absent) instructed the jury that the warrant was void because not signed by the justice; the signature in pencil not being deemed by the court a signature, because it is liable to be so easily obliterated.

But THE COURT said that if a warrant contains on its face a cause of arrest within the jurisdiction of the magistrate, and purports to have been issued within his local jurisdiction, and is, in other respects, formal, the officer is bound to execute it, and resistance is unlawful; although, in fact, the offence was not committed within the local jurisdiction of the magistrate.

Case No. 16,485.

UNITED STATES v. THOMPSON.

[4 Cranch, C. C. 335.] [1]

Circuit Court, District of Columbia. Oct. Term, 1833.

LARCENY — INDICTMENT FOR SECOND OFFENCE — AVERMENT OF PRIOR CONVICTION.

To charge the prisoner, as for a second offence, an averment, that, on the 2d day of October, 1832, at a circuit court of the District of Columbia, for the county of Alexandria, the prisoner "was tried and convicted of larceny, as by the record of the said court doth appear," without averring that the conviction was by judgment, and reciting the record of conviction, &c., is not a sufficient averment to justify the court in sentencing the prisoner to the penitentiary, upon an indictment for stealing 55 cents.

This was a common indictment for stealing forty-three cents, and one silver coin of the value of twelve and a half cents. At the foot of which was the following addition: "And the jurors aforesaid further find, that, heretofore, to wit, on the second day of October, in the year of our Lord, 1832, at a circuit court of the District of Columbia, for the county of Alexandria, then duly sitting, the said Henry Thompson was tried and convicted of larceny, as by the said record of said court doth appear."

THE COURT (THRUSTON, Circuit Judge, contra) was of opinion that this was not a sufficient averment to justify the court in sentencing the prisoner to the penitentiary, as for a second offence, under the 13th section of the act of March 2, 1831 (4 Stat. 448). See 1 Hale, P. C. 324, 685, 686; 1 Hawk. P. C. c. 70, § 25; 3 Inst. 46, 172; 1 Chit. Cr. Pl. 459, 460; 2 East, P. C. 919.

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

Case No. 16,486.

UNITED STATES v. THOMPSON et al.

[1 Gall. 388.] [1]

Circuit Court, D. Massachusetts. May Term, 1813.

BOND FOR CUSTOMS DUTIES — PERFORMANCE OF ALTERNATIVE CONDITIONS — VARIANCE.

1. A bond given for the payment of duties in the alternative required by the act of March 2, 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627], is discharged by performance of either part of the condition at the election of the obligor, although the sum named in the condition be less than the duties.

[Cited in note to Duerson v. Bellows, 1 Blackf. 218; Hurd v. Kelly, 78 N. Y. 595.]

[See Babcock v. Pettibone, Case No. 700.]

2. No averment is admissible to contradict the terms of a written instrument.

[In error to the district court of the United States for the district of Maine.]

The original action was brought in the district court of Maine, on a custom-house bond given to secure the payment of duties. The bond was in the common form, with a penalty of $7000, upon condition to be void upon the payment of $3500, or the amount of duties, to be ascertained as due and arising on certain goods, imported into the district of Kennebunk, on the 2d of July, 1812. From the pleadings in the case it appeared, that double duties, under the act of July 1, 1812, c. 112 [2 Stat. 768], were payable on the goods, amounting to $6168.35. That the defendants [Nathaniel Thompson and others] on the day, on which the bond became due, paid to the collector of the district the single duties amounting to $3084.18, and tendered to the collector the further sum of $415.82, making together $3500, in discharge of the condition. The tender was refused. The pleadings in the court below terminated in a demurrer, on which judgment was given for the defendants. [Case unreported.]

Mr. Lee, district attorney of Maine, for the United States, contended that the bond, being in the form prescribed by the statute, the defendants could not take advantage of the alternative condition, to avoid the payment of the duties payable by law.

Mr. Dane, for defendants.

The condition being in the disjunctive, the obligors have an election to perform either part, and by such performance are discharged from the penalty. Laughter's Case, 5 Coke, 22; Layton v. Pearce, 1 Doug. 15; Basket v. Basket, 2 Mod. 201; Grenningham v. Ewer,

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

Cro. Eliz. 396, 539. They have elected the first part of the alternative, viz. the payment of $3500, and have virtually performed it. This is admitted by the pleadings. The plaintiff's replication to the defendant's plea is bad for two reasons. 1. It is double. 2. The main averment contains new matter, and does not stand with the bond. As to duplicity, the first averment of intention in the bond, which is matter of law belonging to the court, is coupled with another averment of fact, viz. of an error in inserting the sum. As to the main averment, it is inadmissible. No averment can be good that varies or contradicts the contract. The same rules of construction and pleading are applicable when the sovereign is obligee, as in any other case. The statute giving the election, the obligor can avail himself of it against the state, as well as against an individual. The statute laying the double duties passed on the 1st of July, the day before the bond was executed. If there was any mistake then in inserting single instead of double duties, it was a mistake of law, not of fact.

Mr. Lee, in reply.

The replication admits only that the $3084.17 were in part payment of $3500. If the replication be double, duplicity can only be taken advantage of on special demurrer. The forfeiture having accrued, the right to elect is lost. The replication states the error to have been by inserting too small a sum, which error the demurrer admits. If the replication and plea be both bad, then, the declaration being good, judgment must be for the plaintiff.

G. Blake and Silas Lee, for the United States.

N. Dane, for defendants.

STORY, Circuit Justice. The principal question, which has been argued at the bar, is, whether the defendants were entitled to the benefit of the alternatives stated, so as to discharge the bond by a compliance with either. The district attorney has contended in the negative, and has argued, that the intention of the bond having been to secure the payment of all the duties due on the goods, it cannot be discharged by the payment of a less sum. As the acts for the collection of duties are public acts, the court are bound to take notice of their provisions. The present bond appears to be taken in the form prescribed by the act of the 2d of March, 1799, c. 128, § 2 [1 Story's Laws, 573; 1 Stat. 627], which expressly requires all bonds for the payment of duties to be with a disjunctive condition, viz. to pay a specific sum, or the amount of duties to be ascertained to be due and arising on the goods imported. It follows, therefore, that no construction of the condition can be admitted, which in the face of the words destroys the legal effect of the alternatives. By the general rule of law, if the condition of an obligation be in the disjunctive, it may be discharged by the performance of either of the enumerated acts at the election of the obligor, for the condition is for his benefit. Basket v. Basket, 2 Mod. 201; Stanley v. Fearne, 3 Lev. 137; Layton v. Pearce, 1 Doug. 15; Laughter's Case, 5 Coke, 22. An exception to the rule is, where the parties have saved the election to the other party. It cannot be successfully argued, that such an election is in this case reserved to the United States. It is distinctly admitted, that the United States cannot, under any circumstances, be entitled to more than the amount of duties; and this would seem to result from the provisions of the 65th section of the act of 1799. If, therefore, the specific sum had been greater than the amount of the duties, the United States could not have been entitled to elect such sum; and if it be less, it is impossible to contend, that the rule of construction is to change with the increase or diminution of the sum, and not by the terms of the condition. In the nature of the case, therefore, as arising under the laws for the collection of duties, there is nothing to raise an implication in favor of an election in the United States. On the other hand, the words of the condition are expressly in favor of an election by the obligors. "If the obligors, or either of them, their heirs, &c., shall and do, on or before, &c., pay the sum of $3500, or the amount of the duties," &c., are the words of the condition. Plainly, therefore, it is at their option to do either, and if either be done, it is a discharge of the bond. But it is suggested, that the bond is to be considered as a bond with a single condition for the payment of duties. To this we answer, that such a construction is repugnant to the alternative terms of the condition and is therefore utterly inadmissible.

It is averred by the United States in their pleadings, that the bond was executed to the United States, to secure the just and true amount of duties accruing upon the imported goods, and that the sum of $3500 was erroneously inserted in said condition, instead of the true amount of duties, viz., $6168.35. What is the true intent and meaning of a written instrument is not matter of extrinsic averment, but in cases, where there is no latent ambiguity, depends on the instrument itself. And an averment, that the sum stated in the condition is erroneously inserted for another sum, is inadmissible upon the general ground, that it contradicts the language of the condition. Whatever might have been the intentions of the parties, we can only decide upon their acts, and not upon their intentions abstracted from their acts. We construe this instrument precisely as we should, if it were between individuals, and it would be highly dangerous to adopt a different rule. On the whole, we entertain no doubt, that the bond was discharged by the performance of either part of the disjunctive of the condition, and the judgment must be affirmed. The United States are not, how-

ever, without remedy against the defendants for the difference between the sum paid and the duties due. Judgment affirmed.

Case No. 16,487.

UNITED STATES v. THOMPSON.

[Gilp. 614.] [1]

District Court, E. D. Pennsylvania. March 15, 1836.

BONDS—JOINT AND SEVERAL OBLIGORS—RELEASE—REVIVOR OF JUDGMENTS—DEFENSES—RELEASE OF DEBTOR OF UNITED STATES.

1. Where two persons are bound jointly, or jointly and severally in an obligation, the release of one of them will discharge the other.

2. Where a separate judgment has been rendered against one obligor on a joint and several obligation, and a scire facias is issued to revive the judgment, the defendant cannot avail himself of a release given to his co-obligor subsequent to the original judgment.

3. Where a scire facias is issued to revive a judgment, the defendant cannot avail himself of matters of defence which occurred previous to the original judgment.

[Cited in Loeler v. Moore, 20 D. C. 9.]

4. Where a joint judgment has been rendered against two defendants, a release of one of them subsequent to the judgment will discharge the other.

5. Where a release is given to a debtor of the United States by the secretary of the treasury, under the provisions of the act of 2d March, 1831 [4 Stat. 467], it has the same effect and is subject to the same legal consequences as an ordinary release from a creditor to a debtor.

[Cited in brief in Walker v. Com., 18 Grat. (Va.) 23.]

6. Where a joint judgment is rendered against two obligors in favour of the United States, and one of them is subsequently released under the provisions of the act of 2d March, 1831, such release is a sufficient defence under a plea of payment to a scire facias, issued to revive the judgment against the other obligor.

7. Where judgment has been rendered against a defendant who has subsequently conveyed real estate to the plaintiff, he is entitled, under a plea of payment, to a scire facias, issued to revive the original judgment, to a credit for the value of the property at the date of the conveyance.

In the years 1825 and 1826, eight custom-house bonds for the payment of sundry duties were given by Samuel Thompson and Jonah Thompson to the United States of America. The obligors having become insolvent before the respective periods at which the bonds were payable, suits were brought from time to time as each became due. Five of these suits, instituted at August and November sessions, 1827, were brought jointly against Samuel Thompson and Jonah Thompson, and judgments were rendered thereon, generally, on motion of the attorney of the United States, at the respective return days. On the remaining three bonds, separate suits were instituted against each of the obligors, at February, May, and August sessions, 1828, and judgment was rendered on each, severally, for the amount of the bond in question. On the 13th December, 1832, Jonah Thompson was released by the secretary of the treasury, under the provisions of the act of congress of the 2d March, 1831, for the relief of insolvent debtors of the United States. At November sessions, 1835, eight writs of scire facias were issued, on the part of the United States, against Samuel Thompson, the present defendant, for the purpose of reviving each of the judgments previously recovered against him, as well jointly with Jonah Thompson, as separately. These writs were all returned "made known" by the marshal, and on the 9th December, the defendant filed in each case a plea of payment, with leave to give the special matter in evidence. The United States replied non solvit, and issues. With the plea the defendant filed the following notice: "Notice is hereby given to the district attorney, that under the plea of payment filed in the several cases above mentioned, of Samuel Thompson, the following special matters will be offered in evidence on the trial of those cases, in support of those pleas, to wit: 1. That the sum of five hundred and forty-eight dollars and ninety-five cents was paid, by the defendant's estate, to the United States, on the 7th July, 1829. 2. That Jonah Thompson, the partner and surety of Samuel Thompson in the bonds in question, was released by the secretary of the treasury on the 13th day of December, in the year 1832, from all liability for the same, and entirely discharged therefrom. 3. That on the 5th January, in the year 1833, by conveyance duly executed by the said Jonah Thompson to Virgil Maxcy, solicitor of the treasury of the United States of America, in trust for the said United States, the said Jonah Thompson conveyed to the said Virgil Maxcy, and he accepted for the said United States, certain real estates situate in the state of New Jersey, of the value of nine thousand two hundred and seventy-one dollars and twenty cents, in part payment of the debt due by the said Samuel and Jonah Thompson to the said United States. 4. That the sum of two thousand dollars was tendered by the said Samuel Thompson to the secretary of the treasury, in payment of whatever balance might be due from the said Samuel to the said United States, and which he is now ready to pay, or any part thereof, should the same be found due to the said United States, after debiting them with the sum paid in money and the value of the land conveyed as aforesaid. By all which premises it is considered by the said Samuel Thompson, that the United States are fully paid whatever he owed them."

On the trial it was agreed, as the same questions of fact and the same pleas existed in each case, that the jury should be considered "to have been duly sworn and empanelled to try all and each of said suits of scire facias, and should render verdicts in all and each of them, according to the law and evi-

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

dence of the said suits, under the direction of the court, as in other cases."

I. As to the first point embraced in the notice of special matter, it was admitted by the district attorney that the sum of five hundred and forty-eight dollars and ninety-five cents had been paid as stated, and that the defendant was entitled to a credit for that sum.

II. Under the second point, the counsel of the defendant gave in evidence: 1. The records of the court, showing that five of the judgments, to renew which these writs of scire facias issued, were rendered jointly against Samuel Thompson and Jonah Thompson. 2. The record of the proceedings of the commissioners of insolvency, appointed under the provisions of the act of 2d March, 1831, in the matter of the application of Jonah Thompson for the benefit of the provisions for the relief of insolvent debtors of the United States. 3. The warrant of the secretary of the treasury, dated 13th December, 1832, under the seal of the department, issued under the provisions of that act, for the release of Jonah Thompson, which declared that the said secretary "did release the said Jonah Thompson from his debt to the United States," on condition that he should transfer to the United States certain land belonging to him in the state of New Jersey. 4. The deed of conveyance by Jonah Thompson to the United States, of the land in New Jersey, as required by the condition of the release, and dated 5th January, 1833.

III. Under the third point, the counsel of the defendant gave parol evidence of the cost of the land in New Jersey at the time it was purchased by Jonah Thompson, which was the sum stated in the notice. To rebut this, evidence was produced on the part of the United States to show that, subsequent to the purchase, but many years before the release of Jonah Thompson, the land had greatly fallen in value, owing to an irruption of the tide and the entire destruction of the embankments by which it was protected, and that, at the time of the transfer to the United States, it was worth very little indeed.

IV. Under the fourth point no evidence of a tender or acceptance of the sum stated was proved, but merely a conversation between the secretary of the treasury, and Jonah Thompson, relating generally to a proposition on the part of the latter to pay that sum.

Mr. Brashears and C. J. Ingersoll, for defendant.

Though these debts originally arose on joint and several bonds of Samuel and Jonah Thompson, their character is now entirely changed. All the bonds are merged in the judgments; they are of a higher nature than the bonds; the latter are now as if they never existed. What are the judgments? Joint judgments against these two persons. It is a principle of universal law that where two parties are jointly bound, the release of one without the assent of the other, is a release of him also. The distinction of principal and surety does not exist in the case of a joint judgment. As to the release. It is a legal instrument made by an officer authorized by law to make it; by its terms it releases the debt of Jonah Thompson; it therefore releases these judgments as they stand of record. It estops the United States from proceeding under them. As they have no claim against Samuel Thompson except under them, they are estopped from proceeding against him. Another point remains under the plea of payment; that is, the absolute satisfaction of the whole debt by conveying property equal to it in value. This property cost as much as the entire debt; no price is fixed in the deed of conveyance, but proof of the cost was given before the commissioners of insolvency; the fair inference is, that it was taken by the United States at that price. Sugd. Vend. 235; Gow. Partn. 225; 5 Bac. Abr. 702; Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 46; Willings v. Consequa [Case No. 17,767]; Griffith v. Chew, 8 Serg. & R. 17; Milliken v. Brown, 1 Rawle, 391; Beidman v. Vanderslice, 2 Rawle, 334; Cocks v. Nash, 9 Bing. 341.

Mr. Gilpin, for the United States.

These are debts of Samuel Thompson; his notice admits that Jonah Thompson is merely a surety. He also could have had a release by complying with the laws; but he now seeks it without such compliance. He has made no payment in fact, but he asks a credit as if he had. Two questions, therefore, arise: 1. Is Samuel Thompson released from these judgments. 2. Has he paid them in whole or in part.

1. The argument of his counsel, which asserts that the bonds are merged in the judgments, must admit that this release of Jonah Thompson cannot apply to the three cases of the separate judgments against Samuel alone. But as to the others; the joint judgments rendered on the joint and several bonds; it does not affect them. It would not be a release by operation of law on the bonds, for the relation of principal and surety is acknowledged, and the release of the surety, Jonah Thompson, is no release of the principal, Samuel Thompson. It is not a release, by operation of law, on the judgments, for they are still unsatisfied and of record, and if the satisfaction were entered by virtue of the release, it would be a mere satisfaction as to Jonah Thompson. But suppose this act of the secretary of the treasury would have amounted to a release of Samuel Thompson, if it were a release at common law voluntarily made; yet it will not be attended with the same effect, when merely made under the limited power of a statute, and by a party who has no control over the debt, except so far as that statute gives him one. This is not a general release; it is a release of a person who performs certain preliminary acts which the law requires; Samuel Thompson has performed none of these; consequently

he cannot claim the privilege of one who has. The rules applicable to releases at common law have never been extended to those authorised by statute. But suppose this act of the secretary of the treasury operates to release Samuel Thompson; it is ipso facto illegal; it is beyond his authority; he had no right to do any such act; his power was limited to releasing persons who performed the necessary preliminary conditions; if he has done more, the United States are not to suffer by the illegal act of their officer. 5 Bac. Abr. 683; Kirby v. Taylor, 6 Johns. Ch. 242; Creager v. Brengle, 5 Har. & J. 234; Hollingsworth's Adm'x v. Floyd, 2 Har. & G. 87; Powell v. Smith, 8 Johns. 249; Sharpe v. Speckenagle, 3 Serg. & R. 464; Browne v. Carr, 7 Bing. 508; Langdale v. Parry, 2 Dowl. & R. 337; U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720; Locke v. Postmaster General [Case No. 8,441].

2. There has been no payment by Samuel Thompson except the sum admitted. The transfer of the land by Jonah Thompson is merely a personal condition for his own discharge. Besides, it is a conveyance of real estate; that is no payment until the land is sold; assignees would not be chargeable with real estate before it was sold; the United States cannot be charged with a certain sum until that sum is ascertained by a sale. But if an allowance is to be made, any value except that at the time of transfer would be manifestly unjust.

HOPKINSON, District Judge (charging jury). This is a very singular case in some of its aspects, and it is difficult to find any principle which will carry us through every part of it. I hope, however, that we shall be able to come at its substantial justice consistently with the rules of law. We shall make the attempt truly and faithfully, and if we shall fall into any errors, they may be corrected on a future and more deliberate revision by this or another court. There are eight suits and issues on trial before you. You will take them all into your consideration, and give verdicts upon them separately, as the evidence and law applied to each case shall warrant. The cause arises from certain writs of scire facias, issued by the United States, to revive certain judgments obtained by them in this court against defendant. The original suits in which these judgments were obtained, were brought on certain bonds given to the United States by the defendants, Samuel Thompson and Jonah Thompson, for duties on imported goods. They were joint and several bonds. Against the demand of the United States, now on trial, the defendant can avail himself only of such matters of defence as have occurred since the judgments were rendered against him. As to any defence in his knowledge antecedent to the judgments, it was his duty to have pleaded it before the judgment was entered. The defence now set up is within this limitation. It is two fold: 1. He claims an entire discharge from the whole demand or debt. 2. He claims certain credits or payments.

On the 13th December, 1832, the secretary of the treasury, by virtue of an act of congress passed on the 2d March, 1831, executed a release to Jonah Thompson, on certain terms and conditions. This release is of the debt due by Jonah Thompson to the United States. On the 5th January, 1833, Jonah Thompson conveyed to the United States certain lands in the state of New Jersey, which conveyance was one of the conditions precedent to the operation of the release. On the 24th January, 1833, there was a certificate that the conveyance was made. All these proceedings were subsequent to the date of the judgments, now under consideration on the plea of payment by the defendant, and of course, he has a right to the benefit of them to maintain his plea, so far as they will avail him for that purpose. It is on these acts and proceedings that he founds the two points of his defence, to wit: 1. That the release of Jonah Thompson operates as a release to him, Samuel Thompson. 2. That he, the present defendant, has a right to a credit against these judgments, for the property conveyed by Jonah Thompson, to the United States. The amount of this credit, and at what price or value the land should be charged to the United States, are a secondary inquiry.

I. On the first point, that is, the effect of the release, I am of opinion, that when two persons are bound jointly, or jointly and severally, in an obligation, the release of one of them, will discharge the other. Such is the principle of the law. But how does it apply to this case? If the bonds, which were the original evidence of debt, the ground and cause of action in the first suits, and which were joint and several obligations, were now on trial against one or both of the obligors, and a release could be shown of either of them, it would acquit the other. The cause of action would be the bonds; they would be an essential, indispensable part of the evidence of the plaintiff's case; they would be produced here and we should judicially know that they were joint and several obligations, and that the recovery of the money due by them, was the object of the suit; of course any matter of defence which took away the right of recovery, would have its full effect. But such is not the case we have to try and decide. This suit is not on a bond of any description. We do not know what the bond was, or that any bond constituted the evidence of debt between these parties. We are referred to our own records for the cause of action in this suit; we find that it is a judgment duly rendered and recorded in favour of the present plaintiff, against the present defendant. In this judgment the original cause of action and the defences which the defendant may have against it, are merged and lost. The counsel for the defendant has told you that we cannot look behind it. The judgment

has become the debt, and the release of a debt, which was subsequent to the judgment, has no relation back to the antecedent contract or cause of action. It existed no longer. Then the question presents itself, how is the release of a judgment, or a debt of any kind due from Jonah Thompson individually, to be applied to a debt or judgment due from Samuel Thompson? I am of opinion, that on the trial of a scire facias to revive a joint judgment against two or more defendants, a release given to one of them, subsequent to the judgment, will be a sufficient defence and discharge of the others; but that if the judgment on which the scire facias issued, be not against all the parties to the original joint and several obligation, but against one of them only, then he cannot, on the trial of the scire facias, avail himself of a release given to his co-obligors in the original contract, subsequent to the judgment. We can look only to the judgment as the plaintiff's cause of action; we find that judgment standing against the defendant alone, and we cannot know that it was rendered on a joint and several bond, or on any other obligation than that of the defendant himself. If I were to allow myself to look beyond the judgment to the proceedings which led to it, I should find, even there, nothing to inform me that the suit was brought and the judgment given on a bond executed by this defendant and another, as co-obligors. The declaration sets out no such matter; it recites simply a bond executed by Samuel Thompson to the United States, for a certain sum; and the judgment has affirmed that Samuel Thompson, and no other person, is indebted to the United States by virtue of that bond.

The district attorney has argued, that whatever may be the effect of the release of one of two joint obligors, in a contract in an ordinary case between man and man, yet that this rule or principle cannot be applied to this case; that this is a special proceeding under the provisions of an act of congress; that this release has been executed by the secretary of the treasury, by the authority and under the directions of that act; that its extent and operation must be governed by the act; that it is clear that the act contemplated and intended only the discharge of the petitioning debtor, who offers to perform and does perform the conditions imposed upon him by the law, as the price of his liberation; that all these are personal in their nature and effect, and were never meant to be extended beyond the petitioning debtor, and to give another debtor the whole benefit of the law, who does not comply with any one of the conditions required by it, nor even ask for it. I do not deny, that there is force in this argument; certainly it is very plausible. It does not, however, at present appear to me to be sufficiently clear and conclusive to overthrow a settled principle of the law, or to show that this is an exception from it. It may be worthy of a future consideration. I will briefly state the reasons of the opinion I now entertain of it. The act of congress enacts, that an insolvent debtor of the United States may make application to the secretary of the treasury "for the purpose of obtaining a release or discharge from the said debt." The secretary, after receiving the report of the commissioners of the circumstances of the case, and being satisfied that the petitioner has complied with the conditions of the act, is authorised to compromise with the debtor upon such terms as he shall think reasonable, and thereupon he "may execute a release to him for the amount of the said debt." The same term, release, is repeated several times in the law, without any limitation or explanation of its meaning. By this authority the secretary, on the petition of Jonah Thompson, did execute a release to him, in which he says: "I do decide to release him, the said Jonah Thompson, from the said debt." We have then an act of congress, and a treasury act, which, we must presume, was drawn with great care, either by the law officer of the government, or under his supervision. In this act a term is used which, in the courts of law, has a fixed and definite meaning. It is strictly technical, with a settled and determinate construction. Can I then say that congress, in using the term "release," did not intend to give it the same meaning and effect, with all its legal consequences, which have always been given to it? Could it have been expected that the courts of law, finding this term in an act of congress, without any restriction or qualification, would not understand it to have the same meaning, the same force and effect, there as in any other written instrument in which it might be employed? When the secretary says he releases the debtor, why is not his release to have the same operation as any other release, by any other person? If any thing else was intended, it would have been declared and specified, as is done in the insolvent laws of Pennsylvania, which, from that of 1729 down to the latest, have contained an express provision "that the discharge of the debtor by virtue of the act, shall not acquit any other person from any debt," but that "all other persons shall be answerable for the same, in the same manner as before the passing of the act." With these views of the question, I must consider the release of the secretary of the treasury to have the same effect and legal consequences with a similar instrument made and executed by any other person.

As regards the law of this case, for which you will look to the court for instruction, while I cannot say that it is clear of difficulty, you will, in your deliberations, take it to be: 1. That a release given to a debtor of the United States, by the secretary of the treasury under the provisions of the act of March, 1831, is of the same effect and subject to the same legal consequences, as an ordinary release from a creditor to a debtor. 2. That when a suit or trial is founded on a

judgment rendered against the defendant, we may not inquire whether that judgment was given on an obligation or contract made by the defendant with another person; and that, if we might make the inquiry, we could not go out of the record of the action in which the judgment was given, and seek for the information in the evidence, to wit, the obligation or contract on which it was obtained. This, in fact, would be to try the original cause again, and to revise the judgment given in it. The application of the law to the cases before you brings you to this result: That as to the five cases in which the original judgments were rendered against Samuel Thompson and Jonah Thompson, the release of Jonah discharges also Samuel; and in those cases your verdict ought to be for the defendant. That as to the other three cases, in which the judgments were rendered against Samuel alone, and in which Jonah does not appear by the record to have been a party, your verdict should be for the United States, for so much as shall be due upon a consideration of the other matters of defence in proof before you.

II. The credits claimed consist of alleged payments: 1. In money, the sum of five hundred and forty-eight dollars and ninety-five cents, which is admitted and allowed. 2. The lands in New Jersey conveyed by Jonah Thompson to the United States. A credit for this property is not denied, but the question is about the amount. This is for you to decide, taking the rule of law for your guide. The defendant asserts that he is to be allowed a credit to the amount which Jonah Thompson paid for the land. On the other side it is contended, that the value of the property at the time it was transferred by Jonah, as a payment, pro tanto, of his debt to the United States, is the full amount of the credit that should be allowed for it. I have no difficulty in adopting the latter rule; even if the lands at the time of their transfer to the United States had been in the same situation as when they were purchased by Jonah Thompson. Until the transfer, the United States had no interest in them, and then their interest was to the amount of the value of the property and no more. The fluctuation in the prices of real estate is immense and every purchaser takes it at its value at the time of his purchase. This transfer of land is pleaded as a payment. Was it a payment for what it cost six years before, or for what it is actually worth to the creditor who takes it as a payment? How much of his debt will it pay? But the case is infinitely stronger here. By an accident, by the violence of the elements, after the purchase by Jonah Thompson, and long before his conveyance to the United States, the value of the land is changed, is almost wholly destroyed and lost. Is it then to be charged to a creditor, who takes it for a debt, at the value it held antecedent to this destruction? A piece of land of little value may have upon it mills or factories erected at a monstrous expense, and its price would be accordingly. They are destroyed by flood or fire, and afterwards the land is assigned to a creditor, can it be imagined that he should be charged with it at its value before this loss. So the embankment of this meadow constituted its value; the banks are swept away and the value proportionably reduced. It seems to be needless to illustrate a proposition so clear; and I should have left it to you without a word if it had not been so earnestly pressed upon by the counsel of the defendant. It has been further insisted, that if you should not take the value at the time of Jonah Thompson's purchase, you should at least go back as far as his insolvency, when the United States acquired a right in the property. In the first place, this insolvency was subsequent to the destruction of the banks of this meadow. But if it were not so, the insolvency of Jonah Thompson did not pass the property of this land to the United States; it gave no title to it; they could not sell it or take possession of it, or exercise any act of ownership over it. His insolvency gave them a preference over his other creditors, to be paid from the proceeds of his property, but no specific right or title to the property. The defendant should be allowed a credit for the value of these lands, at the time of their conveyance to the United States, of which you will judge from the evidence you have heard. The five judgments affected by the release will be put out of the case; and against the three remaining judgments you will allow a credit for the five hundred and forty-eight dollars and ninety-five cents, and the value of the lands at the time of their transfer to the United States.

The jury found verdicts for the United States in the cases arising under the three original judgments rendered against Samuel Thompson alone, and in favour of the defendant in the five remaining cases.

Case No. 16,488.

UNITED STATES v. THOMPSON.

[Hoff. Land Cas. 79.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANTS.

No objections to the confirmation of this claim.

[Claim by Joseph P. Thompson for two leagues of land, comprising part of the Rancho Entre-Napa, in Napa county; confirmed by the board of land commissioners, and appeal taken by the United States.]

S. W. Inge, U. S. Atty.

Halleck, Peachy & Billings, for appellee.

HOFFMAN, District Judge. The land claimed in this case is part of the rancho of

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Entre-Napa, originally granted to Nicolas Higuera by Governor Manuel Chico, on the ninth of May, 1836. The authenticity of the grant is duly proved, and the expediente is produced from the archives of the former government. It is also shown that the grantee occupied the land the same year the grant was made; that he built a house and corrals upon it; that he cultivated a part of it, and continued to live on it until his death, in 1852. Before his death he had sold a portion of his land to the present claimant. The conveyances to the latter are produced and proven. It is also shown by the proper documentary evidence that the grantee applied for juridical measurement, and that the same was in due form made, and possession of the lands with defined boundaries given to the grantee on the eleventh of January, 1842. Under these circumstances, no reason for rejecting the claim is perceived, nor has any been stated on the part of the appellants. It must therefore be confirmed.

Case No. 16,489.

UNITED STATES v. THOMPSON.

[9 Law Rep. 451.]

District Court, D. Massachusetts. Dec. Term, 1846.

OFFENCES AGAINST POSTAL LAWS—CONSTITUTIONAL LAW—PRIVATE MAIL CARRIERS—POST ROUTES.

1. The act of congress prohibiting the establishment of private expresses is constitutional.

2. If the mail is actually carried over a railroad, under the authority of the post-office department, with the assent of, and by an arrangement with, the railroad corporation, that is sufficient to answer the requirements of the statute, notwithstanding no formal written contract has been made.

3. The establishment of an express, one of the purposes of which is the carrying of letters over such a route, is a violation of the law. Nor does it make any difference, that they are carried without distinct compensation. But the proprietor of such an express might take a document giving him authority to receive merchandise on presenting the same, or a receipt for his own protection for articles delivered.

4. The proprietor of such an express is liable only for acts done or authorized by himself. And if he authorized acts amounting to a violation of the law, he is guilty, although he did not know they would amount to such a violation. And if he authorized the carrying of one class of letters forbidden by law, and his agent carried one of another class, also forbidden by law, mistaking it for one of the former class, he was not criminally responsible therefor.

This was an indictment, alleging that the defendant [James M. Thompson], subsequently to the 3d day of March, 1845, to wit, on the 28th day of July, 1846, at Springfield, did establish a private express for the conveyance of, and cause to be conveyed, and provided for the conveyance and transportation of, by regular trips, and at stated periods and intervals, from one city, town or place in the United States to another, to wit, from Springfield to Chester Village (between which places the United States mail was regularly transported under the authority of the post-office department), letters, and packages of letters, and packets, properly transmittible by mail, and not being newspapers, pamphlets nor magazines; and on the said day, offending against the statute of the United States, by the instrumentality of William E. D. Miller, conveyed a letter from Springfield to Chester Village, which letter was properly transmittible by mail, and was not a newspaper, &c. The second count alleged the carrying of a letter from Springfield to Chester Factories, on the 25th of August, 1846; and the third and fourth counts, the carrying of letters from Springfield to Albany, on the 20th and 26th of August, in the same manner. The indictment was founded on the 9th section of the statute of 1845 [5 Stat. 735], in relation to the post-office department. It was proved that the defendant ran an express over the Western Railroad; but he contended that it was not established for carrying letters, as such, or mailable matter forbidden by law to be carried by a private express. It was also proved that the United States mail was carried over the same route, under an arrangement between the department and the directors of the railroad, and that there had been no failure or irregularity in the transportation from April 1 to the date of the indictment; but no written contract had been executed, and the defendant contended that therefore the railroad was not a route over which the mail was regularly transported under the authority of the department, within the meaning of the law. There had been some correspondence on the subject, and an attempt to complete a definite contract; but difficulties had arisen in relation to fixing one regular hour for starting through the year. The mail was, however, transported over the road, and a car fitted up for the agents of the department, and payments made quarterly by the department. A letter from Mr. Gilmore to the department was put into the case, dated in June, 1846, stating the difficulties in the way of completing a written contract, and proposing to continue the transportation of the mail as before; and it continued to be so transported. The defendant also contended, and offered evidence to show, that he had directed his agents to carry no mailable matter, and no letters except such as were in the nature of orders for goods to be carried by his express, or of receipts for goods or money delivered, or letters enclosing money, bills, drafts, checks, or notes;—and that, if any other letters were carried by his agents, it was in violation of his instructions, so that he was not responsible therefor. The counsel for the government offered evidence to prove the carrying of all the four letters charged in the indictment, but did not rely upon the last two as sufficiently proved. The defendant further contended, that that part of the stat-

ute which prohibited the establishment of private expresses, was unconstitutional.

B. Rantoul, Jr., U. S. Dist. Atty.

Rufus Choate and Mr. Ashmun (whose place was taken by Mr. Chapman in the latter part of the trial), for defendant.

SPRAGUE, District Judge, charged the jury (1) that the law in question was constitutional; (2) that if the mail was actually carried over the route in question, under the authority of the post-office department, with the assent of, and by arrangement with the railroad corporation, that was sufficient to answer the requirements of the statute in question, notwithstanding no formal written contract had been executed; and (3) that if Thompson had established an express, of which one of the purposes was the carrying of letters over such a route, he was guilty of a violation of the law, and was liable to a penalty for each letter proved to have been so carried. It was not necessary, in order to constitute the offence, that the carrying of letters should be the sole business of the express; but it was requisite that that should have been one of the purposes. The accidental transmission of a letter was not sufficient, if not authorized by Thompson himself; he must have intended that it should be carried. It was not necessary that he should have intended to violate what he supposed to be the law, but he must have intended to commit an act, which act would amount to a violation of the law. Every one was bound to know the law. The word "letter" had no technical meaning, but must be understood in the sense in which it was generally understood among business men.

It had been argued, that Thompson had a right, as a common-carrier, to carry any papers incidental to that business. The court ruled, that if he merely took a document giving him authority to receive merchandise on presenting the same, as, for instance, a power of attorney,—or if he took a receipt for his own protection, for the delivery of articles carried by him, he had a right so to do. But he must not take a letter from one person to carry it to another, unless it were a letter relating to a cargo or article carried at the same time with the letter. The defendant was not answerable for any acts of his agents, which were not authorized by him, either expressly or impliedly. But if his instructions were in general terms, not to carry any mailable matter, and he still assented to, or approved of, the carrying of what was mailable, whether or not he knew that the laws embraced such matter, he violated the law.

The defendant had contended that no letters were carried by him except letters connected with his business, as a merchandise express, and that for such letters he made no charge, and received the same compensation for transporting merchandise, from those who did and those who did not send letters; and that, under the eleventh section of the statute, he was authorized so to carry them. But the court ruled that the eleventh section did not authorize the defendant to establish an express for the carrying of letters in connection with, or as a part of his business of a merchandise express, although no charge was made for letters as such. That the tenor and scope of the ninth section was to prevent such competition with the post-office department.

The jury, after being out about two hours and a half, returned for further instructions from the court; and were instructed, that it was not necessary that Thompson should know of the individual letter proved to have been carried by his agent, if it was carried pursuant to his authority; and further, that if the defendant had authorized his agent to carry one class of letters forbidden by law, and prohibited him from carrying another class, also forbidden by law, and the agent carried a letter of the second class, mistaking it for one of the first, the defendant would not be criminally responsible therefor, the letter not being carried by his authority, either tacit or express.

The jury returned a verdict of not guilty.

Case No. 16,490.

UNITED STATES v. THOMPSON.

[6 McLean, 56.] [1]

Circuit Court, D. Michigan. Oct. Term, 1853.

INDICTMENT — CAPTION — CUTTING TIMBER FROM PUBLIC LANDS.

1. The caption or title is no part of the presentment of the grand jury, and may be amended after verdict as a clerical error.

[Cited in U. S. v. Bornemann, 35 Fed. 826.]

[Cited in State v. Brennan (S. D.) 50 N. W. 627.]

2. Not necessary, in an indictment for cutting timber, to state the class of lands from which the trees were cut.

3. Such a description as shows the accused the offense with which he is charged, is sufficient.

4. Where a statute creates an offense, and the indictment charges the same in the precise words of the statute, it is unnecessary to prefix to the charging words, the word "unlawful," or any other word showing a wrongful intention.

Motion in arrest of judgment.

Mr. Hand, U. S. Dist. Atty., and Mr. Frazer, for the United States.

Van Arman & Walker & Lathrop, for defendant.

WILKINS, District Judge. Several reasons are assigned for the arrest of the judgment of the court, comprising various objections to the indictment.

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

The 1st objection is, as to what is technically termed the "caption;" or that the court is not properly entitled. We consider that this objection has been long settled, both in England and in this country. Forming no part of the indictment or presentment of the grand jury, being in fact no more than the clerical endorsement of the record, unnecessary as giving information to the accused, it is only matter of astonishment, that such a technical exception should now be gravely argued in court. In the language of Lord Mansfield, in 1 Saund., and which has been adopted by the most reliable American cases, it is only a copy of the style of the court at which the indictment is found, and is amendable at any time before removed to a higher court. And, if the objection could now be entertained, so as to defeat justice, it would be giving judicial weight to technical exceptions—calling loudly for legislative interposition. Moreover, there is no great fault to be found in this caption. The court is in fact properly entitled: "District Court of the United States." The other words in relation to "Seventh circuit," may be treated as surplusage, without any formal amendment.

The 2nd objection is, that the indictment, in its description of the offense, does not specify the class of lands on which the trespass was committed, so as to distinguish between the lands reserved and those not reserved for naval purposes. This was unnecessary. The act of 1817 [3 Stat. 347], based upon the provision of law for the preservation of ship timber for the use of the navy of the United States,—contemplated only the punishment of cutting naval timber—where the same was cut and removed without authority. The act of 1831 [4 Stat. 472] was designed to extend the efficacious and salutary provisions of the first act,—to all the public lands,—and to all timber, whether naval or otherwise. Under either statute, the secretary of the navy could authorize an agent to cut and remove any timber from any of the lands of the United States, whether reserved or not. Such is the import of the closing language of the 1st section of the act of 1831, creating these offenses: "other than for the use of the navy of the United States." Therefore, the allegation negativing the fact, that timber was cut "other than for the use of the navy of the United States," is sufficient to describe the offense charged. What is the object of the general rule in criminal pleading, requiring a specific and succinct description of the offense, but that the accused may be apprised of what he is accused, by such a clear and intelligible description that he cannot be misled, but may know what charge he is called upon to meet? The old beaten paths of the common law, so much the subject of humorous comment, during the argument, had this principle as their foundation; although many of the old decisions, by too great an observance of technical terms, favored the escape of the guilty. But modern ruling is more consistent with common sense, and the safe administration of justice. All that is required now, is embraced within two simple principles: (1) Charge the offense as defined or described in the law. (2) Describe it intelligently, as to manner, time and place. Such is the description as contained in this indictment. The statute declares the act of "cutting any live oak or red cedar 'or other timber,' from any lands of the United States, with intent to export, use or employ the same in any manner whatsoever, other than for the use of the navy of the United States," a misdemeanor:—I say a misdemeanor—although the term is not employed, but is implied; as the individual so doing is treated as an offender, and punished, on conviction, with fine and imprisonment. This indictment describes the offense in the precise words of the statute—thus—"that the said William Thompson, did, on the 1st of October, 1853, at the county, and township, and range, and section, specially described, a certain close of the United States; viz., the township, and range, and section aforesaid, broke and entered; and certain timber, viz., 5,000 pine trees—there standing and growing, and being on the said lands of the United States,—cause to be cut, felled, and prostrated, with intent, the said timber, then and there to use and employ in another manner than for the use of the navy of the United States, to wit, —for his own private use, etc."

It is difficult for the court to conceive what other language could better describe the offense; or, wherefore there should be an additional showing, that the lands so specifically described, according to the public survey, had not been, and were not reserved for naval purposes. The legislature, by positive enactment, declares that act a crime, which before was but a civil trespass: the act itself was prior to this period unlawful, but not punishable by indictment; and the statute now describes the characteristics of the offense which it creates and punishes—they are two: (1) Cutting timber on the public lands. (2) Cutting with the intent designated. It is true, that the whole scope and spirit of the land laws of the United States, especially the provisions enacted since 1831, encourage and invite actual settlement on the public domain, and bestow upon the settler or pre-emptor certain privileges upon certain prescribed terms. But this invitation is not to trespassers or squatters, nor is there, even in the recent legislation of congress, any provision countenancing the cutting of timber on the lands of the United States, for the private profit of the cutter, or, for his own use, beyond that which might indicate an intention of pre-emption, which must be consummated within a brief period, or the cutter is deemed a trespasser ab initio. I am clearly of opinion, then, that this exception is not well taken, that no such classification is necessary, and that it is sufficient to allege the

trespass, as in this indictment, by the particular township, range or section.

The next objection, and which embraces substantially the 4th and 5th is, that there is no act set forth, from which the law will presume a "criminal intent." I copy the precise words of the exception. The argument took a wider range; but, in determining the validity of the objection, the court will consider the suggestions made as applicable to the particular exception. It is urged, that the description of the offense is defective, because there is no term employed showing a wrongful act or criminal intention. In support of the proposition, it is insisted that the statute of 1831, being part of one general system of legislation, designed to punish as criminals, only those who wrongfully entered the public lands, and wrongfully cut timber thereon, and wrongfully removed the same after it was cut. That antecedent to the enactment, cutting timber on the public lands, was not wrongful or unlawful; and that the offense under this act must be so described. The court has already, on three different occasions, fully commented on this statute, and given to its provisions a judicial construction. These views need not now be recapitulated.

The position is well taken, that the act of 1831 is part of a general system; that all the land legislation, pari materia, may be considered one law, that there are benign provisions encouraging settlement, and contra-distinguishing the pre-emptor, the bona fide settler, from the lawless trespasser; that the former may, for the manifest purposes which are consistent with his settlement and contemplated pre-emption entry, cut such timber as corresponds with his supposed legal immunity; and furthermore, that a wrongful intention is essential to constitute any act a crime. To all these propositions, the court most cordially assents. But they are not involved in the exception taken to this indictment. An unlawful act is alleged; and consequently an unlawful intention will be presumed, on the proof of such unlawful act. Prove the allegata, and the intention is established, to be rebutted by the defense. This principle is as old as the criminal law. The act of homicide implies malice, because the act is proof of the intent. But, it is urged that a manifest distinction exists in this respect, between mala prohibita and mala per se. That distinction the court fully recognizes. But its applicability to the point in question, is not so clearly apprehended. An evil, prohibited, merely, is not that act which was an evil before prohibition; but that which is made an evil only by legislation. If a trespass upon the public lands, and destroying the valuable timber, was never an evil or an offense until the act of 1831, then there would be some weight in the argument; but such was not the case, for although the act was not before punishable by indictment, yet, it was in itself a wrongful, yea, an immoral act, an evil of itself, and for which the trespasser was answerable in damages recoverable by civil action. It is true, the intention to enter a pre-emption claim, vests certain privileges, and within their scope, the party may freely act, without being amenable to this statute; yet the existence of such an inchoate right, a mere privilege, not a consummated right, which could be perfected at the option of the party, is only available as matter of defense, and must be shown by proof only within the knowledge and power of the defendant. It is matter of defense, then, and not matter of pleading, and need not be anticipated by the prosecution. The indictment alleges, in the very words of the statute, the wrongful act, which it prohibits; and describes the offense with all the certainty of the statute itself. What more particularity can be required; what "obvious intention" has been disregarded; and what "known principle of law" would demand greater nicety? To prefix the words "unlawfully or knowingly" to the charging terms, would not serve any purpose favorable to the defendant; it would give him no clearer notice of the offense. His act of cutting or removing, was either lawful or unlawful, according to the circumstances attending the transaction. If he cut, as a pre-emptor, he can shew it; if he removed, he can shew it. Wherefore, then, does substantial justice require the insertion of these words? The known principles of law do not require it, nor does the statute, in its spirit or purview, demand it. Such is no part of the statutory description of the offense.

Upon this point the law has been long, and to my mind, clearly settled, by an unruffled current of authority, both in England and in this country, from Bacon's Abridgement to Sumner's Reports, and Wharton and Blackford but copy the old rule, tread in the old well beaten path of the common law, which is common sense and substantial justice. Bacon says: "Where the act itself is unlawful, the law infers an evil intent." Story says: "Where it is not required by the state, it need not be averred;" and Mr. Justice McLean, in his opinion in the Case of Lancaster, does not express a different ruling, or warrant the interpretation that has been given to his language.

The court holds then, that this exception is not well taken. Setting forth the act prohibited in the words of the statute, is all that is required; and on the proof of such act, the law will infer a criminal intent. Motion to arrest refused.

Case No. 16,491.

UNITED STATES v. THOMPSON.

[2 Spr. 103;[1] 27 Law Rep. 24.]

District Court. D. Massachusetts. March, 1864.

DESERTIONS FROM NAVY—WHO ARE ENLISTED SEAMEN.

Under the act ot congress of 1855, c. 136, § 11 [10 Stat. 628], making the enticing a seaman who has enlisted, to desert, an offence, a seaman who has passed the examination at the naval rendezvous merely, and has not been examined and passed on the receiving ship, is not enlisted.

[Cited in Tyler v. Pomeroy, 8 Allen, 502.]

The defendant was indicted for enticing one Joseph Lovett, a seaman in the navy, to desert. The indictment was found under the act of congress of March 2, 1855, c. 136, § 11 (10 Stat. 628), which provides that "any person who shall entice any seaman, ordinary seaman, landsman or boy, who may have enlisted in the naval service of the United States, to desert therefrom," shall, upon conviction thereof, be punished by fine or imprisonment. At the trial, the evidence showed that Lovett, who had previously been in the navy, and whose term of service had expired, came to the United States naval rendezvous in Boston, to re-enlist, and passed through all the necessary steps there on the 1st of October, 1863. He was examined and passed by the surgeon, and his descriptive and transcript lists made out and given to the commanding officer of the rendezvous. He took the oath required by the act of congress of July 2, 1862, c. 128 (12 Stat. 502), signed the naval shipping articles, which stated, among other things, his "term of enlistment," and "date of enlistment," and received the following orders to go on board the receiving ship, and for his advance:

"United States Naval Rendezvous,
"Boston, Oct. 1, 1864.

"Sir,—Please receive on board Joseph Lovett, enlisted this day by me, for the general service, for three years, as seaman; monthly pay is twenty dollars. Honorable discharge.

"(Signed)
"Saml. R. Knox, Recruiting Officer.

"To the Commanding Officer of Receiving Ship."

"United States Naval Rendezvous,
"Boston, Oct. 1, 1864.

"There is due to Joseph Lovett, seaman, sixty dollars advance, and one hundred dollars bounty, payable by the paymaster of the receiving ship on his delivery on board ship in good order and time. The debt of security is to be paid from the advance.

"(Signed)
"Saml. R. Knox, Recruiting Officer."

And every thing necessary to his enlistment, so far as the officer in charge of recruiting at the naval rendezvous was concerned, was completely performed according to the instructions of the navy department, which were introduced and read at the trial. Lovett went to the receiving ship; but when he reached it, was so intoxicated that the commanding officer, in pursuance of the eleventh section of said instructions, declined to receive him until he became sober. Lovett then left the ship, saying he would report in the morning. Before the morning, the defendant met him, and induced him, by representations as to the great bounty he would receive on enlisting into the army, not to return to the vessel, but to enlist in the army.

Upon this state of facts, the defendant contended that Lovett had not, at the time when the alleged enticement took place, enlisted into the naval service, and was not then a seaman in the navy; that the contract of enlistment was not complete, and Lovett not enlisted until he had been examined by the surgeon on board the receiving ship, accepted there, and his name entered on the books of the ship.

It was argued for the government that the enlistment was perfected, and the contract complete at the rendezvous; but that the navy department reserved the right to discharge any enlisted man who, on being received on board ship, and examined there, did not appear physically strong enough for his work. It was shown in evidence, that no recruit coming from any naval rendezvous, and who had passed through all the forms there, was ever allowed his advance, or any pay, or had his name recorded on the paymaster's books, until he had passed the surgeon on board the receiving ship.

T. K. Lothrop, Asst. U. S. Atty.
J. H. Bradley, for defendant.

SPRAGUE, District Judge. The defendant is indicted for enticing one Lovett, an enlisted seaman in the navy, to desert. The defendant objects that Lovett was not enlisted, and that is the question I have to decide. Enlistment must be deemed to be a contract between the party and the government. The evidence in this case, and the regulations of the department, show that certain acts are all to be done at the naval rendezvous, an examination to be had, a paper to be signed, a document to be received, and the recruit is then to go to the receiving ship. There another ordeal is to be passed, and further proceedings had. In this case the person desiring to enlist passed the rendezvous and presented himself at the receiving ship so intoxicated that the officers would have nothing to do with him; and at this stage of the proceedings the enticing, if any, took place. The regulations provide that the name of the recruit shall not be entered upon the books of the receiving ship, or his advance paid him, until, after an examination by the commander of the ship and his medical officer, he shall be found fit for service; and that

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

then, and not till then, he shall be entitled to, and receive his advance. He is not received as a seaman until then, he is not entitled to any thing till then. The papers received from the officer in command of the rendezvous, do not entitle him to get his advance, unless he has passed the surgeon on board the receiving ship. They are merely documents to enable the recruit to pass the next stage in the proceedings; but he is not entitled to any thing on these alone. Now if the seaman, on signing the papers and passing the rendezvous, was not entitled to any thing, then the contract for service on the one hand, and pay on the other, had not been completed; the seaman had not enlisted, and so was not a deserter.

A verdict of acquittal was accordingly taken, in conformity with this opinion.

Case No. 16,492.

UNITED STATES v. THOMPSON.

[1 Sumn. 168.] [1]

Circuit Court, D Massachusetts. May Term, 1832.

SEAMEN—ENDEAVOR TO MAKE REVOLT — CONFINING MASTER—INDICTMENT—JURISDICTION.

1. In an indictment, founded on the crimes act of 1790, c. 9, § 12 [1 Stat. 115], for an endeavor to commit a revolt, and for confining the master of the ship on the high seas, it is not necessary to allege, that the master was at the time in the peace of the United States, or that he was an American citizen.

2. A cooper of the ship is a seaman within the provisions of the act.

[Cited in The Mary Elizabeth, 24 Fed. 397.]

3. The jurisdiction to try the offence attaches, under the 8th section of the act of 1790 (chapter 36), to the district into which the offender is first brought, or in which he is apprehended, in the alternative. So that the trial may be in either district.

[Disapproved in U. S. v. Bird, Case No. 14,597.]

4. An endeavor to commit a revolt may be complete, as an offence within the act, by stirring up, or encouraging, or combining with any others of the crew to produce a disobedience to any one lawful order of the master or officers.

5. A confinement of the master may be complete within the act, by any moral, as well as by a physical restraint of the master, which prevents his free movements and command of the ship. But it must in either case be an illegal restraint; for it is not an offence for the seamen to confine the master for a justifiable cause, or in justifiable self-defence.

[Cited in Lander v. U. S., Case No. 8,039; The Mary Ann, Id. 9,194; U. S. v. Huff, 13 Fed. 641.]

Indictment for an endeavor on the high seas to commit a revolt on board of the ship Maine by the defendant [John M. Thompson], who was alleged to be a seaman on board; second count, for confining the master of the said ship; against the crimes act of 1790 (chapter 9, § 12). Plea, not guilty. At the trial it appeared in evidence, that the ship was a whale ship belonging to American citizens, and the defendant shipped as cooper for the voyage. It appeared by the shipping articles signed by the defendant, that the agreement was between the "owners, master, and mariners of the ship." It began by stating, "In consideration &c., we, the said seamen and mariners will perform a whaling voyage &c., promising to do and perform the duty of seamen as required by the master by night and by day on board of the said ship." It was proved by witnesses, that the cooper in such voyage, besides coopering, is required to hand sails, reef, steer, stand watch, and do other ship's duty of seamen on board. The offences were, if at all, committed in August, 1830. The vessel arrived at Stonington in Connecticut from the voyage, on Friday, the 8th of February, 1832; and from thence sailed to New Bedford, and arrived there on Monday following. The defendant was then arrested and committed for trial.

Mr. Bassett (of New Bedford), for defendant, contended, (1) That a cooper was not a seaman within the meaning of the act of 1790. (2) That the indictment was not found in the proper jurisdiction, but ought to have been in Connecticut, where the ship first arrived. (3) That it was not alleged in the indictment, that the master at the time of the offence was in the peace of the United States. (4) That the master is not alleged in the indictment to be an American citizen.

Mr. Dunlap, Dist. Atty., for the United States, on the first point, cited 1 Ld. Raym. 632.

STORY, Circuit Justice. As to the first objection, it appears to us wholly unfounded. A "cooper" is a seaman in contemplation of law, although he has peculiar duties on board of the ship. He is so treated in the shipping articles; and he is, like common seamen, bound to do ordinary ship's duty, such as standing watch, assisting in navigation, handing sails, &c. He receives an extraordinary compensation for his duties as cooper, not as superseding but as adding to the common seaman's duties. A cook and steward are seamen in the sense of the maritime law, although they have peculiar duties assigned them. So a pilot, a surgeon, a ship-carpenter, and a boatswain, are deemed seamen, entitled to sue in the admiralty. See Ross v. Walker, 2 Wils. 264; Wheeler v. Thompson, 2 Strange, 707; Ragg v. King, Id. 858. As to the second objection, the language of the crimes act of 1790 (chapter 36, § 8) is, that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district, where the offender is apprehended, or into which he shall first be brought." The provision is in the alternative; and therefore the crime is cognizable in either district. And there is wisdom in the provision; for otherwise, if a ship

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

should, by stress of weather, be driven to take shelter temporarily in any port of the Union, however distant from her home port, the master and all the crew, as well as the ship, might be detained, and the trial be had far from the port to which she belonged, or to which she was destined. And if the offender should escape into another district, or voluntarily depart from that, into which he was first brought, he would, upon an arrest, be necessarily required to be sent back for trial to the latter. Now, there is no peculiar propriety, as to crimes committed on the high seas, in assigning one district rather than another for the place of trial, except what arises from general convenience; and the present alternative provision is well adapted to this purpose. As to the third and fourth objections, they do not appear to the court well founded. The statute contains no descriptive words, that the master shall be in the peace of the United States, or shall be a citizen of the United States at the time, when the offence is committed; and it is not generally necessary to aver more facts than are sufficient to constitute the offence in the terms of the statute. But these objections, if they are well founded, are open upon the record upon a motion in arrest of judgment. Objections overruled.

STORY, Circuit Justice (charging jury). The indictment contains two counts. The first is for an endeavour to commit a revolt on board the ship. Without pretending to enumerate all the cases, which may constitute such an offence, it is sufficient to say, with reference to the facts of the present case, that a mere disobedience of orders by a seaman without encouraging, or aiding, or co-operating with others in the same act, is not an endeavour to commit a revolt. An endeavour to commit a revolt may be complete, not merely by stirring up, encouraging, or combining with others of the ship's crew to produce a general disobedience of all orders; but also by stirring up, encouraging, or combining with any one or more of the crew to produce a deliberate disobedience to any one lawful order of the master or other officers; for to this extent it is an endeavour to commit a mutiny, and to overthrow the lawful authority of the master and officers. But there must be a clear intent to produce such a revolt; and not merely gross or insolent language used by the party, which may, undesignedly, encourage others to such disobedience. The other count is for confining the master of the ship. This may be by a moral or a physical restraint, by threats of violence with a present force, which restrains the master from his freedom of movement or command in his ship, or by physical restraint of his person. In the present case, the defendant seized the master and held him back against the ship's rail, against his will. This is, therefore, in the sense of the act, a clear case of confinement of the master; and it matters not, whether it was for a long or a short time, for a minute, or for an hour, or a day. The law looks to the fact, and not to the duration of the confinement. But every confinement is not an offence within the act. It must be an illegal confinement or restraint. If the master is about to do an illegal act, and especially to do a felony, a seaman may lawfully confine or restrain him. So a seaman may confine the master in justifiable self-defence. If the master assault him without cause, he may restrain the master with so much force, and so long, as is necessary for this purpose. And, if he is suddenly seized by the master, and without any intention of restraining him of his liberty, from the mere impulse of nature, he takes hold of the master, to prevent any injury, for an instant, only, and as soon as he may, he withdraws the restraint, so that the act may be fairly deemed involuntary, it might not, perhaps, be deemed an offence within the act, even though the seizing by the master was strictly justifiable; for the will must co-operate with the deed. But if the seizing by the master be justifiable, and he does not exceed the chastisement, which he is by law entitled to inflict, then the seaman cannot restrain him, but is bound to submit; and if he does hold the master in personal confinement or restraint, it is an offence within the statute. It is for the jury to say, how far the facts bring the case within the law thus laid down.

Verdict, guilty on the second count, not guilty on the first.

[See Case No. 8,919, where the misconduct of defendant herein was set up as a ground of forfeiture upon a libel by him to recover his share of the proceeds of the voyage.]

UNITED STATES v. THOMPSON. See Case No. 14,820.

UNITED STATES (THOMSON v.). See Case No. 13,985.

Case No. 16,493.

UNITED STATES v. THORN et al.

[9 Int. Rev. Rec. 65; 2 Am. Law T. Rep. U. S. Cts. 43.]

District Court, D. New Jersey. Feb. 15, 1869.

INTERNAL REVENUE—NEGLIGENCE OF COLLECTOR—ACTION ON BOND.

[In an action on a collector's bond, on account of his breach of duty in allowing spirits to be removed from a warehouse without the furnishing of proper bonds, it is no defense that he had no corrupt purpose, but was merely careless.]

This action was brought against ex-collector of internal revenue, George W. Thorn, of the Fifth district of New Jersey, and the sureties upon his official bonds for a breach thereof.

A. Q. Keasbey, U. S. Dist. Atty., and Mr. Young, Asst. Dist. Atty.

Ex-Chancellor Williamson and Isaac W. Scudder, for the defence.

FIELD, District Judge (charging jury). This is an action upon the official bond of George W. Thorn, late collector of internal revenue for the Fifth district of New Jersey. The condition of the bond is, "that if the said George W. Thorn, shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for, and pay over, to the United States, in compliance with the orders and regulations of the secretary of the treasury, all public monies which may come into his hands or possession; and if each and every deputy collector, appointed by said collector, shall truly and faithfully execute and discharge all the duties of such deputy collector according to law, then the said obligation to be void."

This condition, you will perceive, is threefold: First, that George W. Thorn shall faithfully discharge the duties of his office. Second, that he shall pay over to the United States all public monies received by him. Third, that any deputy collector he may appoint, shall faithfully discharge the duties of such deputy collector. It is not charged that there has been any breach of the two last-named conditions, and these may therefore be left entirely out of view. It is the first condition of the bond only, which is alleged to have been violated. But it would not have been enough to have alleged generally, that he had failed to perform all the duties of his office. It was necessary to go further, and state what were the specific duties which he had failed to discharge. The declaration, therefore, goes on to say, that by the provisions of an act of congress, approved June 30, 1864 [13 Stat. 223], and the rules and regulations made in pursuance of them by the secretary of the treasury, it was made the duty of the said collector, upon the receipt of an application for a permit, to transport any distilled spirits from a bonded warehouse in his district to a bonded warehouse in another district, to exact from the applicant a transportation bond, with good and sufficient sureties, in at least double the amount of the taxes imposed thereon; and that, in violation of this duty, the said collector did permit large quantities of distilled spirits, amounting in the whole to fifty thousand gallons, to be removed from certain bonded warehouses in his district, to a bonded warehouse in San Francisco, California, without exacting bonds with good and sufficient sureties, as required by law; and so, it is said, the said George W. Thorn, did not truly and faithfully execute and discharge the duties of his office, but wholly failed and neglected so to do. These are the material allegations contained in the declaration, and they indicate the nature of the issue which you have been sworn to try.

On the first day of November, 1866, George W. Thorn was appointed collector of the Fifth district of New Jersey. It was by far the most important revenue district in the state, and one of the most important in the United States. Some idea of its importance may be gathered from the fact, stated by Mr. Thorn himself, that during the few months he was in office, the receipts amounted to about a million of dollars. It was a district of which New Jersey was proud. There was not another district in the whole country, for which the revenue had been more faithfully collected. Such was its character before Mr. Thorn was appointed collector. Such, I am glad to say, is its character now.

It was by the 61st section of the act of June 30, 1864, and the rules and regulations made in pursuance thereof, that distilled spirits were allowed to be removed from one bonded warehouse to another. It was an unfortunate provision, and proved to be a most prolific source of fraud. But before such removal could be made, a transportation bond was required to be taken, with good and sufficient sureties, in at least double the amount of the duties imposed upon such distilled spirits. When Mr. Thorn, therefore, entered upon the duties of his office, he must have known that one of the most important and responsible of those duties would be in connection with these transportation bonds. It was a duty, which required for its faithful performance, the exercise of the utmost care, caution, diligence and vigilance. It was not a mere clerical duty; it was a duty to be performed, not so much in the office as out of it. It was a duty which could only be performed by the collector himself, or by a trusted and experienced deputy, for whose acts he was responsible. Of all duties it was the one which could not properly be entrusted to a mere subordinate. The counsel for the defendants have said it was a new duty never before imposed upon collectors of internal revenue; a device by whiskey dealers, now contrived for the first time; a snare, recently sprung, into which any man might fall unawares. It was not so. The law regarding transportation bonds had been passed in June, 1864. The rules and regulations concerning them had been promulgated in May, 1865. The whole country was ringing with rumors of frauds upon the revenue, growing out of these very transportation bonds. It seems almost impossible that Mr. Thorn could have been unaware of these facts. His attention, indeed, was particularly called to the subject by Mr. Wallace, his predecessor in office. Mr. Thorn had been, for two years, storekeeper under Wallace. In this capacity he had become familiar with warehouse bonds. Mr. Wallace now called his attention to the difference between warehouse bonds and transportation bonds, and how much more necessary it was to exercise vigilance about the one than the other. He cautioned him about taking transportation bonds. He said to him, that in taking ware-

house bonds, less care was required because he had the goods in his possession, but in taking transportation bonds it was necessary to use the utmost scrutiny, because he parted with the possession of the goods, and had nothing but the bonds to rely upon. Thus forewarned, what did Mr. Thorn do? On the 14th of January, 1867, 148 barrels of whiskey were removed from a warehouse in New York to one in Jersey City, and he was applied to for a permit to have it transported to San Francisco. It was the first transaction of the kind in his office. Every circumstance connected with it was calculated to awaken distrust and excite suspicion. It was the first time that whiskey had ever been removed from a bonded warehouse in New York to one in Jersey City. Such was the reputation previously sustained by the revenue officers in our state, that a bonded warehouse in New Jersey was the very last place where a dealer in whiskey, who meditated a fraud, would have cared to have it stored. But again, if it were really intended to be transported to California, why bring it over to New Jersey? There were no steamers or packets running from Jersey City to San Francisco, and it would therefore have to be taken back to New York again in order to reach its destination. A moment's reflection would have satisfied any one that some fraud was intended. It was impossible to reconcile such conduct with any honest purpose. But why ask for a permit to transport it to California? The motive was obvious. If transported to any other district than one on the Pacific coast, only two months would have been allowed by law, in which to complete the transportation. But if transported to California, six months were given. To this add the thirty days in which to produce the certificate of its receipt at San Francisco, and seven months must necessarily elapse before the fraud could be detected.

With everything, therefore, to awaken suspicion, let us see what was the course pursued by Mr. Thorn when this first bond was presented. Gardiner, the bond clerk, says the first time he saw it, it was lying on Mr. Thorn's table. A man was sitting there, who he thought had brought it. Thorn asked him to look at it and see if it was all right. Did he ask him if he knew the parties who had signed it, and if they were responsible men? If he had, Gardiner would have told him that he knew nothing about them. But he simply asked him if it was all right. Gardiner looked at the bond, and said the residences of none of the parties were given, and it was not justified. The man who was sitting there observed they were from New York. Gardiner said, the spaces in the bond were large enough, and their residences had better be put in. The man said he would have it attended to. The next day Gardiner saw the bond on his table, and again called Mr. Thorn's attention to the fact that the residences had not yet been put in. Thorn said the parties had promised to have it done. Gardiner thereupon endorsed the bond and filed it away. That was bond No. 1. Bond No. 2 bears date January 22d, about one week afterwards. The principal on the bond was different, but the sureties were the same as on the former one—H. Wilkins and E. Behn. Not only were their residences not inserted, but their full names were not given. Gardiner found this bond on his table. It had been laid there while he was at dinner. He told Mr. Thorn there was the same objection to this as the former one—the residences were not given. Thorn made the same answer he had done before—the parties had promised to attend to it. The 3d bond is dated January 31st. There were 100 barrels of whiskey, and the amount of the bond was $23,000. The 4th bond was dated February 7th—195 barrels, and the amount of the bond, $42,000. The 5th bond bears date March 2d, two days before Mr. Thorn's term of office expired—the senate not having confirmed his nomination. The quantity of whiskey removed was 500 barrels, and the amount of the bond $110,000. All of these bonds Gardiner found upon his table. Who put them there he did not know. He never inquired about them. All he had to do was to file them away, and record them. Thus, between the 14th of January and the 2d of March, permits were granted by Mr. Thorn for the removal, from Jersey City to San Francisco, of nearly 1,000 barrels of whiskey, the duty upon which amounted to $107,000. Well, of course, the whiskey was taken over to New York and then sold. Nobody in his senses, ever supposed that it was intended to transport it to California. When the time had elapsed when the certificate of its arrival at San Francisco ought to have been received, the bonds were put into the hands of the district attorney to collect. Process was issued, and delivered to Deputy Marshal Benjamin. He went to Jersey City, and enquired of every one who was likely to know any thing of the parties to these bonds. Nobody had ever heard of them, or knew anything about them. He then went to Mr. Thorn and asked him if he could give him any information with regard to them. According to the testimony of Benjamin, Mr. Thorn said, "I don't know the principals; I don't know the sureties; I don't know the witnesses; and, Benjamin, I don't know how I came by them." This, of course, was the last of these bonds. Nothing was ever collected upon them. They were perfectly worthless.

Such is the case made out by the United States. Now what is the evidence on the part of the defendants? Mr. Thorn has been called as a witness, and examined at great length. What account does he give of these

transactions? He really does not seem to have any recollection whatever with regard to these bonds. He does not remember having any conversation with Gardiner in reference to them. He don't know who put them on Gardiner's table. All he can say about them is, "Mr. Gardiner had charge of the bond account. He looked after the securities on the bonds, and their sufficiency. I looked to him for that." And again he says, "I relied wholly upon Mr. Gardiner. I took no personal responsibility as to these bonds." This, then, is the defence. It was the duty of Gardiner to see that the sureties on transportation bonds were good and sufficient, and if he failed to perform this duty, Mr. Thorn was not responsible. It is difficult to treat such a defence seriously. In the first place, was this the duty of Gardiner? He had been bond clerk under Mr. Wallace, the former collector, and it was no part of his duty then. But it is said, his salary was increased when Mr. Thorn employed him, and hence it may be inferred, that some additional duties were to be performed by him. Did Mr. Gardiner understand that this was to be one of his duties, that he was expected to look after the sufficiency of the sureties on transportation bonds? He tells you expressly that he did not, and that Mr. Thorn never informed him that this was any part of his duty. And what is more remarkable still, he says, that permits had actually been given out to the parties, before the bonds ever came into his hands. So that, even if it had been any part of his duty to enquire into the sufficiency of the sureties, it was then too late. What does Mr. Thorn say with regard to this matter? He frankly admits, "that he never gave any particular instructions to Gardiner." Did he even give him any instructions at all? Did he ever give him the slightest intimation that this was one of his duties? He does not pretend that he ever did. But it is insisted, that when the first bond was handed to Gardiner, Thorn asked him, "if it was all right." Great stress is laid by counsel on the use of the words "all right," and it is argued, that by this he must have meant to enquire whether the sureties were sufficient, for if they were not sufficient, it would not have been all right. But how could Gardiner, by merely looking at the bond, judge of the sufficiency of the sureties? If he had been asked, whether he knew the sureties, and whether, in his opinion, they were responsible men, then the case would have been different. It is, I think, very manifest that all that Mr. Thorn meant to ask was, whether the bonds were in proper form. And so Gardiner evidently regarded it. And with respect to the other bonds, no question whatever was asked of Gardiner. He found them lying upon his table —he did not know who put them there—the permits had already been granted—and all he had to do was to file and record them.

But it is said that Mr. Thorn was oppressed by the multiplicity of his duties, and had really no time to look after these bonds. But he was not without valuable assistants. He had a cashier, who also acted as a deputy; he had a chief clerk; he had an abstract clerk; he had a copying clerk, and he had a bond clerk. These were all experienced men, and had been in the employment of his predecessor. What remained for Mr. Thorn to do. He says, he "answered letters, gave information to those who wanted it, and had a general superintendence." There was one duty, however, more important than all others. One of the chief sources of revenue relied upon by government was the tax upon distilled spirits. It was here that the most extensive frauds had been committed—frauds in connection with transportation bonds. This, then, the most important of all his duties, he left entirely with his bond-clerk, a young man under age, without ever informing him that this was his duty, and without ever seeing that he performed it. It is for you, gentlemen, to say whether this was a faithful execution of the duties of his office. If you are satisfied it was not, it is your duty to find a verdict for the government.

But it is said there is no evidence of corruption on the part of Mr. Thorn, or of any dishonest purpose. It is conceded that he was careless, and may have acted under a mistaken sense of duty. But this is no defence. What his motives were we do not know. We can not look into his heart. All I can say is, that if his purposes were honest and right, it is difficult to account for his conduct. This is a case of much importance. It is the first instance, so far as I know, that an action has been brought upon the official bond of a collector of internal revenue. It may be drawn into a precedent in future cases. It is important to know whether such a bond is a mere form, or whether those who become sureties upon it, assume to themselves a grave and serious responsibility. A touching appeal has been made to your sympathy. There is a power which may grant pardons and remit penalties; but we have a sterner duty to perform. We sit here to administer justice, not exercise mercy. We must decide according to the law and the evidence. If you find for the United States, you must assess the damages. The measure of these damages, is the loss sustained by reason of the taking of these worthless bonds. But the penalty of the bond is $100,000, and in assessing the damages you cannot go beyond this amount.

A verdict was rendered in favor of the United States, and the damages were assessed at $100,000.

UNITED STATES (THORNDIKE v.). See Case No. 13,987.

Case No. 16,494.

UNITED STATES v. THORPE.

[2 Bond, 340.] [1]

Circuit Court, S. D. Ohio. Feb. Term, 1870.

CITIZENSHIP IN STATE—EFFECT OF REMOVAL—INTENT TO RETURN—QUALIFICATION OF JURORS.

1. Where a person who had resided for years, and pursued business, at Cincinnati, removed to Covington, Kentucky, with the intention of returning to Cincinnati, and never voted in Kentucky, but uniformly voted in Cincinnati as an elector of Ohio, and who, pursuant to his original intention, returned to Cincinnati: *held*, that such person did not, by such removal, lose his citizenship in Ohio.

2. Such a person is qualified to serve as a juror in a court of the United States, sitting in Ohio; and a new trial will not be granted on the ground of his disqualification to serve as such juror.

[This was an indictment charging Andrew J. Thorpe with defrauding the government, in violation of the internal revenue laws. Motion for new trial on the ground of the disqualification of one of the jurors.]

Warner M. Bateman, Dist. Atty., and Henry Hooper, for the United States.

H. C. Whitman, for defendant.

LEAVITT, District Judge. The defendant, after a fair trial by an intelligent jury, has been found guilty on an indictment charging him with two distinct frauds, in having in possession, and offering for sale and selling, numerous caddies or boxes of tobacco with stamps which had been before used. His counsel now moves the court to set aside the verdict, and award a new trial, on the sole ground that John McHenry, one of the jurors, was not a legal juror, as not being a qualified elector of the state of Ohio. There is no doubt that the act of congress, in relation to jurors in the courts of the United States, requires that they should have the qualification of electors in the state in which they are summoned to serve. And by the law of Ohio, it is provided that no one is a legally qualified elector, who has not resided one year in the state, and at least thirty days in the township or precinct, in which he offers to vote.

The only ground on which it is urged by the counsel for the defendants that the juror was disqualified to act, is that he had not been a resident in Ohio for one year prior to the trial, and was not, therefore, a qualified elector of the state. The facts, as presented to the court by the affidavits on file, are, that McHenry, for many years prior to the year 1866, had been a resident of, and was in business at, Cincinnati. Some time during that year he rented a house in Covington, Kentucky, and removed his family there, but continued his business at Cincinnati, giving every day his personal attention to it. He states, in his affidavit, that he never intended to become a citizen of Kentucky, but during his sojourn there regarded himself as a citizen of Ohio, always voting there as such, without objection or challenge, and never voting, or attempting to vote, in Kentucky. He also swears that the removal to that state was merely temporary, and with the intention of returning to Cincinnati. And pursuant to that intention, in April last, he returned to that city, where he now resides, and where he voted at the recent election without dispute; his vote being received by the judges of the election as a qualified elector of Ohio.

In this state of facts, it is clear that, within the spirit, and by a reasonable construction of the statute of Ohio, McHenry did not forfeit any of his rights of citizenship in that state. During his temporary residence in Kentucky his intention was to return to this state. And, as evidence that he did not intend to lose his rights as a citizen here, abstained from voting in Kentucky, and uniformly exercised the right here. The intent of the Ohio statute, in requiring a year's residence in the state, and thirty days in the township or precinct, obviously was to prevent the introduction or importation of unqualified voters from other counties or states, with the fraudulent purpose of voting at elections. This reason, in no sense, applies to McHenry, from the facts before the court. That he was accepted and held as a qualified elector in this state, by the judges of the elections here, to whom he was personally known, and whose duty it was judicially to decide as to the qualification of voters, is a fact of some significance in this case. The court can see no legal necessity for ignoring their decision.

It is noticeable in this case, that there is no pretense that the verdict of the jury was not fully sustained by the evidence, or that any different result would take place if a retrial of the case was ordered. The court is reluctant to disturb the verdict of the jury upon facts presented in support of this motion. The motion for a new trial is overruled.

The defendant was sentenced to pay a fine of $2,000, and to imprisonment for one year.

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

Case No. 16,495.

UNITED STATES v. THREE BALES OF CLOTH.

[1 Betts, D. C. MS. 39.]

District Court, S. D. New York. 1840.

CUSTOMS DUTIES—ILLEGAL SEIZURES—"PROBABLE CAUSE"—CERTIFICATE OF PROTECTION TO COLLECTOR.

[1. "Probable cause" and "reasonable cause," to which the judge is to certify, under the collection laws (Act 1799, §§ 71, 89 [1 Stat. 627], and Act 1807, § 1 [2 Stat. 411]), in order to exempt the collector from prosecution for an illegal seizure, means not prima facie evidence,

but less than evidence which would justify condemnation. It imports a seizure under circumstances warranting suspicion.]

[2. The fact that the public appraisers, on the valuation of two merchant appraisers, reported to the collector that certain goods were invoiced 19 per cent. below their market value, afforded, of itself, reasonable ground of suspicion that the invoice was false; and, under such circumstances, the collector is entitled to a certificate of protection.]

PER CURIAM. Probable cause, under the collection laws, to which the judge is to certify in order to hold the collector exempt from prosecution for an illegal seizure, means not prima facie evidence, but less than evidence which would justify condemnation. It imports a seizure made under circumstances which warrant suspicion. U. S. v. Locke, 7 Cranch [11 U. S.] 339. What constitutes probable cause is, when the facts are ascertained, a question of law. U. S. v. Gay [Case No. 15,193]. A doubt concerning the construction of the law may be good ground for seizure, and justify a certificate of probable cause. U. S. v. Riddle, 5 Cranch [9 U. S.] 311. The act of February 24, 1807 (section 1), directs that, if it shall appear to the court before whom a prosecution shall be tried, on account of the seizure of any vessel, goods, etc., made by a collector, that there was a reasonable cause of seizure, the court shall order a proper certificate or entry to be made thereof, etc. The few rules before cited indicate with sufficient distinctness the manner in which the duty so imposed upon the judge is to be performed.

The term "reasonable cause," used in the act of 1807 and section 89 of that of 1799, may not be exactly correlative with "probable cause" employed in the 71st section of the act of 1799. That has not been yet the subject of judicial interpretation, at least by the supreme court; but, whatever may be its legitimate import, there can be no foundation for claiming that more is exacted by it than under the latter expression. Whatever could, in a legal sense, supply a probable cause of procedure, could not be less than a reasonable one therefor; and, accordingly, if it is considered that the facts and circumstances in view of the collector amounted to a probable cause for arresting these goods, and submitting the question of their liability to forfeiture to the decision of a court and jury, he is entitled to the certificate appointed by the statute as his protection from prosecution for such act.

The fact upon which the seizure is rested is that the public appraisers, on the valuation of two merchant appraisers, reported to the collector the goods to be invoiced 19 per cent. below their fair market value. If upon that proof alone the jury had condemned the goods, could the court rightfully set aside the verdict as without evidence to support it? I apprehend not. On the contrary, I should consider any court would be bound to say the circumstances, without explanation on the part of the owner, would warrant a suspicion of an intentional misstatement of value. It is most true on the trial the owner was enabled to clear his importation of all suspicion, and without resorting to the direct proofs obtained abroad. As to the verity of his invoice, this was, in a good degree, affected by the more close examination of the merchant appraisers. It is not, however, correct, as urged by the claimant's counsel, that the collector is to be held cognizant of all these appraisers knew and could say. There is no official intercourse between them, nor is it necessary there should be a personal one, or even an acquaintance with each other. The collector designates the merchant who is to be called in, and he appears, and is sworn upon the summons, and the goods are then submitted to his inspection, and he makes up his written report. The court cannot intend any other communication from the appraiser to the collector than what is exhibited upon such report.

The claimant offers to prove, and the district attorney admits the fact may be so, that goods in other importations were frequently admitted to entry by the collector, though raised by appraisement more than 19 per cent. above their invoices. If such fact was coupled with evidence of personal ill will towards the claimant, or favor to those whose goods were admitted, it might go far to take away the claim to a certificate.

The law will tolerate no favoritism in the execution of this high official trust, much less any invidious or malicious disparagements or impediments placed in the way of an importer. The two acts, however pointed the contrast between them, do not involve such conclusion. Should the collector omit to seize when his duty plainly enjoined it upon him, through negligence or corruption, such official default could never be urged as a bar to his proceeding in a case properly justifying a seizure. His omitting to act may be a high dereliction of duty, yet if his not seizing in one class of cases prevents his seizing in others under similar circumstances, the unfaithfulness of an officer in one instance would go to interdict the just execution of the law in all others of like character. This is not so, neither in respect to the right of the seizure, nor in regard to the application of the officer for a protection certificate. Whether he is to have such certificate must, as a general rule, depend solely upon the import of the facts and circumstances before him at the time the seizure is made, and be accordingly dependent upon the character of that specific act. Considering, then, the collector as proceeding solely upon the evidence before him that this entry was 19 per cent. below the market value or cost of the goods abroad, I think that fact afforded reasonable ground of suspicion that the invoice was false, and made up for the purpose of evading the payment of duties.

The certificate will be entered accordingly.

Case No. 16,496.

UNITED STATES v. THREE CASES.

[See Case No. 15,014.]

Case No. 16,497.

UNITED STATES v. THREE CASES, ETC.

[5 Betts, D. C. MS. 42.]

District Court, S. D New York. April 9, 1845.

CUSTOMS DUTIES—FORFEITURE OF GOODS—FALSE INVOICES—ADMISSIBILITY OF EVIDENCE—NEW TRIAL.

[1. Representations by the agent of a foreign importer, made according to a course of dealing, through a series of importations, to a purchaser of the goods, that certain invoices exhibited to the purchaser by the agent were true invoices, sent him by his principal, are admissible against the principal for the purpose of showing the falsity of certain other invoices under which the goods were entered.]

[2. The court will not set aside a verdict condemning the goods, although it is of opinion that the weight of evidence is in favor of the claimant, where there is also evidence of a cogent character tending to show a gross undervaluation, with the knowledge of the claimant, and for the purpose of evading the duties.]

BETTS, District Judge. Motion for a new trial on a case made (1) for admission of improper evidence, and (2) because the verdict is against the weight of evidence. An information was filed against four cases of goods imported by the claimant, and their forfeiture demanded, because of an undervaluation on the invoice, with intent to defraud the revenue of the United States. One case, No. 123, obtained on purchase by the importer, was acquitted, and three cases, obtained otherwise than by purchase, were, on the trial, convicted by the jury, and judgment was rendered conformably to the verdict. The entry of the goods was made by C. Joly, attorney, and agent of the owner, who took the owner's oath in behalf of [T.] Bonjeau the foreign owner. On the trial of the cause the United States offered A. T. Stewart, a witness, to prove the sale of several invoices of similar goods to him in New York by C. Joly, as agent and attorney of the claimant, antecedent to the present importation, and offered those invoices in evidence, and offered to prove the declarations of Joly, at the time of the sale, that those invoices represented the actual cost and market price of the goods abroad, and further offered to prove that Joly had, previous to such sale and representation to witness, entered the same goods at the custom house for the claimant, on other invoices, 40 or 50 per cent. below in prices those on the invoice exhibited to the witness, and at which he bought, as their foreign prices.

The counsel for the claimant objected to this evidence, upon the ground that the declarations or admissions of the agent in this respect could not affect the principal, but the court admitted the testimony, and the exception to that decision forms one of the points on which a new trial is now urged.

No question was made at the trial that the fact of Joly's agency was not sufficiently proved, and the claimant cannot, on the argument of the case, take the exception that the evidence set forth does not establish such agency. It must accordingly, on this discussion, be accepted as proved that Joly was the agent of the claimant in making the entries of his goods imported here at various times, and also in making sale of them in this market. Again, as no objection was raised at the trial to the want of full proof that the invoices exhibited by Joly to Stewart, and in relation to which he gave evidence, were original invoices, transmitted to the agent by the claimant, the claimant cannot now avail himself of any defect or insufficiency of the testimony to that end. Had he brought forward the objection at the trial, the plaintiff might have obviated it, by putting in further evidence, or the court might have given instructions that would have withdrawn the matter from the jury.

Freed of these collateral considerations, the naked question is, whether the representations of the agent to a purchaser who bargains for the goods at their invoice prices, that the invoice sent him by his principal, and exhibited to the buyer, is a true statement, can be given in evidence against his principal. The power of a selling agent to guaranty the quality, amount, or value of property, so as to bind the owner, may be implied from the character of his agency, to the same effect against the principal as if the authority was established by direct proof; and that, notwithstanding the special directions or instructions of the principal, may restrain or qualify such authority. 2 Kent, Comm. 621; 3 Durn. & E. [3 Term R.] 757; 15 East, 45; Story, Ag. §§ 134–137. When, then, it is shown to have been the course of dealing of this agent, through a series of importations, to sell the goods of the claimant upon the basis of their foreign cost, and to present the invoices forwarded by the claimant as evidence of such cost, his acts on such sale are unquestionably within the scope of his authority, whether the authority is implied from the nature of the business, or the acts are regarded as ratified by the repetition and continuance of the business on the part of the principal; and the rule is clear that, where the acts of the agent will bind the principal there, his declarations and admissions respecting the subject-matter will also bind him, if made at the time, and constituting part of the res gestæ. 1 Greenl. Ev. pp. 130, 131, § 113. I think, then, the declarations of Joly, testified to by Mr. Stewart, made to him on the sale of goods for the claimant, are the material consideration or

basis upon which the bargain of sale was arranged, are competent evidence against the claimant, and were properly submitted to the jury as conducing to prove the market value of the goods to have been, at those times, conformably to those invoices. The case of Bottomley v. U. S.' [Case No. 1,688], 16 Pet. [41 U. S.] 342, settles the point that, in seizure cases, acts of the party importing a fraudulent contrivance to evade the payment of duties in the entry of goods, in instances independent of, and anterior in point of time to, the case in question, may be given in evidence to the jury in proof of a fraudulent purpose in the preparation of the invoice and making the entry in the case on trial, and that the jury can rightfully infer a fraudulent intent in respect to the particular transaction, in view of the whole series of acts, without being limited to the special circumstances attending that alone.

The exception to the admission of the testimony of Mr. Benjamin as to the examination of Joly under oath, without further proof of search for the written memoranda of that examination and their loss, must be overruled because there was no certain evidence that the examination was reduced to writing. It is not made necessary to be so taken by the act of congress (Act July 14, 1832, § 8 [4 Stat. 592]), and, accordingly, no presumption arises that it was so done. The statements of the witness, testified to by Mr. Benjamin, would be competent evidence upon the principle before indicated, that they related to the subject-matter of his agency, the entry of the goods, and the documents supplied him by the claimants, on which the entry was to be made.

The main question upon the merits, in my judgment, turns upon the sufficiency of the evidence to support the verdict. In reading the testimony as presented upon the case, and, especially, estimating it by the number of witnesses, I can hardly think it would be doubted that the weight of evidence is with the claimant and against the verdict. It may not probably be improper to say that, on hearing the evidence in court, it produced on my mind an impression different from that adopted by the jury. But do these considerations justify the court in reversing the decision of the jury, and setting aside their verdict? There was evidence, and of a cogent character, produced by the United States, tending to show a gross undervaluation of the goods, and under circumstances denoting the scienter and direct co-operation, if not whole direction, of the claimant himself, in the matter, and for the purpose of evading the payment of duties. This evidence was met by a strong current of testimony tending to show the valuation on the invoice correct, and accordingly displacing the inference of fraudulent intent, sought to be drawn from the facts offered in evidence on the part of the prosecution. Which state of facts and which class of witnesses should be believed was the matter submitted to the jury, and their examination was aided by a full and able analysis of the proofs, and thorough discussion of the relative credibility and bearing of the different particulars of proof, and certainly then it belonged to the jury to weigh those matters, and dispose of them according to their judgment of the bearing and effect of the testimony.

When the testimony is all one way, or if it appears the jury acted hastily, or with ill feeling towards a party, courts will set aside a verdict for not conforming to the fair bearing of the evidence; but, as a general rule, they will not disturb the finding of a jury, when there is evidence on both sides, and the verdict rests upon the credit the jury gave one class of witnesses as against another. When the case turns upon questions of credibility of witnesses, the mere particular of numbers upon the one side or the other afford no safe criterion by which the court can revise and rectify the conclusions of the jury. Graham collects a list of cases on this doctrine, and though in some it would seem that new trials are granted merely because the court, in reviewing the evidence, have thought the verdict ought to have been the other way, in obedience to the weight of evidence, yet the fair purport of the cases he rehearses would seem to support the proposition with which he introduces their examination, that the verdict will not be set aside, as against evidence, where there has been evidence on both sides, and no rule of law violated, nor manifest injustice done, although there may appear to have been a preponderance of evidence against the verdict. Grah. New Trials, 380–405; 3 Hill, 256.

I am of opinion, upon the whole case, that the motion for a new trial must be denied. Order accordingly.

Case No. 16,498.

UNITED STATES v. THREE CASES, MARKED A. D. 1, 2, AND 3.

[6 Ben. 558;[1] 18 Int. Rev. Rec. 173.]

District Court, S. D. New York. June, 1873.

CUSTOMS LAWS—LANDING GOODS WITHOUT PERMIT—PASSENGER'S BAGGAGE.

A passenger by a steamer from a foreign country had, among his personal baggage, three ordinary goods cases, filled with new and dutiable goods only, intended for sale as such. They were landed on the wharf with the personal baggage of the passengers. They were not named in the manifest of the vessel. No entry was made of the goods, nor had any duties on them been paid or secured to be paid; and no

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 18 Int. Rev. Rec. 173, contains only a partial report.]

permit had been granted to land them, except the general baggage permit issued for the vessel, which authorized the inspector on board to "examine the baggage of all the passengers, and, if nothing be found but personal baggage, permit the same to be landed, and send all other articles not permitted in due time to the appraiser's stores." The cases were seized on the wharf, and an information filed to forfeit them, under the 50th section of the act of March 2, 1799 (1 Stat. 665), as landed without a permit. *Held*, that, on the above facts, the jury must find a verdict in favor of the government.

T. Simons and R. M. Sherman, Asst. Dist. Atty., for the United States.

J. McKeon, for claimant.

BLATCHFORD, District Judge (charging jury). This is a seizure of merchandise, alleged to be forfeited under the provisions of the 50th section of the act of March 2, 1799 (1 Stat. 665), which enacts, that no goods, wares or merchandise, brought in any ship or vessel from any foreign port or place, shall be unladed or delivered from such ship or vessel, within the United States, without a permit from the collector of the port, and the naval officer, if any, for such unlading and delivery, and that, if any goods, wares or merchandise shall be unladen or delivered from any such ship or vessel contrary to the direction aforesaid, all goods, wares or merchandise so unladen or delivered shall become forfeited, and may be seized by any of the officers of the customs. The permit referred to in the 50th section is the permit mentioned in the 49th section of the same act, which enacts, that, after an entry of merchandise, and an estimation of the amount of duties on it, and the paying or securing to be paid of such duties; a permit shall be granted by the collector and the naval officer (if there be one), to land the merchandise of which entry shall have been so made, and that then, and not before, it shall be lawful to land the same. The 49th section then proceeds to prescribe the contents of such permit and enact that the form of such permit shall be so and so. Such form contains a certificate that the duties on the merchandise have been paid or secured to be paid, in conformity to the entry thereof, and a permission to land the same.

In the present case, the property seized is dutiable merchandise, intended for sale as such. It was seized after it had been landed within the United States from the vessel in which it had been brought from a foreign port. At the time of its seizure no entry had been made of it, and no duties had been paid, or secured to be paid, upon it, and no permit had been granted to land it, except such permit as I shall hereafter refer to. The owner of the merchandise came as a passenger in the vessel which brought the three cases of merchandise in question. They were ordinary goods cases, the goods were all of them new goods, and there was nothing but such goods in the cases. The cases were taken on board of the vessel at the foreign port by their owner, with her personal baggage, and were landed on the wharf in the United States with the personal baggage of the passengers. The cases were not named in the manifest of the vessel. The only permit issued, under which it is claimed the cases could have been landed, was a baggage permit, being a filled up blank, which, as a blank, read as follows: "The inspector on board the —— from —— will examine the baggage of all the passengers, and, if nothing be found but personal baggage, permit the same to be landed, and send all other articles not permitted in due time to the appraiser's stores, No. 119 Greenwich street. ————, Naval officer. ————, Collector. Custom House, New York, ——, 187–." Such a baggage permit is issued under the 46th section of the same act, which provides, that the wearing apparel and other personal baggage, of persons who arrive in the United States, shall be exempted from duty; that, to ascertain what articles ought to be exempted under such provision, due entry thereof shall be made, as of other merchandise, but separate and distinct from that of any other merchandise imported from a foreign port, and that an oath shall be taken on such entry, and, in certain cases, a bond shall be given; that, on compliance with such conditions, and not otherwise, a permit shall and may be granted for landing the said articles, provided, nevertheless, that, whenever the collector and naval officer (if any) shall think proper so to do, they may, in lieu of the foregoing provisions, direct the baggage of any person arriving within the United States to be examined by the surveyor of the port, or an inspector of the customs, and to make a return of the same; that, if any articles shall be contained therein which, in their opinion, ought not to be exempted from duty, due entry shall be made therefor, and the duties thereon paid or secured to be paid; and that, whenever any articles subject to duty shall be found in the baggage of any person arriving within the United States, which shall not, at the time of making entry for such baggage, be mentioned to the collector before whom such entry is made, by the person making the same, all such articles so found shall be forfeited.

On the arrival of a vessel from a foreign port, at her wharf here, it is usual for the officers of the customs, assuming to act under a baggage permit of the foregoing form, to allow the officers of the vessel to remove therefrom and put upon the wharf what is called the personal baggage of the passengers, before any examination thereof is made. After such landing, and not before, the nature of the contents of the packages alleged to compose such personal baggage is ascertained by the customs officers. This was the course pursued in respect to the cases in question.

I have repeatedly ruled heretofore, that

merchandise situated as was that in this case cannot be lawfully unladen or delivered from the vessel, except according to the regulations prescribed by the 49th section of the act; that the provisions of the 46th section do not apply to such merchandise; and that, if such merchandise is not unladen in compliance with the 49th section, it becomes, under the 50th section, forfeited to the United States, after it is unladen. I must, therefore, direct a verdict for the United States, condemning the merchandise in question. The ruling referred to, and that now made, is limited to a state of facts like that presented in this case; and it is not intended to decide that, if a passenger by a vessel brings with him dutiable goods for his personal use, or for gifts, or otherwise, not for sale as merchandise, and the same be landed with or among his personal baggage, in the manner before described, or under any state of facts different from that presented in this case, such goods are subject to forfeiture under the 50th section, before mentioned. But the practice of importing considerable quantities of dutiable merchandise, intended for sale, with or among personal effects, under the guise of personal baggage, is one especially dangerous to the revenue, as affording direct facilities for the commission of fraud, and is one prohibited by law. The regular provisions for the protection of the revenue, by way of manifest, invoice, entry and permit, are evaded by such practice, and a forfeiture of the merchandise is incurred. If it is incurred without wilful negligence, or any intention of fraud in the person incurring it, the secretary of the treasury has the power, under the 1st section of the act of March 3, 1797 (1 Stat. 506), to remit or mitigate the forfeiture.

Case No. 16,499.

UNITED STATES v. THREE CASES OF TOYS.

[9 Hunt. Mer. Mag. 462.]

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

IMPORTATION OF INDECENT PAINTINGS—CONFISCATION OF ENTIRE INVOICE.

[1. The provision of the tariff law of 1842, making the importation of an indecent and obscene painting cause for forfeiture of the entire invoice, is applicable, though the painting is not a distinct article, but is affixed to another article, such as a snuff box.]

[2. Nor is the balance of the invoice exempted from confiscation by the fact that the owners thereof were unaware of the character of the paintings.]

This action was brought to confiscate three cases of toys and snuff boxes, claimed by Messrs. Poppy & L. Smith on the ground that there were indecent and obscene paintings in the same invoice. The action was brought under the tariff law of 1842 [5 Stat. 548], the twenty-eighth section of which says: "The importation of all indecent and obscene prints, paintings, lithographs, engravings and transparencies, is hereby prohibited, and no invoice or package whatever, or any part thereof, shall be admitted to entry in which any such articles are contained: and all invoices and packages whereof any such article shall compose a part, are hereby declared to be liable to be proceeded against, seized and forfeited by due course of law, and the said articles shall be forthwith destroyed." The indecent paintings were attached to snuff boxes, nine in number, which were contained in the same invoice as the other articles, and imported here from Germany in September, 1842. The snuff boxes had false bottoms, on each of which was painted an indecent scene or figure, of so very obscene a character that they were unfit to be produced in court, and only one of them was exhibited, having been first defaced with ink to hide its obscenity, for the purpose of showing in what manner the paintings were attached to the boxes.

For the defense, it was alleged, and there was no evidence to show the contrary, that the present claimants were innocent of any intent to import these obscene paintings, as the snuff boxes containing them were ordered by another party without their knowledge. It was also alleged in mitigation that, even if the claimants had ordered the indecent prints, they had done so before the law prohibiting such articles was passed, as the law was passed in August, and the goods arrived here in the following September. But the main ground of defense was that those articles were not paintings, nor could be so considered, or would they be so called by any merchant or trader, but that they were snuff boxes, well known under such denomination in commerce, and that the circumstance of paintings being attached to them could not alter their denomination of snuff boxes.

BETTS, District Judge (charging jury). It is said by counsel that if you exclude every article which is in itself of an indecent character, you must necessarily prevent the importation of many of the fine arts. But let us look at what was the evident intent of the legislature in passing this law. It does not say that articles merely indelicate or indecent shall be confiscated. It says something more. It says, "All indecent and obscene paintings," &c. No language could be more significant to mark out the limits intended by the legislature, or to show more manifestly that they meant only productions offensive to modesty, and subversive of morality, and that they did not intend to prohibit the productions of a higher order in the fine arts. If, for instance, it was a painting or statue of the human figure, although perfectly naked, and so far, in a limited acceptation of the word, indecent, yet it could not be called obscene. But if, when the case is given to the jury, they say that the painting

has the characteristics of an obscene production, it matters not what may be its merits in a foreign market, it comes under the law of congress prohibiting indecent paintings. The great and important question is, do these boxes come within the meaning of the act. You are to bear in mind that, on this trial these paintings, representations, or whatever they may be termed, are admitted to be both indecent and obscene; so much so that they were not brought before you. The question is, then, whether the articles come within the denomination under which paintings are included by congress, inasmuch as they are attached to snuff boxes. It is said that congress meant a distinct fabric or work of art, known only as a painting. But to say so would, I think, be limiting too much the intended scope of the law, and counteracting its purposes. Congress acted on the principle that indecent prints or paintings were likely or liable to taint the public morals, and ordered that everything of that sort should be confiscated. But congress did not say in what manner or fashion those articles should be produced. They did not say whether the print or painting should be on wood or canvass, or on some article of ordinary use, but merely that it be a painting or print likely to produce the mischief which congress intended to prevent. Suppose that you imported window curtains or bed curtains, and those curtains or covers are daubed over with indecent paintings, could it for a moment be maintained that they might be imported as curtains or covers, and thus escape the law which prohibits the importation of indecent paintings? Can it, because it is attached to a thing with another name, not be called a painting, although it is in reality such a painting as is calculated to cause the mischief which congress intended to counteract? I apprehend that, taking the language of congress in its plain and obvious acceptation, it intended to prohibit indecent paintings of all and every description, no matter to what material or article they were attached; and it is our duty to give full effect to the language employed by the law, and the only question for you to determine is, was that article an indecent painting? Congress also said that, not only shall all such indecent paintings be destroyed, but also that all articles in the same invoice shall be condemned. The statement made in this case shows that there were looking glasses in the same invoice, belonging to a merchant who is probably innocent of any intentional offence against the law. But the law does not allow us to make any discrimination. If these paintings came as part of the invoice, whatever be its amount or quality, the whole of it is subject to confiscation.

The jury, without leaving the court, brought in a verdict for the United States, thereby confiscating the whole of the goods. The value of the goods thus confiscated on account of the nine snuff boxes was about $700.

Case No. 16,500.

UNITED STATES v. THREE HORSES.

[1 Abb. U. S. 426.] [1]

Circuit Court, E. D. Michigan. March Term, 1870.

COLLECTION OF DUTIES — BOND FOR RETURN OF SEIZED GOODS.

1. Under section 89 of the duties collection act of 1799 [1 Stat. 695], which allows goods seized for non-payment of duties to be appraised, and delivered to the owner upon his giving a bond for the payment of the appraised value and producing a certificate that the duties have been paid or secured,—the certificate should show payment of all burdens or taxes imposed upon the property by the United States as the condition of allowing it to be imported; including any sum imposed under the act of March 3, 1865 [13 Stat. 493], authorizing an additional sum of twenty per cent. ad valorem to be levied in cases where the appraised value shall exceed ten per cent. more than the value at which the goods were entered.

2. The bond to be given under section 89 of the act of 1799, should be for the actual cash value of the property at the time and place of seizure, without deduction for duties paid, where the property has been seized in the hands of the importer.

3. It seems, that, where the goods have been seized in warehouse, the duties may be deducted, in determining the amount for which the claimant must give bond.

Petition for return of goods seized as unlawfully imported. The custom-house officers having seized certain live stock upon an information alleging that it had been imported without payment of full duties, John O'Rourke, the owner and claimant of the property seized, presented a petition setting forth that he entered the property at the custom-house at Port Huron, at the sum of three hundred and eighty dollars and fifty cents, in gold, and paid the duties imposed by law at that valuation,—namely, seventy-six dollars and fifty cents, gold; and praying for an order that the property be delivered to him upon his producing the requisite certificate of the payment of that amount of duties, and upon the execution of a bond for the payment of the sum at which the property might be appraised as required by law; and that, for that purpose, the property might be appraised at its cash value at Port Huron, less the duties legally chargeable upon it. It appeared that the property was imported in March, 1870, and was entered at the amount stated in the petition, and the duties on that amount were paid. The collector, however, caused a new appraisement to be made, which showed the true value of the property in Canada, whence it was exported, to have been seven hundred and fifteen dollars. This being more than ten per centum above the sum at which the property was entered, the collector, after levying the full amount of duty imposed by law, levied in addition thereto a duty of twenty per centum ad valorem on such appraised value, under section 7 of the act of March 3, 1865 (13 Stat.

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

493), providing that, in such cases, "in addition to the duties imposed by law" on the property, "there shall be levied, collected and paid a duty of twenty per centum ad valorem on such appraised value." None of the duties had been paid, over and above the seventy-six dollars and fifty cents paid on the sum at which the property was entered. The property was in the hands of the marshal by whom it had been seized, under the information filed, while in the hands of the importer.

A. B. Maynard, Dist. Atty., and I. W. Finney, for the United States.

A. Russell, for petition.

LONGYEAR, District Judge. This application is founded on section 89 of the act of March 2, 1799 (1 Stat. 695). That statute provides that in such cases the goods, &c., shall be appraised, and on the return of the appraisement, if the claimant shall give a bond as prescribed by the section, for the payment to the United States of a sum equal to such appraisement, and shall, moreover, "produce a certificate. * * * that the duties on the goods * * * have been paid or secured in like manner as if the goods had been legally entered," the court shall order such goods, &c., to be delivered to such claimant.

The questions presented for decision are:—First. What "duties" are required to be certified as paid in order to entitle the claimant to a delivery of the property?—and, second. Should the appraisement be the value of the property less the duties paid, or the full value without deduction?

These questions do not appear to have been heretofore presented to this court. The second question, however, does appear to have been presented and fully considered by Judge Blatchford in the district court for the Southern district of New York, in the case of Four Cases of Silk Ribbons [Case No. 4,986].

1. As to the first question,—what duties must be certified to have been paid,—the statute specifies "the duties on the goods, &c." What are "the duties on the goods" in this case? The term "duties" is clearly meant to and does include all burdens or taxes imposed upon property imported into the country, and all other burdens or taxes upon such property declared to be such by law. First. There is twenty per centum ad valorem upon the actual value at the place from whence the property is exported. In case an appraisement is made by the collector, as in this case, such appraisement must be taken to be the actual value until set aside by higher authority, under certain proceedings prescribed by statute, but which have not, in this case, been resorted to by the claimant. Second. The additional twenty per centum ad valorem required to be levied, &c., by the act of March 3, 1865, in case the appraised value shall be ten per centum more than the sum at which the property was entered. This is expressly declared by the act to be "duty." It may be said that this additional levy is in the nature of a penalty; but the statute prescribes that it shall be "levied, collected, and paid," as "duty." There is no room for construction here. The statute fixes its character, and there can be no doubt the word "duties" in section 89 includes not only the original duty of twenty per centum, but also the added duty of twenty per centum, both to be estimated upon the value as appraised by the collector. The words "have been paid," &c., "in like manner as if the goods," &c., "had been legally entered," refer to the manner of payment, &c., and not to the amount to be paid. The certificate, therefore, must show the whole amount of duties paid, including the twenty per centum added duty.

2. The appraisement must be the actual cash value of the property at the time of the seizure. The property was seized in the hands of the importer. This presents a very different question from that of a case of goods seized in warehouse. Goods in the hands of the importer have entered into and form a part of the general stock of the country, and are worth in cash just what any such goods are worth at the time and place of seizure, and such market value is the same whether the duties have been paid or not. In fact, the legal duties to which imported goods are subject enter into and constitute a part of their value in the hands of the importer, and to deduct these duties would be to appraise the property at so much less than its actual value.

Not so with goods seized in warehouse. In that case the goods have never entered into the consumption of the country, and constitute no part of its general stock. Such goods cannot be placed in market without first paying the duties. Such duties may never be paid, because the goods may be re-exported. At the time of the seizure the goods are virtually in the hands of the government, and have been from the moment they touched our shores, and there they must remain until they are released on payment of duties, or for exportation, or on a bond for their value under section 89 of the act of 1799. The value of such goods at the time of seizure, therefore, is evidently what would be their market value if they had entered into the consumption of the country, at the place of seizure, less the amount of duties required to be paid to bring them into market.

This distinction between goods in the hands of the importer and goods in warehouse is clearly and distinctly recognized in the case of Four Cases of Silk Ribbons, before cited. I entirely concur in the reasoning and conclusions of the learned district judge in that case.

The appraisement, therefore, must be the actual cash value of the property at Port Huron, at the time of the seizure, without any deduction, and a certificate of the payment of the full amount of duties levied, including the added duty of twenty per centum, must be produced before the property can be delivered to the claimant.

Case No. 16,501.

UNITED STATES v. THREE HUNDRED AND EIGHT CADDIES OF TOBACCO.

[10 Int. Rev. Rec. 126.]

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

INTERNAL REVENUE ACT—FRAUDULENT BOND.

[The fact that one or more of the securities on a bond were totally insufficient and worthless at the time of going on the bond, and that the principal was aware of the fact, is material evidence on the question of the fraudulent intention of the parties.]

The tobacco, factory, and machinery, and raw material were claimed by George E. Hutchinson, whose factory was at No. 510 Commercial alley. It was alleged that the claimant had given false bonds. The evidence adduced at the trial tended strongly to show that the bonds which had been given to secure the government the payment of its taxes were false and fraudulent. The first bond was given for $8,000, and there were upon it as sureties the names of Lloyd B. Adamson and Will. H. Latshaw, who were shown in evidence to be saloon lunch-eaters. Jasper Button testified that they slept in his office at night, and he was in the habit of giving them from five cents to ten cents each in order that they might obtain a drink at Mr. Heidler's saloon and that they might secure the best meal possible. The barkeeper at length complained to Mr. Button for having sent them there to get their drinks, Heidler losing by the operation. This bond was accepted by the collector, and the factory ran upon it from the 16th of May until the second bond was given, on the 24th of June, during which time over 25,000 pounds of plug tobacco was manufactured. Adamson, who was on the first bond, was secured by Mr. Hutchinson, as his agent to obtain a new bond for the sum of $20,000, which was required by the government. Through his instrumentality, was obtained, among other sureties, Jacob S. Ritze, and Andrew J. Patterson. Ritze was brought from jail, where he has been for several weeks, and put upon the stand. He testified in effect that, at the time of giving the first bond, he was utterly worthless as a security and had been secured by Adamson. Patterson was also proved to be a man without means, a lunch-eater and a loafer round bar-rooms. It also appeared that Adamson, Ritze and Patterson slept in Button's intelligence office, and it was stated that Patterson's bed consisted of a newspaper. It was further given in evidence that Hutchinson first met the new sureties at the Broad Gauge Saloon, where they had been taken by Adamson. Neither Adamson, Latshaw nor Patterson can now be found; and Ritze was secured by the marshal taking him into custody. Hutchinson had come from Galveston, Texas, and it appeared that Mr. Jas. F. Chapman had advanced $1,500 to Hutchinson to start the factory, upon which sum he got interest at the rate of 2 per cent. per month. Mr. Chapman also appeared as a surety on the second bond, and swore on witness stand that he had no unincumbered real estate in the state except a few lots in Kansas City, which were in an addition so far out that the main town could not be seen. These were valued at $2,500, and he had taken them in payment of a debt. With such bonds the factory went into operation and in May and June manufactured over 33,000 pounds of tobacco, on which tax accrued to the United States to the amount of $13,422, none of which had been paid. The books of the factory were seized by the government, and it appeared from them that upwards of $17,000 in cash had been realized and that the profits amounted to over $8,000. It also appeared that since the commencement of these proceedings Hutchinson had obtained possession of the factory by means of a delivery bond and sold it for about $4,000. The value of this bond is to be inquired into.

Mr. Lightheuzer and Mr. Robert S. McDonald were the attorneys for the claimant and made earnest efforts in his behalf.

The government's interest was ably supported by Gen. Noble, Dist. Atty., who pressed the question upon the jury, what had become of the profits of the establishment, and why had no portion of the money been paid to the United States. He contended that such miserable and intolerable fraud as had been shown should be stopped.

THE COURT instructed the jury that in deciding upon the merits of that question, if they believed that any of the securities on the bond were totally insufficient and worthless at the time of going on the bond, and the claimant knew the same, it would aid them materially in arriving at a determination as to the intention of the parties.

The jury retired and returned in a few moments with a verdict for the United States on all the articles. The value of the property forfeited is considerable, amounting to several thousand dollars.

Case No. 16,502.

UNITED STATES v. THREE HUNDRED AND NINETY-SIX BARRELS DISTILLED SPIRITS.

[3 Int. Rev. Rec. 114.]

District Court, E. D. Missouri. March 1, 1866.

INTERNAL REVENUE ACT—FORFEITURE OF LIQUOR—PROCEEDINGS.

[1. An information for a forfeiture of liquor may properly contain distinct articulations.]

[2. Such information should contain the formal conclusion prescribed by the rules of the supreme court, "contrary to the form of the statute," etc.]

[3. An information for a forfeiture, under the 68th section of the act (June 30, 1864), does not embrace the causes mentioned in the 48th section.]

[4. The removal of spirits by the distiller before they have been officially inspected, gauged, and proved is a cause of forfeiture.]

[5. The failure of the inspector to mark on the barrels the quantity and proof, as enjoined by the 59th section, is not a cause of forfeiture.]

[6. A removal before payment of duties is not a violation of the act.]

[7. Spirits manufactured by the distiller, and still owned by him, are liable to forfeiture, wherever they may be found in the United States.]

[8. A refusal or neglect to comply with any of the requirements of the 57th section works a forfeiture under the 68th section.]

[9. The forfeiture under the 68th section, and the penalty of $500, therein prescribed, are independent of any other penalties named, and are cumulative.]

[10. A suit in another court on the distiller's bond, commenced before an information for the forfeiture under the 68th section, or before the seizure of the property, does not bar or abate the forfeiture proceedings.]

[11. The original information may be amended after 20 days by adding new articles, containing additional causes of forfeiture.]

[12. The court of the district where the res is seized has jurisdiction of the information, though the violation of the law occurred in another state.]

On the 18th day of April, 1865, the district attorney filed an information against the property in question, under the act of congress approved June 30, 1864 [13 Stat. 223], in which it was alleged that the seizure was within the time limited by the proviso to the 68th section of said act, to-wit, thirty days after cause of forfeiture came to the knowledge of the collector of internal revenue, by whom the seizure was made; and also that the causes of forfeiture were removal by the distiller before inspection, removal by him without having the same marked, as required by section 59 of said act, removal before payment of duties, and that same had been removed by the distiller for purpose of avoiding payment of duty; the last cause of forfeiture being intended to fall within the 48th section of the act. On the 19th of April, 1865, a warrant was issued on said information, returnable June 5, 1865. On June 3d, Ferdinand Braun filed his formal claim as sole and bona fide owner. The return on the warrant showed that the custody of the res was retained by the collector, under the provisions of the statute. On the return day, to-wit: the 5th of June, the district attorney, by leave of court, filed an amended information, setting out other causes of forfeiture under the act than those originally assigned. On the 10th of June, Ferdinand A. Reuss, in whose possession the res was found when seized, intervened, claiming a factor's lien for balance due. On the 19th of June the claimant, Braun, filed a motion to quash the amended information, for reasons set out specifically in the motion. On the subsequent hearing of said motion, the court overruled it, for reasons repeated substantially in the opinion delivered on the motions for new trial and in arrest. The opinion delivered orally covered the whole ground which could be reached on a motion to quash or a demurrer. On the 5th of July following, Braun filed general and special demurrers to the amended information, which were not formally heard, as said 5th of July was at the close of the session of the court. On the 20th day of the following November (it being the second day of the November term, 1865), the district attorney, by leave of court, filed a second amended information, covering all the causes of forfeiture previously alleged, and several additional causes, so as to have a formal decision by the court on the various propositions of law covered by the case. On the 28th of November, Braun demurred to the second amended information and the several articles thereof.

The court sustained the demurrer as to the third, fourth, fifth, and sixth articles, and overruled it as to the first, second, seventh, tenth, eleventh, twelfth, thirteenth, and fourteenth articles—the fourteenth being merely the formal conclusion in such cases. On December 11th, Braun, filed several pleas, intended for the "general issue," and special pleas to the remaining articles. On December 13th, Braun filed additional "special pleas;" to which the district attorney interposed demurrers on the 14th, and said demurrers were on that day sustained by the court. On the same day (December 14, 1865), the case was continued on application of claimant, Braun, to the next term. At the next, or February term, 1866, issues having been joined on the remaining pleas, the trial before a jury was commenced, which lasted several days. On the 1st day of March, 1866, the jury, under the following "charge" by the court, found for the United States on the first, tenth, eleventh, twelfth, and thirteenth articles; and against the United States on the second and seventh articles. The charges in the second and seventh articles were for removal by the distiller, Braun, before inspection, gauging and proving by the proper inspector. On the 2d of March, Braun filed a motion for new trial, and subsequently a motion in arrest; each of which motions was overruled for reasons stated in the written opinion thereon. [See Case No. 16,503.] Thereupon the court entered judgment of forfeiture against the res, and for costs of prosecution against the claimant, Braun. As the res had been previously delivered to Braun on bond, for the appraised value, according to the provisions of the statute in such cases, the court, on motion of the district attorney, entered an order on the principal and sureties, according to the tenor of said bond, to pay into the registry the full amount thereof. On the 17th of March, exceptions to the claim of F. A. Reuss were argued, and overruled on the 19th; and, on the latter day, said claim was heard on the evidence offered. The rulings of the court on that claim, with the reasons therefor, are embodied in the following opinion on that branch of the case, which was

given in writing. Thereupon the court made a final order disposing of the fund in the case, viz.: to pay out of the funds, first, the costs and expenses, other than those previously adjudged against Braun; second, the amount of Reuss' lien demand ($11,874 77); and, then, the residue to the collector of internal revenue (the informer), one-half to his own use and one-half to the use of the United States.

Among the many rulings by the court, during the progress of the cause, on the motion of quash, demurrers to the amended informations and pleas, objections to the admissibility of evidence offered, etc., were decisions to the following effect: (1) The structure of the information by distinct articulations, as in libels of information on the instance side of the court in admiralty, was correct. (2) The formal conclusion is prescribed by the 22d rule adopted by the supreme court of the United States: "contrary to the form of the statute," etc., and must be adhered to. (3) An information for a forfeiture under the 68th section of the act, does not embrace the causes mentioned in the 48th section; for the latter are for the conduct and intentions of the parties in whose possession the property is found, and not for the previous actions of the distiller, out of whose possession the distilled spirits have passed. (4) That the removal of spirits by the distiller before the same have been officially inspected, gauged, and proved, as required by the 59th section, is a cause of forfeiture under the 68th section. (5) That the duty to mark on the barrels the quantity, proof, etc., enjoined by the 59th section, is an official duty imposed by law on the inspector, and his failure to perform that duty in any particular, does not work a forfeiture of the distiller's property. The latter is liable only for his own acts of omission and commission, and for those of his agent and superintendent in the distillery. The 68th section is confined to the neglects and refusals of the latter, and not of the inspector or other officers. Hence, a removal of the spirits, the same not having been marked, etc., is no cause of forfeiture. (6) A removal before payment of duties is not a violation of the act. Although the phraseology of the law differs in different sections, yet the true construction thereof is, that the spirits must be first inspected, and true returns of those distilled and sold, or removed for consumption or sale, made to the collector at the times required; at which times the duties are payable, and not before. The books to be kept by the distiller, and the inspector's return, if true, will enable the assessor and collector to ascertain if the distiller's tri-monthly returns are correct. (7) All spirits manufactured by a distiller and still owned by him, wherever found in the United States—whether in the distillery, or in a different district or state, and whether duties had been paid on such spirits or not—are liable to seizure and forfeiture under the 68th section. (8) A refusal or neglect to comply with any of the requirements enjoined on the distiller by the 57th section, works a forfeiture under the 68th section, to wit: a refusal or neglect of any one of the following requirements: To have made in the proper books, true and exact entries of the number of gallons of spirits distilled, etc.; to render to the assessor or assistant assessor correct duplicate accounts, as required; to verify, as prescribed, the entries, books, reports and accounts required; to forward to the collector correct duplicate accounts, as prescribed; to pay to the collector, when rendering said accounts to him, the duties then due and payable; to keep the book or books prescribed therefor by the commissioner of internal revenue for entries concerning what is daily placed in the mash tub; if the charge is for not following the prescribed form, there must be an allegation that a form was prescribed; to have correct entries made in the latter books concerning the mash tubs. (9) A failure to report or pay, under the 55th section, the increased duties thereby imposed on spirits on hand, July 1, 1864, on which duties had not been previously paid, works a forfeiture, under section 68. (10) The facts set up in the first and second additional pleas, filed December 13, 1865, constitute no defence or bar to these proceedings, to wit: That since the commencement of this suit, the assessor of the district in Illinois, where Braun's distillery is situated, has assessed against him for alleged deficiencies in payment of duties down to April 10, 1865, the sum of $109,051 51; and that the collector there had demanded of Braun the payment thereof, together with a penalty of 100 per cent. thereon, making the amount so demanded $218,103 02; and that he had on the 5th of June, 1865, levied on all Braun's real and personal estate, and had sold all his personal estate on the 12th of July, and that said real and personal estate was worth the full amount so assessed, etc. Said assessment and levy did not operate a full satisfaction or waiver of all other demands by the United States against said Braun for his alleged violations of the said act of congress, or for his failure to pay the duties required of him in manner and form, as prescribed by the statute. The forfeiture under the 68th section, and the penalty of $500 therein prescribed, are independent of the other penalties named, and are cumulative. (11) A suit in another court on the distiller's bond, given under section 53, commenced before an information for a forfeiture under the 68th section, or before the seizure preceding such information, does not bar or abate the proceedings to enforce said forfeiture. (12) The amendment of the original information, after the expiration of twenty days, by adding new articles containing additional causes of forfeiture, is not inadmissible, nor violative of the limitation contained in the pro-

viso to the 68th section. (13) The court of the district where the res is seized has jurisdiction of the information for a forfeiture, although the violations of the law may have been committed by the distiller in another state.

These are substantially all the rulings of importance, except those covered by the charge to the jury and the opinions, which were delivered in writing; and all that are necessary for a full understanding of said charge and opinions.

W. N. Grover, U. S. Dist. Atty., and George B. Kellogg, for the United States.

Gustavus Koerner, John M. Krum, Ernest W. Decker, Chester Harding, Jr., and Chester H. Krum, for claimant and intervener.

THE COURT (charging jury). Under the pleadings and admissions in this case, it is necessary for the court to direct your attention only to the following considerations: When a cause of forfeiture exists, under the 68th section of the act of June 30, 1864, the collector or deputy collector may seize the property supposed to be forfeited, at any time within thirty days after the cause of forfeiture comes to his knowledge; and must within twenty days after such seizure, cause proceedings to enforce the forfeiture to be commenced. The testimony, as to the time when the cause of forfeiture in this case came to the knowledge of the collector, and of the deputy collector as to the time within which proceedings were commenced to enforce said forfeiture. The collector has stated, as a witness, when his knowledge as to the cause of forfeiture occurred, and so has the deputy collector as to the date of his knowledge. You have also before you the date of the commencement of proceedings to enforce said forfeiture, to wit: 18th of April. If the seizure and proceedings fall within the time mentioned, then you are to enquire into the existence or non-existence of the causes of forfeiture alleged in the 2d, 7th, 10th, 11th, and 13th articles of the amended information filed on the twentieth of November, 1865. Some of the causes alleged in those articles may not have been averred in the original information filed on the 18th of April, 1865, but, if the additional causes actually existed at the time of seizure, they are as proper subjects of inquiry on this trial as if they had been so averred originally. The charges in said articles of the amended information are for violations of the act of June 30, 1864; and, therefore, no violations of any antecedent act, and no violations of said act of June, which may have occurred after the seizure in this case, are subject matters of inquiry in this suit. Testimony as to the antecedent and subsequent matters has been admitted; not, however, for the purpose of showing a cause of forfeiture prior to June 30, 1864, or subsequent to the seizure, but to enable you to determine whether any of the causes of forfeiture, alleged in the amended information, occurred within the periods of time stated. The sale of distilled spirits, which may have been made to Reuss & Co. after the seizure in this case, is not a cause of forfeiture, now on trial, and the jury should disregard so much of the testimony relating thereto as refers to the nature or good faith of that particular transaction. A portion of the testimony consists of alleged admissions made by the claimant, Ferdinand Braun. Some are said to be direct statements by him, and some acquiescence by him in statements made by others. All such testimony, especially the latter, is to be received with great caution. Hence the jury should duly weigh the circumstances under which the alleged admissions are said to have been made, in order to ascertain whether the recollection and repetition thereof by the witnesses are accurate; whether they caught the precise meaning intended to be conveyed, or whether the person making the admissions caused himself to be clearly understood. Admissions by acquiescence depend, for their force and effect, upon the relations which the parties to the conversation bear to each other, and the circumstances under which the conversation between them takes place. If the statement acquiesced in is made by one who has a right to be informed or to investigate the subject, then the acquiescence, by silence or otherwise, is to receive more weight than under other circumstances it would be entitled to receive. A statement by a mere stranger, which, for its impertinence, receives the rebuke implied by silent contempt, should have no force as evidence. It is the duty of the jury, therefore, who are exclusively to judge of the weight due to the evidence before them, to consider all the facts and circumstances attending the alleged conversations, in the course of which admissions are said to have been made, in order that they may determine what weight is due to the alleged statements of Braun, or his acquiescence in the statements made to him by the witnesses.

The court designed to exclude all his statements which were confidential overtures of pacification, or offers or propositions of compromise, or which were made as a part of negotiations for compromise, or under the faith of pending negotiations into which he had been led by confidence in the success of a suggested or proposed compromise. If, however, any statements or admissions by him, under such circumstances, have been given in evidence, the jury should disregard them. But any independent statement of facts made by him, not on the condition, tacit or express, that the same was to be treated as confidential, or as an overture for a compromise, should be treated as evidence in the cause and duly weighed. An offer to pay a sum named, by way of compromise, is not admissible as proof that any sum is due; but an admission that a sum is due, as an independent fact, is proper evidence, and is to be treated as all other admissions.

The jury should also weigh all other testimony, in order to ascertain what is the exact truth with respect to every controverted fact. They are to judge of the credibility of the witnesses and of their statements, not only by their manner of testifying, but by their opportunities for knowing accurately or definitely the precise fact, or facts detailed by them. It is proper to consider also their relations to the case and to the parties, their means of knowledge, accuracy of memory, disinterestedness, and all other facts and circumstances which will enable the jury to judge, with correctness concerning the reliability of the testimony in any one or all respects. The act of congress, approved June 30, 1864, under which this suit is brought, imposes on a licensed distiller within the United States, the following among other duties: (1) He shall not use, or remove, for any purpose, from his distillery, any spirits distilled by him, before the same are inspected, gauged and proved by the proper official inspector. It is apparent that the provision just named is deemed essential to the due protection of the government revenue. The law imposes on the official inspector several duties, for a failure to perform which, the distiller is not liable in person or property. Hence, a failure by the inspector to properly mark on any one or more barrels of distilled spirits the date of the inspection, the quantity and proof of the contents, or any other matter required of him, does not work a forfeiture of the distiller's property. The latter has performed his duty if he refrains from removing or using the spirits before the same have been inspected, gauged, and proved by the official inspector. If, on the other hand, he uses or removes the spirits distilled by him before such inspection has been made, he forfeits not only the uninspected spirits, but all others distilled by or for him which he still owns, and which may be seized by the collector or deputy collector, under the circumstances and within the times already stated. Hence, the evidence offered in this case upon that point, is not for the purpose of ascertaining as an independent fact, whether the inspector properly marked the barrels, but whether he ever inspected the spirits at all, before the same were removed from the distillery to St. Louis, or any other spirits so removed. (2) The law required each distiller, if he manufactured more than one hundred and fifty barrels of spirits per year, to render to the assessor or assistant assessor of the district, on the first, eleventh and twenty-first days of each month, or within five days thereafter, an account, in duplicate, taken from his books, of the number of gallons of spirits distilled at his distillery, and also the number of gallons sold or removed for consumption or sale, and the proof thereof, not before accounted for; and to make, from day to day, true and exact entry, or cause to be entered, in a book, to be kept for that purpose, the number of gallons distilled, and also the number of gallons placed in warehouse, and also the number sold, or removed for consumption or sale, and the proof thereof; also, to verify, or cause to be verified, the said entries, reports, books and accounts, by oath or affirmation, and immediately forward to the collector of the district, one of said duplicate accounts, duly verified as aforesaid; and also to pay to the collector the duties on the spirits so distilled and sold, or removed for consumption or sale, and in said accounts mentioned, at the time of rendering the duplicate account thereof.

From these last named provisions of the law it will be understood that the distiller must keep the required books, make daily entries therein, or cause the entries to be made, verify said books and entries, make tri-monthly reports to the assessor or assistant assessor, verify said reports, which are to be accurately taken from the books, and to contain the required statements, furnish to the collector a duplicate of said tri-monthly accounts, duly verified, and pay the prescribed duties at the time of rendering said duplicate accounts. By these requirements, faithfully complied with, the government would be able to ascertain correctly, and to receive the duties imposed by law, if none of the spirits were removed before inspection. A failure on the part of the distiller to discharge the legal duties thus imposed on him, or any of them, works, under the limitations referred to, a forfeiture of the property named in the act, which includes all the spirits distilled by or for him, and still owned by him at the time of the seizure. The time for payment of duties is not when the spirits are removed, but when the duplicate account thereof is returned to the collector. They may be removed previously, without a cause of forfeiture; but an accurate entry thereof must be made in the distiller's book, and an accurate account thereof, duly verified, returned to the assessor or his assistant, and to the collector. If these requirements are observed, the inspector's returns, the verified books of the distiller and his duplicate accounts, will correspond.

There is also another provision of the act of June 30, 1864, to be considered in this cause, viz.: All spirits in the possession of the distiller, or in public store, or bonded warehouse, on the first day of July, 1864, no duty having been paid thereon, are to be held and treated as if distilled on that day, and duties thereon to be paid within five days after the time of rendering the proper tri-monthly account thereof. Evidence has been admitted with reference to the returns of Mr. Braun, of the spirits distilled by him prior to the first day of July, 1864—not for the purpose of proving any violation by him of an antecedent law—but for the two-fold object of learning whether he had on hand at that time any unsold spirits previously distilled by him, on which duties had not been previously paid, and if so, whether he included them subsequently in his proper tri-monthly accounts, and paid thereon

the additional duty prescribed. If he had on hand at that time such spirits, and included them in his subsequent accounts, and paid the proper duties thereon, the jury would have some data, in connection with his subsequent sales and shipments, for ascertaining what amounts were subsequently distilled by him. If the spirits then on hand, on which duties had not been previously paid, were not included in his accounts, and the additional duty not paid thereon, as required, then those spirits. and others distilled and belonging to him subsequently, were subject to seizure and forfeiture.

As there are many articles or articulations in the information on which issues are joined by the pleas, the jury will find specially on each of those articles: (1) If they find, from the evidence, that the seizure was made by the collector or deputy collector, within thirty days after the cause of forfeiture came to his knowledge, and that he caused proceedings to enforce said forfeiture to be commenced within twenty days after said seizure, they will find, as to said first article in the information, the issue for the plaintiff; otherwise, they will find said issue for the respondent. (2) If they find that the 396 barrels of spirits seized, or any of them, were distilled at Belleville, Illinois, or within the United States, and were removed, or suffered to be removed, from the distillery by the distiller thereof, before the same had been inspected, gauged and proved by the proper inspector, they will find the facts, charged in the 2d article, for the plaintiff. (3) As to the 7th article, if they find that the said spirits, or any of them, were manufactured by said Braun, at Belleville, Illinois, and were removed or allowed to be removed, by him to St. Louis, before the same had been inspected, gauged and proved, they will find the issues, as to said 7th article, for the plaintiff. As to the 10th article, it alleges several causes of forfeiture, and if the jury find that any of said causes existed at the date of the seizure, they must find on said article for the plaintiff. The causes therein charged are substantially: that said Braun, being a licensed distiller, and subject to the requirements of the act of June 30, 1864, manufactured the spirits in question at his distillery, in Belleville, Illinois, after said 30th of June, and before the seizure, and was the owner of the same when they were seized in this case; and that the same was forfeited for the following causes: (1) That said Braun did not make true and exact entry, or cause to be entered, from day to day, in a book, kept for that purpose, the number of gallons of spirits distilled by him after June 30, 1864, and before the seizure; or, in other words, he did not, during that time, make, or cause to be made, daily, the entries in said book, as the law on that point, heretofore explained, required to be done. (2) That he did not render said tri-monthly accounts to the assessor or assistant assessor. (3) That he did not verify, as aforesaid, the said entries, reports, books and accounts. (5) That he did not pay to the collector, at the time and in the manner required, as aforesaid—viz.; at the time of rendering the tri-monthly accounts, or when the same should have been rendered to the collector—the duties by him payable on such distilled spirits. If any one of those five causes of forfeiture existed at the seizure, as alleged, and occurred within the times named, the jury must find for the plaintiff on that 10th article. These last named issues involve the truthfulness of the entries and returns, as well as the correctness of the amounts of duties payable by him, and paid,—whether he paid tri-monthly the full amount of duties which were then due. As to the 11th article, the issue is: Did said Braun sell, and remove for consumption and sale, after the 30th of June, 1864, and before the seizure, any spirits, by him distilled, after the first day of May, 1863, without paying the duties thereon at the time of rendering the tri-monthly account thereof, or at the time when, after said 30th of June, the tri-monthly account thereof ought to have been rendered, or at any other time after said 30th of June. This article involves an inquiry into the amount of distilled spirits on hand on July 1, 1864—the amount in the possession of the distiller, Braun, at that time—no duty having been paid thereon previously. Also, whether, if there were any such spirits on hand, he paid duties thereon subsequently. It also involves the inquiry whether said Braun failed, after said June 30, 1864, to pay, at any time, when payable, the proper duties on spirits distilled subsequently. If there was such failure to pay duties, either on the amount on hand on July 1, 1864, or on any spirits subsequently distilled, then the plaintiff is entitled to a verdict on that article. As to the 12th article: Did said Braun, after July 31, 1864, and prior to the seizure, fail to pay the duties required of him, on the spirits distilled by him, and sold, or removed for consumption or sale, during that period? As to the 13th article: Did said Braun, after July, 1864, and prior to the time of the seizure, fail to make to the assessor or assistant assessor of the proper district, correct tri-monthly returns of the amount of spirits distilled by him during said period of time, for any one of said tri-monthly periods? This issue requires the jury to find whether said Braun failed, at any one of said tri-monthly periods, to make a correct return to the assessor or assistant assessor, of the amount of spirits distilled by said Braun after July 31, 1864, and before the seizure. It involves the truthfulness of each and every one of the tri-monthly returns made to the assessor during that period. As to the issues joined on the allegations of the several articles named, if the jury find, from the evidence, that the allegations are true in manner and form, as alleged, they will so find, separately, as to each of said articles; and as to the allegations made in any of the said articles, if they find them not to be true, the verdict should be accordingly.

The only articles in the information containing allegations upon which the jury are to pass, are those named above, to wit: 1st, 2d, 7th, 10th, 11th, 12th, and 13th. The first article relates only to the time of seizure, and of the commencement of proceedings; and the others, to causes of forfeiture.

[For opinion of the court on motions for new trial and in arrest of judgment, see Case No. 16,504.]

Case No. 16,503.

UNITED STATES v. THREE HUNDRED AND NINETY-SIX BARRELS DISTILLED SPIRITS.

[3 Int. Rev. Rec. 123.]

District Court, E. D. Missouri. March 19, 1866.

INFORMATIONS OF FORFEITURE—PLEADING—AMENDMENTS—VIOLATION OF INTERNAL REVENUE LAWS—FORFEITURE OF SPIRITS — EFFECT OF SEIZURE—EVIDENCE—ADMISSIONS AND OFFERS OF COMPROMISE.

[1. A motion to quash an information in rem on the exchequer side of the court does not lie. A demurrer is the proper mode of reaching technical or substantial defects.]

[2. Informations of forfeiture filed by United States attorneys are amendable even after pleas filed, and in substance. Such amendments may be allowed even by the judge at chambers, and counts may be stricken out, and new ones inserted.]

[3. Informations in rem on the exchequer side of the court are not criminal proceedings. They are civiliter, non criminaliter.]

[4. Amendments may be made in the appellate court only when the suits are on the admiralty side of the court.]

[5. There are no substantial distinctions between the proper structure of, and rules governing, libels of information and informations for municipal forfeitures.]

[6. Although, in informations of forfeiture, the technical precision of an indictment is not necessary, yet the allegations must be sufficiently specific to enable the claimant to traverse them, and the court to see that, if proved, a violation of the statute exists. The violation may be charged in the words of the statute, but a general averment that the statute has been violated is not sufficient.]

[7. The general structure of an information of forfeiture is governed by the 12th rule of the supreme court, and propounding by articles is admissible. Under the rules prescribed by the supreme court, general denials or "issues" are permissible in informations on the exchequer side of the court in cases of seizure under the internal revenue acts.]

[8. The forfeitures declared by the 68th section of the internal revenue act of June 30, 1864 (13 Stat. 248), extend only to the specific property belonging to the distiller, and, consequently, bona fide purchasers from him are protected.]

[9. In the absence of any express declaration in the statute that the forfeiture shall be instantaneous upon the commission of the forbidden acts, the forfeiture relates only to the time of seizure.]

[10. The proviso in the 68th section of the act which requires that the seizure be made within 30 days after the cause for the same shall have come to the knowledge of the collector and deputy collector, and that proceedings to enforce said forfeiture must be commenced within 20 days after seizure, are to be construed as meaning that the seizure may be made when only one cause of forfeiture has come to the collector's knowledge, and that, when made, it is for all causes of forfeiture which may have been committed, although they are not discovered until after the seizure. Hence there is no error in permitting causes of forfeiture to be inquired into at the trial which had not come to the collector at the time he seized the property. If the pleader has failed to set out, in the first instance, all of the causes which existed at the date of seizure, he should amend, and set them out; for, the suit being in rem, a condemnation and sale will give full title.]

[11. A broad distinction exists between admissions as independent facts, and confidential statements, made with a view to, or pending negotiations for, a compromise. There must be the seal of confidence, tacit or expressed, or an offer or proposition for compromise, before the statement can be excluded. A person who has violated the law, and knows the facts have been discovered, and that the officers are about to exercise the requisite authority for investigating the matter thoroughly, cannot defeat the ends of justice by volunteering all the information desired, and producing his books, papers, etc., and then stating that he desires to negotiate for the compromise.]

[This was an information of forfeiture against three hundred and ninety-six barrels of distilled spirits, claimed by Ferdinand Braun; Ferdinand A. Reuss having also intervened in the proceeding. Heard on motions for a new trial and in arrest of judgment.]

W. N. Grover, U. S. Dist. Atty., and George B. Kellogg, for the United States.

Gustavus Koerner, John M. Krum, Ernest W. Decker, Chester Harding, Jr., and Chester H. Krum, for claimant and intervener.

OPINION OF THE COURT. The original information in this case was filed on the 18th of April, 1865; an amended information, June 5th, 1865; and a second amended information, on leave granted, November 20th, 1865. The cause was tried at the present term of the court, and verdict rendered for the United States, on the 10th, 11th, 12th and 13th counts; and for the claimant on the 2d and 7th counts. Demurrers had been previously sustained to the other counts; except the 14th, which was formal, merely. The claimant has filed a motion for new trial; and the questions arising upon said motion have been argued in connection with such other questions as might be presented on a motion in arrest of judgment. The court has before it for decision, therefore, the many points presented by claimant's counsel; most of which have been previously decided, orally, but which it is now asked to review.

The information and amended informations are under the act of June 30, 1864 (the internal revenue act), and involve a construction thereof, and especially of the 68th section. Heretofore a motion to quash was overruled, on the ground that a motion to quash an information in rem on the exchequer side of the court does not lie. Thereup-

on demurrers were presented to each of the articulations (or counts) of the information; some of which were sustained and some overruled. Many of the points were merely technical, concerning practice and pleading; but as the rulings of the court were then announced orally, they are now re-stated in writing—omitting, however, the detailed reasons on which the rulings were based, and giving, in connection therewith, the views of the court on the new points made:

(1) A motion to quash does not lie. 1 Chit. Cr. Law, 855, 867, 868; 3 Bac. Abr. 647.

(2) A demurrer is the proper mode of reaching technical or substantial defects. 1 Chit. Cr. Law, 841, 846. Steph. N. P. 2263.

(3) Informations by United States district attorneys are amendable even after pleas filed, and in substance; and such amendments may be allowed even by the judge at chambers. Counts can be stricken out and new ones inserted. 1 Chit. Cr. Law, 841–846, 867.

(4) Informations in rem on the exchequer side are not criminal proceedings. They are civiliter, non criminaliter. Anonymous [Case No. 444]; U. S. v. Mann [Id. 15,718]; [The Samuel] 1 Wheat. [14 U. S.] 9; [The Hoppet] 7 Cranch [11 U. S.] 389; [The Emily and The Caroline] 9 Wheat. [22 U. S.] 386; [The Palmyra] 12 Wheat. [25 U. S.] 1.

(5) The broad distinctions between informations by the attorney general and by private persons are well settled, and uniformly recognized. 1 Chit. Cr. Law, 841–868; 3 Bac. Abr. 647; Steph. N. P. 2263; 5 Mees. & W. 372.

(6) That, while it is held in Anonymous and U. S. v. Mann, supra, that amendments may be made at any time, it is evident that amendments can be made in the appellate court only when the suits are on the admiralty side of the court. [The Anne v. U. S. [7 Cranch [11 U. S.] 570; [The Edward] 1 Wheat. [14 U. S.] 261; [The Marianna Flora] 11 Wheat. [24 U. S.] 1; [The Friendschaft] 3 Wheat. [16 U. S.] 14; [Housemann v. The North Carolina] 15 Pet. [40 U. S.] 40.

(7) There are no substantial distinctions between the proper structure of, and rules governing, libels of information and informations for municipal forfeitures. [The Samuel] 1 Wheat. [14 U. S.] 9; [The Hoppet] 7 Cranch [11 U. S.] 389; [The Sarah] 8 Wheat. [21 U. S.] 391; Conk. Prac. 554 et seq. 872.

(8) Although the technical precision of an indictment is not necessary, yet the allegations must be sufficiently specific to enable the claimant to traverse them, and the court to see that, if true, a violation of the statute exists. The violation may be charged in the words of the statute, but a general averment that the statute has been violated is not sufficient. Anonymous [supra]; The Friendship [Case No. 5,124]; The Bolina [Id. 1,608]; U. S. v. Mann [Id. 15,718]; [The Samuel] 1 Wheat. [14 U. S.] 9; [The Hoppet] 7 Cranch [11 U. S.] 389, 496; [The Emily and The Caroline] 9 Wheat. [22 U. S.] 381–386, 430; [The Sarah] 8 Wheat. [21 U. S.] 391; [The Mary Ann] Id. 380; [The Palmyra] 12 Wheat. [25 U. S.] 1.

(9) As to the general structure of the information, it is governed by the 12th rule of the supreme court, and propounding by articles is admissible. The act of congress (5 Stat. 518) clothed that court with authority to make rules for "suits at common law" in the United States district and circuit courts, as well as suits in admiralty and equity. A careful analysis of those rules shows that, while general denials or "issues" are not permissible in many cases, yet in cases on the exchequer side of seizures on land for violation of the internal revenue act, a general denial or "issue" is allowable. The extent to which amendments are permissible is illustrated in [The Sarah] 8 Wheat. [21 U. S.] 391, and [The Emily and The Caroline] 9 Wheat. [22 U. S.] 386; where libels of information for seizures (water-borne) on the admiralty side were required to be changed to informations for seizures on land, so that the trials could proceed on the exchequer, instead of the admiralty side of the court. Thus the supreme court, on appeal, directed amendments, whereby the nature of the jurisdiction was changed. It also decided that charges might be averred in the alternative, but that each alternative ought to contain, in itself, a complete and substantive charge. It may be well, however, to remark upon this point, that although it is not error to make such charges in the alternative, this court will, under its general powers in such cases, order a repleader, so that each charge may be distinctly pleaded in a separate article or count, and indistinctness and confusion thereby avoided at the trial. The claimant should have an opportunity of meeting separately and substantively each charge made, in a direct form; and juries have before them single issues. In the suit now under consideration, the 10th article alleges, in the alternative, several causes of forfeiture, so that when the jury found any one of them true, they had to find for the plaintiff on said article; while the record fails to show which is found true and which false.

(10) The 22d rule of the supreme court determines what the formal conclusion must be—"contrary to the form of the statute of the United States in such cases provided, as the case may require." The judiciary act of 1789 [1 Stat. 73] empowers United States courts to permit parties, at any time, "to amend any defect in process or pleadings, upon such conditions as the said courts" may prescribe. The practice in such cases, as evidenced by the authorities cited, and by the general principles governing informations, is sufficiently liberal to allow new counts or articles to be introduced by way of amendment, although they contain substantively new causes of action. A new res cannot be covered by way of amendment; for that

would introduce a new subject or party, and change the nature of the proceeding. But when a res is before the court for an alleged forfeiture, the court will permit, by way of amendment, any new cause of forfeiture, consistent with the original nature of the suit, to be introduced by amendment. That mode of procedure springs from the nature of the action. The court is required to determine whether the res in custodia legis is forfeited to the United States for the causes assigned; and, if not, whether the res shall be restored to the claimant, or still remain in custody. It cannot be discharged without an order of the court. Hence, as was shown by an elaborate analysis of authorities in this court a few terms ago (U. S. v. Two Hundred and Sixty-Nine and One-Half Bales of Cotton [Case No. 16,583]), when on the hearing it appears that the res is not forfeited for any of the causes alleged, but for some other cause not charged, the court will order the res to be detained, to await further proceedings. That doctrine was applied by Justice Story in a number of cases, even at the hearing of a libel on the prize side of the court. A libel in a prize case, jure belli, had to be dismissed on the hearing; yet, as it appeared in evidence that the res had become forfeited to the United States under an act of congress,—that there was a municipal forfeiture,—he refused to order a delivery to the claimant, for the obvious reason that the claimant was not entitled thereto. He could not condemn the res for a cause not alleged; and, as he was sitting in a prize case, he could not adjudicate a cause on the instance side of the court. Hence the res had to remain in custody, to await proceedings for the municipal forfeiture. As the prize libel was in the name of the United States, the latter could not intervene as claimant, on the ground of the previous municipal forfeiture, and thus be plaintiff and respondent at the same time. It was not so evident, however, that, as between the claimant, after the libel was dismissed, and the United States, the latter could not intervene pro interesse suo, on the ground of the municipal forfeiture, and ask for the delivery of the res to itself. The case would thus become one on the other side of the court, for all practical purposes; and yet a prize court would have to adjudicate upon the municipal forfeiture, so far as to settle the right of possession. It would, as between the United States and the claimant, have to decide, in any event, the right of possession or property, or await the decision of the proper tribunal; but could it enter a decree of condemnation for a municipal forfeiture? The detention of the property for further proceedings, therefore, remitted the parties to the appropriate forum to settle that dispute between them. If the United States district court had not had jurisdiction of both classes of cases, then the correctness of the ruling would have been obvious; but, as it had, the course pursued left the res in the same custody, to be proceeded against on the other side of the court, just as the supreme court decided in The Emily and The Caroline [9 Wheat. (22 U. S.) 386], that that cause should be reversed and remanded, so that the libel on the admiralty side might be converted into an information against the res on the exchequer side.

So, in the case now under review, omitting, for the present, all consideration of the effect of the proviso in the 68th section, a seizure is made, for illustration, by a competent officer for an alleged forfeiture, and an information duly filed. The cause of forfeiture, as alleged, is not proved at the trial; yet the evidence clearly establishes a forfeiture under another statute, or different section of the same statute. The claimant asks for an order of restitution. To entitle him thereto he must show a right of possession, and, generally, ownership. In this case, the claimant appears as owner. The action being in rem, any one interested in the res may intervene pro interesse suo, and the decree is conclusive against all the world. The formal mode of disputing the claimant's right to be heard, or his status, is by exception in the nature of a plea in abatement; but, if no question as to his status is thus made, and the information is dismissed at the hearing, the res still remains in custody. The court has to order it to be restored, or delivered to the person entitled to the possession. Often there are several claimants and interveners. Their respective rights have, in that way, to be adjudicated. The United States is here the plaintiff, and Braun the claimant. If the information were dismissed because none of the grounds of forfeiture alleged were established by proof, and if, on motion of Braun for an order of restitution, the United States should request leave to intervene, on the ground that the res had been forfeited to the United States for other than the causes alleged in the information, and if the court should thereupon proceed to pass upon the new causes of forfeiture, its judgment could only be for the delivery of the property to the United States as intervener, and not for the condemnation of the res. The United States, having thus acquired possession of the res, would be compelled to institute proceedings for its judicial condemnation. Practically, therefore, the same result would be effected as if the course suggested by Justice Story were pursued. If, on the other hand, the United States had several grounds for forfeiture, the causes of which fell on different sides of the court (as in the Cotton Case, alluded to), could it institute several distinct actions against the res, and have them pending at the same time? As a previous seizure is essential to the hearing, this difficulty would occur: The res seized or captured as a prize of war, for instance, must be retained in custody for the adjudication of a prize court; and a prize court is an international tribunal and not necessarily clothed with instance or municipal jurisdiction. The

res being still in the custody of the prize court and subject to its orders, could not also be in the custody and subject to the orders of instance or municipal court. Again, the instance court of admiralty has no jurisdiction of seizures on land; and if it has custody of the res in an admiralty cause, how can the exchequer court have, at the same time, custody and control of the res. Without such custody said courts, respectively, have no jurisdiction to hear and dispose of the cause. By the rules mentioned, however, the court having actual custody of the res would refuse to order the same to be delivered, to the claimant, but would, properly order it to be delivered on intervention, to the proper officer of the other court to be proceeded against according to law. But, as in this country, the United States district courts are prize, and instance, and exchequer courts, the final order would be for the detention of the res to await the decree of the court on the other causes appearing prima facie, whether a formal intervention had been entered or not. Here it must be remembered, that the intervener is not necessarily bound to file his intervention until the original cause of action has been determined; for if the libel or information is dismissed, the subject matter in dispute between him and the claimant he may not care to have even informally litigated in that way; and it may be, that if the res is condemned, the ground of condemnation may be broad enough to forfeit his interest in the res also.

Without pursuing further this branch of practice, it must suffice to say, that the better rule is, that only one action in rem by the United States against the same res should be pending at the same time. If, on the hearing of that cause, it should appear that the forfeiture had been incurred on other than the grounds alleged, or if other causes of forfeiture existed which called for further proof, then on the motion for restitution, the United States could object, and on petition or otherwise, ask for the detention of the res, to await further proceedings. In that way all technical difficulties as to the custody pending suit can be avoided. Still, the court, in acting upon the motion, would necessarily hold the district attorney to due diligence, and not permit him to withhold several of the causes which might be joined in the same information, and if defeated on those alleged, proceed seriatim, for an indefinite period, under orders of detention, to experiment on the time of the court, to the accumulation of costs and expenses and the decay of the res itself. But the proviso in the 68th section of the internal revenue act may have an important bearing upon these questions of practice, requiring serious changes or modifications of the rules stated. To understand what its effect in that way may be, it is necessary to consider some of the provisions of that act, and the true force and meaning of the proviso. For those violations of the act contemplated by that section, a forfeiture is declared, and the collector or deputy collector is authorized to seize the property named. "Provided, that such seizure be made within thirty days after the cause for the same shall have come to the knowledge of the collector or deputy collector, and that proceedings to enforce such forfeiture shall have been commenced by such collector within twenty days after the seizure thereof." The preceding part of the section declares that the owner, etc., shall forfeit all the liquors, etc., which said liquors may be seized, etc. If the meaning of that section is, that the forfeiture operates, eo instante, upon the neglect or refusal of the owner, etc., to perform the duties enjoined, then the title passes to the United States, irrespective of the fact of seizure, and all subsequent purchasers from the original owner are unprotected. The proviso, then, would operate a mere limitation upon the powers of the collector and deputy collector—that is, would prevent them from seizing under any other conditions than those limited, but would not divest the title of the United States, nor prevent the seizure of the property by other persons or officers. Such an interpretation, however, would not be consistent with the general principles of the act, nor with the rules governing statutory forfeitures. [U. S. v. One Thousand Nine Hundred Sixty Bags of Coffee] 8 Cranch [12 U. S.] 398, 417; [Caldwell v. U. S.] 8 How. [49 U. S.] 366. It would be destructive of all commerce and fair dealing in the manufactured article, if for a neglect to make due entry, for instance, of the amount of grain placed in the mash tub on any day, a forfeiture were instantly worked of all the distillers' spirits, etc., wherever situated. The purchaser would be compelled, for his own protection, whenever he bought a barrel of distilled spirits, to ascertain, up to the day of purchase, whether the distiller had previously complied with the law in all required particulars. The language of the 68th section, literally taken, goes even further. It is, that the distiller "shall forfeit all the liquors and spirits made by or for him," without qualification as to time or as to the intervening rights of other parties. It would, literally construed, forfeit even the spirits previously manufactured and sold: so that no purchaser could know, at any time, when the spirits owned by him would become forfeited by the conduct of the manufacturer subsequent to the sale So narrow an interpretation would evidently defeat the object of the law, which is a revenue act, and to be construed by rules governing such statutes. Hence, this court has held, that as "the owner," etc., "shall forfeit,"—and not the purchaser—the owner can forfeit only what belongs to himself. In other words, the forfeiture is only of the specific property belonging to the distiller; and consequently a bona fide purchaser is protected.

But when does the forfeiture attach to the distiller's property? By the rules laid down in the cases cited from the Supreme Court Reports, it does not attach until seizure. The doctrine involved has been so often discussed

in this court within the last five years, and is indeed so well settled by the supreme court, that it is unnecessary to state more than the established rule, viz.: That in the absence of any express terms in the statute declaring an instantaneous forfeiture, the forfeiture relates to the time of seizure only. The section says, then, that the specific property of the distiller named therein—that is, owned by him—may be seized by the collector; and the proviso limits the time within which such seizure may be made by him to "thirty days after the cause for the same shall have come to his knowledge." It is obvious that the limitation was designed for a twofold purpose: (1) to incite due diligence on the part of the collector, and (2) to prevent the interruptions or embarrassments to commerce which would ensue, from protracted suspension of action after the causes of forfeiture had become known. If causes of forfeiture were made known to the collector, and by him made public, any subsequent purchaser of the property aware of that fact, or of the pending investigation, could not claim to be a bona fide purchaser. He would be held to have bought in fraud of law. On the other hand, the collector would have it in his power to keep the property indefinitely in that embarrassed condition, if the limitation had not been imposed. It was necessary that he should have some time within which to investigate the charges, so that he might not make improvident seizures, and yet not hold all traffic in, or disposition of, the property indefinitely suspended.

At this time, the many nice questions which may arise as to the precise legal meaning of the phrase, "after the cause for the same shall have come to the knowledge of the collector," need not be considered. There is no dispute in this case that the seizure was within the prescribed time. Still the counsel for the claimant insists that the admission of certain testimony, and the instructions to the jury upon that provision of the statute, were erroneous. The court held that when only one cause of forfeiture came to the knowledge of the collector, he was justified in seizing; but that it is not necessary that all subsequent proceedings should be confined to that one cause alone. It is proper in all cases for collectors to proceed with due caution and upon substantial grounds. It is not imperative upon them to ascertain, before seizure, every cause of forfeiture which may exist. It is sufficient if they are satisfied that the property is subject to forfeiture for any one or more violations of the law. The phrase, "after the cause for the same shall have come to the knowledge," etc., is not to be interpreted as if it read, "after all causes," etc.; but merely as if it read, "after he shall have learned that the property is subject to forfeiture." The words "cause for the same"—that is, cause for seizure—require for interpretation an examination of the previous causes of forfeiture, for any one or more of which the liability to seizure arises. It is not confined to one cause, but is to be taken generically, as including all causes of seizure, taken collectively and distributively. But when, within the meaning of the act, can a cause of seizure be said to have come to the collector's knowledge? If it be when one cause is known, then the thirty days begin to run from that time; but if it be only when all the causes are known, then the limitation of thirty days may become in practice as many months. Hence, the court held at the trial that the time commenced to run from the day when the collector first had knowledge that any cause of forfeiture existed, for any other interpretation would operate an extension of the time limited; and it further held that a seizure, when so made, was a seizure for all existing causes, whether known to the collector at that moment or not. What may be considered the true meaning of the phrase, "after the cause shall have come to the knowledge of the collector"—that is, what amount of information is necessary to constitute knowledge of the cause, within the purview of the act—whether it means the first suspicion excited, or the first statement made, or the first authentic data obtained, or the first definite charge by any one, or a satisfactory conclusion reached after due and diligent investigation, it is not now necessary to decide, for no such point arises in this case. It is apprehended that there can be no serious difficulty in reaching a correct conclusion on that point when necessary; for the act furnishes the means of prompt investigation in most cases, and does not require the collector to act on suspicion or vague conjectures. He is justified by acts of congress for performance of his duty when reasonable cause exists; and if he acts without "reasonable cause," he proceeds at his peril. It is held, therefore, that there was no error at the trial, in permitting causes of forfeiture to be inquired into other than those which had come to the knowledge of the collector when he seized the property.

It may be doubtful whether the pleas in this case are so framed as to raise an issue upon the limitations of time named in said proviso; but the court considered it more consistent with duty to pass over nice technicalities in pleading, and have the jury pass upon all essential facts cognizable by them. The question was raised, whether the jury should not be confined to such causes of forfeiture as were within the knowledge of the collector when he made the seizure. Hence, the court ruled, and so instructed the jury, that if after cause of forfeiture came to the collector's knowledge, he did, within thirty days, seize, &c., then proceedings duly instituted within twenty days after such seizure, for that cause of forfeiture, and for others actually existing at the time of the seizure, presented for investigation all of said existing causes,

whether all of them were actually known to the collector when he seized or not. Any other construction, on that point might involve strange results. If a collector has thirty days within which to seize after each successive cause of forfeiture becomes known to him, and each day's neglect to make the required entries in a distiller's book, be a cause of forfeiture; and if he daily learns of only one of said causes, then there is no limit as to the time within which he could seize; for each new daily cause would carry with it the right to seize within thirty days after known. It might also happen that in each investigation he would discover a new cause of forfeiture before the seizure was made and within said thirty days; and consequently would have a right to postpone the seizure for the next twenty-nine or thirty days. Such a construction would leave property indefinitely exposed to seizure by a collector, and operate practically a repeal of the safeguards intended by the proviso.

If the rule contended for by claimant be correct, each discovery of a cause of forfeiture would require a new seizure, and consequently a new suit, notwithstanding the res was already in custody of the court and undergoing litigation. But enough has been said on this point under a former branch of the subject. The custody of the res for forfeiture incurred or alleged, must be retained until the case is disposed of, and subject to the order of the court made in that case.

The more serious inquiry is with respect to the second limitation of time in said proviso, viz: "Provided, that * * * proceedings to enforce said forfeiture shall have been commenced by such collector within twenty days after the seizure thereof." "And the proceedings to enforce said forfeiture of said property shall be in the nature of a proceeding in rem., in the circuit or district court of the United States, for the district where such seizure is made," &c. The act itself defines what is a commencement of proceedings by a collector to enforce a forfeiture, viz.: the institution of a suit in rem in the proper court. A suit for what? Certainly not for only one cause of forfeiture; for it is to enforce "the forfeiture." The seizure was for a forfeiture incurred, and it is immaterial so far as seizing is concerned, whether it is made for one or the other of the many causes named in the act. The "proceedings" are to secure a condemnation accordingly. The information should allege the causes on which the proceedings are based, in order that all may know what allegations are to be met. The rules for amendment then apply. If the pleader has failed to set out, in the first instance, all of the causes which existed at the date of the seizure, he should amend and set them out, for the suit is in rem., and a condemnation and sale will give full title. It is not necessary now to consider what would be the effect if the res had been bonded and sold (as in this case), and the information dismissed at the hearing, there having been no allegations of the really existing causes—whether in such a case the res would not necessarily be discharged of all antecedent grounds of forfeiture, and the rights of the United States in said property lost. An intimation by Justice Story is to the effect that the bond represents the property in all respects, and may be proceeded against precisely as if it were the res itself. The view taken by the court is this: After seizure by the collector under the 68th section, the property is held for the forfeiture incurred, whether for one or more existing causes; and the commencement of a suit to enforce a forfeiture within twenty days is sufficient.

The cases cited to support the opposite views are not, in the opinion of this court, in the least at variance with the rules just stated. In The Harmony [Case No. 6,081] an application was made in the appellate court to amend the original libel so as to introduce a cause of forfeiture under another section of the act declared on—an entirely new cause of action. Justice Story said the objection thereto had never been considered as of itself sufficient, even at common law. "In revenue cases, such amendments were formerly denied, but latterly they seem to have been generally allowed, as the attorney general might obtain the same effect by a new information." The cases to which he referred were in personam, in which the rule is, for reasons already given, more stringent than in actions in rem. He refused to permit the proposed amendment in that case, on the ground that the cause of forfeiture proposed to be inserted occurred more than three years previously, and was therefore barred by the statute of limitations. Here, the district attorney might, on the theory of the defence, have commenced a new action within twenty days after new seizure made for another cause of forfeiture, discovered within thirty days of the new seizure, so that the party claimant was not injured by permitting the amendment. The refusal in that case was in the appellate court. The case [Houseman v. The North Carolina] 15 Pet. [40 U. S.] 40, is wholly inapplicable. It merely asserts what has been already stated, viz: that an amendment cannot bring in a new res, especially in the appellate court. Under section 68, although there may be many causes for a forfeiture, there can in the nature of things be only one forfeiture; for that exhausts the subject or res. The seizure is made because a forfeiture has been incurred, and proceedings are instituted to enforce that forfeiture. There was no new forfeiture incurred after the seizure and commencement of this suit, and none alleged in the amendments. New causes were assigned, but causes that existed at the date of the seizure. The court refused to permit any acts done after the seizure to be considered a cause of forfeiture, cognizable in this case. Again: The second limitation of the proviso is to prevent the collector from keep-

ing the res in his custody, unadjudicated, for an indefinite period of time. If a new cause of forfeiture arises after the first seizure, he can abandon that seizure, cause the information based thereon to be dismissed, and proceed de novo. But if after the first seizure and information filed, causes previously existing become known, he can amend by inserting new counts, according to the decision even in the Harmony Case; for if he could dismiss, seize anew, and file a new information, the case would fall exactly within the rules there laid down. Of course, if by law the right to seize and prosecute were gone, then the court would not permit such an amendment. Here the case is different, for even on the doctrine contended for by claimant, the right to seize anew for each new cause discovered exists at all times, if the seizure be made within thirty days of the discovery.

The analogies on the admiralty side of the court will fully illustrate the principle. After the res has been arrested under a warrant issued upon one libel, the process under the next libel is an order of detention. If a new warrant were issued on the second and each succeeding libel filed, while the property was still in custody, the marshal would be directed to seize and to take into his custody the very property already seized and in his custody to answer a pending libel. Each successive warrant would be a re-seizure, or "detention," merely. So in this case the discovery of a new cause would require from the collector, in whose hands the res remains until final adjudication, only the process of "detention" for such new cause. That detention or re-seizure would give twenty days within which to commence proceedings. But as the res is continually in his hands, the detention attaches continuously. A new or amended information is a declaration of such detention for the newly discovered cause. If he had turned the res over to the marshal, he could not seize it and take it from the marshal, but only declare that he seized it in the marshal's hands, to abide the result of the new information. But then it might occur that the first information would result in condemnation and sale, and consequently the res be disposed of in that case, leaving nothing for the new suit to operate upon. It is better, therefore, and more consistent with the rights of all concerned, to introduce the new causes by amendment of the first information, which operates within the reason and purview of the proviso, as a new seizure or detention, and also as a commencement of proceedings to enforce the same. In any logical or legal view of the question, the same result is reached: the amendments are permissible and within the proviso. They bring all the causes existing at the date of the seizure, whether discovered after seizure or not, into one information, and thus expedite final adjudication, instead of compelling a resort to a series of suits, involving new seizures, or to interventions at the close of each trial, to the indefinite delay of final proceedings, unnecessary accumulation of costs and expenses, and practical loss or destruction of the res itself or of its value.

It is contended that as the causes of forfeiture involve fraud, the proof should be stronger than in ordinary cases; but many of the causes alleged involve only neglect, and were it not so, satisfactory proof is all that can be required. It was clear that at least nineteen or twenty thousand gallons had not been returned as the law required, and the United States consequently defrauded out of thirty or forty thousand dollars during three or four of the months covered by the information.

It is objected that evidence of the returns made prior to the act of June 30, 1864, under which the suit was brought, was admitted; also evidence of the amount of sales made prior to that time. That evidence was clearly admissible under one of the charges made, viz.: That the spirits on hand on the 1st of July, 1864, on which taxes had not been previously paid, were sold and removed afterwards, and no payment of the increased duty made under section 55. It was also admissible to show whether any of the whiskey sold after that time had been manufactured, and had paid duty prior thereto. If the whiskey sold after that date had been included in the previous returns and had paid duty thereon, then no violation of the law with respect thereto had occurred on the ground of nonpayment of duties. It is true the evidence might cut two ways. If the previous sales exceeded the previous returns, it would appear inferentially that no spirits could have been on hand at that time, and consequently all sold afterwards were dutiable. If, on the other hand, it appeared that the amount manufactured exceeded the amount on which duties had been paid, then the excess was chargeable at the increased rate.

It is urged that the court erred in admitting admissions made by the claimant while endeavoring to procure a compromise, and although the rules on that subject laid down by the court in the charge to the jury were correct, still the original error was not thereby cured. If any error was committed under this head, it was in charging the jury on that point at all; for the court could not then, and cannot now, detect any such admissions which were permitted to go to the jury. The broad distinction exists between admissions as independent facts, and confidential statements made with a view to, or pending negotiations for, a compromise. There must be the seal of confidence, tacit or express, or an offer or proposition for compromise, or the statements are not to be excluded. A person who has violated a law or incurred a liability, and knows the facts have been discovered, and that the officers are armed with, and are about to exercise,

the requisite authority for investigating the matter thoroughly, cannot defeat the ends of justice by volunteering all the information desired, producing the books, papers, and documents which evidence the facts, and then stating that he desires to negotiate a compromise. A desire expressed is not a negotiation commenced, especially if the desire is mentioned to one who has no authority to compromise. But the rules of law are too well settled on this point to need argument or repetition. A frank confession is the best inducement to a consent to open negotiations for compromise—a confession not under the seal of confidence and not intended to be so regarded. If the negotiations fail, those confessions, made not under promise of secrecy and before it could be known whether any negotiations would be allowed, are not admissions or propositions within the rule concerning privileged communications. The act of 1862 [12 Stat. 576], concerning rules of evidence in United States courts, only extends the provisions of the act of 1789 to equity and admiralty suits. The act of 1864 (page 351) covers all persons in interest, even parties in civil suits; while the act of 1865 (13 Stat. 442) expressly declares informers competent witnesses.

The objection that the original information has no formal caption and does not show who is the plaintiff, would have no weight, even if not cured by the amendment; for it is substantially in the established form: "The information of William N. Grover, Attorney of the United States, etc., who sues on behalf of the United States," etc.

The causes of forfeiture in this case were for the violation of the 55th, 57th, 59th, and 68th sections of the act. Section 59 forbids the removal of spirits before inspection, and if such a removal is made, then a forfeiture is worked by force of the 68th section. It requires the inspector to mark the quantity and proof of the contents, the date of the inspection and the name of the inspector, upon each cask. The failure of the inspector to so mark the packages or casks is not any failure of duty on the part of the distiller. This and other cases recently tried in this court illustrate the importance of the rule. It seems that in some of the most important districts the proof is never marked on the cask by the inspector, but is averaged and a proper return thereof made in his duplicate returns. The language of the 6th section works a forfeiture for the distiller's "neglect to do, or cause to be done, any of the things by law required to be done as aforesaid,"—that is, to be done by him or his agent, or superintendent, and not by the collector, assessor, or inspector. Under the 57th section the distiller must keep the prescribed books and enter therein daily, or cause to be so entered, a true and exact account of the number of gallons distilled, sold, removed, &c., and the proof thereof, and verify the same by oath or affirmation. If he manufactures more than 150 barrels of spirits per year, he must make tri-monthly returns within five days after the first, eleventh, and twenty-first days of each month, to the assessor or assistant assessor—which returns are to be accounts taken from his books of the number of gallons, &c., not before accounted for and duly verified; and he must immediately forward duplicates thereof, also duly verified to the collector, and pay the duties called for by said accounts at the respective times when so rendered to the collector. Here is a regular series of checks. The inspector's returns to the assessor and collector show the number of proof gallons distilled; so do the distiller's books. The latter shows also the number removed, whether for consumption, sale, or otherwise, during each tri-monthly period. The sworn books and duplicate returns, if true, should correspond. If the distiller's books are false, and the returns are copies thereof, then the falsehood will run through both. In the language of the 68th section, the distiller will have neglected to make true and exact entry and report of the spirits distilled by him on which duty is payable. The 57th section also requires entries to be made of the quantity of grain, &c., put in the mash-tub daily, and the entries are to be in a book or books, in a form to be prescribed by the commissioner. If the commissioner has prescribed such a form, and there is a failure to comply with that provision, then a forfeiture occurs by force of the 68th section.

It is contended that no spirits are forfeited except those on which duties have not been paid; but the language of the act is, "all spirits made by or for him." It is also insisted that the only spirits forfeited are those still remaining in the distillery, or on the premises where distilled, or at most in the district where manufactured. It is not necessary to repeat the views expressed heretofore by the court on that point. The language of the act covers all spirits owned by the distiller, wherever they may be, which have been manufactured by or for him; and requires the suit to enforce the forfeiture to be brought in the district where the seizure is made, and not where the same were manufactured. If only the spirits still at the distillery are forfeited under the 68th section, then large frauds may escape the consequences contemplated by the act. It is true there are many pecuniary penalties imposed for some violations of the act, and the vats, boilers, etc., are forfeited; still the value of those vats, etc., and of the distillery, together with the amount of the pecuniary penalties, may, in some instances, fall far short of the duties which have been withheld. If a distiller can in three years sell and remove nearly two hundred thousand gallons, in fraud of the law, and thus

defraud the United States, at present rates of duty, of more than sixty thousand dollars per year; his distillery, vats, etc., and the sum total of the pecuniary mulcts, will not make good the lost revenue. But as the act imposes no lien on the spirits, but does on the distillery, etc., it is evident that the design was, not to embarrass commerce, but to subject only the distiller's property to forfeiture—to protect the bona fide purchaser of spirits.

This cause has been stoutly contested from its commencement; and among the rulings on so many points raised and ably urged at every step, it may be that error has been committed. On a careful review thereof none has been detected. The motions will, therefore, be overruled.

[For final proceedings, see Cases Nos. 16,502 and 16,504.]

Case No. 16,504.

UNITED STATES v. THREE HUNDRED AND NINETY-SIX BARRELS DISTILLED SPIRITS.

[3 Int. Rev. Rec. 135.]

District Court, E. D. Missouri. Feb., 1865.

INTERNAL REVENUE ACT—FORFEITURE OF LIQUORS—BONA FIDE PURCHASERS AND LIENORS.

[1. A bona fide purchaser for value prior to seizure is protected.]

[2. Bona fide liens upon spirits are protected against a forfeiture under the internal revenue act, provided the liens be subsisting at the date of the seizure, and also at the time when the claims thereunder are passed upon by the court.]

[3. In order that a factor's lien may be protected against the forfeiture of the liquor, it must appear that his demand requires for his protection an enforcement of his lien against the specific property seized.]

[This was an information of forfeiture against three hundred and ninety-six barrels of distilled spirits, claimed by Ferdinand Braun. The charge to the jury appears in Case No. 16,502. Motions for a new trial and in arrest of judgment were overruled (Id. 16,503), and the case is now before the court for final proceedings, including the determination of the petition of Ferdinand A. Reuss, intervenor, to have allotted to him a part of the fund.]

W. N. Grover, U. S. Dist. Atty., and George B. Kellogg, for the United States.

Gustavus Koerner, John M. Krum, Ernst W. Decker, Chester Harding, Jr., and Chester H. Krum, for claimant and intervenor.

OPINION OF THE COURT. The res in this case was claimed by Braun, the distiller, as his property, and by him bonded, under the act of congress. As the collector of internal revenue retained the custody, instead of delivering the property to the marshal, it was returned to the distiller on bond, as prescribed by law; which bond has been produced in court, and the principal and sureties therein ordered, according to its tenor, to pay, as a consequence of the judgment of forfeiture, the appraised value of the res into the registry. The bond taken in this case is conditioned that the principal and sureties will pay, etc., as the court may order, if said res is adjudged to be forfeited. The form of the bond, and the obligations of the parties thereto, have been well settled by repeated adjudications in United States courts. There is no difficulty on these points. Reuss intervenes for a portion of the proceeds, claiming a factor's lien thereon for the amount stated. It appears, from the evidence, that for a long period of time antecedent to that under inquiry, and down to the time of seizure, he had been the consignee or regular factor of Braun, under the following agreement: to receive and sell the spirits distilled by Braun, make advances from time to time, etc., and have as compensation therefor ten per cent. interest on moneys advanced, two and a half per cent. commission on sales, etc.; all advances to be covered by shipments. The balance due at the date of the seizure was the amount for which he claims a factor's lien. The res was, at the time of seizure, in his possession, as consignee, under the foregoing agreement. The rule of law under the facts proved give him such a lien. It is not necessary to review the general doctrines on that subject; for a brief statement of the general propositions applicable to this, and other cases under advisement, must suffice. Although a bill of lading, prima facie, gives to the consignee such a right of property as authorizes him to sue the ship-owner, even in trover, yet that rule springs chiefly from the contract of affreightment and the privity of parties thereto. A shipment to meet a previous acceptance, or an acceptance of a bill drawn against the shipment, or a shipment to cover a balance due or previous advances, or payments made by a factor on account of a shipment made, gives a lien to the factor; and the property consigned to the factor is the primary fund to which he must look for reimbursement. Abb. Shipp. 333; 5 Seld. [9 N. Y.] 486; 22 Pick. 40; [Brown v. M'Gran] 14 Pet. [39 U. S.] 479; 4 Mees. & W. 775, 791; 12 Const. [12 N. Y.] 62.

There is no doubt that on the facts presented, the intervenor had a factor's lien on the res when it was seized by the collector, which has not been discharged by any subsequent payment of the balance due. The subsequent purchase of property from Braun, for which a time bill was given, does not affect this case, even though the bill may not have been negotiated; for that purchase did not carry any title to that property. The naked question is, therefore, before the court —whether, under the 68th section of the internal revenue act [of June 30, 1864 (13 Stat. 248)], a factor's lien is protected where the bona fides are unquestionable.

The subject is not wholly free from doubt

or difficulty. This court has already held, in this case, that a bona fide purchaser for value, prior to seizure is protected. The language of the 68th section is, that the owner, etc., shall forfeit, etc.; from which it was held, ex vi termini, that only that is forfeited which he owns. How can he forfeit what does not belong to him? and how can he be owner of what he does not own? But the settled rules of construction with regard to statutory forfeitures, make the forfeitures under that section operate only from the time of seizure. Of course, sham sales, or sales in fraud of the law, are not protected. The purchaser must act bona fide. An analysis of the whole act confirms that view. Section 28 provides for collection of duties or taxes by distraint of personalty; and section 30 of realty. Section 45 defines the force and effect of the collector's bill of sale of personalty, and section 30 of his deed for realty. "Said deed * * * shall be considered and operate as a conveyance to the purchaser, of the title to said estate, but shall not affect the rights of innocent parties, acquired previously to the claim of the United States under the act. * * * And the claim of government to lands sold under and by virtue of the foregoing provisions, shall be held to have accrued at the time of seizure thereof." Thus the rights of innocent parties acquired previously to the seizure are exempted, in express terms, and it is difficult to conceive how it could have been otherwise, even had that express provision been omitted; unless there had been a forfeiture, eo instante, by the positive requirement of the statute. Again: Section 48, which provides for seizures of personalty by the collector, says the same "may be seized by any collector," etc., "and the same shall be forfeited to the United States." In those cases the act contemplates that the seizure will precede the forfeiture. Section 55 makes duties on distilled spirits a lien on the distillery and the lot of land on which it is situated, and also on the stills, vessels, fixtures, and tools in the distillery. Section 69 gives for nonpayment of the duties and the increased per centum therein imposed, as a penalty, a lien on the distillery. An analysis of the act, in short, shows that forfeitures of personalty date from the seizure. In many cases a lien is given, but not on the spirits manufactured. The reason is obvious. As an article of commerce, it could not be thus covered with liens, without defrauding and ruining innocent purchasers. The common law presumptions are left to apply, viz.: that possession is prima facie evidence of title, and that liens are lost when the possession is abandoned. With realty and fixtures the rule is different, and hence the act recognizes the distinction and the salutary reasons in which they are founded. It goes even further in fact, in the 30th section, and makes the title to realty under distraint relate only to the date of seizure.

The same principles which protect the bona fide purchasers, protect also subsisting liens. At first blush, this may seem to operate perniciously; but on consideration of the whole subject, it will be found to be as salutary and important as the common law rules on the subject in all ordinary cases. The general principles of law under which the commerce of the country is carried on, if overturned by the internal revenue act, would be destructive of commerce, and consequently of the very object of the revenue act itself. If there can be no sales of distilled spirits without a continuing liability to forfeiture from subsequent as well as antecedent acts of the distiller, then no purchases would be made, and the manufacture for sale would cease with the demand. An essential part of the machinery whereby sales are effected is by consignments, etc.; and that mode of operating, together with advances on the faith of shipments, etc., has come to be necessary to the successful operation of manufacturing enterprises, especially by small capitalists. If no one can advance on shipments with safety, all advances must cease. If the bona fide purchaser is to be protected, why not the qualified owner, to the extent of his ownership or interest in the res itself? The same care must be observed in each instance. When an intervenor appears, claiming to be the absolute or qualified owner, the bona fides are open to investigation. A merely colorable transaction, for the sake of shielding the distiller or his property, cannot prevail against the rights of the United States. Whatever real interest the distiller has remaining in the property at the time of the seizure, whether legal or equitable, is forfeited.

The effect of this ruling, upon the practice of the courts, may be easily understood. If the collector is to seize only what spirits the distiller owns, then if he happens to seize other spirits, the bona fide purchaser may contest the fact of ownership. If his purchase were made, bona fide, prior to seizure, then, whether the distiller had violated the provisions of the act or not, the finding of that fact would dispose of the case. So it might sometimes happen with a lien large enough to absorb the whole value of the res. True, the ordinary practice is, to first determine whether the causes of forfeiture, as alleged in the information, really exist; and if judgment is obtained thereon, to then consider the demands filed by interveners. Still, the order of proceedings is in the discretion of the court; and, to save time and expense, the fact of ownership, or of the lien of demands, may well be determined in the first instance, in proper cases and on issues joined. Really a demand by an intervenor, when based on a lien, as in this case, comes in its proper order after judgment of forfeiture and sale. That sale give a full title, and the incumbrancer receives only his due share of the proceeds. His share cannot be

ascertained until sale is made; for that is the only mode of learning whether there will be a surplus for the original owner, or the government, which succeeds to his rights. Without elaborating this branch of inquiry, the court decides that Reuss has a factor's lien for the balance due him at the date of the seizure, which has not since been paid. If the res were in actual custody, a venditioni exponas would issue, and his demand be paid out of the proceeds of the sale; but as a bond has been given for the appraised value of the res, and the amount thereof has been ordered to be paid into the registry, the court now grants the petition of the intervenor, and orders the sum claimed by him to be paid out of the fund.

The rulings by this court are to the effect: That bona fide sales and liens are protected, but the liens must be subsisting at the date of the seizure, and also at the time when the intervening demand, or claim, is passed upon by the court. All of the facts, and circumstances connected with the lien, will be carefully scrutinized, so that the same may not operate as a cover to, or for the special benefit of, the dishonest distiller. It is not enough that the factor has a lien, according to commercial rules, but it must also appear that his demand requires for his protection an enforcement of his lien against the specific property seized. If, for instance, the distiller, for the purpose of defrauding the government, secures continuously large advances from his consignee and ships to the latter all his distilled liquors as soon as manufactured, the bona fides would be rigidly scrutinized, and also the means of the consignee to enforce his demand against the consignor, without reliance upon the specific lien. In no case is a factor's lien to be used for the benefit of the distiller, by withdrawing from the fund in court a portion thereof for the payment of his debts, when the factor can collect from him what is due, without difficulty. Hence, each case will necessarily have to be decided on its own merits, under the general rules stated.

Case No. 16,505.

UNITED STATES v. THREE HUNDRED AND SEVENTY-TWO PIPES OF DISTILLED SPIRITS.

[5 Sawy. 421.] [1]

District Court, D. California. Feb. 27, 1879.

INTERNAL REVENUE—ILLICIT DISTILLING—FORFEITURES—INNOCENT PURCHASERS AND MORTGAGEES.

The forfeiture denounced in section 3281 of the Revised Statutes is of all distilled spirits, etc., found in the distillery, etc., and of all distilled spirits wherever found owned by the distiller at the time of seizure. It does not extend to spirits not the product, and which have not been the subject of illicit operations, and which have been disposed of by him to innocent parties for value, notwithstanding that the distiller may have owned them at some time during the period of his illicit operations. A bona fide mortgagee of such spirits will be protected to the extent of his lien, notwithstanding that the legal title may remain in the distiller. And conversely, his rights will be limited to the enforcement of his lien, notwithstanding that his mortgage is in the form of a bill of sale absolute on its face.

At law.

Philip Teare, U. S. Atty.

Mr. Latimer, Mr. Morrow, and Geo. Cadwalader, for defendant.

HOFFMAN, District Judge. The general proposition on which the district attorney chiefly relies in support of his demurrer is too firmly established to be questioned. Where a statute in terms denounces a forfeiture of property as a penalty for a violation of law, without alternative of value or other qualifications or provisions, or language showing a different intent, the forfeiture takes place absolutely and instantaneously on the commission of the offense, and it is not in the power of the offender, or former owner, to defeat the forfeiture by a subsequent transfer of the property, even to a bona fide purchaser. U. S. v. One Hundred Barrels of Spirits [Case No. 15,948]; 14 Wall. [81 U. S.] 44.

The question presented in this case is, whether this principle is applicable. The information, in substance, alleges that certain persons therein named did, during the months of May, June, July, August, September, October and November, A. D. 1878, at a certain distillery owned by them, manufacture a large quantity, to wit, ten thousand gallons of distilled spirits, with intent to defraud the United States, and for the purpose of selling the same with intent to defraud the United States, and that the United States has been thereby defrauded of the sum of nine thousand dollars. That the fourteen thousand seven hundred and twenty-one and forty one hundredths gallons of spirits seized were manufactured at said distillery with intent to defraud the United States of the tax due thereon. The libel further alleges that at the time of the seizure the said spirits were owned by the persons who owned and carried on said distillery as aforesaid, and were found in a certain warehouse in the city and county of Sacramento. The answer of the National Gold Bank of D. O. Mills & Co. alleges in substance that at the time of the seizure the distilled spirits in question were lawfully stored in the United States bonded warehouse at Sacramento; that the gold bank had, previously to the seizure, purchased the three hundred and fifty-two packages claimed by it under a regular bill of sale, absolute on its face, but intended as security for advances made by it to the full value of the liquor transferred; that the change of title was duly registered in the bonded warehouse, and also on the books of the collector's office; that the sales and transfers were made in good faith,

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

and in the ordinary course of trade, and without any suspicion of any irregularity on the part of the distillery. It is further alleged that prior to the seizure, the claimant had offered to pay the government tax. The special plea of Mrs. Hinkson, claimant of fifty packages of the liquor, sets forth the same state of facts, with the addition that the fifty packages were manufactured the year previous to the period during which the information alleges the distillery was operated in violation of law.

The information is founded upon section 3281 of the Revised Statutes. This section, in substance, provides that: "Every person who engages in, or carries on, the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, etc. * * * All the distilled spirits or wines owned by such person, wherever found, and all the distilled spirits or wines and personal property found in the distillery, or in any building, room, yard, or inclosure connected therewith, and used in, or constituting a part of the premises, * * * shall be forfeited to the United States."

It is contended, on the part of the United States, that the forfeiture thus denounced extends to all spirits of which the distiller was at any time the owner within the period during which the illicit operations have been carried on. This forfeiture is claimed to have accrued, notwithstanding that no unlawful practices were used in the production or disposition of the liquors seized. Indeed, under the construction contended for, it would not be necessary to show that the spirits had ever been in the distillery. They may have been lawfully imported from abroad, and disposed of by the distiller to retail dealers, and by them sold to their customers. It would be sufficient to secure the forfeiture if the distiller was at any time during his illicit operations the owner, for no matter how short a time, of the spirits seized. It is obvious that a construction so harsh and oppressive, so destructive of the freedom and security of the ordinary operations of trade, and which would visit the consequences of guilt upon innocent parties who had no means of protecting themselves, ought not, unless the language be imperative, to be admitted. The forfeiture embraces all spirits of two classes: (1) Those found on the premises; (2) spirits owned by the distiller, wherever found. It is evident that the first description refers to spirits found on the premises at the time of the seizure. It is not contended that it embraces spirits which might have been found there at any time during the illicit operations. The phrase "owned by such person, wherever found" is clearly used with a similar reference. It does not mean spirits which may have at any time during the illicit operations been owned by him, but those spirits which are owned by him when found; and it should be construed as if it read "all spirits, wherever found, of which he is the owner;" nor will this construction necessarily be unfavorable to the government; for the spirits owned by the distiller at the time of the seizure may exceed in quantity those owned by him during the period of his illicit operations, especially if that period has been brief and not recent. This interpretation of the section in question, seems to have been unhesitatingly adopted by Mr. J. Dillon in U. S. v. One Hundred Barrels of Spirits [Case No. 15,948], and on this point the decision was not reversed by the supreme court. In U. S. v. Distillery at Spring Valley [Id. 14,963], the court took the same view. The Case of Henderson, 14 Wall. [81 U. S.] 44, is confidently relied on by the district attorney, but that case arose under a different section of the act (section 3450, Rev. St.). That section denounced a forfeiture of spirits removed with intent to defraud the United States of the tax imposed thereon. It was held that the forfeiture attached at the moment of removal, and that the title of the United States, thus acquired, could not be divested by a subsequent transfer to an innocent purchaser. The fraudulent removal impressed upon the spirits a guilty or illicit character, which adhered to them as long as they existed, and in whosesoever hands they might pass. In the case at bar it is not pretended that the spirits seized were the product, or had been the subject of any illicit operations. The construction contended for would, as before remarked, include in the forfeiture spirits which had never been within the distillery or manufactured by the delinquent distiller, and would therefore be wholly untainted by any fraud committed in respect of them.

It is evident that the ruling of the supreme court in Henderson's Case [supra] has no application to the case at bar. Construing the section then as embracing only those spirits which were found on the premises, or of which the distiller was the owner at the time of the seizure, the question arises in what sense is the term "owner" used? On behalf of the claimants it is contended that it refers merely to the legal ownership, and that, inasmuch as the legal title to the spirits was in the claimants under the bill of sale and transfer of the warehouseman's receipt, they were not liable to seizure, notwithstanding that they were held merely as security for advances.

In the present case, the advances are alleged to have amounted to the whole value of the property mortgaged, but the principle contended for would apply to cases where the mortgage debt is insignificant compared with the value of the whole property mortgaged. The guilty distiller would save, from just condemnation, the whole excess of value, over and above the amount of the mortgage debt. On the other hand, the construction contended for might work a great hardship on innocent parties. If the distiller had been employed as a mere agent to purchase liquors for his

employers, with instructions to take the bill of sale in his own name, and to receive and hold the goods, those goods would, if the legal title is alone to be looked to, be liable to forfeiture for the distiller's offenses, although he has no beneficial interest whatever in them.

I think that the word "owner" in the statute is used in its popular, and not in its technical, sense; and that the intent of congress was to condemn the property of the delinquent to the extent to which it, in fact, existed in him at the time of the seizure, and without reference to the technical legal title. The right of a mortgagee would thus be protected, while the property of the distiller, as it really exists, would be forfeited.

It may be objected, that to allow the mortgagee to appropriate the proceeds of the goods to the payment of the debt, is in effect to pay off the distiller's debt with the proceeds of his own forfeited property; and that he should not be allowed this benefit unless he is insolvent, and the mortgagee has no other means of reimbursing himself. Such, no doubt, might be the practical operation of the construction proposed. But the inquiry into the solvency of the mortgagor might be extremely difficult, or practically impossible, especially in cases like the present, where the distillery is owned by a corporation, and the inquiry might extend to an investigation, not only of the solvency of the company, but also to that of each of the stockholders, who are by law liable for its debts.

But the true and conclusive answer to this objection is, that the mortgagee has a vested interest in the property mortgaged. He has the legal title, subject to be revested in the mortgagor, upon the performance of the condition, and the absolute title at law in case of breach of the condition. In the exercise of these rights he is entitled to protection, nor can he be required before availing himself of the benefit of his security to enter upon a protracted and expensive effort to collect his debt by a personal suit against his debtor, or others who may be liable for it. But whilst he retains as against the United States all the rights he acquired as against the mortgagor, he can possess no other or additional rights. He can have the full benefit of his security up to the amount of the debt due him. But to the excess he can make no pretension. The United States having succeeded to the rights of the mortgagor, can redeem the mortgaged goods by paying the debt, or on their condemnation and sale, the court may direct the application to the payment of the debt of so much of their proceeds as may be necessary.

If this view of the respective rights and relations of the United States and of the claimants to the goods under seizure be correct, it follows that the facts set up in the plea of Mrs. Hinkson, claimant of the fifty packages, are, if true, a bar to the suit; and that the facts alleged in the plea of the gold bank are, if true, an entire or partial bar, according as it shall appear that the value of the property equals or is in excess of the amount for which the claimant has a mortgage-lien upon it.

The demurrer must therefore be overruled.

Case No. 16,506:

UNITED STATES v. THREE HUNDRED AND THIRTY-SEVEN CASES OF WINE.

[1 Woods, 47.] [1]

Circuit Court, D. Louisiana. April Term, 1870.

REVIEW ON ERROR — BILL OF EXCEPTIONS — INSTRUCTIONS TO JURY—CUSTOMS DUTIES—UNDERVALUATION—FRAUDULENT PURPOSE.

1. Error in excluding depositions of witnesses cannot be considered in the appellate court when the bill of exceptions does not identify the depositions, but they are inserted in the copy of the record by the clerk, more than two months after the signing of the bill of exceptions.

2. Judgment will not be reversed because the court refused to give a charge, abstractly correct, but which the bill of exceptions does not show was pertinent to the case on trial.

3. When imported goods are libelled by the government for undervaluation, upon proof of the undervaluation, a fraudulent purpose will be implied, and claimant must rebut this implication by evidence showing an innocent mistake.

[Error to the district court of the United States for the district of Louisiana.]

A. B. Long, U. S. Atty.

J. S. & W. R. Whitaker, for claimant.

WOODS, Circuit Judge. The first error assigned in this case is presented by the second bill of exceptions, and is to the ruling of the court in excluding the depositions of certain witnesses taken upon letters rogatory and interrogatories. Neither the depositions themselves, nor copies thereof, are incorporated in or attached to the bill of exceptions, or referred to by letter, number or other mark, so that it is impossible for this court to say that the court below fell into error in excluding them. It is true the names of the witnesses whose depositions were excluded, the date of the letters rogatory, the date of the filing of the interrogatories, and the date of the filing of the depositions in the court below are given, and what purports to be a copy of the depositions of the said witnesses in the French language, and a translation thereof into the English language, is found in the body of the record. But this is not sufficient. These copies have no business in the record save as a part of the bill of exceptions. The clerk had no authority, and it was improper for him to insert these copies in the record. There is no evidence that the copy is a correct one, or that the translation is a correct one. A bill of ex-

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

ceptions must be verified by the hand and seal of the judge, and every exhibit to a bill of exceptions must so far be made a part of it, that the verification of the bill by the judge shall extend to the exhibit, and if it is a copy, show that the copy is a correct one. If this bill of exceptions had incorporated the depositions into the body of it, or had referred to it thus: "The depositions of the witnesses, O. P., Q. R. and S. T., a copy (or the original) of which is hereto annexed, marked 'Exhibit A,' and made a part of this bill of exceptions," such a designation of the depositions would have been conclusive, and the verification of the bill of exceptions by the hand and seal of the judge would have extended to and covered the exhibit, and, if the exhibit was a copy, would have certified the correctness of the copy. This bill of exceptions was signed and filed by the district judge, July 10, 1869. The copy of the depositions was made, as appears by the certificate of the clerk, October 22, 1869. So that it is clear that before the signing of the bill, the judge had not inspected or seen this copy, and certainly did not certify to its correctness when he signed the bill of exceptions. These copies of these depositions are certainly no part of this bill of exceptions, and this court cannot consider whether or not they were improperly excluded. To show that this strictness is not unwarranted, I refer to the case of Leftwitch v. Lecanu, 4 Wall. [71 U. S.] 187.

The next error said to be in this record is in the refusal of the judge of the district court to give certain charges to the jury, as requested by counsel for claimants. Several of these charges embody the same idea in different forms, and, as the most clear and precise of these, I copy the fourth charge requested. It is in these words: "If the jury shall find, under instructions from the court in matters of law or in any other way, that the invoice valuations of the wines under seizure did not conform to the actual valuations of such wines in the actual markets of the country of production, as required by the revenue laws of the United States, still they cannot return a verdict for the government unless they shall also find that such discrepancy was not the result of honest error on their part in respect of law or fact, but was made knowingly, with guilty knowledge, with design to evade the payment of duty which they knew was legally chargeable on the merchandise."

So far as appears from the bill of exceptions, this charge, and all charges of the same purport, were properly refused. When an undervaluation of imported goods is established by the proof, unless it is shown to have occurred by mistake or accident, it follows inevitably that the undervaluation must have been made with intent to defraud the revenue. Since the passage of the act of March 2, 1799 [1 Stat. 627], the policy of the revenue laws of the United States is to throw the burden of proof upon respondent to show mistake or error, when the government has in the first place proven undervaluation. So that when, in this case, the United States had established the undervaluation of the goods, the inference of the law was that there was guilty knowledge and guilty intent, and in the absence of any proof on the part of claimants of mistake or accident in making the valuation, the court might well say to the jury that they were to presume knowledge and guilty purpose. This was, however, a presumption which claimants might, and which it stood them in hand to rebut by proof, and if they had offered any evidence tending to show mistake or error, then the charge requested might have been and should have been given. But this bill of exceptions utterly fails to show that any such proof was offered. The issue is, that the claimants had entered undervalued goods, and the court properly charged that, if undervaluation was shown, in the absence of proof of mistake or accident, the presumption of guilty knowledge and intent must prevail.

It is further alleged as error that the court refused to give the following charge to the jury: "If wines of equal value and similar to those seized in this suit were worth in Bordeaux, at the fair and usual market price there, no more than the price stated in this invoice at the date of this shipment, then these wines cannot be condemned for undervaluation." In Vasse v. Smith, 6 Cranch [10 U. S.] 226, Chief Justice Marshall lays down this rule: A bill of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court was prayed. In Dunlap v. Munroe, 7 Cranch [11 U. S.] 270, Johnson, J., says: Each bill of exceptions must be considered as presenting a distinct substantive case, and it is on the evidence stated in itself alone the court is to decide. All the testimony upon which the charge is based must be incorporated in the bill of exceptions when the party wishes to review the charge upon writ of error.

I apply these well settled rules to this assignment of error. This bill of exceptions no where shows that any evidence whatever was offered upon the point on which the instructions to the jury just recited were asked. If there was no such evidence, and that is the presumption, as the record fails to show it, the court was right in refusing the charge. As far as I can see from the record, the charge asked was purely abstract, and had no reference to any facts proven in the case, and it was the right and duty of the court to refuse it.

I see no error in this record. Let the judgment of the court below be affirmed. [Case unreported.]

Case No. 16,507.

UNITED STATES v. THREE HUNDRED AND TWENTY-SIX CASES OF HOSIERY, MARKED H & V. & T. S.

[N. Y Times, Nov. 22, 1861.]

District Court, S. D. New York. Nov. 20, 1861.

VIOLATION OF CUSTOMS LAWS — FORFEITURES — FRAUDULENT INVOICE—FOREIGN CURRENCY.

[Claimants purchased merchandise in Saxony, which was invoiced in Prussian thalers, whose value is fixed by our statutes at 69 cents each. The goods were sent to Bremen, where claimants' correspondents made new invoices, stating the value in Prussian thalers and also in Bremen thalers, which are valued by our statutes at 71 cents, and the entry was made by transmuting the value of the Bremen thalers at this rate into currency of the United States; the claimants swearing that this Bremen invoice was the true and only invoice received by them. There was evidence tending to show that the real value of the Bremen coin was 78¾ cents, and that the transmutation from Prussian thalers was made at that rate, and that the goods were by this means entered at much less than their value according to the original invoice, which claimants, in fact, had in their possession. *Held* that, as the invoice by which the entry was made stated the value in both Prussian and Bremen thalers, there was no fraud justifying a forfeiture.]

This was an action to forfeit the goods on the ground of an alleged fraudulent extension of the invoice by the claimants, with intent to evade the payment of duties. Henschen & Unkart, the claimants, are importers, doing business here, and imported these goods, in value about $30,000, in the latter part of 1857 and the early part of 1858. They purchased the goods at Stollberg, near Chemintz, in the kingdom of Saxony. The currency there is Prussian thalers, whose value is fixed by our statutes at 69 cents each. The goods were sent from Saxony to Bremen, and thence to the United States. At Bremen their correspondents made out new invoices, stating the value of the goods in Prussian thalers, which they transmuted into Bremen thalers of 72 grotes, and these new invoices were presented by the claimants to the collector on making entry of the goods here, making oath that these were the true and only invoices by them received. They had, however, at the time in their possession invoices made out and furnished to them by the person in Stollberg from whom they had purchased.

Our statute fixes the value of the Bremen thaler of 72 grotes at 71 cents, and the value of the goods in the invoices on which the entry was made was carried out into federal currency at that rate. Evidence was given, however, to show that the real value of the Bremen thaler of 72 grotes was 78¾ cents, and that the transmutation from Prussian thalers in the invoice was made at that rate, and that by this means the claimants were enabled to enter the merchandise at some $1,800 less value than if the entry had been made on the invoices which stated the value in Prussian thalers, on which difference the duty amounted to $404.79.

The government claimed that this extension of the invoice was such a one that if the jury found that it was done with intent to evade the payment of the duties, the goods were forfeited, and claimed that that question should be passed upon by the jury.

Messrs. Allen, Craig, and Webster, for the United States.

O'Conor & Dunning, for claimants.

THE COURT [SHIPMAN, District Judge], however, held that whether the claimants were bound to have produced the original Saxony invoices was simply a question of law, and as the invoices which they did produce contained the value in Prussian thalers as well as in Bremen thalers, held that the government could not recover. The jury accordingly found for the claimants.

Case No. 16,508.

UNITED STATES v. THREE HUNDRED BALES OF WOOL.

[2 Int. Rev. Rec. 139.]

District Court, S. D. New York. 1865.

IMPORTATION OF GOODS—FORFEITURE FOR UNDERVALUATION—CUSTOMHOUSE OATHS.

[1. The fact that the consignee, upon entering the goods, added 2 per cent. to the invoiced value thereof merely as a precaution against having the goods subjected to penal duties and forfeited, does not prejudice the question whether the shipper of the goods stated the value thereof correctly in the invoice.]

[2. The intent to pass the customhouse at less than the proper sum is necessary in order to warrant a condemnation of the goods for undervaluation.]

This case was brought to forfeit certain goods for undervaluation. It appeared on the trial that the goods arrived in April, 1863, on board the brig Veteran, from Matamoras. They were consigned to the firm of M. Echeverria & Co., and by them entered at the custom-house. The shipper of the goods was Joseph San Roman of Matamoras, and the affidavit taken before the American consul and attached to the invoice stated that the price in the invoice was the "true cost value" of the goods. The wool was invoiced at 6 cents a pound. On entering it here, the consignees advanced its price 2 cents a pound, to bring it up to the market value. On appraisal at the custom-house, the value was fixed at 10 cents a pound for a part, and 16 cents for the rest, in gold. A second appraisement was had, and the appraisement was confirmed. Upon this valuation the duty was laid. A penalty of 25 per cent. additional duty was also imposed and paid, and then the government seized the goods and brought this suit to forfeit them for an alleged fraudulent undervaluation.

The witnesses for the government, who were merchants here, testified that the appraisement was correct, and that the value of the article was as appraised. The govern-

ment also showed that on a previous entry of wool from Matamoras by the same claimants, in March, 1863, the invoice value was 6 cents a pound, and they added 4 cents to make market value. They also proved that several similar entries of wool had been made from December, 1862, to June, 1863, by different importers at from 8 to 18 cents a pound.

The defendants proved that the wool was shipped by San Roman not for himself, but as agent for Tomas Benavente, of Zacatecas. They gave testimony from Matamoras to show that there was, owing to the disturbed state of things there, no fixed market value for wool, but that the actual value at the time was according to the invoice. They also explained the addition to the entry by saying that there had been a good deal of trouble about invoices at the custom-houses, and they had raised this invoice because they thought it was safer to make the addition and pay an additional duty than to have any trouble; that they had raised this invoice only 2 cents because they thought they had added too much before, when they added 4 cents, and could not make out the market. All the witnesses joined in saying that there was no intention to defraud the revenue either in making the invoice or the entry.

Mr. Courtney and Mr. Allen, for the United States.

Mr. Wilcoxson, for claimants.

BENEDICT, District Judge (charging jury). In this case there are two charges made against the goods. One is that they were not estimated in the invoice and not entered at their cost in Matamoras; another is that they were not entered at their actual or market value in the principal markets of that country, and it is agreed here that Matamoras is the controlling market for that country. To make these charges good against this wool, it must appear that there was an entry of the goods on the invoice, that the invoice was incorrect, and that that inaccuracy or misstatement arose from an intent to pass these goods at a less rate of duty than the law requires.

This brings to you two questions: Were these goods on the evidence, purchased at Matamoras, by the consignee, or by this shipper? And if so, is it a case of an attempt to pass the goods at less than their cost? The affidavit made respecting the cost of this wool you have heard read, and you have heard the statements of the parties who shipped it there as to who owned it, and whether it was purchased. You will have little difficulty in ascertaining whether or no on the facts this was an attempt to pass the goods, where the goods should be entered on their cost, as having been purchased. If it was a purchase of the goods, then their cost would have been proper enough. If it was not, then you come to the other branch of the case, which is, what was the true market value of the goods at Matamoras?

That brings you then to a simple question of fact in this case, and that is a question which you are to decide and no one else. I shall express to you no opinion whatever, and you will not seek in any words of mine for an intimation on this subject, but you will decide for yourselves from the evidence, this simple question of fact, whether or no these goods were entered at their real market value in Matamoras, at the time they were purchased. Now, the market value is got at in various ways. In this case, as in all such cases, it is got at by proving a train of similar importations of the same class of articles from the same market, it being properly enough inferred that if various merchants, in various ports of the country, or in one port, and in no way jointly connected, import from a certain city or seaport, at various times during the season, different shipments, by looking at that series of shipments information is obtained as to what was the value of the wool, or whatever the article may be, at the port of exportation. And so you have had before you in this case various importations and their values. You will look at them, at the article itself, at the period of time which elapsed, and from all the evidence draw your conclusions upon this point. Then you have, besides, the statements of witnesses produced before you. You have the opinions of the appraisers here, and of Mr. Coggill, the merchant appraiser. That has been commented on by counsel on both sides, and you will give it such weight as you may think it entitled to, bearing in mind that the question is, what was the value, the fair buying and selling price of wool of this class at Matamoras at that time. On the other hand you have had the testimony of Mr. De Babian and Mr. Tellkampf also before you, and you will remember what they have testified. One of them speaks of actual transactions in Matamoras, and you will consider that as having such weight as a sensible man should give to a statement of what was witnessed of the actual transactions in a place, as against the opinions of another person largely engaged in the trade. In addition, you have the depositions of Joseph San Roman and Fulgencio San Roman and Mr. Thomas, they being persons in Matamoras. You will look at their means of information —you will look at what they said, at the fullness of their statements, at their probable bias in this case, at their probable likelihood to tell the whole truth; and taking all this evidence together, form your opinions as to whether or no the price at which this wool was entered was the actual fair buying and selling price of the wool of this class at this time in Matamoras. If you are satisfied that the invoice, as originally made up, stated the fair value of the wool, then that is the end of the case. If you are not (and as to that point you are judges, and not I), then you

must go further, because the goods were not all entered here at the price in the invoice. The law allows an importer to raise the invoice price, and if this is done, and the raised invoice be the true, actual market value at the place of exportation, then that satisfies the law. And so you will be brought perhaps to go on further and say, not whether 6 cents, but whether 8 cents was the market value. I am asked to charge you and can charge you that if you believe that the consignee in entering the goods added 2 cents to the invoiced value of the wool, not because he thought the invoice was not high enough, but as a precaution against having the goods subjected to penal duties and charges of forfeiture by the government appraisers, his acts do not prejudice the question whether the shipper of the goods in stating the value as he did in the invoice, stated it correctly. If you find upon this evidence, that 8 cents a pound was not high enough, that these goods, when they attempted to pass the custom-house at 8 cents, were passed at a lower rate than the real fair market buying and selling price of such an article as this at Matamoras, then you must go further still, and satisfy yourself whether that arose from an honest mistake on the part of the claimant. That might happen. But the intent to pass the custom-house at less than the proper sum is necessary, in order to warrant a condemnation. Now, accidents may happen, and every one can imagine cases where such a thing might transpire as that goods were undervalued in the papers by mistake. Whether this is a bona fide case of a mistake, in not having found out what this wool was worth, or whether or no this was an after-thought, produced here to save the goods from forfeiture, is a question for you. But if you do not find, upon the evidence before you, that this case is free from an intent of that kind, and the goods were undervalued, then you must condemn the goods. If you find it was free, although it may have been an undervaluation at 8 cents, then you must acquit them.

I am asked, on behalf of the claimant, to charge you that errors in the forms of the custom-house oaths and entries can have no bearing on the case, unless the jury believe that they are evidence of a fraudulent design. I do not charge you in those words upon that point. The errors in the custom-house affidavits in this case are material, as showing the design with which this invoice was made up, and you have not the right to state that a custom-house oath is no oath. An oath made in proceedings under the custom-house law, and at the custom-house is an oath taken, and it is supposed to be as in law and in truth as solemn an oath as is taken anywhere. I shall never charge you or any other jury that a custom-house oath is a mere formality, but I charge in this case that you are to look to the facts and see what kind of oaths have been made in the case. If you find that oaths have been made here contrary to the facts, and that the party knew at the time he made the oath that it was contrary to the facts, then that has great weight in determining the amount of credibility that should be given to this man's statements made in his deposition or in any other statement of his.

The district attorney requested the court to charge that the affidavit of the clerk attached to the invoice being unexplained, was prima facie evidence of fraud.

THE COURT said that if the jury found that the statement of that affidavit was not the fact, they had the right to take into consideration the fact that a false affidavit was made with reference to the shipment of these goods as a circumstance showing the intent with which the invoice was made up.

Counsel for defense stated that the young man was a Spaniard, and the affidavit was drawn up by the American consul, and he in doing so inserted the word "cost," and the young man used it in the sense of "value."

THE COURT said that was an explanation which the jury could accept or not.

The jury found a verdict for the United States, condemning the goods, which were valued at about $25,000.

Case No. 16,509.

UNITED STATES v. THREE HUNDRED BARRELS OF ALCOHOL.

[1 Ben. 72;[1] 8 Int. Rev. Rec. 105.]

District Court, E. D. New York. July, 1866.

MARSHAL'S COSTS—KEEPER'S FEES—PREMIUM OF INSURANCE—CARTAGE AND STORAGE.

1. Where alcohol was seized in an unlocked shed by an internal revenue collector, and on a libel being filed, was seized by the marshal, and after a delay of many months was bonded by consent of all parties, the claimant consenting to pay the fees and expenses of the marshal, and the clerk taxed $2.50 a day for keeper's fees from the date of the seizure, and an item for cartage and storage, and another for premiums of insurance paid by the marshal on a monthly policy which valued the alcohol at its market value, tax paid; and an appeal was taken from the clerk's taxation of these items—*held*, that the sum actually paid a keeper to watch property in custody, not exceeding $2.50 a day, may be taxed upon satisfactory proof (1) that a prudent precaution in regard to all concerned in the property justified the marshal in placing a keeper over it, and (2) that the keeper actually continued in charge of it for the time specified, and that the sum charged has been actually paid by the marshal.

[Cited in Re Lowenstein, Case No. 8,572.]

2. On the facts the items for cartage and storage were justified by the situation of the property, and the marshal's responsibility for the property seized by him was not affected by

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the fact that a collector of another district claimed that the property had been in his possession under entry for deposit in a United States bonded warehouse.

3. The objection to the item of insurance, because the policy was monthly instead of yearly, cannot prevail, the claimant being shown to have been informed of the form of the policy.

4. The marshal would not have been justified in insuring this property as if it were in bond. He could only treat it as property belonging to the United States, and insure it at its full value.

5. Under the consent to pay the marshal's expenses, it could not be claimed that this part of his expenses should be stricken out as chargeable to the United States alone.

This case came up upon an appeal from the clerk's taxation of the marshal's fees. [See Case No. 16,510.] The information in the case was filed in October, 1865, and averred that the property proceeded against had been seized by Collector Wood, of the Second district, as forfeited to the United States for a violation of the internal revenue act. Process was thereupon issued to the marshal, directing him to attach the property. Accordingly the marshal seized the same, and retained it in his custody under the process. On the 14th of July, 1866, upon the written consent of the district attorney and the attorney for the claimants, an order was made for the appraisement of the property, and its delivery on bail upon payment of the fees and expenses of the marshal. Under this consent and order, the property was appraised, and the marshal's fees presented to the clerk, and by him taxed. Among other items, the clerk allowed an item of $2.50 for each day after the seizure of the property, besides an item for the cartage and storage of the property, and an item for premiums paid for its insurance while in custody. It was to the clerk's allowance of these items that objection was taken.

BENEDICT, District Judge. The objection to the item of $2.50 per day for keeper's fees paid is rested upon the question of fact, whether there had been a daily watching of the property by the marshal or persons in his employ. Upon this issue the weight of evidence is clearly against the claimants. The affidavit of the keeper is positive, and the statement made by the proprietor of the warehouse does not amount to a contradiction of the keeper. The ground upon which the objection to this item rested fails to sustain it.

I notice, however, that an explicit statement that the amount charged for the keeper has been actually paid is wanting. The sum actually paid a keeper to watch property in custody, not exceeding $2.50 a day, may be taxed, by the clerk upon satisfactory proof that a prudent precaution in regard to all concerned in the property justified the marshal in placing a keeper over it; that the keeper actually continued in charge of it for the time specified; that the sum charged therefor is reasonable for the service, and has been actually paid by the marshal. The Trial [Case No. 14,170]. The proof in this case is not sufficiently full in all these particulars. Before the item can be allowed, there must be proof of the necessity of a keeper daily, and that he has been paid. This proof may be given before the clerk.

The objection to the charges for the expense incurred in the removal and storage of the property cannot prevail. It appears by the affidavits of the claimants, as well as by the information, that the property was first seized by Collector Wood, of the Second district, and that when found by the marshal, after the commencement of proceedings to enforce the forfeiture, as is stated by the deputy and not denied, it was in an unlocked shed or outhouse upon a wharf. No objection to the marshal's taking custody of the property was ever made by Collector Wood, and he must be deemed to have assented to it under the option given him by the act as it then stood. The responsibility of the marshal for the safe keeping of property coming into his possession under such circumstances is in no wise affected by the fact that at a period subsequent to its seizure by him, Collector Bowen, of the Third district, claimed that the property had been at all times in his possession under entry for deposit in a United States bonded warehouse. If constructively in his possession, it appears actually to have been seized by Collector Wood, and to have been found in an exposed position upon a wharf, and not in charge of any person who claimed to represent Collector Bowen, or claimed that it was in his custody under bond.

Considering the character of this property, and its position when so found, I am satisfied that removal to a proper storehouse after its seizure was a proper act on the part of the marshal, required of him in the line of his duty, and that the reasonable and necessary expense of such removal and storage, actually paid by him, should be allowed. As no objection is here made to this item upon the ground that the amount is excessive, the clerk's allowance is confirmed.

To the item of premiums paid for insurance, the principal objection is that the insurance was effected by a monthly instead of a yearly policy, whereby the rate of insurance was greatly and unnecessarily increased. But I see nothing in the case tending to lead the marshal to believe that the property would remain in his custody for any considerable period of time, or to charge him with negligence or extravagance in taking out or continuing a monthly policy. It is nowhere made to appear that the marshal was ever requested to insure the property for any long period, or that objection was ever made to the form of the policy, although the attention of the claimants was frequently called to the fact that the insurance was expiring, and that de-

lay was increasing the amount of the premiums. It seems to me too late now, after such acquiescence, and after the premiums have been actually paid by the marshal in good faith, and without suspicion of fraud or connivance, to raise the objection, and ask that the item be stricken out of his bill because a policy was not taken out for a year.

A further objection is raised to this item, that the property has been insured at its market value, as alcohol saleable in the market on the assumption that the tax on it has been paid, whereas, in fact, the tax on it has never been paid, but only secured by the bond of the owner taken by the collector, and that its value as alcohol in bond is much less than as free alcohol, and it should have been insured as such. I am unable to see the force of this objection. If bound to insure at all, the duty of the marshal was to insure the property at its value as it stood in his hands, and for the benefit of whom it might concern. It is not perceived that any difference exists between the condition of goods seized for non-payment of tax and goods seized for non-payment of duties on imports, and in the numerous cases of the latter class which have arisen in this port, I have never known of its being claimed that the goods after seizure by the marshal should be treated as goods in bond. Furthermore, it is not made to appear that the marshal was, until a very late day, notified that the alcohol was ever in bond, and certainly he was not bound to assume it to be so. He could only treat it as property wholly belonging to the United States as forfeited for the violation of law, and insure it at its market value. Besides, in this case it appears that a written consent, signed by the attorney of the claimants, has been filed, in which it is stipulated that the marshal's fees and expenses are to be paid by the claimant before discharge of the property. Upon taxation of the marshal's fees and expenses in this cause, under that consent, I do not think that it can be fairly contended that part of his expenses should be stricken out as chargeable to the United States alone. The item of premiums of insurance must therefore be allowed.

In dismissing this case, I feel bound to express my surprise that this property has been allowed to remain in custody for so long a period of time. If any reason existed why the cause should not have been tried, as it might have been long ago, I conceive of no good reason why the property has not been sold or bonded. The same action now being taken by the claimant could, for aught that appears, have been taken immediately after the seizure of the property, in which case the items of expense now complained of would have been insignificant, and the hardship of the case avoided.

UNITED STATES v. THREE HUNDRED BARRELS OF DISTILLED SPIRITS. See Cases Nos 16,580 and 16,581.

Case No. 16,510.

UNITED STATES v THREE HUNDRED BARRELS OF WHISKEY.

[1 Ben. 15; [1] 2 Int. Rev. Rec. 165.]

District Court, E. D. New York. Nov., 1865.

INTERNAL REVENUE — PRACTICE — BONDING PROPERTY UNDER SEIZURE—POWERS OF THE COURT.

1. This property was proceeded against under the internal revenue acts of June 30, 1864 [13 Stat. 223], and March 3, 1865 [Id. 469]. The property being under seizure by the marshal, the claimant applied for leave to bond it. *Held*, that the court has power, independent of any statute, to discharge upon bail property in custody, in cases of seizure under the import acts, whether upon land or water.

2. The same power exists in the present case under the 48th and 50th sections of the revenue act of June 30, 1864.

This was an application on the part of the claimant of the property seized, to have the same delivered to him upon giving security in the amount of the value thereof. The motion was founded upon a petition showing that the property was proceeded against for a violation of the internal revenue act, passed June 30, 1864, and amended March 3, 1865; that upon filing the information, process was issued against the property, and the same was seized by the marshal and taken into his custody without objection on the part of the collector of internal revenue, and was still in the custody of the marshal under the process in this cause, and that no opportunity existed to try the cause at the then present term.

B. D. Silliman, U. S. Dist. Atty.
Cooper & Roe, for claimants.

BENEDICT, District Judge. The act to provide internal revenue nowhere in express terms confers upon any court the power to deliver to the claimant on bail, pending the proceedings, the property claimed to be forfeited to the United States under its provisions. Nor do I find that by express provision or by implication the power is withheld. It is true, that the proviso to section 48 seems to contemplate in certain specified cases, the giving of a bond to the assessor to be by him filed in the office of the commissioner of internal revenue, but it does not appear that, in such cases even, the order of the court can be dispensed with. What construction should be given to section 48 it is not necessary, however, to decide here, inasmuch as in the case before the court, the privilege is not asked upon the ground that the property is perishable or otherwise, within the proviso of that section. But although the act does not by express terms confer the power here sought to be invoked, it is apparent that the intention of the act was that proceedings under

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

it should conform in this respect to the methods heretofore pursued in cases of seizure under previous revenue laws. Thus, section 48 provides that the proceedings to enforce forfeiture under the act shall be "in the nature of proceedings in rem," while section 50 provides that the act of March 2, 1833 [4 Stat. 629], entitled "An act to provide for the collection of duties and imposts," shall extend to all cases arising under the laws for the collection of internal revenues. Now, section 2 of the act of 1833, expressly provides that all property taken or detained by any officer or other person under the authority of any revenue law of the United States shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. These provisions, taken together, seem to me to warrant the conclusion that if the courts of the United States have, in cases of seizure upon land, under the import acts, the power independent of any statute, to discharge upon bail property in custody, the power exists in a case like the present. No reason is seen why this power should not, in a proper case, be exercised as well in cases of seizure under the internal revenue act, as in cases of seizure under the import acts.

Now the power of releasing property upon bail, pending the proceedings, has been in constant exercise in most, if not all cases of seizure under the import acts, and been deemed to be one of the inherent powers of the court over property in its custody. Indeed, it would seem to be a power necessary to the proper exercise of the jurisdiction of the court in most cases, in rem, for in such cases the proceedings might sometimes prove futile, and the decree, when made, a barren one, without the exercise of such a power. So in cases of property seized upon the waters for a violation of the revenue laws, the order to deliver on bail has been an order almost of course, and this too without any statute conferring the power, but by mere rule of court. This practice, in such cases, has been adjudged upon appeal to be warranted by law, and judgment given upon bonds so taken. The Alligator [Case No. 248]; Story, J.

Nor has the exercise of this power been confined to seizures upon the waters. The case of U. S. v. Four Part Pieces of Woolen Cloth [Id. 15,150] was a case of a seizure upon land. Thompson, J., there held that a bond taken in the district court, upon request of the claimant to obtain an order for the discharge of the property pending the proceedings, was valid, and the point being taken that no statute authorized the taking of the bond, the court so held, but declared the power to be one of the inherent powers of the court, to be exercised in its discretion, independent of any statute.

The practice which has grown up under these decisions has proved, I think, a beneficial one, not only to claimants, but to the government. Any other practice would be likely to entail upon the government large expenses for the storage, custody and care of all property seized as forfeited. Property held during long periods to await the result of litigation, is necessarily subject to great risks of loss by fire, by thieves, &c. This very case may be taken as an illustration. These three hundred casks of whiskey of a certain proof, now worth $23,449, are on storage. and if not bonded, must remain in custody until the final termination of the action. Can any one doubt that the risk of its turning out at the end of the litigation less in quantities, proof and value, is greater than the risk of the solvency of competent sureties, carefully selected and sworn? It seems to me, therefore, that the power in question is one conducive to justice, and must be considered as resting both on principle and authority.

I have given this question more careful attention, because it was suggested, on the part of the government, that a different opinion has been expressed in another district. I do not learn, however, that any case like the present has been passed on. Here the property is in the actual custody of the marshal, and the district attorney does not oppose the application. In such a case, no court, to my knowledge, has denied its power to discharge on bail; while it is believed that the power has been exercised in many districts in cases under the internal revenue acts, and that without question.

It may perhaps be proper to add, that the commissioner of internal revenue denied an application made to him for the discharge of this whiskey on bail as perishable, as appeared by his letter made part of the motion papers, and added: "The court, however, in which proceedings for forfeiture are now proceeding, has jurisdiction of the matter, and can order a release, if, in its judgment, such release is proper." The motion for the release of the property is therefore granted, and an order to that effect will be entered, upon filing in court a bond in the value thereof, as fixed by appraisers appointed by the court; the bond to be in a form approved by the district attorney, and executed by two sureties to be approved by the district attorney and clerk.

The importance of having the practice in this class of cases uniform throughout this circuit, has led me to submit this opinion to the presiding justice of the circuit, and he concurs with me in the view I have taken of the law.

[See Case No. 16,509.]

Case No. 16,511.

UNITED STATES v. THREE HUNDRED CASKS OF JUNIPER CORDIAL.

[Hoff. Op. 467.]

District Court, N. D. California. Nov. 26, 1859.

VIOLATION OF CUSTOMS LAWS — IMPORTATION OF LIQUORS—JUNIPER CORDIAL.

[Juniper cordial, which contains sufficient saccharine matter to disguise 11 per cent. of alcohol, is a sweet cordial, within the meaning of the 103d section of the customs act of 1799 (1 Stat. 701), which provides that no distilled spirits (arrack and sweet cordial excepted) shall be imported, except in casks or vessels of 90 gallons and upwards.]

HOFFMAN, District Judge. The goods in this case have been seized by the collector as forfeited under the 103d section of the act of 1799. That act provides "that no distilled spirits (arrack and sweet cordial excepted) shall be brought into the United States, except in casks or vessels of the capacity of ninety gallons, wine measure, and upwards," etc.

The only question in the case is, is this liquor a sweet cordial, within the meaning of the act? Several witnesses on the part of the United States have testified that the liquor in question is very similar to what is known as "Old Tom," and that it would not be called in commerce a sweet cordial. None of these witnesses, however, profess to have any general knowledge of the mode in which the liquor is denominated or regarded in the general trade of the country. Their knowledge on the subject being confined to this city, and obtained from the experience of the last few years, they, of course, do not pretend to state that this liquor would not, at the date of the act (1799), have been considered a sweet cordial. When asked to define or explain what, in their judgment, constitutes a sweet cordial, the witnesses acknowledged their inability to give any definition to the term which would not include the liquor in question.

On the other hand, it appears from the testimony of the witnesses produced by the claimants (one of whom was a manufacturer of cordials, and the other a chemist, Mr. McCulloch, who states that he assisted in the preparation of "McCulloch's Commercial Dictionary") that a sweet cordial is a plain spirit, flavored by an essential oil or other aromatic substance, and sweetened by some saccharine matter. Such is precisely the composition of this liquor. The same definition is given in the various standard works. In one of these, under the word "juniper," this liquor is described as a "cordial water," and a definition of it is given, which is stated by Mr. Roach, the appraiser, by whom the subject has been investigated, to be almost a recipe for its manufacture. The fact that the liquor contains a large proportion of alcohol has no bearing on the question, for several liquors admitted to be cordials are mentioned by the witnesses which contain more alcohol.

Mr. McCulloch states that this liquor is "English cordial gin," and he adds that if this be not a sweet cordial, he is unable to conjecture to what liquors that name should be applied. In addition to this, the claimants have produced as a witness Mr. Roach, the appraiser of the custom-house, by whom the subject has been diligently examined, and who states his firm opinion that this liquor must be classed as a sweet cordial, and that neither technically, commercially, or scientifically, can it be called "gin." It would seem that the term "liqueur" in French corresponds with the English word "cordial," and a liqueur is defined to be "a liquor compounded of alcohol, water, sugar, and different aromatic substances,"—a definition which precisely describes the juniper cordial, or British cordial gin, in question. It is also stated by Mr. McCulloch that, by the British excise laws, a discrimination is made between cordials and distilled liquors, and that cordials or strong waters are liquids sweetened or mixed with any article, so that their strength cannot be ascertained by a hydrometer. It appears, from an analysis of the juniper cordial under seizure, that it contains sufficient saccharine matter to disguise 11 per cent. of alcohol. I think it clear, from this testimony, that this liquor must be classed among those intended to be included in the act of 1799 under the denomination of "sweet cordials."

It may be observed, in addition, that the size of the package in which the article is imported does not affect the amount of duties, and that the duty imposed is the highest sale under the act; and no reason of public policy is suggested why this liquor should be excluded from the class of sweet cordials any more than Marachine, Curaçoa, Keischewasser, etc., which are confessedly within it. I think, therefore, that the libel should be dismissed.

Case No. 16,512.

UNITED STATES v. THREE PARCELS OF EMBROIDERY.

[3 Ware, 75;[1] 19 Law Rep. 140.]

District Court, D. Massachusetts. June 11, 1856.

INFORMATION OF FORFEITURE — CUSTOMS LAWS — FALSE INVOICE—PARTIES.

1. In an information in rem for a forfeiture alleged to be incurred under the collection act of 1799, c. 22, § 66 [1 Stat. 677], it is essential to charge that the goods were entered under a false invoice, and that they were falsely invoiced with the design to evade the duties thereupon, or some part thereof.

[Distinguished in Friedenstein v. U. S., 8 Sup. Ct. 842, 125 U. S. 232.]

2. Therefore, where such an information only alleged that the entry was made below the actual cost, with the design, &c., and the court instructed the jury that the invoice must be falsely made, and with the design to evade the

[1] [Reported by George F. Emery, Esq.]

duties, and the jury found for the plaintiffs, it was held that judgment must be arrested.

[Distinguished in Friedenstein v. U. S., 8 Sup. Ct. 842, 125 U. S. 232. Cited in U. S. v. Fifteen Barrels Distilled Spirits, 51 Fed. 423.]

3. It seems that such an information should be brought in the name of the United States alone, without making the seizing officers parties.

B. F. Hallett, U. S. Dist. Atty.

Milton Andros, for claimant.

WARE, District Judge. An information was filed on the 4th of June, 1855, by the district-attorney, against three parcels of embroidery, imported into the port of Boston from Liverpool, England, as subject to forfeiture, for a violation of the 66th section of the collection law of 1799 (chapter 22). It is filed 'in the name and behalf, as well of the United States as of Charles H. Peaslee, collector of the port of Boston and Charlestown, in said district, and all other persons concerned.' At the last term of the court the case was given to the jury, and they returned a verdict for the plaintiffs; a motion was then made, January 2, by the counsel for the claimants, in arrest of judgment, for the supposed errors and insufficiency of the information, and several causes were assigned for the motion. The first, then, in natural order, though not in that adopted in the motion, is, that there is a misjoinder of parties. The form in which the information is presented, makes Peaslee, collector, as much a plaintiff as the United States. By the 88th section of the act, it is ordered that 'all penalties accruing by any breach of this act shall be sued for and recovered in the name of the United States of America.' This is indeed an information in rem for a forfeiture, but I can see no reason for a distinction in this respect, between a suit in rem for a forfeiture, and a suit in personam for a penalty; and certainly when a statute peremptorily requires a suit to be in the name of a particular plaintiff, it would seem to be the intention of the legislature, that his name alone should stand as plaintiff on the record, and this inference would appear to be strengthened when that plaintiff is the United States. The reason for making the collector a party is presumed to be because he is supposed to have an interest in the suit, and the technical reason, on the general principles of law, would be strong for making him and other officers of the customs, who share in the forfeiture, parties, if they had an interest that was absolute and indefeasible. But their rights are precarious, and dependent entirely on the pleasure of the United States. Without their consent, their interest may be released at any time, even after judgment, and until the proceeds are paid over to the collector and ready for distribution. McLane v. U. S., 6 Pet. [31 U. S.] 404; U. S. v. Morris, 10 Wheat. [23 U. S.] 288. The technical reason for the joinder therefore fails.

By the general provisions and policy of the law, as well as by the practice of the courts, the seizing officers have no authority, nor are they allowed ordinarily in any way, to interfere in the management of the suit through its whole progress, from the beginning to the end. There is, therefore, no reason for making them joint plaintiffs, but an obvious impropriety in doing so. When a forfeiture is ascertained and declared, it accrues in law to the United States. They receive it under the law, partly to their own use and partly as trustee for those who are entitled under the law. But this peculiarity is attached to the trust, that the trustee is not compellable to execute it, but may at pleasure remit the whole forfeiture to the claimant. This view of the subject also seems to me to be confirmed by the general character of our fiscal laws. The sole purpose of the penalties and forfeitures with which they are so profusely studded, is the protection of the revenue. It is no part of their object, in a just and legal sense, to enrich the officers of the customs. The shares allowed to them are not allowed as a part of their compensation, in a legal sense. Their services are compensated by their salaries, and their shares of forfeitures are pure gratuities, given to quicken their diligence in the performance of duties for which they are otherwise fully paid. The promises held out to them by the law are, in theory, promises without consideration, mere nude facts, and therefore, on general principles, are not binding upon the promisors. And they are not only so in theory, but so held in practice. A gift becomes irrevocable only when executed, when the thing is delivered; and the right of the officers of the customs to their shares in forfeitures, becomes perfect only after they are paid over. There are, therefore, no reasons, so far as I can see, founded on general principles, why the seizing officer should be made a party plaintiff. There is a dictum in the case of Gelston v. Hoyt, 3 Wheat. [16 U. S.] 313, thrown out arguendo, that he may be a co-plaintiff. The question did not arise in the case, and it has not, therefore, the authority of a decision. The reason given for it is, that he has an interest in the case; but if I have a correct view of the law, it is not such an interest as entitles him to make himself a party; and if it be not, there is an obvious reason why he should not be clothed with the rights of a party to interpose in the management of the suit. And such appears to have been the course from the origin of the government. The direction of the first collection laws of 1789, c. 5, § 36 [1 Stat. 47], was, that suits for penalties, under that act, should be in the name of the United States. This was copied into the amended act of 1790, c. 35, § 69 [1 Stat. 177], and from that transferred to the last general collection law of 1799, c. 22, § 88. The same direction is given in the registry act of 1792, c. 6, § 8 [1 Stat. 232], and in the

act for enrolling and licensing vessels of 1789, c. 11, § 21. But, however the law may be, the practice seems to have been various from an early time. In this district, it seems to have been customary for a long period, if not from the beginning, to join the collector in a libel of information, with the United States, and there is a precedent in Dunl. Adm. Prac. p. 372, said to have a very high authority, which is in exact conformity with this information. In the district of Maine, the only one of which I have any particular knowledge, the practice, until quite recently, was to bring the suit in the name of the United States alone. The district-attorney contends that the joinder is justified by long, if not immemorial usage, in this district, and that if in strict law it is open to objection, that the exception is declinatory in its nature, and is waived by going to trial on the merits, and cured by verdict. On the other hand, it is contended that the joinder being against the express words of the statute, the exception is fatal at any stage of the suit, before final judgment.

I do not, however, find it necessary to decide the case on this question, because there is another ground on which, in my opinion, the judgment must be arrested.

The other causes assigned for the arrest of judgment, and which have been insisted upon in the argument, may all be resolved into one, and that is, that the offence is not set out in the information with that clearness and distinctness which is required by the rules of pleading and the practice of the courts. It was long ago held by the supreme court, that an information to recover a penalty under the collection act of 1799, is in the nature of a criminal proceeding. Locke v. U. S., 7 Cranch [11 U. S.] 339; Clifton v. U. S., 4 How. [45 U. S.] 242. The description of the offence for which the penalty is demanded, must have the same kind and degree of certainty that is ordinarily required in other criminal proceedings. And although it may be true, as is argued by the district-attorney, that in the practice of our courts, all that technical accuracy of description may not be required which is held to be essential in indictments, and even in the exchequer practice, in England; and that niceties need not be observed which rest on dry precedent, the reason of which has either ceased to exist or cannot now be discovered, it is still indispensable that every circumstance constituting the offence be clearly and distinctly set out in plain and direct averments. It is not sufficient to show, that a man learned in the law may find in the information, by comparing one part with another, a full description of the offence. It is, I apprehend, necessary that the offence be charged in such plain and positive terms, that a plain and unlearned man, inops consilii, may clearly understand, by reading the information, what is charged upon him, and to what he is required to answer, and so, also, that a jury equally unlearned, may understand, from the information, what they have to pass upon. Guided by these principles, let us first look at the law which creates the offence, and then at the description of it in the information.

The language of the law is, 'That if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof, at the place of exportation, with a design to evade the duties thereupon, or any part thereof, all such goods, wares, or merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited.' It is very clear from this language that three facts must concur to complete the offence: First, an entry must be made of the goods. Second, they must be invoiced, not according to their actual cost. Third, they must be thus invoiced, with the design to evade the duties thereupon, or upon some part thereof. Each of these facts must be found to entitle the plaintiffs to a verdict, and all of them being necessary to constitute the offence, each should be plainly and distinctly charged in the information.

To ascertain whether they are thus charged, let us look at the information. I read all that part which is descriptive of the offence. The allegation is, that an entry of these goods 'was then and there (at Boston, May 26, 1855) made upon an invoice then and there produced, as and for the true invoice of said goods and merchandise according to law, when, in fact, the said entry was so made upon said invoice, below the actual cost of said goods at the place of export, and said entry was so made under the true value and cost of said goods, with the design then and there to evade the payment to the said United States, of that part of the duties chargeable according to law, upon the cost and value of said goods, which was chargeable upon the excess of said actual cost and value according to law, over and above the reduced and false value, at which said goods were so entered, as aforesaid, the said goods, wares, and merchandise, being then and there imported into the United States from a foreign country, and being then and there liable to the payment of duties upon an entry upon an invoice according to their actual cost or true market value at the place of export.' Now to complete the offence, there must be, undoubtedly, a corrupt design to defraud the United States in the duties, and there must be some act done towards carrying that design into execution; and it appears to my mind quite clear, that in order to bring the case within the reason of the law, this design must have existed at the time of making the invoice, and that the invoice itself must be prepared and concocted for the purpose of carrying that design into effect. The criminality of the fraudulent design is attached to the mak-

ing of the invoice, and not to the entry. The entry may be honestly made by an agent, who knows nothing of the fraudulent undervaluation; and if the forfeiture attached to the criminal intent in the entry, it might easily be avoided by keeping the consignee in ignorance of the actual cost. To prevent this, the law fastens the forfeiture to the first act in the series, by which the fraud is intended to be perpetrated, and by which it may be effected, though all the subsequent agents are innocent. The case was so put to the jury, and they were told, before they could find a verdict for the plaintiffs, they must be satisfied not only that the invoice was false, but that it was made so with the design of defrauding the United States of the duties, or a portion of them. The jury may be presumed, under the instruction of the court, to have found the fact, although it is not distinctly charged in the information.

And I now come to the question, whether there is any sufficient allegation in the information, that the goods were not invoiced according to their actual cost, with the design to evade the payment of the duties, or any part thereof? And I think there is not. The information seems to have been framed on the idea that the forfeiture attached to the design of fraud in making the entry. The entry is charged to be made on said invoice, below the actual cost. What invoice is here meant? It is described above as an invoice produced, as and for the true invoice. But it is not declared to be false, except by way of inference; again, it is charged that the entry was made with a design to evade the duties; but it is nowhere distinctly and plainly charged, that a false invoice was made with that design. Under this section of the statute, it appears to me that this design in making the invoice is an essential part of the offence. If it is so, the rules of pleading require that it be distinctly alleged. If it be said that the jury, under the direction of the court, found the fact, it is still true that by the strict rules of pleading in penal causes, the plaintiff can recover only according to his allegation as well as his proofs. My opinion on the whole, is, that judgment must be arrested.

Case No. 16,513.

UNITED STATES v. THREE RAILROAD CARS.

[1 Abb. U. S. 196;[1] 1 Am. Law T. Rep. U. S. Cts. 114; 7 Int. Rev. Rec. 189.]

District Court, N. D. New York. May Term, 1868.

CONSTRUCTION OF PENAL STATUTES—"WILLFULLY"—FORFEITURE FOR VIOLATING CUSTOM-HOUSE SEALS.

1. To authorize a conviction under a penal statute prescribing a punishment for "willfully" removing an official seal from property which has been sealed up by officers of the customs, it must appear that the defendant not only intended to remove the seal, but that he had at the time a knowledge of its character. One who removes such a seal in ignorance of its character, and in the honest execution of a supposed duty in the care and transportation of the property, is not liable to punishment under the statute, for the reason that he cannot be deemed to have acted willfully.

[Cited in Highway Com'rs v. Ely, 19 N. W. 940, 54 Mich. 180; Minkler v. State, 15 N. W. 331, 14 Neb. 183; State v. Preston, 34 Wis. 685.]

2. The punctuation of a statute, as printed, affords no very decisive test of construction; but may be regarded as one indication of the meaning.

3. To warrant a forfeiture of property, under the last clause of section 5 of the act of June 27, 1864 [13 Stat. 198], for the unauthorized removal therefrom of a custom-house seal, affixed pursuant to other sections of the act, proof must be made that the removal was willful, in the same manner as would be necessary to sustain a conviction and punishment of the offender under the previous clause of the section.

Trial of an information. This information was filed against three railroad cars and three hundred barrels of flour, claimed to be forfeited by reason of an unlawful removal of a custom-house seal while the cars and contents were in course of transportation from Canada into the United States. The property was claimed by the New York Central Railroad Company.

William Dorsheimer, U. S. Dist. Atty., cited [Three Hundred Baskets of Champagne v. U. S.] 3 Wall. [70 U. S.] 145; [Ex parte Bank of New Orleans] 3 How. [44 U. S.] 310; Whart. Cr Law, 401, note s; Act March 3, 1863, § 8 (12 Stat. 740); Act July 28, 1866, § 1 (14 Stat. 328).

A. P. Laning, for claimants, cited 2 Bouv. Dict. 562.

HALL, District Judge. The information in this case is founded upon section 5 of the act of June 27, 1864. Section 1 of this act provides for the unloading and inspection at the first port of entry or custom-house of the United States, of all merchandise and other articles imported into this country from any contiguous foreign country, except as thereinafter provided. Section 2 provides that in order to avoid the inspection at the first port of arrival, as required by section 1, cars, &c., containing such merchandise or other articles may be sealed or closed, under regulations authorized by such act to be prescribed by the secretary of the treasury; "whereupon the same may proceed to their port of destination without further inspection." It also provides that such cars, &c., shall proceed, without unnecessary delay, to their destination, as named in the manifest of their contents, and be there inspected as provided in section 1. Section 3 authorizes the secretary to make regulations for the sealing and closing of cars, &c., and sections 4 and 5 are in the following words:

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

"Sec. 4. And be it further enacted, that if the owners, master, or person in charge of any vessel, car, or other vehicle, sealed as aforesaid, shall not proceed to the port or place of destination thereof named in the manifest of its cargo, freight, or contents, and deliver such vessel, car, or vehicle, to the proper officer of the customs, or shall dispose of the same by sale or otherwise, or shall unload the same or any part thereof, at any other than such port or place, or shall sell or dispose of the contents of such vessel, car, or other vehicle, or any part thereof, before such delivery, he shall be deemed guilty of felony, and on conviction thereof, before any court of competent jurisdiction, pay a fine not exceeding one thousand dollars, or shall be imprisoned for a term not exceeding five years, or both, at the discretion of the court; and such vessel, car, or other vehicle, with its contents, shall be forfeited to the United States, and may be seized whenever found within the United States, and disposed of and sold as in other cases of forfeiture: provided, that nothing in this section shall be construed to prevent sales of cargo, in whole or in part, prior to arrival, to be delivered as per manifest, and after due inspection.

"Sec. 5. And be it further enacted, that if any unauthorized person or persons shall willfully break, cut, pick, open, or remove any wire, seal, lead, lock, or other fastening or mark attached to any vessel, car, or other vehicle, crate, box, bag, bale, basket, barrel, bundle, cask, trunk, package, or parcel, or anything whatsoever, under and by virtue of this act and regulations authorized by it, or any other act of congress, or shall affix or attach, or in any way willfully aid, assist, or encourage the affixing or attaching by wire or otherwise, to any vessel, car, or other vehicle, or to any crate, box, bale, barrel, bag, basket, bundle, cask, package, parcel, article, or thing of any kind, any seal, lead, metal, or anything purporting to be a seal authorized by law, such person or persons shall be deemed guilty of felony, and upon conviction before any court of competent jurisdiction, shall be imprisoned for a term not exceeding five years, or shall pay a fine of not exceedling one thousand dollars, or both, at the discretion of the court. And each vessel, car, or other vehicle, crate, box, bag, basket, barrel, bundle, cask, trunk, package, parcel, or other thing, with the cargo or contents thereof, from which the wire, seal, lead, lock, or other fastening or mark, shall have been broken, cut, picked, opened, or removed, by any such unauthorized person or persons, or to which such seal or other thing purporting to be a seal, has been wrongfully attached as aforesaid, shall be forfeited to the United States."

The information, after stating the seizure of the property in question, alleges the proper sealing and closing of the three cars containing the three hundred barrels of flour, at Clifton, in Canada, by the consul of the United States, as authorized by the regulations prescribed under the authority of the act of congress; that said cars were permitted, by reason thereof, to enter and pass the port of Niagara without inspection; and that before the said cars arrived at the port of their destination, the seals, by which said cars had been sealed and closed by the consul, were broken, cut, opened, and removed from each and all of the said cars by some unauthorized person, by which such cars and their contents had become forfeited. The information does not allege that such seals were "willfully" broken, cut, opened or removed; nor does it contain any allegation that the same was done willfully or maliciously, or with any fraudulent, corrupt, unlawful, or improper purpose or intent.

The answer of the claimants admits the material allegations of the information, but sets up that the seals of the consul were removed from such cars by mistake, and not willfully, nor for the purpose of violating any act of congress, or any regulation of the treasury; nor for the purpose of interfering with, or removing any of the property contained therein; that said cars were not opened, nor was any of the property therein removed, or interfered with; and that such seals, and the wires to which they were attached, were so removed by an employee of the railroad company, in ignorance of their character, and of their being the seals of the consul, and for the purpose of putting on the doors of the cars a fastening which it had been the custom to place thereon, and thereby make the same more secure.

At the trial the jury returned a special verdict by which they found that the seals of the consul affixed to the cars of the claimants, as stated in the information, were removed by an unauthorized person who was in the employ of the claimants; but that they were so removed in ignorance of the character and purpose of such seals, and without knowing by whom, or why, or for what purpose they had been placed upon said cars; that they were so removed for the purpose of making the fastening of said cars more secure, without any improper or illegal motive or intention, or any desire or purpose to defraud the government, or enable any person to do so; and that no officer, agent, or employee of the claimants aided, or assisted in, or directed or authorized such removal, or in any manner consented thereto.

Upon these pleadings, and this special verdict, the counsel for the claimants insisted, in substance: (1) That in order to a conviction of a person for removing seals under the first clause of section 5, above quoted, it is necessary to show that the removal of the seals was willful; that this was not shown by the evidence in this case, and is negatived by the special verdict. (2) That the forfeiture declared by the last sentence of the section is only a further penalty for the commission of the act made criminal by the preceding sentence, and that there can be no forfeiture unless the

facts proved would justify a criminal conviction of the party by whom the seals were removed.

1. The first question thus presented depends mainly upon the signification, purpose, and effect of the term "willfully," as used in the section referred to; and it must be conceded that the question is not free from doubt. The words "knowingly," "willfully," and "maliciously," either singly or united, or one of them connected with another, have been frequently used in criminal and penal statutes; but their signification and effect have not been, and cannot be, so precisely defined that different interpretations are not required in different cases,—depending to some extent upon the connection in which they are found. The first of these words does not, in common parlance, or in legal construction, necessarily and per se, imply wicked purpose or perverse disposition, or indeed any evil or improper motive, intent, or feeling; but the second is ordinarily used in a bad sense to express something of that kind, or to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty. The last of these terms, "maliciously," in its ordinary sense, and when used in criminal or otherwise penal statutes, implies the existence of a wicked, base, or revengeful purpose, or an evil disposition and wanton disregard of the rights of others; though in its technical sense, as used in the merely formal, though necessary allegations of an indictment, it generally has a less noxious signification, implying that legal malice which is presumed to exist whenever any unlawful and injurious act is voluntarily committed, rather than the actual existence of malignant feeling and evil purpose. In its ordinary sense, and when used in statutes, it is generally considered as including the term "willfully," and something more; and it has therefore been held that in an indictment founded on a statute requiring the act charged to be willfully done in order to make it criminal, charging that the act was done "maliciously" was sufficient; but when the words "willfully and maliciously" are both used in the statute creating the offense, it was held that both must be used in the indictment, and that an allegation that the act was done "unlawfully and maliciously" was not sufficient. Archb. Cr. Prac. 50. The definitions given by our best lexicographers, as well as the authority of legal writers, show that "willfully" is ordinarily used in a bad sense. Webster, whose definitions are most reliable, gives as the proper definition of "willful," in its present use, "governed by the will without yielding to reason; obstinate; perverse; inflexible; stubborn; refractory;" and he gives as the definition of "willfully." "in a willful manner; obstinately; stubbornly."

Upon the best consideration I have been able to give to this case and to the authorities which my researches have discovered, I am quite confident that neither the evidence nor the special verdict will justify the conclusion that the removal of the seals of the consul, as found by the verdict, was "willful," within the meaning and intent of the act of congress. It is true, that a person who deliberately does an act which he knows to be unlawful, or wrongful, is generally held to have done it willfully; and the familiar doctrine that a person is conclusively presumed to know the law of the country of his domicil or temporary sojourn, was pressed upon the court for the purpose of bringing this case within the principle of the cases in which this doctrine has been applied. Without considering the question whether the regulations presented by the secretary of the treasury, under an act of congress, are to be considered as laws, it must be observed that in all cases of this kind the intention of the legislature is to govern; and that when, as in this case, the act must be willfully done to make it criminal, it can hardly be supposed that the legislature intended to declare an act committed without any illegal or improper motive, and under the honest belief that it was entirely right and proper, to be a felony punishable, in the discretion of the court, by a large pecuniary fine and five years' imprisonment. Indeed, under such proof of the absence of all criminal or improper intent or feeling, eminent judges have directed acquittals in cases where the punishment authorized was much less severe.

In the case of U. S. v. Hart [Case No. 15,316], Mr. Justice Washington held that a constable who stopped and detained the mail-coach, by arresting the driver because he was driving through the streets of Philadelphia at a speed which was considered dangerous to the persons of its citizens, was entitled to a verdict of not guilty on an indictment founded upon a statute making it criminal for any person "knowingly and willfully to obstruct or retard the progress of the mail;"—the judge holding that driving at a dangerous speed, upon the streets of the city, was a breach of the peace and an offense at common law, and authorized an arrest of the offender without a warrant;—and that it could not therefore be said that the act was a willful stopping of the mail;—and this decision was referred to and approved by Mr. Attorney-General Crittenden, in an opinion furnished the postmaster-general in 1852. I am aware that the authority of Mr. Justice Washington's decision may be said to have been shaken by the decision of Mr. Chief Justice Taney in U. S. v. Harvey [Case No. 15,320]. The chief justice felt it to be his duty to follow a decision, made in the same district, by Judge Winchester; and which he supposed to be in conflict, to some extent, with Mr. Justice Washington's decision; and he therefore decided that arresting and detaining the mail-carrier, under civil process, and thereby obstructing and retarding the progress of the mail, justified a conviction of the constable who made the arrest. This decision, and the case of People v.

Brooks, 1 Denio, 457, and other analogous cases, have raised doubts upon the question now under consideration; but the decision of the chief justice was made during the hurry of a circuit, and it is quite certain that the case before Judge Winchester was clearly distinguishable from those before Mr. Justice Washington and the chief justice, for reasons which do not appear to have been considered by the latter. In the case before Judge Winchester the defendant was a private individual who had detained the mail by holding possession of the horses employed in its transportation, on the ground that he had a lien on them for food furnished for them, while engaged in that employment, prior to such detention; and Judge Winchester evidently reached the conclusion that no such lien existed, even against the owner of the horses, and that it was entirely clear that no such lien could be enforced against the right of the government to use the horses in the transportation of the mail. The act of detention was intentional and deliberate, and under such circumstances that the defendant was bound to know that it was without legal right, and in violation of law; and, it was therefore held to be an offense under the statute. In the case before Judge Washington the defendant was in the execution of what he believed to be his duty as a peace-officer; and in that before the chief justice the defendant was a constable, holding a civil process to arrest the mail-carrier, and he may well have supposed it to be his duty to execute the process in his hands. If he acted upon his honest conviction of duty, without improper motive or feeling, I confess my inability to assent to the propriety of his conviction. In short, I cannot believe that congress, when expressly requiring that the act should be willful, intended to subject a public officer to indictment and punishment for honestly endeavoring to do what he really believed to be his official duty. I cannot believe that congress, when it required the act to be willful, intended that an honest mistake upon a question of law, in respect to which the opinions of such eminent judges as Mr. Justice Washington and Judge Winchester had been opposed, and which had not been settled by any later decision, should be punished as a crime.

This decision of the chief justice, and others which serve to sustain, to some extent, the position of the district-attorney, were doubtless based upon the maxim that "ignorance of the law excuses no one," and in accordance with which a party is legally presumed to know what the law is, even when the question depends upon the intent and meaning of an act of congress of which he has never heard, and in regard to which the opinions of judges and lawyers are not only in opposition but almost equally divided; and it can hardly be doubted that the term "willfully" is sometimes, if not generally, introduced into criminal and penal statutes to prevent the gross injustice that might otherwise be perpetrated in the strict application of the rule which requires this legal presumption in opposition to the real truth of the case.

But there is another view of the case which deserves consideration. The maxim "Ignorantia juris non excusat," has its co-relative in the maxim "Ignorantia facti excusat." Broom Leg. Max. 122. And while ignorance of the law, which every man is presumed to know, does not excuse, ignorance of a material fact may excuse a party from the legal consequences of his acts; more especially when such acts are criminal only when willful. Thus, if a man, believing a woman to be unmarried and free, marries her when she is in fact a married woman, he will not be criminally responsible. So, under the statute against willfully obstructing the passage of the mail, the stopping of a private carriage and horses, although such carriage and horses might at the time be actually employed in the transportation of the mail, would not be criminal if the fact of such employment was unknown to the party charged, and he had no reason to suspect the fact of such employment. Even where an act of congress had made it criminal to cut or remove timber from the lands of the United States, without expressly requiring that the act should be willfully, or even knowingly done, it would seem to have been the opinion of the learned judge of the district of Michigan that evidence showing mistake, ignorance of the section lines, and a well founded belief that the timber was being removed from other lands than those of the United States, would constitute a good defense. U. S. v. Schuler [Case No. 16,234]. And under an indictment for knowingly and willfully obstructing or resisting an officer in the discharge of his duties, it is well settled that it must be proved that the party charged had knowledge or notice that the party obstructed or resisted was an officer, and engaged in such official duties. Whart. Cr. Law, §§ 1289, 1290; and see 5 Mass. 455; Reed v. Davis, 8 Pick. 515.

As the party who removed the seals in this case was wholly ignorant of their character and purpose, it may be doubtful whether he would have been guilty of an offense under section 5, so often referred to, even if the word "willfully" had not been used as descriptive of the criminal offense; and, upon the statute as it stands, and the whole case, I am of the opinion that neither the evidence nor the facts found by the jury would justify a conviction of the person who removed the consular seals, as alleged in the information. To convict a person of willfully removing official seals under proof clearly showing the absence of any will or intent to do that or any other unlawful or improper act, would seem to be palpably unjust. But the question which has now been discussed at great length is not, in strictness, involved in this case. The information does not allege that the seals were

willfully removed, and the verdict of the jury establishes the fact that they were removed in ignorance of their character and purpose, and without improper or illegal purpose, motive, or intent.

Now, it is very clear, as a question of pleading, that the omission of the allegation that the seals were willfully removed, —this being absolutely necessary to the statutory definition of the offense intended to be charged,—would be fatal in an indictment against a party charged with such removal, unless, indeed, the sense of the word "willfully" was legally embraced in some other word used to characterize the act. This must dispose of the case, if the second position of the counsel for the claimants can be maintained. It is true that, in a proper case, a court might allow a defect of that kind to be remedied by an amendment; but, under the proofs in this case, it is clear no amendment of that kind should be allowed. The evidence showed that the seals were removed by a subordinate employé of the claimants, who had been directed by the station agent to put upon the cars the leaden seal of the station, and had him furnished with leaden blanks for that purpose; that the station seal had been usually placed on a peculiar kind of lock, which had been in use on the cars, and on which said leaden blanks for the station seal were intended to be used; that when this employé went to the cars to affix the station seals, he found no locks upon the cars, and could not, therefore, do as he had been directed without placing the locks thereon; that he went to the depository of such locks, in the station, and obtained the necessary locks, and put the same on the cars, and affixed the station seal thereto; that he found that in order to put said locks and the station seals on the cars, it was necessary to remove the wires and leads that he found thereon, and that he did so remove the same for that purpose, and after having done so, reported the facts to the station agent; that the station agent, understanding from this report that consular seals had been removed, immediately went with the person who removed them, to the consul at Clifton, and reported the facts and circumstances of such removal; that the consul declined doing anything in the matter, as his duties were to be discharged in Canada, and directed the station agent to report the facts to the collector on this side; that affidavits showing the mistake, and the facts in regard to the removal, were made by the station agent and the employé, but that the collector seized the property and insisted upon the forfeiture. Under such proof, and the finding of the jury in this case, no court should allow an amendment, in order to decree a forfeiture of the property of parties entirely free from all suspicion of blame.

This point upon the pleadings was not raised upon the argument, and it did not occur to me afterwards until I had nearly completed my examination of the authority I have referred to. Having performed the labor of searching for and examining the authorities, I have thought it better to express my opinion upon both the questions argued, rather than to dispose of the question of the construction and effect of the first sentence of section 5 of the statute, upon the ground that no willful removal of the seals is alleged in the information. If the question were now evaded, I might soon be called upon to decide it upon an indictment.

The remaining question which was argued by counsel is, in substance, whether the last sentence of section 5,—which declares the forfeiture,—is so connected with and dependent upon the preceding sentence that a willful removal of the consular seals must be alleged and proved to entitle the government to a forfeiture of the property in controversy; and it need hardly be said that the question is not free from doubt. The latter part of the section is closely connected with the first by its general relation to the same subject matter, and by a copulative conjunction; and without such connection, or some reference to prior provisions of the act, the last sentence of the section would be wholly inoperative. And there is certainly much reason for saying that the forfeiture provided for is intended as a cumulative penalty for the commission of the act just made criminal. The word "such" in the expression "such unauthorized person," can only refer to the person just referred to,—that is, one who has willfully removed the seals just described; and these indicia, though not controlling, must strengthen the probabilities that congress did not intend to declare that consequences so penal as the forfeiture of the merchandise of an entire stranger to the transaction, and of a carrier wholly innocent of blame, should be visited upon such parties, because a third person, equally innocent of improper or unlawful intentions, had, by mistake, and in ignorance of their character and purpose, removed the seals of a government agent. It may well be that congress intended that property owners and carriers should be responsible for the integrity and good faith of those to whom they had intrusted the care of merchandise and property, passing through the country under official seals; but it can hardly be supposed that this responsibility was intended to be extended to a case like the present.

The words "as aforesaid," near the close of the section, may have been intended to apply to the first as well as to the last portion of the sentence, and if a comma were inserted immediately before these words, as well as after them, such would, I think, be the necessary construction of the sentence. There is, however, no comma immediately before those words, and though the punctuation of a

statute, as printed, affords no very decisive means for determining its construction, yet, so far as it affects the question, the punctuation is undoubtedly an indication that the words "as aforesaid" are only intended to apply to the affixing and not to the removing of seals.

But a strong argument in favor of giving these words a broader application may be based upon the fact that they would seem to have no effect unless they can be applied to the first branch of the sentence. The word "such" precedes the words "seals, or other thing purporting to be a seal," and the word "wrongfully" is used in respect to the attaching of seals, so that there would seem to be no reason for using the words "as aforesaid" in regard to the attaching of seals, whilst their use in respect to the removal of seals would render it clear that the forfeiture for such removal was intended only when such removal was willful.

After a careful consideration of the language of the act, I am strongly inclined to the opinion that in order to produce a forfeiture there must be proof that the consular seals were willfully removed. It must be conceded that the construction which I have deemed it my duty to give to the statute on which the proceedings in this case have been based, is not free from doubt; but if the questions discussed were more doubtful, and even if the judicial mind was slightly inclined to the opposite construction, rather than to the one now adopted, it is supposed that in a case like this, involving a forfeiture, and when no improper motive existed, the final judgment of the court should still be for the claimants. In the case of The Enterprise [Case No. 4,499], Mr. Justice Livingston said: "A court has no option when any considerable ambiguity arises on a penal statute, but is bound to decide in favor of the party accused;" and although this doctrine ought not to be acted upon except in a case of serious and considerable doubt, it may well be considered as relieving a court from all embarrassment in deciding a case like the present.

The claimant must have judgment upon the special verdict, but, as the law of the case was unsettled and doubtful, the usual certificate of probable cause will be granted, notwithstanding the fact that I have a very decided opinion that the case is one which should not have been prosecuted. After the facts had been made known to the collector, and the removal of the seals had been shown by affidavit to have been made by mistake, the collector would have, in my judgment, done all that his duty required if he had directed the cars to be returned to the Canada portion of the suspension bridge, and procured the consul to renew the seals thereon. And if the consul had declined to do so, I think the collector might then have properly taken other measures to secure the government against injury by reason of the mistake made by the railroad employee, and even advised the remission of the forfeiture, if any one had claimed that a forfeiture had been incurred.

Decree accordingly.

Case No. 16,514.

UNITED STATES v. THREE THOUSAND BASKETS OF CHAMPAGNE.

[10 Int. Rev. Rec. 206.]

District Court, E. D. New York. Dec. 15, 1869.

CUSTOMS DUTIES—FORFEITURES—FRAUDULENT UNDERVALUATION.

The 3,000 baskets of champagne marked "C. H." was owned by Charles Heidsick & Co., and had been exported by them in the steamer Talisman, consigned to their agents in this city. The condemnation of the champagne was sought on the ground that it had been fraudulently invoiced below its market value. The agents filed a claim for the champagne, but, failing to appear when the case was called, THE COURT [BLATCHFORD, District Judge] directed a verdict for the government, condemning the champagne by default.

Case No. 16,515.

UNITED STATES v. THREE TONS OF COAL.

[6 Biss. 379:[1] 21 Int. Rev. Rec. 251.]

District Court, E. D. Wisconsin. July, 1875.

FORFEITURE AGAINST DISTILLERY—CONSTRUCTION OF STATUTES—POWER OF GOVERNMENT—PERSONAL AND CONSTITUTIONAL RIGHTS—CERTAINTY OF DESCRIPTION—PRESENCE OF CLAIMANTS.

1. A proceeding against a distillery for forfeiture under the revenue laws, is not a criminal proceeding within the meaning of the constitution.

[Cited in Dobbins' Distillery v. U. S., 96 U. S. 399.]

2. The true test is, whether the judgment is of punishment, against the person, or of forfeiture, against the res.

3. Section 860 of the United States Revised Statutes is modified and partially repealed by the act of June 22, 1874 (Rev. St. U. S. 1874, p. 162).

4. The revenue law is not, properly speaking, a penal statute to be construed with strictness in favor of the defendant.

5. If the legislative protection against a witness' evidence being used against himself, is as broad as the constitutional provision against compelling a person to criminate himself, he can be compelled to answer.

[Cited in U. S. v. Shapleigh, 4 C. C. A. 237, 54 Fed. 132; Boyd v. U. S., 6 Sup. Ct. 535, 116 U. S. 635.]

6. The complete superintending control of the business of distillers and rectifiers is exercised by the government, and when they enter the business they contract to submit to this governmental surveillance.

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

7. It is no infringement of personal or constitutional rights for the government, under the act of June 22, 1874, to require the production of, and, if necessary, seize any or all the books and papers kept by them in their business. They are not such private property as to be exempt from seizure and search, nor are they protected by the rules against obtaining from a party evidence to be used against himself. The government has really an interest in such business, as affecting the public revenues.

8. The discretion of the court in requiring books and papers to be produced, should not be exercised in favor of the claimants, when no special circumstances are shown by them.

9. The books and papers are not required to be more specifically described than as those used and kept in their business as distillers or rectifiers, between certain dates named.

10. The claimants and their counsel have the right to be present at the examination of their books and papers.

11. Many cases cited and commented upon.

J. C. McKinney and L. S. Dixon, for the United States.

Matt. H. Carpenter, for claimants.

DYER, District Judge. Informations having been filed in this court, on behalf of the United States, in several causes of seizure under the internal revenue laws, orders were made requiring the claimants in the respective cases, to produce certain books and papers, for examination by the attorneys of the United States. On the day named in the orders for the production of these books and documents, the claimants appeared by their counsel to contest the right of the government to take these proceedings, and in the Case of Schœnfeld, who is alleged to be a rectifier of distilled spirits, moved to vacate the order previously made in that case. The act of June 22, 1874, to "amend the customs revenue laws and repeal moieties" (18 Stat. 186), provides, in the fifth section: "That in all suits and proceedings, other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice or paper belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion particularly describing such book, invoice or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper, in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid." It is under this section of the act of 1874 that these proceedings for the production of the books, papers and documents specified in the order are prosecuted.

The fourth amendment of the constitution of the United States provides, that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." The fifth article declares that no person "shall be compelled, in any criminal case, to be a witness against himself;" and it is insisted that the section of the revenue law before quoted is in conflict with the guaranty of rights embodied in these amendments, and therefore void.

The question has been argued by eminent counsel with a learning and ability commensurate to its importance. On the one hand it is contended that in this proceeding there is threatened an invasion of the most sacred rights of the citizen—rights protected by the solemn guaranties of the constitution—rights that no emergency of government can justify the courts in disregarding, and an appeal has been made such as is seldom heard at the bar, that the hand of the government may be stayed, and the exercise of what is termed arbitrary power may be restrained in these proceedings, where such restraint will, as it is urged, directly operate as an enforcement of constitutional rights. On the other hand it is contended, with equal earnestness, that the power sought to be exercised here is directly incidental to the power conferred by the constitution, "to lay and collect taxes, duties, imposts and excises;" that no violation of any constitutional privilege is involved, and that the right of congress to pass the law in question, is beyond dispute.

First, in seeking a general principle needful for guidance, the language of Chief Justice Marshall may be accepted as in the highest degree authoritative: "The question whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled

by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Relieved of its verbiage, the statute in question, in terms provides, that in any proceeding other than criminal, arising under any of the revenue laws of the United States, the court in which such proceeding is pending, may at its discretion, on motion of the government attorney, require the claimant or defendant, to produce for examination, any business book, invoice or paper, belonging to or under the control of such claimant or defendant, and which, in the belief of the attorney, will tend to prove any allegation made by the United States; and on failure to produce the books and papers required, the allegations of the government may be taken as confessed. In determining whether this act of congress is repugnant to the amendments of the constitution which have been cited, the question may be resolved into two main inquiries, to which other points presented are incidental: First. Are the suits or the proceedings in which these informations have been filed, and in which these orders were made, criminal cases within the meaning of the constitutional provision? Second. Are the books and papers called for of such a character, as the private property of the claimants, as to be secure from search and examination by the attorneys for the government?

The spirit of the constitutional prohibition against unreasonable searches and seizures, has its source in that principle of the common law which finds expression in the maxim that "every man's house is his castle." English history discloses as the original occasion for constitutional provisions on the subject, that they had their origin "in the abuse of executive authority, and in the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals, in order to obtain evidence of political offenses." Cooley, Const. Lim. 300. The struggle in England against the right of seizing private manuscripts and papers, on warrants of search, began substantially with the resistance of Wilkes to the warrants of Lord Halifax, which culminated in the action of Wilkes against Wood, the under secretary of state. In that action, Lord Chief Justice Pratt said: "The defendant claimed a right under precedents, to force persons' houses, break open escritoires, and seize their papers upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search whereever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject." The case of Entick v. Carrington, 19 How. St. Tr. 1030, cited by claimant's counsel, marks another step in the struggle, made in England against the right to seize private papers. That was the case of a warrant to search for and seize the papers of the accused, in the case of a seditious libel, Lord Camden delivering the judgment of the court. He says of the great point involved in that cause, that if it "should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel. * * * There is no process against papers in civil causes. It has been often tried, but never prevailed. * * * In the criminal law, such a proceeding was never heard of, and yet there are some crimes, such, for instance, as murder, rape, robbery and housebreaking, to say nothing of forgery, and perjury that are more atrocious than libeling. But our law has provided no paper search in these cases to help forward the conviction." Again he says, in the same judgment, "the great end for which men entered into society was to secure their property; that right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man, by common consent, gives up that right for the sake of justice and the general good." It was thus judicially determined in England, that warrants for the seizure of private papers, were illegal at the common law, and the action of parliament was not in conflict with judicial adjudication. The precise principle established was, that the citizen in his home shall have protection in his person and his papers, even against the process of the law, except in certain cases. Cooley, Const. Lim. 300. Chatham in his speeches on general warrants declared the scope and application of the principle, when he said, "the poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement."

Other decisions, many of which were cited on the argument, and some of which will be particularly noticed, accomplished the permanent overthrow in England, of the right at

common law to search for and seize the private papers of the citizen, for the purpose of convictions for crime, or for the purpose of recovery in civil causes, where the evidence when produced would convict of a felony. [Chetwind v. Mernell, Exr. 1 Bos. & P. 271;] [2] Rex v. Dixon, 3 Burr. 1687; Rex v. Purnell, 1 Wils. 239; Reg. v. Mead, 2 Ld. Raym. 927; Rex v. Cornelius, 2 Strange, 1210. It is to be remarked, that in nearly all of these cases the attempt was made in prosecutions upon information or indictment for crime, to compel the production of the papers of the accused as ground for conviction. The proceeding was direct, and its character as a "criminal case" was clear. The case of Huckle v. Money, 2 Wils. 205, was one in which a warrant was granted by Lord Halifax, secretary of state, directed to four messengers to apprehend and seize the printers and publishers of a paper called the North Briton, No. 45. The action was trespass and the jury gave £300 damages. The Lord Chief Justice held the damages not excessive, and ordered the verdict to stand, laying stress upon the point that the warrant was granted without any information or charge laid before the secretary of state, previous to the granting thereof, and without naming any person whatsoever in the warrant, and was a violation of Magna Charta. Other cases in England will be hereafter noticed in a branch of the case which will arise for consideration. The common law rule upon this subject was thus established in England, and thus it existed and was the law of that realm, when the American colonies were organized, and when this government was formed. Under the shelter of judicial decision, the subject became secure in his person, papers and effects, against unreasonable searches and seizures, and could not be compelled to accuse himself.

The constitution of the United States, as originally adopted and ratified by the states, containing no provision expressing the principle of personal protection against searches, seizures, etc., amendments were proposed by Mr. Madison at the first session of the first congress. The purpose of these amendments has been somewhat discussed upon the argument. High authority says that they were mainly in the nature of a declaration of rights, placing the freedom of speech, the freedom of the press, freedom of religion, the security of property, personal liberty, trial by jury, and in general every right and power of the people not delegated or surrendered, under the ægis of the constitution, and by an express interdiction beyond the reach of the government. Rives' Life and Times of Madison, 39, 40. The debates in congress show that the purpose of the amendments, in the view of Mr. Madison, was, to render the constitution as acceptable to the whole people of the United States, as it had been found to be to a majority of them, and that without impairing the powers of the constitution, apprehensions for the public liberty would be quieted, and the great body of the people would be united in support of that instrument. That part of the fifth amendment, discussed here, originally proposed by its author, was in the following language and stood in this connection: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property without due process of law, etc." The debates upon this clause show that it was objected to because it "contained a general declaration in some degree contrary to laws passed. The member objecting alluded to that part where a person shall not be compelled to give evidence against himself. He thought it ought to be confined to criminal cases, and moved an amendment for that purpose, which amendment being adopted, the clause as amended was unanimously agreed to." 1 Ann. Cong. p. 782.

So we find it to have been the clear intent of the framers of the amendment, as disclosed not only in its language, but in the original debates, to restrict the provision to criminal cases, and with the adoption of the fourth and fifth amendments, principles established at the common law became reaffirmed in the constitution.

I have referred at some length to the history of the law upon this subject, and to these amendments, because it was considerably dwelt upon in the argument, and it is important that in considering the present question, we do not mistake the character of the case and the state of facts to which the law in its design and scope should be applied. What then are the cases we have here? Seizures of certain distilleries and rectifying establishments having been made by the government, for alleged violations of the internal revenue laws by distillers and rectifiers of distilled spirits, informations have been filed, upon which forfeitures of the property seized are sought to be enforced. The proceedings as they stand are against the property, are strictly in rem, and from their nature can be nothing else. They are as emphatically proceedings in rem, as a libel against a vessel. By the internal revenue laws of the United States, certain violations of those laws involve a forfeiture of the property employed, and may also involve punishment of the offending parties by fine and imprisonment. The second section of the act of March 2, 1867 (14 Stat. 547), authorized the seizure of books and papers, where complaint was made of the commission of frauds on the revenue. By the act of June 22, 1874, the fifth section of which has been quoted, the second section of the act of 1867, authorizing seizure of books and papers, was repealed; and in its place was enacted the section in question, providing for the production of books under-compulsory process, "in all suits and proceedings other than criminal, arising under the revenue laws,"

[2] [From 21 Int. Rev. Rec. 251.]

which of course included suits for penalties and forfeitures. So that in place of any legislative authority for the seizure of books and papers, we have the statute and proceeding for compulsory production of books and papers now under consideration. Section 860 of Revised Statutes of United States provides that "no pleading of a party, nor any discovery or evidence obtained from a party or witness, by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate in any court of the United States. in any criminal proceeding, or for the enforcement of any penalty or forfeiture." Rev. St. U. S. 1874, § 162. Undoubtedly so much of this section as relates to the use of evidence against a party for the enforcement of a penalty or forfeiture is repealed by the act of 1874, which requires the production of books and papers by compulsory process, in any proceeding other than criminal, arising under the revenue laws. If section 860 were now in full force in its original terms there is little doubt the books and papers of these claimants could not be used against them, because they would then be evidence obtained from the claimants by means of a judicial proceeding for the enforcement of a forfeiture. In the case of U. S. v. Hughes [Case No. 15,419], Judge Blatchford excluded the books and papers of the defendants, seized upon warrant issued under the second section of the act of March, 1867, because, in the language of section 860 of the Revised Statutes, they were evidence obtained from the defendants by means of a judicial proceeding in a suit for the enforcement of penalties. That was a case arising before the passage of the act of 1874, which we are here considering. In a subsequent endeavor to apply to that case the act of 1874, Judge Blatchford held that so far as it applied to that action, it was an ex post facto law, and therefore unconstitutional and void, limiting his decision, however, to that point, and not intending, as he says, to express any opinion about that act, in its applicability to cases arising after its passage. [U. S. v. Hughes, Case No. 15,416.]

We have here, then, a judicial proceeding against certain property, for the enforcement of a forfeiture, the ground of the proceeding being alleged violation of the revenue laws of the United States. We have a constitutional provision, declaring that no person shall be compelled in any criminal case, to be a witness against himself; a statute authorizing compulsory process for the production of the books and papers of a claimant or defendant in any proceeding other than criminal, arising under the laws relating to revenue, and a further statute that no discovery or evidence obtained from a party, by means of a judicial proceeding, shall be in any manner used against him in any court of the United States, in any criminal proceeding.

The question now arises: Is the proceeding for the forfeiture of this property a criminal case, within the meaning of the constitution? It is argued that the construction of the constitutional provision should not be limited; that as some of the alleged violations of the revenue law involve not only punishment by forfeiture, but punishment, also, by fine and imprisonment, after conviction or indictment, this case is criminal in its character, within such a construction as the constitutional provision should have. The rule of constitutional construction is thus laid down by Chief Justice Marshall: "The intention of the instrument must be collected from its words; its words are to be understood in that sense in which they are generally used, by those for whom the instrument was intended; its provisions are neither to be restricted into insignificance nor extended to objects not comprehended in them, nor contemplated by its framers."

I have said that these are proceedings in rem; and it should be noticed that the cases are not like those where a forfeiture of property and a punishment by fine and imprisonment may be adjudged in the same action. Of the kind of forfeiture provided for in the statute relating to revenue, it may be said, that it is a punishment which "falls on the thing as respects ownership; and it does not visit the owner's person. Though he loses the thing, which lapses to another or the state, the loss is not in the nature of a penalty for personal crime." 1 Bish. Cr. Law, § 816. There is another kind of forfeiture, which happens when a person on conviction is sentenced to forfeit specific articles of property, instead of, or in addition to a fine. This class of forfeitures rests upon the precise principle of fines; there are also the cases of forfeiture of an office, or of the capacity to hold an office, imposed upon the person as a punishment, which must be distinguished from the kind of forfeiture we are now considering, and I think a correct apprehension of this distinction clears away many difficulties. The forfeitures we are here dealing with are such as are created by statute to enforce revenue laws, kindred to forfeiture of property used in illicit trade, to forfeitures of seamen's wages on desertion of the ship, to forfeitures incurred by violations of embargo laws. Mr. Bishop, in his work on Criminal Law (4th Ed. vol. 1, §§ 702, 709), says: "The object of these forfeitures, or, more accurately, the law's motive for inflicting them, may be akin to the peculiar spirit of either the criminal law or the civil. But whether the one or the other, the forfeiture proceeds in a way of its own, drawing its sustenance from a principle of its own, peculiar neither to the one nor to the other of these two great departments of our law. It is neither a punishment for crime, even though a crime is committed when it is incurred; nor a damage awarded for a civil injury, even though a civil liability follows the act which produces it. * * * Whenever the law, statutory or common, creates a

forfeiture of property by reason of particular circumstances attending it, or of its peculiar nature, as being dangerous to the community —by reason of any form or position which it assumes—this forfeiture is not to be deemed a punishment inflicted on its owner in the criminal law sense, and within constitutional guaranties protecting persons who are accused of crime. * * * But if the law provides that a person shall forfeit property A. for what property B. does, or for what the owner does, in a matter not connected with the property, or for a bare intent, which does not enter into the situation and conduct of the property, the forfeiture is a punishment, which can be inflicted only on conviction of the owner, for his act or intent viewed as a crime."

I think the distinction thus indicated is grounded upon principle; and it is, in my judgment, most satisfactorily illustrated in a case not cited upon the argument, decided by Justice Story. I refer to the case of The Palmyra, 12 Wheat. [25 U. S.] 1. Justice Story says: "It is well known that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the crown, by the mere commission of the offense; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, in rem, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing,—and this whether the offense be malum prohibitum or malum in se. The same principle applies to proceedings in rem, on seizures in admiralty. Many cases exist where the forfeiture for acts attaches solely in rem, and there is no accompanying penalty in personam. Many cases exist where there is both a forfeiture in rem and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understand the law to be, that the proceeding in rem stands independent of and wholly unaffected by any criminal proceeding in personam."

Now, applying this doctrine to the cases at bar, I think I speak with accuracy when I say, that in these proceedings, the distilleries and other property in question are the things which (if any offense at all has been committed) are to be primarily considered as the offenders, or rather the offenses, if any, attach primarily to them, and that these proceedings in rem stand independent of and wholly unaffected by any criminal proceeding in personam. The forfeiture is not, in an apt and legal sense, a punishment for crime, even though a crime be committed when the forfeiture is incurred. The true test, I think, lies here. When the judgment of forfeiture necessarily carries with it and as part of it a conviction and judgment against the person for the crime, the case is of criminal character. But when the forfeiture does not necessarily involve personal conviction and judgment for the offense, and such conviction and judgment must be obtained, if at all, in another and independent proceeding, there the remedy by way of forfeiture is of civil and not criminal nature. Understanding the words "criminal case," in the constitution in the sense in which they are generally used, and upon the views already indicated, I must construe them as meaning a case in which punishment for crime is sought to be visited upon the person of the offender, in the ordinary course of criminal prosecution, in contradistinction to a proceeding in rem to effect a forfeiture of the thing to which the offense primarily attaches.

Discussion was had in the course of the argument upon the question, as to whether the statute for enforcement of forfeitures in cases like the present was a penal or remedial statute. In the case of U. S. v. Breed [Case No. 14,638] Justice Story says: "Revenue and duty acts are not, in the sense of the law, penal acts, and are not therefore to be construed strictly. Nor are they, on the other hand, acts in furtherance of private rights and liberty, or remedial, and therefore to be construed with extraordinary liberality. * * * We are not to strain to reach cases not within their terms, even if we might conjecture that public policy might have reached those cases; nor, on the other hand, are we to restrain their terms, so as to exclude cases clearly within them, simply because public policy might possibly dictate such an exclusion." In the case of Taylor v. U. S., 3 How. [44 U. S.] 197, the supreme court of the United States has said: "In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial. It must not be understood that every law which imposes a penalty is therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not in the strict sense penal acts, although they may inflict a penalty for violating them. It is in this light we view the revenue laws, and we would construe them so as most effectually to accomplish the intention of the legislature in passing them." Such are the views of the court of last resort, and they must have weight

here. Whether the statute referred to be penal or remedial, I do not think decisive of the question in dispute. But within the definitions given I construe it as bearing more a remedial than a penal character. Two cases have been cited on the argument, as in antagonism to each other upon the question under consideration. Emery's Case, 107 Mass. 172; People v. Kelly, 24 N. Y. 74. The stress laid upon the last-named case by the counsel for the government, and the earnestness with which the Massachusetts case is pressed by counsel for the claimants, justifies a somewhat close analysis of both cases.

The constitution of the state of New York provided, in the identical language of the constitution of the United States, that no person "shall be compelled in a criminal case to be a witness against himself." Hackley was a witness before a grand jury, in a matter against certain aldermen of the city of New York, and refused to answer a question, on the ground that an answer would disgrace him and have a tendency to accuse him of crime. The question was, whether he could so lawfully refuse. There was a statute of the state which provided that testimony so given should not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. Judge Denio held that Hackley was not protected by the constitution from being compelled to give the testimony called for, though it might implicate him in a crime, as he was fully protected by statute, against the use of such testimony, on his own trial. He says: "It is perfectly well settled, that where there is no legal provision to protect the witness against the reading of the testimony on his own trial, he cannot be compelled to answer. People v. Mather, 4 Wend. 230. This course of adjudication does not result from any judicial construction of the constitution, but is a branch of the common law doctrine, which excuses a person from giving testimony which will tend to disgrace him, to charge him with a penalty or forfeiture, or to convict him of a crime. It is of course competent for the legislature to change any doctrine of the common law, but I think they could not compel a witness to testify on the trial of another person, to facts which would prove himself guilty of a crime, without indemnifying him against the consequences, because, I think, as has been mentioned, that by a legal construction the constitution would be found to forbid it."

In the Massachusetts case, Emery, in obedience to summons, appeared as a witness before a joint special committee of the senate and house of representatives of the general court, to inquire if the state police was guilty of bribery and corruption. In the course of his examination, he was asked this question: "Have you ever paid any money to any state constable, and do you know of any corrupt practice or improper conduct of the state police? If so, state fully what sums and to whom you have thus paid money, and also what you know of such corrupt practice and improper conduct." He declined to answer, on the grounds that the answer would accuse him of an indictable offense, and would furnish evidence against him by which he could be convicted of such an offense. The constitution of Massachusetts provided that "no subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself." The dissimilarity in terms between this provision and that in the constitution of the United States, which is, that no person "shall be compelled in any criminal case to be a witness against himself," is, at a glance, apparent. The statute under which Emery was required to testify undertook to secure him against the use of any disclosures he might make, as admissions or direct evidence against him, in any civil or criminal proceeding. Now the point of the decision in this case was that, as the constitution of the commonwealth in broad and unlimited terms provided that no subject should be compelled to accuse or furnish evidence aganst himself, the statute securing Emery from future liability should be as broad as the constitutional shield; and as it was not, and as it did not protect him from the indirect and incidental consequences of a disclosure, he was relieved from obligation to answer the question. In the opinion of the court, Justice Wells says that no one can be required to forego an appeal to the protection of the constitution, "unless first secured from liability and exposure to be prejudiced in any criminal proceeding against him as fully and extensively as he would be secured by availing himself of the privilege accorded by the constitution. * * * This cannot be accomplished so long as he remains liable to prosecution, criminally, for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate. It is not done in direct terms by the statute in question; it is not contended that the statute is capable of an interpretation which will give it that effect, and it is clear that it cannot and was not so intended to operate. Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the constitution, or to remove the whole liability against which its provisions were intended to protect them, it fails to deprive them of the right to appeal to the privilege therein secured to them." And so it was held that Emery, in refusing to answer the question put, was in the exercise of a constitutional right. The court refer to the case of People v. Kelly, 24 N. Y. 74, in their opinion. I do not understand that they intend to express any dissent to the doctrine

laid down in that case; for Justice Wells says that the terms of the provision in the constitution of Massachusetts require a much broader interpretation than the terms of the provision in the constitution of New York, which, as we have seen, were identical with the provision in the constitution of the United States. Like the statute of New York, cited in People v. Kelly [supra], the statute of the United States declares that no evidence obtained from a party by means of a judicial proceeding, shall be in any manner used against him in any criminal proceeding. With this legislative protection, as ample as the terms of the constitution itself, I think it cannot be successfully asserted, as was done in the Massachusetts case, that the party is not as fully secured as he can be from future liability in a criminal proceeding.

Counsel for claimants cited Cattell v. Ireson, 96 E. C. L. 90. In that case, the defendant was charged upon information, with the unlawful use of two snares, for the purpose of taking game on certain land, not being authorized so to do, for want of a game certificate; and it was held in that case, that the party charged was not compellable to give evidence against himself. Lord Campbell, chief justice, and the other judges place their decision distinctly upon the ground that the information was a criminal proceeding, for an offense punishable on summary conviction; that the legislature had made the act a crime, punishable by fine or imprisonment, and the case is expressly distinguished from a fiscal proceeding, or a proceeding for a civil right, or for a wrong done to the party applying.

In Greene v. Briggs [Case No. 5,764] liquors of the plaintiff had been seized, on the ground that they were kept and deposited for purposes of sale contrary to law. The penalty in such a case was forfeiture and destruction of the property, and fine or imprisonment, and the forfeiture and punishment by fine or imprisonment were necessarily imposed in the same action; and the court hold the proceedings criminal in their nature, their object being to inflict upon the person fine or imprisonment, and at the same time to adjudicate a forfeiture of the liquors. The process and the judicial action under it, are directed both against the offender and his property, and it is held that it is not possible to separate the proceedings under the act against the property from the proceedings against the person.

The case of Fisher v. McGirr, 1 Gray, 1, was similar in character to Greene v. Briggs [supra], the forfeiture and punishment by fine or imprisonment, for violation of the law, being enforcible in the same action. The statute was held unconstitutional, because it provided for the destruction of private property and the punishment of its owner without charging him with any offense, or giving him opportunity to defend and meet the witnesses face to face. It may be said of this case, and of that in 1 Curtis, that the forfeiture provided for was, conjointly with fine or imprisonment, clearly made a punishment for a criminal offense. It was a forfeiture which was by the statute itself made to depend alone upon an intent in the mind of the owner of the property, which, as Mr. Bishop points out in his Criminal Law (volume 1, §§ 702, 709), is to be distinguished from a forfeiture resulting from particular circumstances attending property, imposed sometimes with and sometimes without a conviction of the owner for crime.

Obviously there cannot be a complete determination of the rights of the parties to these proceedings without considering the remaining question, which touches the character of the books and papers claimed by the respondent's counsel to be protected against search and examination. We have seen that the principle of the common law in relation to searches and seizures was established for the protection of purely private rights, and for the security against public use of private papers; that it was aimed as a prohibition against the unwarrantable intrusion into private houses of executive agents, and searches upon mere suspicion by messengers armed with general warrants. We have seen, also, that it was this principle that was incorporated into the constitution, and it is all important that the meaning of the principle, and the real purpose for which it was originally invoked by the citizen and asserted by the courts, be not lost sight of; for even in some of the English cases cited upon the argument, distinctions are drawn that must not be overlooked.

In Prichett v. Smart, 62 E. C. L. 625, the action was assumpsit on a bill of exchange drawn by one Williams upon, and accepted by, the defendant, and by Williams indorsed to the plaintiff, a sworn broker of London. The statute required every broker to keep a book of all contracts, agreements and bargains made by him. The defendant made application to require the plaintiff to produce his broker's books, and the real ground of the decision is, that the defendant had no direct interest in the book, and that if the plaintiff could be required at all to produce the book, it could only be done at the instance of his principal. It was held that the defendant was not a party to any of the transactions presumed to be entered in the book, nor was it held by the plaintiff as a trustee for him.

In Crew v. Saunders, 2 Strange, 1005, an action was brought against the defendant on the statute for intermeddling in elections, being postmaster at Nantwich. It was moved in behalf of the plaintiff for liberty to inspect the postoffice books and take a copy of his deputation. The court said that the origin of such motions was in the inspection of court rolls; "but then it was confined to the case of persons interested, the rolls being the common evidence, which of necessity must be kept in some one hand. But lords and tenants of different manors have al-

ways been denied, as strangers. In the case of public companies, it is restrained to the entry which concerns the party himself." The plaintiff took nothing by his motion.

In Reg. v. Mead, 2 Ld. Raym. 927, the defendant and others were incorporated by the name of surveyors of certain highways and were trustees of a charity called "Bedford's Gift." An information was preferred against the defendant for executing his office without having taken the oaths. A rule was moved for, that two books might be produced which the surveyors kept, in which they entered their elections, and their receipts and disbursements. The rule was denied, because the books were "perfectly of a private nature," and moreover the prosecution was purely criminal.

Now, as a source of revenue for the maintenance of the government, congress has enacted a law imposing certain taxes on distilled spirits, and for the purpose of enforcing payment of such taxes, has established a system, rigorous in its features and in many instances arbitrary in its operation, under which distilled spirits shall be manufactured and rectified. The law is a complete regulation of the business. To engage in the business except under statute regulation and government surveillance, is absolutely forbidden. The preliminary circumstances under which the business can be entered upon, are prescribed to the remotest detail. Applications must be made, notices and bonds must be given. The location of the establishments, with all mechanical arrangements for operating them, are prescribed, the days and hours of business, and the quantity of grain for every gallon of production are fixed, and government officers, consisting of gaugers and storekeepers, hold the keys and control the locks and seals of the furnaces, rooms, wine cisterns and storehouses, appertaining to the establishments, and employed in the business. It is only under the rigid observation and control of these officers that spirits can be removed from one location to another, and that the owner can exercise his rights of disposition and sale. By the express terms of the law, books must be kept, showing the conduct of the business in all its details, which books are required to be always open to the inspection of the officers, and at specified times accounts must be rendered to the government from these books, and the bond which must be given is conditioned that all of these and many more provisions of law shall be faithfully complied with. All these requirements of the law are fully set out in the case of U. S. v. Singer, 15 Wall. [82 U. S.] 118, where it is said that "the system thus adopted was designed to prevent the secret production of spirits and consequent evasion of the government tax. * * * In view of the enormous frauds previously practiced upon the government, in rendering accounts, this system cannot be justly charged with unnecessary harshness." And in this case, and in the cases of Collector v. Beggs, 17 Wall. [84 U. S.] 182, and Pahlman v. Collector, 20 Wall. [87 U. S.] 189, it is substantially held, that the producing capacity of the distillery, as fixed by the law, is the basis of taxation, rather than the actual cost of production. It may be said that these provisions of law are anomalous and severe, depriving parties of that control of their own business which every citizen should be permitted to enjoy. Undoubtedly it is true that the passage of such a law involves the exercise of extraordinary power. But its high purpose is the securing of revenue, and the authority given by the constitution on this subject is necessarily a great power because the existence of the government is dependent upon its exercise. Mandatory and rigid as the internal revenue law is, in all the provisions referred to, it has been expressly held constitutional by the supreme court of the United States in the case of U. S. v. Singer, 15 Wall. [82 U. S.] 111. In view of the provisions of the statute, it cannot be denied that complete superintending control of the business of distillers and rectifiers is exercised by the government, as was held by Judge Blodgett in his recent decision. U. S. v. Mason [Case No. 15,735]. I think that it is not an exaggerated statement to say that the distiller and rectifier, when they enter upon the business, contract that they will submit to this governmental surveillance. The method in which the business must necessarily be done, places the government in the position of a party in interest, to the extent of securing revenue therefrom, and the distiller and rectifier consent to this participation in interest. Statutes of this character have existed almost from the foundation of the government. In 1791, which was not long subsequent to the adoption of the amendments to the constitution, congress passed an act which is the very parallel of the present act in many of its provisions, and which authorized inspections, searches and seizures, and required books to be kept by distillers, subject to government inspection. Append. vol. 2 Ann. Cong. 2383. In Re Platt [Case No. 11,212], Judge Blatchford in a very elaborate opinion holds that "the searches and seizures authorized by the 2d section of the act of March 2, 1867, are not repugnant to the fourth or fifth amendments to the constitution. A search for and seizure of goods subject to duty, is made part of a system for the recovery of duties, and is a necessary part of such a system; and the books and papers which relate to goods with respect to which frauds are alleged to have been committed, are properly included in such searches and seizures." In this opinion Judge Blatchford fully reviews the history of revenue legislation in this country since 1789, as bearing upon the question of searches and seizures. In Stockwell v. U. S. [Case No. 13,466], Justice Clifford, at the circuit, sustained the power of seizure of books and papers, upon a review of the law, and even approved the

admission of such books and papers in evidence, in a proceeding to recover penalties and unpaid duties. It seems questionable whether section 860 of the Revised Statutes, before referred to, was brought to his attention on the point of the admissibility of the books and papers as evidence against the parties charged with violation of the statute. This case was taken to the supreme court of the United States (13 Wall. [80 U. S.] 531), but the question of the power of seizure was not there raised or passed upon, and on the question of that power alone, it must be regarded only as an authority of judges at the circuit. In Re Meador [Case No. 9,375], a summons was issued by a supervisor of internal revenue, under a section of the law authorizing such a proceeding, requiring the production of books and papers. Disobedience of the summons was attempted to be justified under the fourth and fifth amendments to the constitution, but the court sustained the writ. A similar proceeding was sustained by the district court for the Southern district of Mississippi in Stanwood v. Green [Id. 13,303].

Conceding that the power sought to be exercised here is equivalent to the power of seizure, and in the absence of decision by the supreme court, I am clear in the conviction that the statute in question is not obnoxious to constitutional objection. This is not an attempt to unreasonably search the private affairs of the citizen. The books and papers called for pertain to the business in which the government, as a supervising power, has an interest, and concerning the conduct of which, as affecting the public revenues, the government is prosecuting the pending proceedings. The cases are not like those condemned by the courts of England where general warrants empowered the officers to enter any private house, and intrude upon the privacy of any citizen and seize private papers or property for purposes of personal prosecution on any charge the crown might choose to make. The power here claimed is one incidental to collection of public revenue. The proceeding is against property which it is claimed is subject to forfeiture because of alleged delinquencies in the use of that property in a business regulated by law. To all the conditions and requirements of that law the claimants subjected themselves when they entered upon the business. It is, in my judgment, no infringement upon their personal rights to require that books and papers used and kept by them in their business as distillers and rectifiers, shall be produced for inspection by the attorneys for the government. And in so holding, I am not unmindful of considerations pressed by the learned counsel upon the argument. I agree with counsel that, as was declared by the supreme court in Bronson v. Kinzie, 1 How. [42 U. S.] 311, the constitution was not designed to protect a mere barren and abstract right, not affecting the business of life. It was designed for the protection of real and substantial rights; and when the legislative authority infringes upon those rights and transcends its constitutional powers, the duty of the court, as the case may arise, is clear, and not to be avoided. But upon all the considerations stated, I do not hesitate to express my judgment that the law in question is constitutional and valid.

The act of 1874 provides that, upon motion, the court may, in its discretion, require books and papers to be produced; and it is insisted that this discretion should be exercised in favor of the claimants and the motions be denied. But, as I hold the law to be valid, and as no objection addressed to the discretion of the court has been urged, except that involved in the claim that the law is invalid, I do not think it would be a just and suitable exercise of discretion to refuse the orders applied for. A case is made, on the papers, for the granting of the orders. No special circumstances are shown for a refusal of the orders. The claimants stand on what they maintain are constitutional rights. Deciding as I do, that these rights are not infringed upon, on the cases presented, I must permit the orders requiring the production of the specified books and papers, to stand.

Nor do I think I should dismiss these proceedings or vacate the orders made, on the objection that the motion papers do not describe with sufficient particularity the books and papers required. They are specified in the motion as the day-books, blotters, journals, ledgers, cash books, letter books, shipping-bill books, and receipts for spirits and liquors shipped, and invoices of spirits and liquors bought or received, used and kept by the parties in their business as distillers or rectifiers, between certain dates named in the written motion. This is a sufficient designation of the books and papers to meet the requirement of the statute. The books and papers are specified, the business in which they were made, kept and used, is named and dates are given.

The motion to vacate the order heretofore granted in Schoenfield's Case is denied. All the orders for the production of books and papers in these cases will stand. The books and papers should be produced for examination by the government attorneys, the owners having the right to be present with their counsel during such examination.

Case No. 16,516.

UNITED STATES v. THROCKMORTON et al.

[8 N. B. R. 309;[1] 18 Int. Rev. Rec. 54.]

Circuit Court, W. D. Texas. May 21, 1872.

OFFICIAL BONDS — LIABILITY OF SURETIES — DISCHARGE IN BANKRUPTCY.

1. Suit was brought against defendants as sureties on the bond of a deceased collector of internal revenue. One of the defendants pleaded his discharge in bankruptcy in bar of the ac-

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tion, and the court held, that although this defendant was a surety to the government, he was discharged under the bankrupt act, and that the plea was good, this case not coming within the exceptions named in the act.

2. The court construes the fourteenth section of the bankrupt act in relation to contingent debts and liabilities.

At law.

DUVAL, District Judge. This suit was brought on the 21st day of May, 1872, against the defendants, as sureties upon the bond of Robert H. Lane, deceased, given as collector of internal revenue for the Second collection district of the state of Texas. In bar of the action, one of the defendants, William Hooks, has pleaded his discharge in bankruptcy, setting out the same in hæc verba; and the question for decision is whether this defendant, as a surety to the government, is discharged under the bankrupt act. The discharge is dated March 16, 1868. The thirty-fourth section of the act [of March 2, 1867 (14 Stat. 533)] provides "that a discharge duly granted under this act shall (with certain exceptions thereto) release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in hæc verba, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge." The exceptions referred to, and which the discharge would not bar, are specified in the thirty-third section of the act. It provides "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; * * * and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, endorsee, surety, or otherwise." Now, does the case of the defendant, Hooks, fall within any of these exceptions? I think not. He has committed no defalcation as a public officer, because he held no office; neither as a surety for the collector, can he be regarded as acting in a fiduciary character. If the defendant has committed no defalcation as a public officer, and was not acting in a fiduciary capacity (which, in my judgment, he was not,) no other portion of the exceptions specified in the act can have any possible application to his case.

That the discharge is a bar in this case, is further apparent to my mind by a consideration of the fourteenth section of the act. It is therein provided "that if the bankrupt shall be bound as owner, endorsee, surety, bail or guarantor upon any bill, bond, note, or any other speciality or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained." My construction of this provision is, that where the payment of a debt cannot be enforced until the happening of some contingency, such debts, being readily estimated, may be proved; or if the extent of a liability depends on the happening of a contingency, and such contingency is reasonably certain to happen before final dividend, the court may, by some method, determine the value to be placed by the claimant on such value, and admit him to prove it. But in this case the contingency did not happen before the final dividend; or, if it did, the government made no effort to have the value of the liability ascertained, or to prove it in the bankrupt court. A final dividend was made and the defendant discharged nearly four years before the bringing of this suit. To this hour the extent of the liability of the sureties on Lane's bond is undetermined, and can only be fixed by judicial determination yet to be had.

I am unable to see, either from any provisions of the bankrupt act, or any principle of general law, that the government is excepted out of the provisions of the bankrupt law making the discharge in this case a bar to the action. My opinion on this subject is sustained by Judge McLean in the case of U. S. v. Davis [Case No. 14,929].

The plea in bar is sustained, and the case dismissed as to defendant, Hooks.

UNITED STATES v. THROCKMORTON. See Case No. 15,121.

UNITED STATES (THURN v.). See Case No. 14,015.

Case No. 16,517.

UNITED STATES v. TIERNEY.

[1 Bond, 571.] [1]

Circuit Court, S. D. Ohio. April Term, 1864.

CRIMINAL JURISDICTION OF UNITED STATES—PLACE RENTED FOR MILITARY CAMP—CONCURRENT STATE JURISDICTION.

1. Land rented to the United States, to be used temporarily as a camp, is not a place, with-

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in the terms of the constitution of the United States, over which the United States have "sole and exclusive jurisdiction."

2. Within such camp the jurisdiction of the United States would only be such as was necessary for military purposes and required for the enforcement of discipline and the execution of the rules and articles of war.

3. The United States possesses exclusive jurisdiction of places that have been purchased by the United States by consent of the legislature of the state, for the purpose of erecting a fort, magazine, arsenal, dock-yard, or other needful building.

[Cited in Nebraska v. Pollock, Case No. 10,077.]

4. The courts of the United States have no jurisdiction of an offense against section 16 of the act of congress of 1790 [1 Stat. 116], committed in a place where the jurisdiction of the United States is concurrent with that of a state.

[This was an indictment against Patrick Tierney upon the charge of larceny, under the crimes act of April 30, 1790. On a plea to the jurisdiction.]

Flamen Ball, U. S. Dist. Atty.
John M. Staples, for defendant.

LEAVITT, District Judge. The indictment against the defendant in this case, is based upon section 16 of the crimes act of April 30, 1790, which provides, "that if any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away with intent to steal or purloin the personal goods of another," etc., shall be liable to the punishment prescribed. The charge against the defendant is the stealing of a mule at a place called "Camp Hurtt," and the indictment alleges that it is "a military camp of the United States, the site of which said camp is within the sole and exclusive jurisdiction of the United States." The defendant has filed a plea to the jurisdiction. By agreement of counsel, the facts in reference to the right of exclusive jurisdiction in the United States over the said camp have been submitted to the court. These facts are, in substance, that on March 19, 1863, by a written agreement between Timothy Kirby and Capt. Hurtt, assistant-quartermaster of the United States, Kirby leased to the United States a pasture-field containing about sixty acres of land for one month, with the privilege of using and occupying the same for six months, at the option of the government, at a stipulated rent. Was this field, alleged in the indictment to be within the limits of Camp Hurtt, a "place" within the sole and exclusive jurisdiction of the United States, so as to give this court jurisdiction of the larceny? The constitution of the United States (article 1, § 8) authorizes congress to exercise exclusive legislation "over all places purchased by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Was the field rented by Kirby to the United States a "place," within the terms of the constitution, within or over which the United States had "sole and exclusive jurisdiction?" There are several reasons why this jurisdiction did not exist. The places over which exclusive jurisdiction is granted, are those which have been purchased by the United States for some of the purposes specified in the constitution, and the grant of power does not extend to a place or tract of land rented by the government for a temporary purpose. An unanswerable objection to the exercise of exclusive jurisdiction in this case is that the tract of land was not purchased of the United States by consent of the legislature of the state of Ohio, for this consent is essential to the exercise of exclusive jurisdiction by the United States. Again, it is clear, the purpose for which the land was rented is not within any of the specifications of the constitution, or within the scope of any of the terms used. The land was not purchased for the purpose of constructing a fort, magazine, arsenal, dock-yard, or other needful building. The constitution clearly implies the permanent use of the property purchased for the construction or erection of some of the structures designated, or some other needful building. It would be strange, indeed, if such an agreement for renting a piece of land to the United States should deprive the state of Ohio of all jurisdiction over it, and confer sole and exclusive jurisdiction to the United States. It is not in the power of a citizen thus to dispose of the right of a state over any part of her territory. The averment, in the indictment, that this tract was within the limits of Camp Hurtt, a military camp of the United States, does not withdraw it from the jurisdiction of the state. The jurisdiction of the United States would only be such as was necessary for military purposes, such as were required for the enforcement of discipline and the execution of the rules and articles of war. It seems clear, too, on the authority of the case of U. S. v. Davis [Case No. 14,930], that to sustain an indictment under section 16 of the act of 1790, the jurisdiction of the United States over the places referred to in the statute must be sole and exclusive; if merely concurrent with a state, the courts of the United States have no jurisdiction of the offense.

The plea to the jurisdiction is sustained.

Case No. 16,518.

UNITED STATES v. TILDEN.

[The case reported under above title in 24 Int. Rev. Rec. 414, 26 Pittsb. Leg. J. 64, 18 Alb. Law J. 416, and 7 Am. Law Rec. 370, is the same as Case No. 13,707.]

Case No. 16,519.

UNITED STATES v. TILDEN.

[9 Ben. 368; [1] 24 Int. Rev. Rec. 99.]

District Court, S. D. New York. March, 1878.

INCOME TAX—ASSESSMENT—COLLECTION.

1. The United States sued T. to recover money alleged to be due from him as unpaid taxes or duties on income. The suit was founded on sections 49–51, Act Aug. 5, 1861 (12 Stat. 309–311), and on sections 90–92, Act July 1, 1862 (Id. 473–475), and on the joint resolution of July 4, 1864 (13 Stat. 417), and on sections 116–123, Act June 30, 1864 (Id. 281–285), and on the said sections of the act of 1864, as amended by section 1 of the act of March 3, 1865 (Id. 479–481), and on the said sections of the act of 1864, as so amended, and as further amended by section 9, Act July 13, 1866 (14 Stat. 137–140), and on the said sections of the act of 1864, as so amended, and further amended, and as further amended by section 13, Act March 2, 1867 (Id. 477–480), and on sections 6–17, Act July 14, 1870 (16 Stat. 257–261). *Held*, that no tax on income could any longer be collected under the act of 1861.

2. The causes of action for unpaid taxes on income, arising under said other provisions, were not barred by the facts that T. made a return, and an amount of tax was assessed against him and he paid it, and no imperfection was discovered until after July 13, 1866, or by the facts that he made no return, and an amount of tax and a penalty, or only an amount of tax, were assessed against and paid by him.

3. Under the acts of 1862 and 1864, the United States may sue for and collect a tax on income without a prior assessment, in the mode specified in the act creating the tax.

[Cited in U. S. v. Little Miami, C. & Z. R. Co., 1 Fed. 701; Folsom v. U. S., 21 Fed. 37.]

4. The case of Dollar Sav. Bank v. U. S., 19 Wall. [86 U. S.] 227, examined and applied.

[This was a suit by the United States against Samuel J. Tilden to recover certain income taxes.]

Stewart L. Woodford, U. S. Dist. Atty., and Roger M. Sherman, Asst. U. S. Dist. Atty.

James Emott, Aaron J. Vanderpoel, Thomas Harland, and Charles F. Stone, for defendant.

BLATCHFORD, District Judge. The complaint in this case contains twelve causes of action, and is framed to collect from the defendant, by an action at law, unpaid taxes or duties on income.

The first count is based on sections 49–51, Act Aug. 5, 1861 (12 Stat. 309–311), and claims to recover, as due on the 30th of June, 1862, the sum of $3,000, as a tax of three per centum on an income of $100,000 for the year next preceding the 1st of January, 1862. That statute imposed a tax on income for the year next preceding the 1st of January, 1862, and declared that it should be due and payable on or before the 30th of June, 1862, and that it should be assessed and collected under such regulations as the secretary of the treasury might prescribe. By section 89, Act July 1, 1862 (12 Stat. 473), it is enacted, "that, for the purpose of modifying and re-enacting, as hereinafter provided," so much of the act of August 5, 1861, "as related to income tax," sections 49, 50 (except so much thereof as relates to the selection and appointment of depositaries), and 51, "be and the same are hereby repealed." The act of 1862 then goes on, in the following sections, to provide for the payment of a tax on income for the year ending December 31st, 1862, and for each of the three years thereafter. The act of 1862 contains no clause preserving the right to collect the tax for any time prior to January 1st, 1862, or any right of action for that purpose, nor does it re-enact any part of the act of 1861 which relates to an income tax for any time prior to January 1st, 1862. On the contrary, the collection of any tax on income for any time prior to January 1st, 1862, is plainly excluded from the operation of the act of 1862, by the terms of that act, and, by the repeal contained in section 89 of the act of 1862, the income tax imposed by the act of 1861 fell altogether, except so far as it had been collected. It is said by the supreme court, in Bennett v. Hunter, 9 Wall. [76 U. S.] 333, decided in 1869, that the income tax imposed by the act of 1861 "has never been collected." The defendant demurs to the first count and the demurrer is sustained.

The second count is based on sections 90–92, Act July 1, 1862 (12 Stat. 473–475), and claims to recover, as due on the 30th of June, 1863, the sum of $6,515, as a duty of five per centum on an income of $130,300 for the year next preceding the 1st of January, 1863.

The third count is based on the same sections of the act of 1862, and claims to recover, as due on the 30th of June, 1864, the sum of $6,250, as a duty of five per centum on an income of $125,000 for the year next preceding the 1st of January, 1864. The defendant, in his answer to the complaint, denies that he received, for either of the years mentioned in the second and third counts, any amount of income in excess of the amount on which he paid a duty, and alleges, that, for each of those years, he paid to the United States the full amount of duty for which he was liable on his income. For a further defence to the second and third counts his answer avers, in respect to each of those two years, that, at the proper time, he made a list or return in due form, to the proper assistant assessor, of the amount of annual income for which he was liable to be assessed; that the proper proceedings prescribed by law were had thereon, assessing an amount of tax against him; that he paid to the proper collector such amount of tax; and that it was not ascertained, at any time within fifteen months after the 13th of July, 1866, that any of the lists were imperfect or incomplete.

The fourth count is based on the joint resolution "imposing a special income duty," approved July 4, 1864 (13 Stat. 417), and claims

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

to recover, as due on the 1st of October, 1864, the sum of $6,250, as a duty of five per centum on an income of $125,000 for the year next preceding the 1st of January, 1864. The defendant, in his answer to the complaint, denies that he received for the year mentioned in the fourth count any amount of income in excess of the amount on which he paid a duty, and alleges, that, for that year, he paid to the United States the full amount of duty for which he was liable on his income. For a further defence to the fourth count, his answer avers, that, before the 20th of July, 1864, he made a list or return, in due form, to the proper assistant assessor, of the amount of his annual income for the year 1863; that the proper proceedings prescribed by law were had, assessing an amount of special duty against him; that he paid to the proper collector such amount of special duty; and that it was not ascertained, at any time within fifteen months after the 13th of July, 1866, that the list on which said assessment was entered was imperfect or incomplete.

The fifth count is based on sections 116–123, Act June 30, 1864 (13 Stat. 281–285), and claims to recover, as due on the 30th of June, 1865, the sum of $16,000, as a duty of ten per centum on an income of $160,000 for the year next preceding the 1st of January, 1865.

The sixth count is based on the same sections of the act of 1864, as amended by section 1, Act March 3, 1865 (13 Stat. 479–481), and claims to recover, as due on the 30th of June, 1866, the sum of $33,300, as a duty of ten per centum on an income of $333,000 for the year next preceding the 1st January, 1866. The defendant, in his answer to the complaint, denies all the allegations of the fifth and sixth counts, except those as to his residence and profession and ownership of certain property. For a further defence to the fifth and sixth counts, his answer avers, in respect to each of those two years, that he neglected to make a list or return to the assistant assessor, of the amount of his income; that thereafter the assessor made a list of his annual income, and assessed the duty thereon, and added twenty-five per centum, as a penalty, to the amount of the duty assessed; and that the defendant paid to the collector the amounts of tax and penalties so assessed.

The seventh count is based on the same sections of the act of 1864, as amended by section 1, Act 1865, and as further amended by section 9, Act July 13, 1866 (14 Stat. 137–140), and claims to recover, as due on the 30th of April, 1867, the sum of $5,350, as a tax of five per centum on an income of $107,000 for the year next preceding the 1st of January, 1867.

The eighth count is based on the same sections of the act of 1864, as amended by section 1, Act 1865, and as further amended by section 9, Act 1866, and as further amended by section 13, Act March 2, 1867 (14 Stat. 477–480), and claims to recover, as due on the 30th of April, 1868, the sum of $6,215, as a tax of five per centum on an income of $124,300 for the year next preceding the 1st of January, 1868. The defendant, in his answer to the complaint, denies all the allegations of the seventh and eighth counts, except those as to his residence and profession and ownership of certain property. For a further defence to the seventh and eighth counts, his answer avers, in respect to each of those two years, that he neglected to make a list or return to the assistant assessor of the amount of his income; that thereafter the assessor made a list of his annual income, and assessed the duty thereon, and added fifty per centum, as a penalty, to the amount of the duty assessed; and that the defendant paid to the collector the amounts of tax and penalties so assessed.

The ninth count is based on the same statutory provisions on which the eighth count is based, and claims to recover, as due on the 30th of April, 1869, the sum of $6,625, as a tax of five per centum on an income of $132,500 for the year next preceding the 1st of January, 1869. The defendant, in his answer to the complaint, denies all the allegations of the ninth count, except those as to his residence and profession and ownership of certain property. For a further defence to the ninth count, his answer avers that he neglected to make a list or return to the assistant assessor of the amount of his income for said year; that thereafter the assessor made a list of his annual income for said year, and assessed the duty thereon; and that the defendant paid to the collector the amount of tax so assessed.

The tenth count is based on the same statutory provisions on which the eighth count is based, and claims to recover, as due on the 30th of April, 1870, the sum of $35,550, as a tax of five per centum on an income of $711,000 for the year next preceding the 1st of January, 1870. The defendant, in his answer to the complaint, denies all the allegations of the tenth count, except those as to his residence and profession and ownership of certain property. For a further defence to the tenth count, his answer avers that he neglected to make a list or return to the assistant assessor, of the amount of his income for said year; that thereafter the assessor made a list of his annual income for said year, and assessed the duty thereon, and added fifty per centum, as a penalty, to the amount of the duty assessed; and that the defendant paid to the collector the amounts of tax and penalties so assessed.

The eleventh count is based on sections 6–17, Act July 14, 1870 (16 Stat. 257–261), and claims to recover, as due on the 30th of April, 1871, the sum of $13,887.50, as a tax of two and one-half per centum on an income of $555,500 for the year next preceding the 1st of January, 1871.

The twelfth count is based on the same sections of the act of 1870, and claims to recover, as due on the 30th of April, 1872, the sum of $2,500, as a tax of two and one-half per centum on an income of $100,000 for the year next preceding the 1st of January, 1872. The defendant, in his answer to the complaint, de-

nies all the allegations of the eleventh and twelfth counts, except those as to his residence and profession and ownership of certain property. For a further defence to the eleventh and twelfth counts, his answer avers, in respect to each of those two years, that he neglected to make a list or return to the assistant assessor, of the amount of his income; that thereafter the assessor made a list of his annual income and assessed the duty thereon, and added fifty per centum, as a penalty, to the amount of the duty assessed; and that the defendant paid to the collector the amounts of tax and penalties so assessed.

The plaintiffs demur to each of the above recited "further" defences, on the ground that they do not any of them constitute defences to the complaint or to any part of it. The demurrer to the further defences to the second, third and fourth counts raises the question, whether the causes of action in those counts are barred by the facts, that the defendant made a return, and an amount of tax was assessed against him, and he paid it, and no imperfection was discovered until after the 13th of July, 1866. The demurrer to the further defences to the fifth, sixth, seventh, eighth, tenth, eleventh and twelfth counts, raises the question, whether the causes of action in those counts are barred by the facts, that the defendant made no return, and an amount of tax and a penalty were assessed against him, and he paid them. The demurrer to the further defence to the ninth count raises the question, whether the cause of action in that count is barred by the facts, that the defendant made no return, and an amount of tax was assessed against him, and he paid it.

The act of 1862, in imposing the income tax, provides (section 90) that "there shall be levied, collected and paid annually," upon annual income, a duty specified in, and fixed by, the act, on the amount of such income, three per centum or five per centum, according to the amount of the income. It then goes on to specify (section 91) what deductions shall be made, in estimating the annual income. It provides (section 93) that it shall be the duty of all persons to make return of income, and that, where no return is made, the assessor or assistant assessor shall assess the amount of income. In either case, the amount of income and the amount of tax or duty are required (section 14) to be entered on a list. The act provides (section 19 and 92), that the collector shall collect the tax. The tax is to be collected (section 16) according to the list. Sections 19–21 provide for a collection by distraint and sale of property, both personal and real.

The joint resolution of 1864 provides, that, "in addition to the income duty already imposed by law, there shall be levied, assessed and collected," a special income duty upon income, for the year ending December 31st, 1864, "by levying, assessing and collecting said duty" at the rate of five per centum, and that "the same shall be levied, assessed, estimated and collected, except as to the rate, according to the provisions of existing laws for the collection of an income duty annually."

The act of 1864 provides (section 116) that "there shall be levied, collected and paid annually," upon annual income, a duty specified in, and fixed by, the act, on the amount of such income, five per centum, or seven and a half per centum, or ten per centum, according to the amount of the income. It specifies (section 117) what deductions shall be made in estimating the annual income. It provides (section 118) that it shall be the duty of all persons to make return of income, and that, where no return is made, the assessor or assistant assessor shall assess the amount of income "and the duty thereon." In either case, the amount of income and the amount of tax or duty are required (section 18) to be entered on a list. The act provides (sections 28 and 119) that the collector shall collect the tax. The tax is to be collected (section 20) according to the list. Sections 28–31 provide for a collection by distraint and sale of property, both personal and real. The amendments made by the act of 1865 do not substantially change the scheme of procedure. The duty is made five per centum and ten per centum, according to the amount of the income, and an addition of twenty-five per centum penalty to the amount of the duty, when there is a neglect to make a return, is provided for. This penalty is increased to fifty per centum, by the act of 1866. The act of 1866, in amending section 41 of the act of 1864, introduced (14 Stat. 111) a provision, that "taxes may be sued for and recovered, in the name of the United States, in any proper form of action, before any circuit or district court of the United States for the district within which the liability to such tax may have been or shall be incurred, or where the party from whom such tax is due may reside at the time of the commencement of said action." That provision is re-enacted in section 733 of the Revised Statutes in these words: "Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides." By section 919 such suits must be brought in the name of the United States. By section 563 jurisdiction is given to the district courts of all suits at common law brought by the United States and a like jurisdiction is given to the circuit courts by section 629. The act of 1866 did not change in substance the former scheme of procedure, nor did the act of 1867 nor the act of 1870.

The general grounds taken by the defendant are, that, for the years 1862 and 1863, he made returns of his income, and was assessed, and paid the tax assessed; that he was assessed, on his return for 1863, for the special income tax of 1864, and paid the tax assessed;

that, for the subsequent years, he made no returns, but was assessed in the manner prescribed by the statute, and paid the tax assessed and the penalty, except for 1868, when he paid no penalty; and that the United States have no right of action to recover anything more from him in respect of a tax on his income for any of those years. In respect to the instances where there were returns made by him, namely, the years 1862 and 1863 and the special tax of 1864, the answer denies the receipt of any income in excess of the amount on which a duty was paid. The complaint, in respect to each of the amounts of income set forth, alleges that it is the amount in excess of the amount on which the defendant paid a tax or duty. The answer of the defendant, by its form, denies such allegation in respect of all the years subsequent to 1863.

By the provisions for assessment in the act of 1864, the assistant assessor is clothed with power to search out persons owning property liable to pay any duty or tax, and to make a list of the owners, and to value and enumerate the objects of taxation by all lawful ways and means. Power was given to the assessor, in case of neglect to make a return, or if in his opinion a return was false or contained any understatement or undervaluation, to summon the party, or any other person, to examine under oath the party and witnesses, to compel the production of books of account, to enter on the premises of the party, and to make, according to the best information attainable, including that derived from the evidence elicited by the examination, and on his own view and information, the list or return for the party, of property or objects liable to tax, owned by him, and assess the duty thereon. The statute declares, that the lists or returns so made shall be "taken and reputed as good and sufficient lists or returns for all legal purposes." It is then provided, that the individual returns shall be consolidated into a general list, and that public notice shall be given for the hearing of appeals. The notice is to be a notice of the time and place "when and where appeals will be received and determined relative to any erroneous or excessive valuations," and the assessor is "authorized at any time to hear and determine, in a summary way, according to law and right, upon any and all appeals." This appeal, which is an appeal by the party, is required to be in writing and to specify the particular matter respecting which a decision is requested, and to state the ground or principle of error complained of. Power also is given to the assessor to re-examine and determine upon the assessments and valuations, and rectify the same, as shall appear just and equitable. This includes the power to increase the valuation, assessment, or enumeration, on notice to the party interested to appear and object. On the hearing of appeals the assessor is authorized to require by summons the attendance of witnesses and the production of books of account. After the time for hearing appeals has expired, the general lists are to be transmitted to the collector. If the assessor finds that the annual list so furnished to the collector is incomplete, in having persons or objects liable to tax or duty omitted therefrom, he may, from time to time, at any time thereafter, enter on a special list all such objects of duty or taxation, with the names of the persons liable to the tax or duty and the sums payable by each which he shall discover to have been omitted. The general provisions of the statute are made applicable to such special list. The above scheme of the act of 1864 is in substance that of the act of 1862, and continued to be the same for all of the years for which the income tax was imposed. By the act of 1864 (section 44) a provision was introduced authorizing the commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury, "on appeal to him made, to remit, refund and pay back all duties erroneously or illegally assessed or collected, and all duties that shall appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected." By the act of 1862 (section 35) this refunding was authorized in the case of taxes paid by levy and distraint.

In the special statutory provisions in regard to the income tax, in the act of 1862, it is provided, that the duty on income shall be "assessed and collected." In the act of 1864 the language is, "assessed, collected and paid." In both the word "estimating," is used, in describing the process of arriving at the net annual income. In both acts a penalty is imposed for non-payment of the income tax or duty, and a lien is given therefor, and a remedy by distraint, to enforce such lien.

It is contended, for the defendants, that the statute contains no provision, either in the act of 1862 or in that of 1864, for the collection or payment of any income tax which has not been assessed in the special manner prescribed by the statute; that the United States cannot maintain an action to recover a tax on the annual income of an individual (even if such an action can be maintained at all), until after the sum of such annual income shall have been estimated and assessed in the mode provided by the law creating the tax, and the amount of the tax shall have been computed and ascertained, by applying the rate of the tax to the sum of the income; and that then the action must be for the amount of the tax so computed and assessed. The theory of this view is, that the statute has created a special tribunal of assessment, for the determination of all questions arising in regard to the amount of an income tax; that the decisions of such tribunals are final and conclusive as to both the government and the individual; and that, if payment is made to the collector, of the amount of income tax certified by the assessor, no remedy exists to enforce by action the payment of any further sum.

I regard the positions thus taken on behalf of the defendant, as distinctly held to be untenable, by the decision of the supreme court of the United States in Dollar Sav. Bank v. U. S., 19 Wall. [86 U. S.] 227. Section 120 of the internal revenue act of 1864, as amended by the act of July 13, 1866 (page 138), provides, that "there shall be levied and collected a tax of five per centum on all dividends thereafter declared due as part of the earnings, incomes or gains of any bank or savings institution in the United States, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds." It also provides, that said banks "shall pay the said tax, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid, the said tax of five per centum;" that "a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth day of the month following that in which any dividends or sums of money become due or payable as aforesaid, and said list shall contain a true and faithful account of the amount of taxes as aforesaid," and it is to be verified by oath; that, for any default in making such list or return, the bank making it shall forfeit $1,000 as a penalty, and that, "in case of any default in making or rendering said list or return, or of any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal." The scheme of this statute is the same as the scheme of the statute in regard to the income tax—a list or return to be made by the party charged with the tax; a penalty for not making it; in default of making the list or return or paying the tax, an assessment and collection of the tax and the penalty through the machinery of the assessor and the collector, under the general provisions of law for other such cases; and, in all cases, collection according to a list passing from the office of the assessor to the collector. In respect to the income tax, the act of 1862 provides (section 93) that in case of neglect or refusal to make a return, the assessor or assistant assessor shall assess the amount of income and proceed thereafter to collect the duty thereon, "in the same manner as is provided for in other cases of neglect and refusal to furnish lists or schedules, in the general provisions of this act;" and the act of 1864 provides (section 122) "that, in case of any default in making or rendering said list or return, or of the payment of the duty or any part thereof, as aforesaid, the assessment and collection of the duty and penalty shall be made according to the provisions of law in other cases of neglect and refusal."

The United States brought an action of debt, founded on the above statute, against the savings bank (which was a banking institution created by the laws of Pennsylvania, without stockholders or capital stock, and doing the business of receiving deposits to be loaned or invested for the sole benefit of its depositors, and whose charter authorized it to retain a contingent fund, accumulated from its earnings, to the extent of ten per centum of its deposits, for the security of its depositors), alleging that it had earned and added to such contingent fund or undistributed sum, from July 13th, 1866, to December 31st, 1870, an aggregate specified sum of money, made up of several sums of earnings, which were added semi-annually, during such period, on the first days of July and January in each year, to such contingent or undistributed fund, and that it owed to the United States a tax of five per centum on such aggregate sum. The bank had never made any return relative to any such sum. It was not only not required by the commissioner of internal revenue to do so, but three successive commissioners of internal revenue, in 1867, 1870 and 1871, had decided that the bank was not liable to a tax on any sum added to its retained and undistributed funds. A subsequent commissioner, in 1872, adopted a different construction of the statute, and the action referred to was brought, in the circuit court for the Western district of Pennsylvania. A judgment was rendered by that court, in favor of the United States, against the bank, for the amount of the tax, at five per centum, $5,356.00, without interest from the semi-annual periods when the taxes became due and payable, such interest being disallowed because the failure of the bank to pay the tax had been induced by the rulings of the several commissioners. After judgment, the bank took the case to the supreme court, by writ of error, and assigned for error, that the statute did not authorize the levy and collection of the tax, and that an action of debt was not maintainable for the recovery of the tax. On the argument of the case before the supreme court, it was contended, for the bank, that the statute did not authorize the levy and collection of the tax at all; and that, if it did, the tax could not be recovered by the action of debt brought. As parts of the latter proposition, it was contended, for the bank, that, as the statute afforded a remedy for the assessment and collection of the tax, through the machinery of the assessor and the collector, an action of debt would not lie to recover the tax; that, as the statute created the right, and provided a particular remedy for vindicating such right, no other remedy than that provided by the statute could be used; and especially, that, as the statute provided, that, in case of default in making a return or paying the tax, the assessment and collection of the tax and penalty should be in accordance with the general provisions of law in other cases of neglect and refusal (namely, the making by the assessor of lists containing specified particulars, authority in the assessor, within fifteen months after the 13th of July, 1866, or from the time of the delivery of the list to the collector, to make special additional

lists, and the delivery of the lists to the collector, as his warrant to levy the tax on the property of the delinquent taxpayer), no action of debt would lie to recover the tax. It was further contended, for the bank, that, even if an action of debt could be sustained, to recover a tax duly assessed, notified and demanded, it did not appear that any one of the taxes in question was ever duly assessed; that, if an attempt to assess them had been made, the assessor could not have gone back of the term of fifteen months before he delivered his last list to the collector; and that, because the taxes demanded in the suit had never been regularly assessed, the suit would not lie. In the circuit court, the only point considered had been whether the statute required the bank to pay the tax.

The opinion of the supreme court in the case was delivered by Mr. Justice Strong, and was concurred in by Chief Justice Waite, and by Justices Clifford, Swayne, Miller, Davis, and Hunt. In the opinion, it is first held, that the statute authorized the levy and collection of the tax. The opinion then passes to consider the question whether an action of debt could be maintained to recover the tax, and says that the question must be answered in the affirmative. The opinion discusses and meets the propositions urged, that the statute which imposed the tax provided a special remedy for its assessment and collection; that, in such case, no other remedy than that afforded by the statute could be used; that a return was required and a penalty imposed for a default in making it; that, in case of default in making the return or paying the tax, the statute provided that the assessment and collection of the tax and penalty should be in accordance with the general provisions of law in other cases of neglect and refusal, such provisions being assessment, delivery of lists to collector, and distraint; and that, where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common law remedies. Speaking of this latter rule, the opinion says, that it applies when the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and when any one to whom the statute is a rule of conduct seeks redress for a civil wrong; that, in such case, there is a presumed statutory prohibition, confining the party to the remedy pointed out in the statute, and forbidding him to make use of any other; that, by the internal revenue law the United States are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of the state; that the prohibitions, if there are any, either express or implied, in the statute, may be obligatory on tax collectors, and prevent any suit at law by them, but they are not rules for the conduct of the government of the United States; and that it is not prohibited, by anything in the act of 1866, from employing any common law remedy for the collection of its dues. The opinion cites decisions both in England and in the United States, holding that actions to recover duties on imports may be maintained, although the statute provides a different remedy for enforcing payment. It also cites, as authorizing the action, the provision, before referred to, in the act of 1866 (page 111), now section 733 of the Revised Statutes, respecting suits for taxes, in the name of the United States.

The opinion then passes to consider the objection that there had been no assessment. It says: "Nor is there anything in the objection that the taxes for which judgment has been recovered in this case had not been assessed. No other assessment than that made by the statute was necessary to determine the extent of the bank's liability. An assessment is only determining the value of the thing taxed and the amount of the tax required of each individual. It may be made by designated officers or by the law itself. In the present case the statute required every savings bank to pay a tax of five per cent. on all undistributed earnings made or added during the year to their contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank (Attorney-General v. ——, 2 Anst. 558), and, without more, it made the bank a debtor. We think, therefore, the second assignment of error cannot be sustained." The court affirmed the judgment of the circuit court. Justices Bradley and Field dissented from the judgment of the court, on the ground that a tax of the kind in question ought to be first entered on the assessment roll before an action would lie for it; and that the assessment roll should be regarded as conclusive as to the persons or things liable to taxation. In the opinion delivered by the court it is said, that the question whether an action of debt was maintainable to recover the tax, not having been raised in the circuit court, it was not clear that it could be raised first in the supreme court. But it was allowed to be raised, and it was argued, and the opinion of the court as well as the dissenting opinion discuss the question and adjudicate upon it. The opinion of the court holds the point taken for the bank, that the tax had not been entered on an assessment list, not to be a good one, while the dissenting opinion is placed solely on the ground that the action would not lie, because the tax had not been entered on an assessment list.

It is impossible not to regard the decision in Dollar Sav. Bank v. U. S. [supra] as completely covering the present case. The statutes imposing the two taxes are substantially identical in their provisions. In each a tax is imposed by the statute. The tax is not imposed by any officer or by any of the machinery or methods organized by the statute. The statute itself declares, in each case, that a tax of a fixed specified percentage shall be levied, collected and paid on a specified object of taxation. In the one case it is undistributed earnings added during the year to the contin-

gent fund of a bank. In the other case it is the annual gains, profits or income of the individual. In the one case it is five per centum on such earnings. In the other case it is equally a fixed and specified per centum on the income of each individual, according to its amount. The liability of the bank is determinable by ascertaining what in fact was the amount of its undistributed earnings added during the year to its contingent fund, and calculating the tax thereon at the rate of five per centum. The liability of the individual for income tax is determinable by ascertaining what in fact was the amount of his income during the year, according to the definition given in the statute itself, and including and deducting just what the statute allows and requires to be included and deducted, and calculating the tax thereon at the rate of five per centum, or seven and a half per centum, or ten per centum, according to the amount of income so arrived at. The extent of the liability of the individual for income tax is defined by the statute, equally with the extent of the liability of the bank for the tax on undistributed earnings. In each case it is necessary, in an action of debt for the tax, to resort to sources of information outside of the statute, to ascertain the amount on which the per centum of tax fixed by the statute is to be calculated. In the case of the bank, its books and the testimony of its officers, and, perhaps, other means of information, may and must be resorted to. In the case of a suit for income tax, the books and accounts of the individual, and his testimony, and, perhaps, other means of information, may and must be resorted to. The difference between the two cases, in that respect, if there be any, will be, in every case, one of degree merely, not of principle. The statute, in imposing the per centum of tax on the income of the individual, makes a charge on him of a sum which is certain for the purposes of an action of debt, because it can be made certain through the action of a judicial tribunal, by following the rules laid down in the statute. That is the principle of the decision in the case of the bank, and it controls the present case.

It is contended, for the defendant, that the authority of the decision in the Savings Bank Case is confined to the single question as to whether the bank was subject to the tax, and that everything else, in the opinion of the court, is obiter dictum. It is further contended, that, whatever the opinion of the court did decide or did sanction, it did not decide that an action could be maintained except when the tax was a sum certain ascertained before the suit; nor that, in a case where the value of the thing to be taxed is uncertain or indefinite, so as to require discretion or judgment in determining that value, an assessment by the assessor can be dispensed with; nor that the amount of the tax must not be adjudged by the assessor before an action for its recovery can be maintained; nor that, in a case where the income, gains, and profits of a year are to be estimated, and deductions are to be estimated, and the powers of discretion and judgment vested in the assessor are commanded to be exercised, an assessment by him can be dispensed with. I cannot concur in any of these views. I regard the Savings Bank Case as deciding every one of the questions referred to, and as deciding all of them adversely to the positions relied on by the defence in this case.

The foregoing considerations dispose of the view urged, that the taxes sued for in this case cannot be recovered because they have never been entered on any assessment list. There remains the further question, whether the fact that a less amount of tax than that now claimed was entered on a list by the assessor, whether after a return by the defendant, or in default of a return, and that such less amount of tax was paid, whether with or without an added penalty, is a bar to a recovery by the United States of the difference between the list tax and the true tax.

It is contended, for the defendant, that the making of the list in his case, and the collection of the tax thereon and thereby, operated as an election by the United States between the statutory process and the remedy by action, so as to debar the United States from now prosecuting the remedy by action for the deficiency of true tax, and that the action of the assessor, under the authority given him by the statute to value the subject of taxation, and apply to it the rate of taxation and determine the amount of the tax, amounted to an adjudication of the whole question, and is not subject to review in this action.

The case of U. S. v. Hazard [Case No. 15,337], decided by Mr. Justice Clifford and Judge Knowles, in the circuit court for the district of Rhode Island, is, in all respects, like the present one. The United States brought an action of debt against Hazard, to recover a tax on his income for the year 1868, the action being founded on the same statutory provisions on which the rights of action claimed in the eighth, ninth and tenth counts in the present case are founded. The defendant pleaded the general issue and three special pleas, each of which special pleas set up, in substance, as a bar to the recovery, the payment by the defendant of a tax on his income for the year 1868, on an assessment made by the proper assistant assessor, together with a penalty of fifty per centum on account of his failure to make a return. The United States demurred to the special pleas, and contended that the principles of construction and decision established and promulgated by the supreme court in Dollar Sav. Bank v. U. S. [supra], clearly recognized and affirmed the right of action in the case against Hazard, as against the bar set up in the special pleas. The defendant contended to the contrary. Judge Knowles delivered the opinion of the court (which consisted of Mr. Justice Clifford and himself), and in it says, speaking for and

of the court: "Its conclusion is, that the case above cited is, as claimed by the plaintiff, a case directly in point, to be construed and respected as a precedent decisive of the point presented, controlling the action of this court and compelling a sustaining of the plaintiff's demurrers; and this, too, even were the principles embodied in that precedent as unaccordant with the views of the presiding judge as with those of his associate of this term." The language thus quoted means, that the views set forth in the opinion of the supreme court, delivered by Mr. Justice Strong, are in accordance with the views of Mr. Justice Clifford as to the matters embraced in that opinion, and are not in accordance with the views of Judge Knowles as to those matters; but that both Mr. Justice Clifford and Judge Knowles regard the principles established and promulgated in that opinion as decisive of the question, that the assessment of an income tax and a penalty, and their payment, do not bar an action for the difference between the tax so paid and the true tax. Mr. Justice Clifford was one of the seven judges who concurred in the opinion of the court delivered by Mr. Justice Strong. His statement, made in the opinion of the court delivered by Judge Knowles, that the principles of construction and decision established and promulgated in the Savings Bank Case are decisive of the point presented in the Hazard Case, is entitled to great weight, as he must be presumed to know the views of the justices who concurred in such opinion, as to the scope and extent and meaning of the principles thus established. In the opinion of Justices Bradley and Field, who dissented in the Savings Bank Case, the doctrine is asserted, not only that there should be an assessment-roll to authorize a suit for a tax, but that "the assessment-roll should be regarded as conclusive as to the persons or things liable to taxation." In opposition to this stands the statute before cited, providing that the United States may collect by suit taxes due to it. The income taxes are due without any assessment other than that made by the statute, and the taxes sued for are not taxes covered by or embraced in the taxes assessed and paid. The further defences now in question only set up that the defendant paid what was assessed. The United States do not sue for any tax which was assessed or for any amount of tax which was paid. The defendant does not set up that he paid any part of the tax sued for, but only that he paid as tax some money which is not sued for.

The proposition, that the United States elected between the statutory process and this action, is not tenable. They pursued the statutory process, and thereby collected a part of the tax. They now seek to collect the rest. Equally unsound is the proposition, that the action of the assessor was an adjudication barring this suit. Both of these propositions are inconsistent with the views expressed in the opinion of the court in the Savings Bank Case. If the United States, as is there held, are not to be regarded as bound to resort to the statutory remedy, they cannot be held to be concluded, by a resort to it, from collecting by a suit taxes which they have not collected by means of such resort. So, the decision of the assessor or the assistant assessor as to the assessment or tax can hardly be denominated a judicial construction, any more than the decisions of the commissioner of internal revenue, which, in the opinion of the court in the Savings Bank Case, it is said, "can hardly be denominated judicial constructions."

The view which is to be deduced from the decision of the supreme court in the Savings Bank Case is, that the remedy by assessment and collection of taxes, through the machinery of assessors and collectors, is a remedy for the prompt, periodical ascertainment and collection of taxes, subject always to a concurrent right to bring a suit for the tax, such latter right being one which exists both to collect a tax in the absence of any use of the statutory machinery, and to collect it where the statutory machinery has been used and has failed to collect the true amount of tax. Whether the tax be one on income, or on undistributed earnings of a bank added to its contingent fund, or on a legacy or a succession, or on any other subject of tax, where a tax of a fixed percentage is imposed by the statute on a subject or object which is so definitely described in the statute that its amount or value, on which the fixed per centum is to be calculated, can be ascertained and determined, on evidence, by a court, a suit for the tax will lie, without an assessment, and the defence set up in this case is no bar to the suit. Such I understand to be the purport of the decisions of the supreme court. A scheme of taxation like that found in the federal statutes, where there is imposed by the statute a fixed tax, by a percentage on an amount of money, the elements for ascertaining which are definitely designated in the statute, or a fixed tax of a given amount on a designated object or subject of tax, is a very different scheme of taxation from that which prevails generally in the states, where power is confided to public officers to value property, real or personal, and to fix the percentage of tax thereon. There no tax is imposed till the officers act, and no suit for any tax will lie till after such action by the officers.

The doctrine of the Savings Bank Case is no new doctrine. In Meredith v. U. S., 13 Pet. [38 U. S.] 486, in 1839, an action was brought by the United States to recover duties on imported goods, under a statute which provided that there should be "levied, collected, and paid" the several duties prescribed by the statute, on goods imported into the United States. The statute gave a lien on the goods for the duties, and a bond was given as security for the duties. The question arose, whether the importer became personally indebted for the duties, or whether the remedy of the United States was confined to the lien and the bond.

The court held, that, under such a statute, the duties on imported goods constitute a personal debt due to the United States from the importer, and that the debt accrues when the goods have arrived at the proper port of entry. The statutes in regard to duties on imports are like the statutes in regard to internal revenue, in the particulars under consideration. In both, the statute imposes the tax or duty, by saying that there shall be levied, collected, and paid, a designated rate of tax or duty, either a percentage on a valuation, or a quantum per weight, or measure, or numeration. In both cases, where the tax or duty is a percentage on the valuation, the valuation has to be ascertained by some means. Yet in both cases the right to the tax or duty accrues before the valuation is ascertained, because the statute lays the fixed rate of duty on the goods or on the income.

The provision before cited from section 44 of the act of 1864, in regard to paying back duties erroneously or illegally assessed, was re-enacted by the act of 1866 (page 111), and is embodied in section 3220 of the Revised Statutes, to the effect, that "the commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court for any internal taxes collected by him, with the cost and expenses of suit." Section 3689 (page 730) provides, that there is appropriated, out of any moneys in the treasury not otherwise appropriated, for the purpose of refunding and paying back "duties erroneously or illegally assessed or collected under the internal revenue laws," such sum as may be necessary for such purpose, and that such appropriation shall be deemed a permanent annual appropriation. These provisions show, that an assessment and a collection of a tax thereunder are not regarded as concluding the taxpayer. Is there any reason for holding that it can be intended that an assessment and payment of a tax should conclude the United States, except as to the amount of tax paid? Certainly, there can be none. To so hold would be to say that concealment or mistake by the taxpayer, or neglect or collusion on the part of the assessor, is to operate as a binding judicial decision, and not only deprive the government of the taxes to which the statute declares it to be entitled, but give to taxpayers who do not make correct returns an advantage over those who do.

In Philadelphia v. The Collector, 5 Wall. [72 U. S.] 720, it was held by the supreme court, that an erroneous assessment may be questioned, in a suit brought by a taxpayer against a collector, to recover back duties or taxes erroneously assessed under the internal revenue statutes, and paid under protest. The statute may require that there shall be an appeal before suit is brought, but that does not alter the principle.

In Clinkenbeard v. U. S., 21 Wall. [88 U. S.] 65, it was held by the supreme court, in a suit brought by the United States to recover an assessed tax, in which the assessment was put in evidence by the United States, and relied on to sustain a recovery, that the defendant could give evidence to show that the assessment was erroneous.

If an assessment may be questioned by the taxpayer, in a suit brought by him to recover back taxes paid according to the assessment, and in a suit brought by the United States against him on the assessment, it is difficult to see why, in a case where the United States are claiming to recover taxes omitted from the assessment, the assessment shall be regarded as conclusive against the United States. In U. S. v. Halloran [Case No. 15,286] the circuit court for this district, held by Judge Shipman, decided, that an assessment was not final and conclusive against the United States, in a case where the tax assessed had been collected by distraint, and the United States sued to recover, not any tax assessed, but the difference between the tax assessed and paid and the true tax.

All the legal propositions contended for on the part of the defendant have thus been considered. The importance of the questions involved, and the earnestness and ability with which they have been discussed on both sides, demanded that they should receive full attention. As in the Hazard Case, the stress of the argument on the part of the defendant has been to attack the decision of the supreme court in the Savings Bank Case. In the argument for the defendant it is said, that the supreme court, in that case, invented a judicial device to save the loss of a tax. It may safely be left to that court to vindicate, if necessary, its decision. It is the duty of this court faithfully to interpret that decision, and apply it to other cases as they arise.

The demurrer interposed by the plaintiff is sustained.

[Subsequently the defendant moved for a bill of particulars of the plaintiff's complaint, which motion was denied. See Case No. 16,521.]

Case No. 16,520.

UNITED STATES v. TILDEN.

[10 Ben. 170.] [1]

District Court, S. D. New York. Nov., 1878.

PRACTICE—CONSTRUCTION OF STATUTE—DEPOSITIONS DE BENE ESSE—OPENING BEFORE TRIAL.

1. Depositions de bene esse taken pursuant to Rev. St. U. S. § 863, may be opened before the

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

trial by order of the court upon motion of one party to the suit and against the objection of the other party.

2. In the construction of the Revised Statutes of the United States the presumption is against an intention to change the meaning of a statute re-enacted therein. And no change of meaning will be imputed to a change of phraseology, unless the language used indicates an intended departure from the re-enacted statute.

3. Rev. St. U. S. § 865, is to be construed as a re-enactment of part of section 30, Act Sept. 24, 1789 [1 Stat. 88], and is not to be construed as changing the construction of that section in respect to the time when depositions de bene esse may be opened.

[Suit by the United States against Samuel J. Tilden to recover income taxes. See Case No. 16,522.]

Mr. Woodford, U. S. Dist. Atty., and Mr. Sherman, Asst. U. S. Dist. Atty.

T. Harland, A. J. Vanderpoel, and J. K. Porter, for defendant.

CHOATE, District Judge. This is a motion on the part of the plaintiffs to have certain depositions which have been taken in the cause under section 863 of the Revised Statutes opened and filed. The learned counsel for the defendant object on the ground that under section 865 such depositions can only be opened at the trial, unless by consent. Section 865 is as follows: "Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it was taken; or it shall together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel and appear in court, such deposition shall not be used in the cause." The argument for the defendant is that the word "then" refers for its antecedent to the words "in court" and that the context clearly shows that "then" means at the time of the trial, and therefore that the words "in court" necessarily import "in court upon the trial." It is also argued, from the fact that, where the deposition is returned personally by the magistrate to the court, no certificate as to the reasons for taking it is required, that this is because the magistrate is in such case within the contemplation of the statute present in court and may testify as to those reasons; that this indicates that such personal delivery is to be upon the trial only, and not before the trial. Hence an argument is drawn from this provision in aid of the construction contended for as to the other clause now particularly in question; that the entire provisions of the section indicate a policy that depositions de bene esse, which are the depositions to which the section relates, are not intended to be published or opened, unless by consent, until the trial. And it is further urged, in support of this theory of the statute, that reasons of public policy and a regard to the rights and interests of the parties may well have required such protection against publicity; that under the original statute of 1789, which is in substance here re-enacted, such depositions could in some cases be taken without notice and in the absence of the opposite party; that in regard to all such depositions there was no discretion on the part of the magistrate to reject any testimony offered, and that therefore the taking of such depositions before the trial might be made the occasion for introducing irrelevant and scandalous matter, the publication of which, before the trial, may be greatly injurious to the reputation or good name of the party against whom it is taken, or may even tend to create such a prejudice against him as to prevent a fair trial; whereas, if the depositions were kept secret till offered upon the trial, such irrelevant and scandalous matter might then be suppressed and excluded. The argument drawn from the word "then" appears to have no force when this section is examined in connection with St. 1789, c. 20, § 30, of which it is a re-enactment. In that earlier statute the two clauses which are brought together in Rev. St. § 865, are separated from each other by other provisions, and the word "then" obviously does not relate back to the words "in court" as its antecedent. That the word "then" refers to the time of the trial is indisputable. In the original act the language is: "And if an appeal be had such testimony may be used on the trial of the same if it shall appear to the satisfaction of the court which shall try the appeal that the witnesses are then dead or gone out of the United States or to a greater distance than as aforesaid from the place where the court is sitting or that by reason of age, etc., they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause." In the construction of the Revised Statutes of the United States the presumption is against an intention to change the meaning and construction of a statute re-enacted therein. The Revised Statutes purport to be, in general, a re-enactment of existing statutes. Section 5595. And, therefore, no change of meaning will be imputed to the change of phraseology, unless the language used in the revision indicates an intended departure from the meaning of the re-enacted statute; and section 5600 expressly repels any inference to be drawn from a different collocation of the parts of the old statutes in the revision. It is clear, I think, that on the point now in question, Rev. St. § 865, is to have the same construction as the 30th section of the act of 1789, and that

the word "then" in section 865 has no new or different meaning, and is not to be construed as relating back to the words "in court," as antecedent, but as referring to the time of the trial, which time is otherwise plainly referred to in the same clause in which the word "then" occurs.

While there is some uncertainty as to how the reasons for taking the deposition are to be made to appear, in case the magistrate taking the same delivers it personally into the court, I can not find either in the terms of this statute or the decisions or practice of the courts in relation to depositions taken de bene esse any such policy of keeping the same secret until the trial as is claimed on the part of the defendant. On the contrary, the rules of courts as well as the decisions assume that in respect to all depositions taken before the trial, the policy of the law is to have them opened and made accessible to the parties to the suit, in order that all formal questions in respect to the manner of taking may be disposed of before the trial. Thus, rule 113 of this court, adopted in 1838, provides that "depositions taken under commission, or otherwise, shall be forwarded to the clerk immediately after they are taken, and be filed on their return to the clerk's office, in term or vacation, etc. And all objections to the form and manner in which they were taken or returned shall be deemed waived, unless such objection shall be specified in writing in four days after the same are opened, unless further time shall be granted by the judge." Rule 114 provides "that in suits between individuals, either party may at any time after the commissions or depositions are deposited with the clerk, enter an order of course as of a special sessions, if in vacation, to open the same and deliver copies thereof;" and rule 115 provides "that in suits in which the United States are a party, such order may be entered on the written consent of the proctors or attorneys of the respective parties, or on motion to the court at a stated or special session." While the rules of court can not dispense with the requirements of the statutes, they may and often do furnish very satisfactory evidence of the practical construction which the courts have put on the statutes to which they refer, and these rules are clearly inconsistent with the supposition that, when they were framed and while they have been continued in force, this statute was regarded as forbidding the opening of depositions de bene esse, unless with consent of the parties, before they should be offered to be used upon the trial. Similar rules have been adopted in the district and circuit courts in other districts. And the same general policy is shown by the practice and the rules in the courts of the state of New York, and in the practice in regard to depositions taken in courts of equity. See, also, Shankwiker v. Reading [Case No. 12,704] Van Hook v. Pendleton [Id. 16,852]; Jasper v. Porter [Id. 7,229]; York Co. v. Central R. Co., 3 Wall. [70 U. S.] 113; Brooks v. Jenkins [Id. 1,953]. Nor does it seem that the peculiar character of the depositions taken under section 863 of the Revised Statutes, being in some cases, as the law originally stood, without notice, and at all times without power on the part of the magistrate to limit the subject of inquiry or to exclude any testimony from the record, affords any such strong grounds for withholding them from publication in the clerk's office prior to the trial, as to have been made the basis for a distinction in this respect between such depositions and depositions taken under commission. While it is possible that in some cases the power to take testimony may be abused for the purpose of publishing scandalous and irrelevant matter, yet on the other hand the power of either party to forbid the opening of the depositions until the trial may lead to abuses much worse, and to surprise and failure of justice on the trial. Thus, if this right has existed under the act of 1789, a party taking a deposition de bene esse, even without notice before the recent change of the statute requiring notice, might have kept this deposition secret till the trial, and then have used the testimony of a witness whom the other side had not seen, nor had an opportunity to cross-examine, and whose testimony he would have no opportunity, perhaps, to rebut. So, also, a party taking depositions, which have been sealed up and certified by a magistrate, might be prevented till the trial from ascertaining whether they were certified and returned in due form and would have no opportunity to have any mistake in that respect corrected or obviated by retaking the depositions. These and other inconveniences far outweigh the inconveniences and possible injury to be done by publication, and fully justify the practice which has been referred to and which is embodied in the rules. Upon the whole, I think the statute will be entirely satisfied by the depositions being opened in the presence of the parties or their attorneys, in open court.

Motion granted.

Case No. 16,521.

UNITED STATES v. TILDEN.

[10 Ben. 547.] [1]

District Court, S. D. New York. Sept., 1879.

BILL OF PARTICULARS—INCOME TAX—LACHES.

1. The United States brought suit for an unpaid balance of income tax, alleged to be due from the defendant during a period of ten years. Among other defences, it was denied that the defendant's taxable income exceeded the sums on which he had paid the tax. The defendant moved for a bill of particulars, making affidavit that "he in good faith intends to defend the action, and that he is ignorant of the particulars of the claim made against him, and that it is necessary and material to his defence that he shall have rendered to him a bill of the particulars thereof, as he is advised by his counsel and

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

verily believes," and the district-attorney made affidavit that "it is not in his power, and to the best of his knowledge and belief not in the power of the plaintiff, to state all the items or particulars which have to be considered in determining what defendant's taxable income was:" *Held*, that the case was not a proper one in which to order a bill of particulars.

2. The granting or refusing a bill of particulars is a matter in the discretion of the court under the circumstances of the particular case.

3. In general, such a bill is not ordered where the matters of which information is thus sought are peculiarly within the knowledge of the defendant or more within the defendant's than the plaintiff's knowledge, or where, from the nature of the case, the plaintiff cannot be reasonably expected to be able to give the items of his claim with certainty.

4. Whether a delay from April, 1878, when the demurrer to some parts of the answer was finally disposed of, till September, 1879, when this motion was made, would be fatal to the application for a bill of particulars, if defendant were otherwise entitled to it, or whether such application should be denied because at an intervening term of the court the defendant's counsel had announced that they were ready and desirous to go to trial, quære.

[This was an action by the United States against Samuel J. Tilden to recover certain income taxes. Heard on a motion for a bill of particulars of the complaint of the plaintiff.]

S. L. Woodford, U. S. Dist. Atty., and S. B. Clarke, Asst. U. S. Dist. Atty.

T. Harland and A. J. Vanderpoel, for defendant.

CHOATE, District Judge. This is a suit brought to recover of the defendant certain sums alleged to be due and owing from him for income taxes during the years 1863 to 1872 inclusive, over and above the amounts paid by him for his income taxes for said years respectively. The complaint alleges in separate counts for the several years the receipt of a certain sum of money as income in excess of the several specified sums, amounts and receipts which, by the law in force in said several years, were exempt from taxation as income, and in excess of the amount on which the defendant paid tax for such years respectively. The answer sets up certain defences growing out of the returns made by the defendant to the assessors and the assessment and other proceedings thereon, or assessments made without any return by the defendant during certain years, and the payment of the taxes so assessed with the penalties where the same were required by law in default of returns. These defences have on demurrer been held insufficient in law as an answer to the complaint. The answer also denies the receipt of any income, gains and profits for which the defendant was liable to pay an income tax in excess of the income on which he was assessed and paid the tax. The answer was filed June 23d, 1877. The demurrers were finally disposed of in or before April, 1878. [See Case No. 16,521.]

The defendant now moves for a bill of particulars of the plaintiff's complaint. He makes affidavit that "he in good faith intends to defend the action, and that he is ignorant of the particulars of the claim made against him in said complaint, that it is necessary and material to his defence that he shall have rendered to him a bill of the particulars thereof, as he is advised by his counsel and verily believes." He also makes affidavit that "the reason why this application was not sooner made, is that with reference to all preceding terms of the court since said answer was served, defendant has been advised by his counsel that the issue of fact herein could not then be brought to trial." In opposition to this motion, the district-attorney makes affidavit that "it is not in his power, and to the best of his knowledge and belief not in the power of the plaintiff, to state all the items or particulars which have to be considered in determining what defendant's taxable income for the several income years was; that he has filed a bill of discovery in the circuit court on behalf of the United States, to compel the defendant to make a disclosure thereof, and that said bill of discovery is now pending unanswered in said circuit court." The district-attorney also makes affidavit on information and belief to certain alleged misconduct of one of defendant's counsel with reference to certain books of account alleged to contain material evidence for the plaintiff in this action and which are said to have been improperly taken away in another district, while a witness was under examination in connection therewith.

This motion must be denied, upon the well-settled rules of practice, relating to the matter of bills of particulars. The object of such a bill is to prevent a surprise upon the trial by giving the defendant reasonable information as to the details of the claim made against him, and the effect of ordering the bill is to limit the plaintiff's evidence strictly to the items of his claim as detailed in the bill. The granting or refusing of the order in each case is a matter in the discretion of the court under the circumstances of the particular case. In general, such a bill is not ordered where the matters of which information is thus sought are peculiarly within the knowledge of the defendant, or more within the defendant's than the plaintiff's knowledge, or where, from the nature of the case, the plaintiff cannot be reasonably expected to be able to give the items of his claim with certainty. In all such cases the granting of the order is either unnecessary, or is likely to do more injustice to the plaintiff, than the refusal of the relief will do to the defendant. Such seems to me upon the affidavits presented, and considering the nature of the issue to be tried, to be the present case. The government is not to be presumed to know what any man's income is, still less the several parts of which it is made up. Every man is to be presumed to know these things with entire certainty. While the officers of the

government may have such credible information as to taxpayer's income as makes it proper to bring a suit to recover an excess of income tax due above that paid, that information may not be so specific or detailed as to enable the district-attorney in advance of the trial to set forth the items going to make up the income, with the certainty required in a bill of particulars. He may not be able, out of court and before trial, to obtain information from witnesses, who, under subpœna, may be compelled to disclose all the facts within their knowledge. Under our system of law, which allows one party to call the other as a witness, a party may rely for details on the examination of the other party as a witness in court. The affidavits in this case do not overbear or affect this presumption arising from the nature of the case. The defendant swears that "he is ignorant of the particulars of claim made against him." He does not swear that he is ignorant of the particulars of his income during the periods in question. All that he is ignorant of, is what receipts of money by him during those periods the district-attorney intends to put in evidence against him, and to claim as constituting taxable income. This may well be, but he is to be presumed to know and to have an account of all the sums of money he did receive, and as to those it may, I think, well be assumed that he or his counsel can readily anticipate which of them may be claimed to be in whole or in part taxable as income. I do not think that, practically, the defendant is in any danger of being surprised upon the trial by the attempted proof on the part of the government, through misinformation or otherwise, of the receipt of moneys, during the periods in question, which he did not, in fact, receive. If such proof should be offered, it would seem to be a matter easily defended against, or in the event of a genuine case of surprise of this kind, the defendant would not be without relief, as the trial can be delayed for the production of the necessary proof on his part. So as to the other points suggested, that may possibly arise, as, for instance, conflicting claims between the parties, as to what part, if any, of moneys received are taxable as income, or what deductions might be properly made; while a full bill of particulars, if in the power of the government to give it, might save considerable trouble and labor to the defendant and his counsel in preparing for trial, it seems not to be so necessary to prevent a surprise in meeting the case, that the government may put in evidence, that the defendant is in danger of injustice from the want of such a bill. On the other hand, the proof is that the plaintiff is, in fact, unable to furnish such a bill. Nor is it to be inferred from this fact, admitted by the district-attorney, that the suit is a mere fishing suit, brought for a general inquisition into the private affairs of the defendant, as suggested by the learned counsel for the defendant, who urge that the court should, by granting this motion, discountenance such a suit. As pointed out above, a plaintiff may have credible information which fully justifies an action, though that information be not such as enables him to make a bill of particulars. And it is not the office of a bill of particulars merely to discover the evidence on which a plaintiff relies, or the information on which his action is brought. The court must assume as to all parties before it, whether plaintiff or defendant, until the contrary appears, that they are acting in good faith, and that their pleadings, which are in the proper and accustomed form, are not frivolous nor intentionally false, but are intended to bring to trial the claim or defence set forth therein. That presumption holds as to the parties to the present action; and, moreover, in respect to the plaintiff, the complaint being made on its behalf by a sworn officer of the government, it must be further presumed that what he has done, he has done rightfully, in the due course of his official duty, and under the responsibility of his oath of office, upon the information presented to him. And while, of course, no deduction adverse to the truth of defendant's answer is to be drawn from this fact, yet this presumption in favor of the regularity of official conduct, would prevent the court from drawing the inference claimed by defendant's counsel from the alleged inability to furnish a bill of particulars, since such inability is not necessarily inconsistent wth good faith in bringing and prosecuting the plaintiff's action.

I have not found it necessary to consider whether, if the defendant were otherwise entitled to a bill of particulars, the motion should be denied on the ground of delay in applying for it, or because at the last April term of the court the defendant's counsel, when the case was called for trial, answered that they were ready, and would prefer to go to trial, but yielded to the district-attorney's application for delay, that he might have the opportunity to file a bill of discovery in the circuit court, a fact within the knowledge of the court, though not stated in the affidavits. It would seem that the position then taken by counsel was inconsistent with the advice now given by them to the defendant, and in such a case perhaps it should be shown that since the case was declared to be ready, some further information received, or at least some new view taken by counsel, suggests a danger in going to trial, not before seen. But however this may be,—and this difficulty, if real, might be obviated by further affidavits,—I prefer to put the decision of the motion on the grounds above stated.

I have also disregarded the alleged misconduct of one of defendant's counsel, which I do not think has any relevancy to this motion.

Motion denied.

Case No. 16,522.

UNITED STATES v. TILDEN.

[10 Ben. 566;[1] 25 Int. Rev. Rec. 352.]

District Court, S. D. New York. Oct. 31, 1879.

DEPOSITIONS DE BENE ESSE — PRODUCTION OF BOOKS AND PAPERS.

A witness examined de bene esse under Rev. St. U. S. § 863, may be compelled to produce books and papers in his possession which would be material and competent evidence for the party calling him, upon the trial of the cause, but he cannot be compelled to produce his books and papers merely for the purpose of refreshing his memory.

[Suit by the United States against Samuel J. Tilden to recover money alleged to be due as taxes on income.]

S. L. Woodford, U. S. Dist. Atty., and S. B. Clarke, Asst. U. S. Dist. Atty.

Wm. Allen Butler, for witness.

CHOATE, District Judge. On the 28th day of October, 1879, the district attorney took out a subpœna duces tecum directed to James B. Colgate, requiring him to attend on the 29th day of October, at 9 o'clock a. m., before a circuit court commissioner, named therein, to give evidence de bene esse in this cause on the part of the plaintiff, and requiring him also to have with him books and papers described as follows: "All and singular, the books, papers, writings and documents now in your custody or under your control, which show or in any manner relate to any gains, profits or income, made, gained, had, derived or received by, for, or on account of Samuel J. Tilden, the defendant, at any time between the first day of January, 1862, and the 31st day of December, 1871." This subpœna was issued from the clerk's office upon the filing of an affidavit of one H. H. Mason, that he knew the said Colgate and that on the 28th day of October, 1879, the said Colgate told him that he was going to Europe in a few days. On the 29th of said October, at the hour named, the said Colgate appeared before the commissioner and his examination de bene esse was proceeded with, the attorneys of both parties to the suit attending. He testified that during the period named in the subpœna his firm of Trevor & Colgate had some transactions with the defendant in the buying and selling of stocks; that they bought and sold stocks on defendant's orders; that he did not remember any particular orders; that he thought it probable and had no doubt that they had such transactions for the defendant in the stocks of the Pittsburgh, Fort Wayne & Chicago Railroad Company during the said period, but that his recollection was not clear; that he had no recollection as to the number of shares purchased or sold; that he did not recollect any such transactions in any other stock but had no doubt there were others. The witness was asked whether the stock was purchased for the defendant alone or for him in connection with somebody else, and he answered that he should have to refer to his books to find out He was asked what books he had got by which he could refresh his memory on that subject, and he answered, the books of that date, if they could be found; that he presumed the ledgers would be the principal books and that he presumed that there were other books that might throw light on the subject, the cash books; that these were the only books he knew of to refresh his memory by; that these, the ledgers and the cash books, were the principal ones. Being further examined as to the books required for this purpose of refreshing his memory, he said that he could refer from one book to another, and that he could not tell what books he would want until he got at it. He testified that he kept books that might be called daily blotters, and which he called cash books; that he did not know whether he kept books called daily blotters; that he did keep books called cash books, and journals, memorandum books, in which purchases and sales of stocks were originally entered. All the foregoing questions related to books kept in the years 1862 to 1871, inclusive. He further testified that he did not know whether the books above referred to had been preserved; that if he was going to search for them he would look in the attic; that all such books, if preserved, were kept in the custody of his present firm of James B. Colgate & Co., successors to Trevor & Colgate. Being asked whether the defendant advanced any money for the purchase of the Fort Wayne, etc., stock above referred to, he answered that he could not tell without examining his books; that he presumed he did; that if his firm purchased any of said stock in which the defendant was interested, it was about the time of a reported lease of the railroad in the year 1869. Being asked if his firm sold at a profit any of this stock in which the defendant was interested, he said he could answer the question after an examination of his books; that he could not answer it now. At this stage of the proceedings the plaintiff's counsel requested the witness to produce all the ledgers, journals, memorandum books of the purchase and sale of stocks and daily blotters, cash books and check books which relate, in any way, to the purchase and sale of certain specified numbers of shares of the stock of the Pittsburgh, Fort Wayne & Chicago Railway Co., giving certain dates between March 4th and April 3d, 1869, with a certain number of shares for the several dates. The proceeding was then adjourned to October 30th, 10 a. m. On the morning of October 30th, 1879, the district attorney took out another subpœna duces tecum directed to the witness and requiring him to appear before the same com-

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missioner on the 30th of October, at 10 a. m., as a witness on behalf of the plaintiff, and to have with him books and papers described as follows: "All and singular, the daily blotters, memorandum books of the purchase and sale of stocks, journals, cash books, check books and ledgers kept by or for the firm of Trevor & Colgate during the period commencing on the 1st day of January, 1869, and ending on the 31st day of December, 1869, now in your custody or under your control, and all books, papers, writings and documents now in your custody or under your control, which show or in any manner relate to the purchase and sale of, and the disposition of the proceeds of the sale of the following numbers (or thereabouts) of shares of the stock of the Pittsburgh, Fort Wayne & Chicago Railway Company, purchased on or about the following dates," giving the same dates and numbers of shares given in the foregoing request to produce.

The witness attended at the time to which the proceeding had been adjourned and the counsel for both parties appearing, his examination was resumed. He admitted that he had been served with the subpœna last referred to, and declined to produce the papers referred to therein under advice of counsel, denying the right to compel their production. At the request of the district attorney the counsel for the plaintiff and the witness appeared before the court, and argument was heard on the question whether the witness was bound to produce the papers described in the second subpœna.

No objection has been taken to the shortness of the time allowed for the production of the books and papers, nor to the sufficiency of the preliminary proof by affidavit on which the subpœna was issued. The district attorney conceded on the argument that the books and papers were required, not because they are competent evidence in the cause, but because they are necessary for the purpose of refreshing the recollection of the witness in respect to facts pertinent to the issue in the cause. It is conceded that the books of the witness could not be used as evidence in the cause.

It is insisted on behalf of the witness: (1) that under Rev. St. § 863, the court has no power to compel by subpœna duces tecum the production of books and papers of the witness upon an examination de bene esse before trial; (2) that if such production can be compelled at all, the proceedings must be according to the provisions of the New York Code of Civil Procedure, which requires by section 867 for such production of books by a witness upon a trial or hearing, special application to and order of the court and a notice of a given number of days; and (3) that if in any case under Rev. St. § 863, a subpœna duces tecum will issue, it will not issue to require the production of books and papers merely to refresh the recollection of the witness upon his examination.

1. Upon the first point it is argued that the court has no power in the premises except what is given in Rev. St. § 863; that this only provides that in the cases specified, a person may be compelled to appear and testify; that this section contains no provision authorizing the party taking the deposition to require the production of books or papers; that in sections 868–870, regulating the taking of depositions under a commission issued by a federal court, special provisions are made for the production of books and papers by the witness upon proof to the satisfaction of the court that a necessary case exists therefor; that it is unjust and oppressive to require a third party, having no interest in the suit, to produce upon the mere call of one of the parties by a subpœna, any or all of his private books of account and papers, often to his great inconvenience, the derangement of his business and possible injury from the exposure of his private business affairs. Attention is called to the fact that among the magistrates before whom the witness may be thus summoned, are notaries public and some other officers having little or no judicial character or experience, and that, by the settled construction put on this and similar laws for the taking of testimony out of court, the magistrate taking the same has no discretion as to the reception or rejection of testimony, but must take whatever is offered, thus greatly increasing the risk of injury to the witness and his affairs. And this argument, from the inconvenience of the thing, is urged as a reason for the strict construction of this section in this particular and against a construction which would involve these mischiefs. It is further argued from the careful provisions of law designed to protect parties from an improper inspection of books and papers, that no such right to require the production of those of a witness in this loose way and without special proceedings for that purpose can exist, the argument being that it cannot have been intended that indifferent third persons, having no interest in the controversy, shall have less protection in this respect than parties to suits.

The question is one of great importance and no decisive authority is cited on either side. In the case of Ex parte Peck [Case No. 10,885], Judge Betts expressed a doubt whether upon the examination of a witness de bene esse under the 30th section of the judiciary act of 1789 [1 Stat. 73], of which Rev. St. § 863, is a re-enactment, there was any power to compel the production of books and papers. The case did not call for a decision of this point. I have given the question as full consideration as a very limited time for examination will allow, and have reached the conclusion that under this section it is competent for the court to issue a subpœna duces tecum to compel the production, upon the examination, of books and papers which would be competent evidence in the cause.

This provision for the examination of wit-

nesses de bene esse before the trial, first enacted in the act of 1789, has been said to be a novelty in legislation. Until a statute of the first year of William IV. (1831), there was no English act of general application giving parties in common law actions this relief against the probable loss of testimony from the absence or death of witnesses. Prior acts, beginning in the reign of George III., gave partial relief, limited mostly to the taking of testimony of persons in the remote colonies or dependencies of the realm. Prior to this more recent statute, the courts of common law, impressed with the hardship and injustice resulting from such loss of testimony, forced parties to consent to the taking of testimony by postponing causes, refusing to enter nonsuits or judgments in case such consent was unreasonably declined, and by other like rude devices. The power to issue commissions for the taking of testimony of witnesses, except in foreign countries, had a very limited application within the kingdom and afforded no sufficient protection against this evil. See the English cases and statutes; 2 Phil. Ev. (4th Am. Ed.) p. 843 et seq. In New York it was not till after this enactment by congress that any such statute was passed, but the practice in substantial conformity with the statutes afterwards passed was recognized as proper, independently of any statutory authority. See Mumford v. Church, 1 Johns. Cas. 147; Sandford v. Burrell, Anth. N. P. 250; Jackson v. Kent, 7 Cow. 63; Wait v. Whitney, Id. 69. Indeed the first statute in New York is declared by the revisers to be founded on these early cases. 1 Rev. Laws, 455. The general course of proceeding was by a special application to the court and an order for the examination based on proof of the essential facts making the relief necessary, and not by the issue of a subpœna properly so called.

The purpose of this act of congress undoubtedly was to provide a convenient and effectual remedy for this possible failure of justice from the anticipated loss of material testimony, and also for the relief of witnesses living at such distance from the place of trial that they could not reasonably be required to attend in person, which reasonable limit of distance was fixed at a hundred miles, although it was probably competent for congress to authorize the summoning of a witness to attend the trial from any part of the United States. And the statute provided that "whenever the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of every such person may be taken de bene esse," etc. "Every person so deposing, as aforesaid, shall be carefully examined, etc., and sworn to testify the whole truth," etc. "And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court." 1 Stat. p. 88. It is impossible, I think, to escape the conclusion that the purpose of the statute was to give parties, in all substantial respects, the full benefit of the testimony of witnesses to material facts, whose testimony they were liable to lose from age, infirmity or departure from the country, and also of witnesses living at a greater distance from the court than one hundred miles, who, for their own convenience, were to be excused from attending. The statute thus debars the parties from calling into court witnesses residing more than one hundred miles from the place of trial, even though living within the jurisdiction and, but for the statute, within reach of the subpœna of the court. This extension of the provision to distant witnesses very clearly requires, as it seems to me, that a construction should be given to the statute which shall not substantially deprive the parties of the benefit of their testimony. And considering the very large proportion of civil causes in which the testimony of witnesses, respecting books and writings in their possession and material to be put in evidence on the trial, is absolutely essential to the proper enforcement of the rights of one party or the other, the statute would, as it seems to me, fail of its intended purpose and effect if the parties were debarred by it from the compulsory production by witnesses more than a hundred miles from the place of trial, of papers material as evidence in the cause. While the statute, as being in derogation of the common law, must be strictly followed as to the course of procedure prescribed by it (Bell v. Morrison, 1 Pet. [26 U. S.] 355), yet it must have a fair and reasonable construction, having regard to the particular purpose it was intended to subserve and the special evils it was designed to remedy. It is to be observed, also, that at the time of its enactment it was the only statute of the United States in force making any provision for the compulsory attendance for examination of witnesses out of court, to be used upon trials in the federal courts. The statute regulating the attendance of witnesses under examination on commission, and providing that the courts of the district in which they might be examined should compel their attendance, and the production by them in proper cases of books and papers (now Rev. St. §§ 868–870), was not passed till 1827, nearly forty years later. [4 Stat. 197.] And although this statute of 1789 declares that "nothing herein shall be considered to prevent any court of the United States from granting a dedimus potestatem to take depositions according to common usage when it may be necessary

to prevent a failure or delay of justice," yet I think it cannot be claimed that this proviso effectually supplied, or was understood by congress to supply, the defect in the statute for de bene esse examinations of witnesses beyond a hundred miles from the place of trial, and as furnishing other effectual means of compelling the production of material books and papers by such distant witnesses, since it was not till long afterwards that any statute was passed giving to the courts the power to compel such production of books and papers in case of witnesses examined under commission. There was one large class of causes, that might arise under laws relating to patents, contemplated from the beginning as liable to be pending in the federal courts, although no patent law had then been passed, to which this reasoning applies with special force. In another large and important class of federal causes, admiralty suits, which were clearly within the view of the framers of this law at the time of its enactment, this construction of the act is peculiarly necessary, since from the occupation of the witnesses they must be tried largely upon depositions. But the urgent necessity for this construction is by no means confined to any particular class of cases. The argument that a subpœna duces tecum is not named in the statute, nor the matter of the production of books and papers, is, I think, sufficiently met by saying that such mention was wholly unnecessary. The provision for compelling obedience on the part of the witness was in these words: "Any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court." It was for a long time considered doubtful whether this power of compulsion was conferred upon the magistrate who was empowered to take the examination or upon the court of the district in which the examination is taken. The latter view has prevailed. Ex parte Humphrey [Case No. 6,867]; Ex parte Peck [Id. 10,885]; Ex parte Judson [Id. 7,561]. The words "may be compelled in the same manner as to appear and testify in court," refer to the instrumentalities then in force in the common practice of the courts for compelling the attendance and the testimony of witnesses, the writ of subpœna and the power to punish disobedience to a lawful order as a contempt. This is the practical construction which these words have received. (Cases last cited.) The writ of subpœna duces tecum was, equally with the subpœna ad testificandum, and in certain cases the writ of habeas corpus ad testificandum, such an instrumentality in common use. The failure to mention it or to define the instrumentalities further than by a general reference, broad enough to include it, constitutes, as it seems to me, no valid argument for its intended exclusion, when the evident purpose of the act and the construction necessary for its beneficial operation are considered.

The argument, drawn from the comparison between section 863 and the sections of the Revised Statutes regulating the compulsory attendance of witnesses and their production of books and papers upon the examination, would have great weight if they were contemporaneous statutes. If these other provisions had been contained in the judiciary act of 1789, it could be argued with great force that this especial provision for producing books and papers in the one case and the omission of such provision in the other, showed an intention to discriminate between the two cases in this particular. But, as pointed out above, these provisions are enactments of forty years later, when it appears to have been found necessary to supply, in case of examinations under commissions, this very power to compel compliance on the part of the witness with the conceded right of the party to take his testimony. It would seem that the beneficial and convenient exercise of the power to examine witnesses de bene esse, under the act of 1789, had been so generally availed of that it was not till 1827 that congress was called upon to pass an act giving like powers in this other class of examinations. The terms in which the power is granted are more in detail than in the old statute, and certainly some valuable safeguards against the abuse of the power are embodied in the statute itself. But it seems to me that this furnishes no reasonable aid in the construction of that part of the earlier law now in question; that is to say, as to what is meant by "the same manner as to appear and testify in court," except that the special provision for compelling the production of books and papers when material as evidence in the cause is an essential or important part of the relief intended to be given by such a statute. And it is to be observed, further, that the English act of 1 William IV. c. 22 (6 Eng. Rev. St. p. 849), above referred to and passed in 1831, contained a similar provision to that in the act of congress of 1827, for the production upon the examination of books and papers.

I have not overlooked the possible inconveniences and dangers to the private and business interests of witnesses, so strongly urged as a reason for excluding the construction which allows the issue of a subpœna duces tecum in such a case. But while the law jealously protects private books and papers from unreasonable searches and seizures, and from unnecessary exposure, even when necessarily produced in court, yet the principle is equally strongly held that parties litigant have the right to have private writings which are competent for proof in their causes produced in evidence; and to this imperative demand of justice, all scruples as to the confidential character of the writings as private property, except in certain well-ascertained

exceptions growing out of professional employment, must yield from considerations of public policy. The argument has gone largely upon the terms of this statute, as it now exists, in the Revised Statutes, which extends the power to take these depositions to all notaries public. It must be admitted that this extension increases the possibility of inconvenience and perhaps of positive injury in the operation of the statute; but the question is to be determined upon the act of 1789, which has not, in the particulars under discussion, been materially changed, and which conferred the power only on a justice or judge of the United States, a chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, all being judicial officers of considerable experience, except mayors of cities, who, at the time the act was passed, might certainly be presumed to be persons of great intelligence and experience in the conduct of business, and, at that time, very few in number. Congress, in extending the class of examining officers for reasons of public convenience so as to include notaries public, seems not to have appreciated highly the supposed greater dangers to which witnesses might be thereby subjected. And perhaps it was regarded as a sufficient protection against the abuse of this process, that the courts of the United States have full power by general rules, or special orders in the absence of general rules, to check and guard against the abuse of the processes of the court. Thus, if this power of subpœnáing witnesses to produce books and papers were found to be used oppressively upon witnesses, it would seem to be competent for the courts to prevent it by requiring by their rules a compliance with reasonable conditions as to the preliminary proof of the necessity for the production of the books and papers and of their materiality as evidence is the cause.

2. The claim made on behalf of the witness that no subpœna duces tecum can issue except under the provisions governing the practice in the New York Code of Civil Procedure, seems to rest wholly on Rev. St. § 914, assimilating the practice of the courts of the United States, in civil causes other than cases of equity and admiralty, to the practice in the state courts. This section has been held not applicable to matters specially regulated by act of congress, as this matter of depositions de bene esse appears to be. Beardsley v. Littell [Case No. 1,185].

3. Finally, it is objected that no subpœna duces tecum will issue merely to compel the production of books and papers to be used on the examination to refresh the recollection of a witness. Books and papers are, as matter of practice, constantly used in court upon the examination of witnesses for the purpose of refreshing their memory. In some cases, it may well be that this opportunity to refresh the memory of a witness called in a cause may be of great value to a party. But it certainly is a startling and I believe a novel proposition, that a merchant or broker or banker may be subpœnaed to produce all his books of account and all his business papers during a period of ten years, as was substantially attempted in this case, upon a mere possibility that out of this mass of books and papers some might be found whereby he could refresh his memory, if it should, upon his examination, appear that his memory needed refreshing on some point on which he should prove to be able to give testimony competent in the cause. No precedent is produced for this exercise of power, nor has any statute or decision been found or cited which appears to recognize or authorize the compulsory production of books and papers for such a purpose, the same not being relevant or material to the cause. While there is a possibility of failure of justice in special cases from an inability to resort to this means of refreshing the memory of a witness, it seems to me clear, that this evil is not of so substantial importance as to require a construction of this statute so extremely liberal in favor of parties litigant and so inconvenient and oppressive to witnesses and so beyond all precedent in the practice of examining witnesses out of court. It has been well pointed out that in such examinations. on account of the limited power of the examining magistrate, persons summoned for such examination have less chance of protection against the oppressive and injurious use of this power of the court than upon a trial in court where all questions arising can be submitted to and decided by the court as they arise. And I am satisfied that the statute in question does not require a construction permitting such a compulsory production of a witness's books and papers. A very strong if not a controlling argument in support of this view, is to be drawn from the terms of the statute of 1827, above referred to. In providing for the regulation of this very matter in examinations under a commission or dedimus potestatem, it expressly limits the compulsory production of books and papers to such only as would be "if produced, competent and material evidence for the party applying therefor." This is a legislative declaration of the highest possible character, as it seems to me, that this was as far as the policy of the law goes in the matter of compelling the production of books and papers on the examination of witnesses out of court, and all that substantial justice requires in this direction, having a due regard to the rights, the convenience and the interests of other persons as well as of the parties litigant. No reason can well be imagined for supposing that congress would withhold from this class of examinations under commission, where the commissioners are appointed by the court and the mode of interrogation is prescribed before the examination under the direction of the court itself, as full an authority to compel the production of books and papers by the witness as

is allowed on an examination de bene esse, which is subject to less restriction and supervision. This act, therefore, seems to show that congress understood that this was the limit allowed for the compulsory production of books and papers under the system of examinations de bene esse then in force.

The circumstance that in supposable cases there may be even a serious failure of justice by reason of the inability of a court to exercise a certain power, is not in itself the test of the existence of that power. The question always is, does the statute, fairly construed, having in view its purpose and its effect, authorize the exercise of the power? Our machinery for administering justice is not and must not be expected to be found absolutely perfect in its operation. There are cases of hardship and possible injustice, not provided for; and whether or not they can be properly provided for with a due regard to all other public and private interests entitled to be considered in connection with any proposed alteration of the law, is, of course, exclusively a question for the legislature and not for the courts.

It must be held, in this case, that there was no authority to compel the production of the witness's books and papers merely to refresh his memory, and for this reason his refusal to produce them is sustained.

Case No. 16,523.

UNITED STATES v. TILDEN.

[21 Law Rep. 598; 1 West. Law Month. 163.]

Circuit Court, D. Massachusetts. 1859.

OFFENCES AGAINST POSTAL LAWS—CARRYING LETTER NOT IN MAILS—INFORMATION—RIGHTS OF INFORMERS—PENAL STATUTES.

1. An information under the post office act of 1845 (5 Stat. 736), for carrying a letter out of the mail, need not negative the fact that it was stamped. The act of 1852, which allows stamped letters to be so carried, merely furnishes matter of defence.

2. Where a statute creates a new offence, and affixes a specific pecuniary penalty, appropriating one half thereof to the informer, it adopts, by implication, those remedies by which alone the informer can sue.

3. Although, in the absence of an informer, the government may have judgment for the whole, yet this does not authorize a proceeding by indictment.

This was an indictment [against Francis Tilden], founded on the 10th section of the post office act of March 3, 1845 (5 Stat. 736). The first count, to which the others were similar, was as follows:

"The jurors of the United States of America, within and for the district aforesaid, upon their oath, present that Francis Tilden, of Easton, in said district, railroad conductor, on the eighteenth day of April, in the year one thousand eight hundred and fifty-seven, then and there being the conductor of a certain railroad car, and then and there having the charge thereof at the time, and not then and there being the owner thereof, in whole or in part, said car then and there performing regular trips, at stated periods, on a post-route, to wit,—on a certain railroad then and there made and completed, called the 'Easton Branch Railroad,' and on one other certain railroad then and there made and completed, called the 'Stoughton Branch Railroad,' and on one other certain railroad then and there made and completed, called the 'Boston and Providence Railroad,'—did, after the third day of March, in the year one thousand eight hundred and forty-five, to wit,—on the eighteenth day of April, in the year one thousand eight hundred and fifty-seven, on said railroad car, then and there performing regular trips as aforesaid over the said railroads as aforesaid, the same then and there being post-routes as aforesaid, he, the said Tilden, then and there having charge at the time of said car,—transport and convey a certain letter otherwise than in the mail, on said post-routes from the said town of Easton to the said city of Boston, said letter then and there being mailable matter, and not then and there being a newspaper, pamphlet, magazine, or periodical, and not then and there relating to any article at the same time conveyed in and by said railroad car, whereof the said Tilden was then and there conductor, and then and there had charge as aforesaid."

The defendant moved to quash the indictment, for causes stated in the opinion of the court.

C. T. Russell, for the motion.

Mr. Woodbury, Dist. Atty., contra.

CURTIS, Circuit Justice. The objection that the indictment should have negatived the fact that the letter transported by the defendant bore a stamp, cannot be sustained. The act of August 31, 1852, § 8 (10 Stat. 142), which allows stamped letters to be carried out of the mail, does not repeal any part of the enacting clause on which this indictment is founded. Its true office is to engraft on the existing law a clause in the nature of a proviso, which may furnish matter of defence, but need not be noticed in an indictment. The case cannot be distinguished from that of The Aurora, in 7 Cranch [11 U. S.] 382, where one act inflicted a forfeiture, and a subsequent act provided that it should not be inflicted if the property belonged to a citizen of the United States. It was held to be unnecessary to negative the citizenship of the owner, it being matter of defence to be shown by him. See, also, Two Hundred Chests of Tea, 9 Wheat. [22 U. S.] 430; Com. v. Hart, 6 Law Rep. (N. S.) 79.

The other objection is that only an action or information for the penalty lies, and not an indictment. The 10th section, on which the indictment is rested, after declaring that it shall not be lawful for certain persons to do certain acts, enacts that one class of persons, of whom the defendant is alleged to be one, "shall forfeit and pay in every such case of offence, the sum of fifty dollars." The 17th

section provides "that all pecuniary penalties and forfeitures, incurred under this act, shall be one half for the use of the person or persons informing and prosecuting for the same, and the other half to the use of the United States." It is laid down by Mr. Justice Story in Ex parte Marquand [Case No. 9,100], that at common law, wherever a penalty is given, and no appropriation or method of recovery is prescribed by the act, an action or information of debt lies, and not an indictment. Though he does not so qualify the proposition in terms, he was speaking of a case where the statute alone prohibited the act, which was lawful before, and at the same time annexed a pecuniary penalty as the only punishment for its commission. In such a case Rex v. Malland, 2 Strange, 828, is in point, and I am not aware that it has been overruled. But it is not necessary to determine this case upon that ground. It has been settled since Castle's Case, Cro. Jac. 644, that when a statute creates a new offence, and appoints a specific remedy, by a particular method of proceeding, that method and no other must be pursued. And accordingly, when a statute creates a new offence, and affixes a specific penalty, one half to be to the use of the king, the other half to the use of any such person as will sue for the same by writ, &c., no indictment lies. Rex v. Wright, 1 Burrows, 543. See, also, U. S. v. Simms, 1 Cranch [5 U. S.] 252; Wiley v. Yale, 1 Metc. (Mass.) 553; Rex v. Robinson, 2 Burrows, 803. This statute creates a new offence and affixes a specific pecuniary penalty; it also appropriates that penalty, one half to the United States, and one half to the use of the person informing and prosecuting for the same. It does not declare how the informer is to prosecute for the same. Nor was it needful to do so; because it was already a part of our law, that when a statute gives part of a penalty to any one who will sue for the same, an action or information of debt is the proper remedy. Bac. Abr. tit. "Actions Qui Tam" (A); Chit. Pl. 112. When, therefore, this statute appropriates one half the penalty to the use of him who informs and prosecutes for the same, it does, in effect, by a necessary implication, adopt those particular remedies which appropriately belong to the common informer, and by which alone he can prosecute for the same.

It is true that if no informer does prosecute, the attorney of the United States may have a judgment for the entire penalty to the use of the United States. 2 How. P. C. c. 25, § 20; Rex v. Hymen, 7 Durn. & E. [7 Term R.] 536; Com. v. Howard, 13 Mass. 221. But whether the information name an informer or not, only affects the mode of rendering the judgment; the absence of an informer does not authorize a change in the nature of the remedy, and the substitution of one not contemplated by the legislature.

Let an order be entered to quash the indictment.

Case No. 16,524.

UNITED STATES v. TILLOTSON et al.

[1 Paine, 305.] [1]

Circuit Court, D. New York. Sept. Term, 1823.[2]

PRINCIPAL AND SURETY — RELEASE OF SURETY — ALTERATION OF CONTRACT — CONTRACTS BY WAR DEPARTMENT—POWER OF AGENT.

1. Sureties are exonerated from their responsibility by any agreement, without their consent, between the creditor and principal, which varies essentially the terms of the contract.

[Cited in U. S. v. De Visser, 10 Fed. 658; U. S. v. Campbell, Id. 820; Minturn v. U. S., 106 U. S. 444, 1 Sup. Ct. 408.]

2. Such an agreement substituting tapia for brick, and altering the mode of estimation and price of labour in the construction of a fort, was held to discharge the sureties.

[Cited in Roman v. Peters, 2 Rob. (La.) 479.]

3. And it is immaterial whether such alterations be for the benefit or to the prejudice of the principal.

[Cited in U. S. v. Case, Case No. 14,743.]

4. Where an agent of the war department was empowered to make a contract, which reserved no right of ratification to the secretary, it was held complete and binding without such ratification.

5. One made a contract with the war department to build a fort, in which it was agreed that advances should be made, in part payment of the work, for materials delivered with the invoice at the fort, and pronounced by the engineer of proper quality, and at the end of each month for the work performed. Large advances having been made, the contract was assigned, and the assignee gave a bond with sureties to account for "advances under and by virtue of the contract." The sureties were held entitled to the benefit of all the limitations provided in the contract, and not answerable for advances made where such limitations were dispensed with, whether the advances were made before or after the making of the bond, the sureties not appearing to have known how such advances had been made.

6. The bond provided that the principal should account "for all such further advances as might thereafter be made to facilitate the execution of the contract." This was held to mean such advances only as were provided for by the contract, and with the same limitations and restrictions.

7. Advances made under such a contract are not a purchase of the materials delivered so as to vest the property in the United States, but it remains unchanged.

8. Where the contracting parties modify the contract so that the rights of the obligor in some particulars are materially varied, it becomes a new contract as it regards the sureties, to which their undertaking does not extend.

9. Whether the death of the principal before the time for the completion of the work had expired put an end to the contract above described and discharged the sureties? Quere.

10. But it seems that they were discharged by the refusal of the war department to suffer the administrator of the principal to proceed to complete the work.

11. Whether the appropriation by congress of only 30,000 dollars to complete the fort, when 690,000 dollars were required, authorized the

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Reversed in 12 Wheat. (25 U. S.) 180.]

contractor to suspend the work before the appropriation was exhausted, and discharged the sureties? Quere.

[Cited in U. S. v. Hall, Case No. 15,281.]

This was an action of debt on bond.

The bond declared on was executed by Samuel Hawkins, as principal, and the defendants [Robert Tillotson and Nicholas Gouverneur], as his sureties, on the 2d of November, 1819, and was in the penal sum of 150,000 dollars, with the following condition:

"Whereas the late Benjamin W. Hopkins, of the state of Vermont, did, on the 13th day of May, 1818, enter into a contract with General Joseph G. Swift, then chief engineer of the United States, well and truly to construct, or cause to be constructed, at such place, in the vicinity of Mobile Point, in the state of Alabama, as the United States, by any engineer, might direct, a fort, to be constituted of such walls, ditches, embankments, buildings, parts, and dimensions, as the said engineer might, from time to time, prescribe, and to construct the same of such materials and in such manner, as should be prescribed by such engineer, as by the said contract, (reference being thereunto had,) may more fully and at large appear. And whereas, also, the said Benjamin W. Hopkins hath lately died intestate, without having completed said contract, by reason whereof the obligation of performing the said contract, on the part of the said Benjamin W. Hopkins, deceased, has devolved upon the person or persons who may be authorized to administer the personal estate of the said intestate: and whereas further, Roswell Hopkins, father of the said Benjamin W. Hopkins, has taken upon himself the burthen of administering the personal estate of the said Benjamin W. Hopkins, having first been duly appointed administrator thereof. And whereas the said Roswell Hopkins, administrator as aforesaid, hath, by an instrument in writing, under his hand and seal, dated the 27th day of October, 1819, obligated himself legally and fully to assign, transfer, and set over to Samuel Hawkins, of the city of New-York, the said contract, together with all its conditions, stipulations, and advantages thereunto in any wise appertaining; and also all the benefits arising and to arise from the contracts entered into and made by the said Benjamin W. Hopkins, in his lifetime, with various individuals for work and labour, and for furnishing materials, &c. in and about the construction of the said fort, together with all and singular the brick-yards, work-shops, sheds, lumber, and buildings of every description, tools and implements, provisions, mules, slaves, storehouses, horses, carriages, boats, vessels, iron, goods, and merchandises, and all other things provided by the said Benjamin W. Hopkins for the fulfilment of the contract so made by him as aforesaid. Now the condition of this obligation is such, that if the said Samuel Hawkins shall well and truly perform, or cause to be performed, all the covenants, undertakings, and engagements contained in the said contract so made as aforesaid by the said Benjamin W. Hopkins, in his lifetime, for the construction of the said fort, which remains to be fulfilled, and shall also well and faithfully account to the war department of the said United States, for all sums of money heretofore advanced by the said United States, under and in virtue of the last mentioned contract, and also for all such further advances as may hereafter be made to facilitate the execution of the said contract; then this obligation to be void, otherwise to remain in full force and effect."

The contract referred to in the condition of the bond as made between the war department and Benjamin W. Hopkins, was as follows:

"This agreement or contract, made and concluded this 13th day of May, 1818, by and between Joseph G. Swift, chief engineer, on the part of the war department of the United States, on the one part, and Benjamin W. Hopkins, of the state of Vermont, of the other part, witnesseth—That the said Benjamin W. Hopkins, will, for the consideration hereinafter stated, well and truly construct, or cause to be so constructed, at such place, in the vicinity of Mobile Point, Alabama, as the United States, by any engineer may direct, a fort, to be constructed of such walls, ditches, embankments, buildings, parts, and dimensions, as the said engineer may, from time to time, prescribe; and the said Benjamin W. Hopkins will well and truly furnish all materials of such quality, and all artisans, labourers, and workmanship, requisite for the construction of the fort aforesaid, as may be prescribed by the said engineer, and the whole workmanship and materials to be executed and found by the said Benjamin W. Hopkins. And the said Benjamin W. Hopkins will grout, or cause to be grouted, all the walls of the said fort. And that the construction of the said fort shall be commenced by the said Benjamin W. Hopkins on or before the first day of November, 1818; and that the said fort shall be completed, or caused to be completed, by him, the said Benjamin W. Hopkins, by the first day of July, 1821. And the said war department, by Joseph G. Swift aforesaid, will well and truly pay, or cause to be paid, unto him, the said Benjamin W. Hopkins, for the workmanship and materials aforesaid, as follows: That is to say—for every cubic yard of earth excavated and removed as aforesaid, eighty-three cents and eight tenths of a cent; for every cubic yard of brick masonry, eleven dollars; for all carpentry where joists or scantling may be used of dimensions not exceeding in measure ten by ten inches breadth and

thickness, sixty-two cents and one half of a cent per yard, running measure; for all carpentry where joists of dimensions smaller than six inches by eight inches breadth and thickness may be used, forty-four cents per yard running measure; for all flooring with two inch stuff, two dollars and twenty-five cents per square yard; for all flooring with three inch stuff, three dollars and fifty cents per square yard; for all double doors, five dollars and fifty cents per square yard; for all windows, including frames, shutters, sash and glazing five dollars and fifty cents per square yard; for all bunks and ceilings, one dollar and twenty-five cents per square yard; for all wainscoting, thirty-seven and a half cents per running yard; for all iron work, twenty-five cents per pound. And the said Joseph G. Swift, on the part of the United States as aforesaid, will pay or cause to be paid unto him, the said Benjamin W. Hopkins, the amount of value of every cargo of materials, which the engineer aforesaid may pronounce to be delivered of proper quality, at or near the said Mobile Point, for the construction of the fort as aforesaid, the said value and amount to be considered in part payment of the work aforesaid; provided always, that the said Benjamin W. Hopkins shall and do deliver to the said engineer the invoice of the materials so delivered as aforesaid. And the said Joseph G. Swift, on the part of the United States as aforesaid, shall and will pay, or cause to be paid, unto the said Benjamin W. Hopkins the sum of twelve thousand and five hundred dollars, if demanded, at the close of every month, after the work shall have been commenced; provided always, that the said work so done at the close of every month as aforesaid shall amount to twelve thousand five hundred dollars, exclusive of the materials used in the construction of the said work. It is clearly understood by this agreement or contract, that the work shall be executed agreeably to the orders and to the satisfaction of the said engineer or engineers, whom the government may appoint to direct or superintend the works as aforesaid. Also it is understood by the parties hereunto, that all walls of masonry shall be estimated in measurement, by their actual length, breadth, and thickness. This agreement or contract shall be considered binding upon both parties hereunto subscribing, as soon as the secretary of war shall have signified in writing hereupon, his approval of the securities given for the faithful execution of this agreement. It is also understood, that at least thirty thousand cubical yards of masonry will be constructed, and at least one hundred thousand cubical yards of earth will be excavated and removed, in constructing the fort as aforesaid. In witness whereof, the parties have hereunto set their hands and seals, the day and year first above written. Signed, sealed, and delivered in the presence of C. Vanderventer, Geo. Blaney. (Signed) J. G. Swift, Ch. Engineer. B. W. Hopkins."

The following breaches of the condition of the bond were assigned in the declaration. First. That Hawkins did not perform, or cause to be performed, all the covenants made by Hopkins in said contract, which remained to be fulfilled at the making of the bond, inasmuch as Hopkins had agreed that the fort should be completed by the 1st of July, 1821, which was not done, although an engineer was ready at the place to give the requisite directions. Secondly. That the plaintiffs, before the execution of the bond, had paid to Hopkins, under the contract, 90,907 dollars 29 cents, of which Hawkins had notice, but failed to account for it to the war department, except as to 5,902 dollars 3 cents. Thirdly. That the plaintiffs, after the execution of the bond, advanced, at different times, several sums of money to Hawkins to facilitate the execution of said contract; yet that Hawkins had failed to account therefor to the war department, except as to 3,304 dollars 46 cents. Of all which matters the defendants had notice.

The defendants pleaded the general issue, accompanied with notice of special matter, to be given in evidence at the trial.

The cause was not tried; but by arrangement, a bill of exceptions was taken by the plaintiffs to a supposed charge of the court, directing the jury to find for the defendants, in the same manner as if a trial had actually taken place. In order to obtain the opinion of this court upon the points of law arising on the bill of exceptions, a case was agreed upon containing the following facts: Benjamin W. Hopkins began, under the superintendence and direction of an engineer, as provided for by his contract, to construct a fort on Mobile Point, at the place for that purpose designated, according to said contract, and received from the plaintiffs, through their agents, at different times, the sum of 90,907 dollars 29 cents, as appeared from exemplifications of his receipts in the treasury department, and a transcript of Hawkins's account as settled at the treasury. In this account he was credited with work which Hopkins had performed to the amount of 5,902 dollars 3 cents. On the 9th of August, 1819, Hopkins died, without having done any work on the fort, except that for which credit was so given. After Hopkins's death, Hawkins became the lawful assignee of his contract; and after the execution by Hawkins of the before-mentioned bond, he was always admitted and acknowledged by the plaintiffs, or those acting in their behalf, as the lawful assignee, or substitute, of Hopkins, in relation to said contract, and the performance thereof, on his part. Hawkins, after the assignment to him of Hopkins's contract, entered upon the performance thereof, under the superintendence of an engineer, and received several sums of money from the plaintiffs, as appear-

ed by his receipts and account exemplified from the treasury department. In March, 1821, he died, without having completed the fort, and before the time for its completion had expired, having performed no work, nor done any thing else in regard to the erection of the fort, except to the amount of 3,304 dollars 46 cents, for which he was credited in his said account, in different items. Neither Hopkins nor Hawkins ever accounted for the monies received by them, except by the account before referred to. On the 7th of June, 1820, while Hawkins was proceeding in the execution of the contract, Colonel James Gadsden, then acting as the agent for fortifications at Mobile Point, and thereto duly authorized by the war department, entered into a new agreement, or contract, with him, touching the contract with Hopkins, and the erection of the fort, which new contract was in the following words:

"Memorandum of an agreement entered into and concluded this seventh day of June, in the year of our Lord one thousand eight hundred and twenty, at Mobile Point, in the state of Alabama, by and between Captain James Gadsden, of the engineer corps of the United States, in pursuance of instructions of the secretary of the war department of the United States, on the part of the United States, of the first part, and Samuel Hawkins, of the second part, witnesseth: That whereas the late Benjamin W. Hopkins did, on the thirteenth day of May, in the year of our Lord one thousand eight hundred and eighteen, make and enter into an agreement or contract, with Joseph G. Swift, agent, and acting on behalf of the United States, to erect, build, and complete, a fortification for the United States, at Mobile Point, which said fortification was principally, as to the revetment walls, to be built of brick; and for the erecting, building, and completion of which said fortification, the said Benjamin W. Hopkins was to receive eleven dollars per cubic yard for the mason work aforesaid, as will more fully appear by the aforesaid contract or agreement, executed by Joseph G. Swift and Benjamin W. Hopkins, as aforesaid, and now on file in the department of the secretary of war. And whereas the said Benjamin W. Hopkins died some time in the month of August, eighteen hundred and nineteen; and whereas Roswell Hopkins was duly and legally empowered, authorized, constituted, and appointed administrator of all and singular the rights and credits, goods and chattels, which were of Benjamin W. Hopkins, deceased, at the time of his decease; and whereas the said Roswell Hopkins did, on the twentieth day of November, eighteen hundred and nineteen, and on the second day of May, eighteen hundred and twenty, being thereto as administrator legally authorized, make over, assign, and convey, the said agreement or contract, entered into and executed as aforesaid, by Joseph G. Swift and Benjamin W. Hopkins, for a valuable consideration, to Samuel Hawkins, as will more fully appear, reference being had to the said assignments or conveyances, made and executed as aforesaid, by the said Roswell Hopkins, as administrator as aforesaid, to the said Samuel Hawkins; and whereas the said Samuel Hawkins, together with Robert Tillotson, and Nicholas Gouverneur, executed on the second of November, eighteen hundred and nineteen, a bond to the United States of America, in the sum of one hundred and fifty thousand dollars, for the true and faithful performance, by Samuel Hawkins, of all the covenants, undertakings, and engagements, entered into by Benjamin W. Hopkins, in the contract or agreement made by the said Benjamin W. Hopkins with Joseph G. Swift, as aforesaid; and whereas the party of the first part has received authority to substitute for the building, erecting, and constructing the revetment walls of the said fortification at Mobile Point, in the place of brick, a certain composition called tapia; the said tapia to be substituted for brick in such portions of the walls aforesaid, as shall be designated by the superintending engineer of fortifications at Mobile Point, which said tapia is a species of artificial stone, formed by a proper union, in equal proportions, of sharp sand, fresh lime, and oyster shells, with water sufficient to produce adhesion, provided the said Samuel Hawkins would consent to receive ten dollars per cubic yard, in lieu of the eleven dollars contracted to be paid to the said Benjamin W. Hopkins for each cubic yard of masonry. Now, therefore, it is agreed by the party of the first part and the said party of the second part, that such portions of the revetment, and other walls, of the said fortification to be erected at Mobile Point, as the engineer may designate, shall be constructed of tapia; the oyster shells to be broken up, and the composition, running it in the frames, and every necessary operation in the making and placing the said tapia in the revetment walls, is to be made, done, and executed, to the complete satisfaction of the superintending engineer of the fortifications to be erected at Mobile Point. The said party of the second part hereby relinquishes to the United States of America, all claims which he now has, or hereafter may have, in consequence of the assignment aforesaid by Roswell Hopkins, as administrator as aforesaid of the agreement aforesaid, between Joseph G. Swift and Benjamin W. Hopkins, for any lost time, as damages sustained by the said Benjamin W. Hopkins, in consequence of the United States of America neglecting to have an agent at Mobile Point in the fall of eighteen hundred and eighteen, to designate the site of the fortification to be erected at Mobile Point, or instruct the said Benjamin W. Hopkins what he, the said Benjamin, was to do. The said party of the second part hereby agrees, that the following shall be the construction of that part of the contract, entered into by Joseph G. Swift and Benjamin W. Hopkins, which relates to the excavation, viz. The eighty-three

and eight tenths cents allowed for each cubic yard of earth excavated and removed, applies to each cubic yard composing the remblais [3] in its finished state, embracing the several stages of excavation, removing, putting up, ramming, sodding, dressing, &c. and every thing necessary to complete the remblais; and that the monthly receipts for labour performed, in reference to this part of the contract, will be by the relays, or for each cubic yard of earth excavated and removed, in proportion to the value the same may bear to its finished state. And it is further agreed between the contracting party of the first part and the said party of the second part, with a view of equalizing the advantages and disadvantages arising from inequalities on the earth's surface at the site of the fort to be erected at Mobile Point, that the quantity of earth composing the remblais in its finished state, on which the said party of the second part will be entitled to eighty-three and eight-tenths cents per cubic yard, agreeable to the stipulations of the contract aforesaid, will be ascertained by measuring the cubical contents of the earth, dug, formed, raised, removed, rammed, and sodded above the level of the parade, now permanently designated and fixed, by the upper surface of a small brick monument, enclosing and supporting a pine stake, marked 'centre polygon;' the said stake being the centre of the fort. And the said party of the second part, hereby agrees to receive ten dollars per cubic yard for every cubic yard which shall be built of tapia, instead of the eleven dollars per cubic yard, agreed to be paid for mason or brick work, as mentioned in the agreement between Joseph G. Swift and Benjamin W. Hopkins. And it is further agreed by both parties aforesaid, that this agreement, or contract, is to have no effect on any part, or construction of any part of the contract, entered into between Joseph G. Swift and Benjamin W. Hopkins as aforesaid, except as in this agreement mentioned. In witness whereof, we have hereunto set our hands and seals, in presence of Horace C. Story, Lieut. Engineers, E. J. Lambert, Lieut. 8th Reg. Infan. (Signed) Samuel Hawkins, James Gadsden, Capt. of Engineers. Certified to be a correct copy from the original. (Signed) E. J. Lambert, Lieut. 8th Infantry, attached to Engineers.—A true copy."

This last contract was entered into by the parties without the knowledge, privity, or consent of the defendants. As soon as it was executed, however, it was transmitted to the war department, and a copy was immediately enclosed to the defendants in a letter from the secretary of war, dated the 10th of July, 1820, in which they were requested to declare their assent or dissent to the contract, in order that it might be determined whether to ratify or reject it. This letter was sent by mail, but there was no other proof of its receipt by the defendants. No answer to it was ever received at the war department, in consequence of which the contract was not ratified by the secretary of war; nor was it ever ratified or acted upon, except so far as it appeared to have been from the transcripts offered in evidence from the war department.

It appeared that Hopkins, in his lifetime, made a claim on the government for expenses and loss of time, which he alleged that he had incurred by the failure of an engineer to attend and point out the site for the fort, as stipulated in the contract. Congress, on the 3d of March, 1821 [3 Stat. 633], passed "an act for making appropriations for the military service of the United States for the year one thousand eight hundred and twenty-one," by which there was appropriated for fortifications 200,000 dollars, in addition to an unexpended balance of 100,000 dollars, to be applied to certain fortifications in the proportions therein designated, among which was mentioned, "Mobile Point, thirty thousand dollars," and no more than this sum could have been advanced by the war department to Hawkins, had more been demanded. But it appeared from an estimate by the engineer department that 690,000 dollars would be required to complete the fort. The administrator of Hawkins on the 18th of May, 1821, addressed a letter to the superintendent of the works at Mobile Point, expressing his regret that an assignee or agent appointed by Hawkins to perform the contract, had not been recognised, and offering himself to go on with the work. To this letter the superintendent replied, that he could not recognise the administrator nor any one else as the successor of Hawkins, without instructions from the war department. In the account of Hawkins with the treasury department, a transcript of which was produced, he was charged with 90,907 dollars 29 cents for advances to Hopkins. It did not appear from the account at what times or for what purposes such advances had been made. But transcripts of various documents were also produced, from which it appeared that a greater part of the advances were for the passage expenses of men, pay to mechanics and labourers, provisions, clothing, and transportation of men, construction of houses for the men, making brick-yards, pay for horses, &c. In most cases where there appeared to have been any materials furnished, they were so blended in the vouchers with other things, that it was impossible to separate them. Those advances which appeared to have been wholly for materials, amounted to only a few thousand dollars. Large advances, but not for work done, were made on account, without any evidence that any thing had been furnished. The advances for materials, where there was evidence that they were for materials, were principally made for materials which it appeared had not been delivered at or near Mobile Point. In June, 1819, Hopkins performed work to the amount of 5,902

[3] Remblais, the necessary earth brought on the natural ground, for throwing up a rampart, parapet, glacis, and other earth-work.

dollars 3 cents, for which he was regularly paid at the end of the month. This was the only work done by him. and the only advance made to him specifically for work. It did not appear that invoices of the materials had been furnished, except in a very few instances. Hawkins was also charged in said account, on the 1st of January, 1820, with 10,000 dollars, and on the 8th of September, 1820, with 8,643 dollars 37 cents, and on the 3d of May, 1821, with 2,783 dollars 60 cents, advanced him, without its being expressed for what such advances were made. It however appeared from the vouchers, that 15,000 dollars was advanced before any materials were furnished by him. On the 1st of November, 1820, he was charged with 4,092 dollars 57 cents, for that amount of provisions furnished him by the commissary. The whole amount of materials furnished by him was between five and six thousand dollars. He was credited in said account with the work done by Hopkins, amounting to 5,902 dollars 3 cents, and with work done by himself to the amount of 3,304 dollars 46 cents. Of this, 135 dollars was for work done prior to June, 1820, and the residue for work done during and subsequent to that month, and estimated and charged according to the new contract entered into by Hawkins and Gadsden. The balance of the account due the United States was 107,220 dollars 34 cents.

D. B. Ogden, for plaintiffs.

T. A. Emmet and C. G. Haines, for defendants, contended—

First. That the sureties were discharged by the making of the new contract between Gadsden and Hawkins. 2 Brown, Ch. 582; 2 Ves. Jr. 542; 2 Term R. 256; 2 Johns. Ch. 560; 10 Johns. 182; 2 Caines, Cas. 49; 3 Bin. 523; 3 Madd. 21; 10 Johns. 587, 595; 2 Desaus. Eq. 230, 339, 604; 17 Johns. 384; 3 Price, 214, 218.

Second. That the death of Hawkins exonerated the sureties. [Pollard v. Shaaffer] 1 Dall. [1 U. S.] 210; 2 Co. Inst. 206a; 1 Bac. Abr. 432, tit. "Contract" Q 11; 2 Mod. 200; 12 Mod. 381; 1 Salk. 170; 2 Atk. 18; 3 Burrows, 1637; 2 Call. 286; 7 Mod. 338; Alleyn, 26.

Third. That the performance of the contract was prevented by the plaintiffs: (1) by their refusal to suffer the administrator of Hawkins to proceed to complete the work; and, (2) by the want of a sufficient appropriation by congress. 17 Johns. 364; 19 Johns. 534; 2 Co. Inst. 206a; 3 Com. Dig. 92, 93, "Contract"; Cro. Eliz. 479; 3 Com. Dig. 271, "Covenant" F; Rolle, Abr. 445; 1 Term R. 638; 2 Doug. 694; Id. 688, note; 10 East, 536; [Reily v. Lamar] 2 Cranch [6 U. S.] 345; 1 Salk. 198; 3 Bos. & P. 301.

Fourth. That the sureties were not liable for the advances made, as they were not made agreeably to the contract. 2 Term R. 366, 370; 10 Johns. 180; 2 Caines, Cas. 49, 58, 65.

Fifth. That Hawkins was not bound to account to the war but the treasury department. Act March 3, 1817, § 2 [3 Stat. 366].

THOMPSON, Circuit Justice. The rules and principles of law by which the rights of the parties in this case are to be determined, seem not so much to have been drawn in question upon the argument, as the correct application of those principles to the contracts and circumstances embraced in the case. The defendants are prosecuted as the sureties of Samuel Hawkins, upon a bond duly executed by them, bearing date the second day of November, in the year one thousand eight hundred and nineteen, conditioned for the faithful performance by Hawkins of a contract entered into by him with the proper department of the government for building a fortification at Mobile Point, in the state of Alabama.

It is contended on the part of the defendants, that they are exonerated from all responsibility as sureties, by reason of a subsequent contract entered into with Hawkins, varying essentially as is alleged, the stipulations in the contract, for the performance of which the defendants became sureties. Other grounds were raised and urged on the argument, upon which the sureties claim to have been exonerated from all responsibility, but the one principally relied upon, is the second contract I have referred to. This contract was entered into without the knowledge or consent of the sureties, and nothing was afterwards done by them, in any manner to ratify or confirm the same. The general principles of law applicable to this class of cases, are too well settled and understood, to require authorities or illustration in their support. Sureties cannot be made responsible beyond the scope of their engagement. Any agreement between the creditor and principal, which varies essentially the terms of the contract, without the consent of the sureties, will exonerate them from their responsibility. Any new debt incurred, or the demand enlarged, or any act done to the injury and prejudice of the surety will discharge him from all liability. These are undeniable and controlling rules, and universally admitted, both in courts of law and equity. And the only inquiry before us, is as to their application to the case under consideration.

The bond executed by the defendants, and upon which this suit is brought, contains several recitals stating substantially, that Benjamin W. Hopkins, on the 13th of May, 1818, entered into a contract with Joseph G. Swift, chief engineer of the United States, to construct, or cause to be constructed, a fort, at such place in the vicinity of Mobile Point in the state of Alabama, as the United States by any engineer might direct, and refers to that contract for more particular information respecting it. That Hopkins has since died, and that his administrator had duly assigned and transferred to Samuel Hawkins, the said contract, with all its conditions, stipulations, and advantages, thereunto in any wise ap-

pertaining. And it is admitted in this case, that Hawkins was acknowledged by the authorized agents of the United States to be the lawful assignee of the contract, and that he entered upon the performance and execution thereof, under the superintendence and direction of the agents of the United States. And on the 7th day of June, 1820, the second contract was entered into between Col. James Gadsden, then acting as the agent for fortifications at Mobile Point, and Samuel Hawkins, the legal effect and operation of which as is contended, is to discharge the sureties from all responsibility. Such are the general outlines of the case; and I now proceed to notice more particularly the points that have been drawn into discussion.

The first inquiry which seems naturally to present itself is, the effect of the new contract upon the one for the performance of which the defendants became sureties. It is objected however on the part of the plaintiffs in the first place, that this second contract is not binding on the United States, not having been made or ratified by the proper authority. No reference was made on the argument, to any act of congress pointing out and regulating the mode and manner, in which contracts of this description are to be made; nor am I aware of any law designating any particular mode in which it is to be done. The contract upon its face purports to have been made by competent authority. It expressly declares, that the agreement was entered into and concluded on the part of the United States by Capt. James Gadsden of the engineer corps, in pursuance of instructions from the secretary of war. In addition to which the case expressly states, that it appeared in evidence, that after the execution of the bond, and whilst the said Samuel Hawkins was proceeding in the execution of the contract assigned to him, Col. James Gadsden, then acting as the agent for the fortifications at Mobile Point, and thereto duly authorized by the war department, entered into the contract, &c. Here we find it distinctly admitted, that the agent who acted in behalf of the United States was duly authorized to make the contract. And it is worthy of remark, that the case was made up by the parties without any trial, upon facts and documents agreed on and admitted by the parties, so that no mistake or misapprehension could have occurred, either with respect to the purport of the evidence or its competency to establish the fact; and if any thing farther could be necessary to show that this contract was binding on the United States, the case furnishes sufficient evidence that it was ratified by the proper department. For by Schedule B, it appears that after the 7th of June, 1820, the date of the second contract, money was advanced to Hawkins, and credit given to him for work performed according to the stipulations in the second agreement.

I shall therefore assume it as undeniably established, that this second contract was duly and legally made, and is binding on the United States, and the next inquiry will be, whether any and what alterations are thereby made in the original agreement. Although it was urged on the argument by the plaintiffs' counsel, that there was no material difference between the old and the new agreement, it appears to me impossible to read the two, without at once discovering the most essential difference. The only points of difference, that I deem it necessary to notice here, are first, the substitution of tapia for brick in the formation of the revetment walls, and the reduction of the price from eleven to ten dollars per cubic yard, and secondly, the new stipulation as to the price for excavation.

It was contended on the part of the plaintiffs, that under the original contract with Hopkins it was left in the discretion of the engineer to direct of what materials the walls of the fort were to be made. If the contract could by possibility admit of such construction, the mind would be irresistibly led to the conclusion, that such an incautious and unguarded stipulation must have crept into the contract by inattention or mistake. It is inconceivable that any man would knowingly place himself so entirely at the will and pleasure of another, in a contract of such magnitude, and expose himself to the hazard of being required to build the walls of this fort of marble instead of brick, at the price of eleven dollars per cubic yard. But the contract admits of no such construction; and it is inconceivable to me, how the learned counsel could have been led into such a palpable misconception of the contract. I can account for it in no other way, than that he must have been misled by the recital in the bond. It is true that in reciting the contract with Hopkins, it is stated that he was to construct the fort of such materials, and in such manner, as should be prescribed by the engineer, as by the contract, (reference being thereunto had,) may more fully appear. On reference to the contract, this appears clearly to be a misrecital. The contract only provides that the materials should be of such quality as the engineer should direct, but the contract throughout manifestly shows that the walls were to be built of brick. It expressly provides that the contractor was to receive eleven dollars for every cubic yard of brick masonry. And that such was the understanding of all parties is manifest, both from the special provisions, and general scope of the second contract. In reciting the contract with Hopkins it is expressly stated, that the fortification was principally, as to the revetment walls, to be built of brick, and that Col. Gadsden had received authority to substitute for the building, erecting, and constructing the revetment walls of the fortification, in the place of brick, a certain composition called tapia, being a species of artificial stone formed by a proper union in equal proportions, of sharp sand, fresh lime, and oyster shells, with water sufficient to produce ad-

hesion. This tapia to be substituted for brick, in such portions of the walls as should be designated by the superintending engineer. And Hawkins stipulates to receive ten dollars for every cubic yard which should be built of tapia, instead of eleven dollars for every cubic yard agreed to be paid for mason or brick work, as mentioned in the agreement between Swift and Hopkins. Can there then be the least possible doubt, that by the first contract the principal walls of the fort were to be built of brick, and that by the second contract, tapia was to be substituted in the place of brick, and that the price per cubic yard was to be reduced from eleven to ten dollars? If this is not a material alteration of the contract for the performance of which the sureties became bound, it is difficult to say what would be deemed a material alteration. But whether this alteration was for the benefit or to the prejudice of Hawkins, cannot enter into the question. This was a matter upon which the sureties had a right to judge for themselves; and it was not in the power of the plaintiffs to transfer the suretyship from one contract to another, without the consent of the sureties. The first contract became functus officio, so far as it was altered by the second. The latter, with the adopted part of the old contract, became the one to which the plaintiffs must look for performance of the stipulations between the parties. Both contracts could not be in force at the same time, so far as they are incompatible with each other; and to say that the latter was not in force and binding, would be denying to the parties the right of modifying and altering their own engagements.

But admitting the first contract in part to remain in full force, as to Hawkins, the second was an essential alteration or modification of it, and cannot be binding on the sureties in this new shape. Such a rule would be placing it in the power of the principal to draw his sureties into responsibilities they never assumed, contrary to the established doctrine of the law in relation to principals and sureties. If Col. Gadsden, as appears by the contract itself, and as the case expressly admits, was duly authorized to make the second contract, no subsequent ratification by the war department was necessary. And the case furnishes no evidence of any such usage or practice, nor has any law been referred to requiring this to be done. The letter therefore written by the secretary of war to the sureties, to declare their assent or dissent to the contract, even if it had been received, could have had no effect upon the contract; it was at this time complete and binding on both parties. The sureties were not bound to give any answer. They had a right to remain silent, and avail themselves of the legal effect of the second contract upon their responsibility. And besides, it appears from the schedule already referred to, that at the very date of this letter, (July 10th,) the work at the fortification was going on under the new contract, for credit is given according to the modification by the second contract, which shows the understanding of the parties, that the contract was complete without the ratification of the secretary of war.

It is said, however, that it is reasonable to infer that the contract was made subject to the ratification of the secretary of war, because such was the provision in the contract with Hopkins. Even admitting this reservation in Hopkins's contract, it does not warrant the conclusion drawn from it, but rather affords a contrary inference that a special reservation in the contract for such ratification was necessary. Besides, the instructions to General Swift might have been very different from those to Col. Gadsden. What the former were, does not appear. But the case shows expressly that the latter was duly authorized by the war department to enter into the contract, and upon the face of which it is stated, that he acted in pursuance of his instructions. The reservation however, in the contract with Hopkins, is not as it seems to have been understood by the counsel; it only reserves to the secretary of war his approval of the sureties given for the faithful execution of the agreement.

The second point of difference between the two contracts which I am to notice, is that which relates to the price for excavation. In the contract with Hopkins, the stipulation on the part of the United States, is to pay for every cubic yard of earth excavated and removed, as aforesaid, eighty-three cents and eight-tenths of a cent. To what part of the contract the aforesaid refers, is not easily perceived. There is no provision respecting the excavation and removal of earth, except what is implied under the terms "ditches" and "embankments," in that part of the contract which declares that the fort shall be constructed of such walls, ditches, embankments, buildings, parts, and dimensions, as the engineer may from time to time prescribe. And that it was understood to apply to this part of the works, will appear from the certificate of John Bliss the superintendent, being one of the documents referred to in the case. He certifies, that 7,043 cubic yards of earth had been excavated from the ditches of the fortifications at Mobile Point by B. W. Hopkins, for the quarter ending 30th June, 1819. Upon which, an account is made out as follows: "7,043 cubic yards of earth at eighty-three cents and eight tenths of a cent, agreeably to contract, five thousand nine hundred and two dollars and three cents," which was duly paid. In the last contract we find the following clause relating to this subject: "The party of the second part (Hawkins,) hereby agrees, that the following shall be the construction of that part of the contract entered into by Joseph G. Swift and Benjamin W. Hopkins, which re-

lates to the excavation, viz.: The eighty-three and eight-tenths cents, allowed for each cubic yard of earth excavated and removed, applies to each cubic yard composing the remblais in its finished state, embracing the several stages of excavation, removing, putting up, ramming, sodding, dressing off, and every thing necessary to complete the remblais; and that the monthly receipts for labour performed in reference to this part of the contract, will be by relays, or for each cubic yard of earth excavated and removed, in proportion to the value the same may bear to its finished state." Although this purports to be a construction of the first contract, no one can read the two provisions without at once perceiving a manifest difference, and that the labour to be performed by Hawkins is increased, and the monthly payments therefore reduced.

Without noticing in detail, the particulars in which the contracts disagree in this respect, I shall only mention one about which there can be no difference of opinion, viz.: the sodding of the remblais. No possible construction of the first contract could impose this upon the contractor. It is therefore an increased burden put upon him, and one too of no inconsiderable importance as to expense, which, if the sureties were bound to see done, would be increasing their responsibility beyond their engagements, and enlarging the demand against them without their consent.

But it is said that the defendants are not called upon to perform specifically the contract for the performance of which they become sureties, or for the payment of damages for the non-performance; but to reimburse the advances made to Hopkins and Hawkins, beyond the amount they were entitled to receive for work done and materials found. And for this it is alleged, there is an express stipulation in the bond upon which this suit is founded. A little attention to the provisions in the bond, and in the contract with Hopkins, will show that this claim cannot be enforced against the sureties. By the bond the defendants among other things, became bound that Hawkins should well and faithfully account to the war department of the United States, for all such sums of money theretofore advanced by the United States, under and in virtue of the late-mentioned contract, and also for all such further advances as might thereafter be made to facilitate the execution of the contract. If the United States have made any advances not required, or warranted by the contract with Hopkins, they have been made on their own responsibility, and for which the defendants cannot be held accountable. They only stipulate that Hawkins shall account for all advances under and by virtue of the contract. The case furnishes no evidence that the sureties were apprized of what advances had been made to Hopkins, or that they had any knowledge of the state of the accounts between him and the United States. The sureties were bound only to look to the contract, to learn the extent of their responsibility. And they are entitled to all the guards and checks it contains to shield them from risk and hazard. This was doubtless taken into their calculation when they became sureties, and the United States were bound not to transcend these limits, and thereby expose the sureties to risks they never meant to assume.

We must then look to the contract to ascertain what advances were authorized; and the only stipulations we there find upon this subject are, that the United States will pay, or cause to be paid, to Benjamin W. Hopkins, the amount of value of every cargo of materials, which the engineer aforesaid may pronounce to be delivered of proper quality, at or near the said Mobile Point, for the construction of the fort as aforesaid—the said value and amount to be considered in part payment of the work aforesaid: provided always, that the said Benjamin W. Hopkins shall and do deliver to the said engineer, the invoice of the materials so delivered as aforesaid. And that the United States shall pay, or cause to be paid, to the said Benjamin W. Hopkins, the sum of twelve thousand five hundred dollars, if demanded at the close of every month after the work shall have been commenced: provided always, that the said work so done at the close of every month as aforesaid, shall amount to twelve thousand five hundred dollars, exclusive of the materials used in the construction of the said work. The sureties have a right, and doubtless did take into their calculation, that these checks would be strictly adhered to; and if so, the risk they incurred was comparatively trifling. No advances were to be made for materials until they were deposited at the place where the fortification was to be built, and duly approved by the superintending engineer. All the sureties had therefore to see to, with respect to the materials, was their faithful application to the contemplated works. This was a mere guaranty of the integrity and good faith of the contractor, and no advances on account of labour were to be made until the work was done. So that no risk whatever was here incurred.

The amount claimed in this suit is one hundred and seven thousand two hundred and twenty dollars thirty-four cents, of which sum ninety thousand nine hundred and seven dollars twenty-nine cents, is the balance standing against Hopkins. No detailed statement of the account with him accompanies the case. The items therefore of which it is composed, and the grounds upon which this balance is struck, does not appear. Enough however is shown by the documents, to make it evident, that a great proportion of this balance is made up of advances, not required by the contract with Hopkins; being neither for ma-

terials delivered, nor work done upon the fortifications. Most of the expenses incurred, and for the payment of which the advances were made, related to preparations for commencing the works, as will be seen by reference to the documents accompanying the case; and if I am correct in the construction I have given to the engagement of the sureties, they are not responsible for these advances. The case does not furnish materials to enable me to say to what extent the advances were made, under and by virtue of the contract. And the advances on account, and drafts for materials and labour properly falling within the contract, are so blended with others, that it is impossible to separate them. Thus the first draft of the 15th of November, 1818, for three thousand dollars, purports to be for materials and passage-expenses of men, &c. That of the first of December, in the same year for ten thousand dollars, is for materials and expenditures on account of fortifications, &c. So also it appears from a certificate of Col. Gadsden upon some of Hopkins's accounts, and which was intended for and received as an authority for an advance of upwards of thirty thousand dollars. The items consisted of invoices of provisions, clothing, lumber, transportation of men, construction of accomodations for them, expenses of brick-yards and pay of men employed at them; expense of excavators, their provisions and transportation, and quarters for their accomodation. Advances to a considerable amount appear likewise to have been made for brick at the kilns, and before delivery as provided by the contract. And to hold the sureties responsible for all these advances, would certainly be extending their liability far beyond the scope of their engagement. The plaintiffs are bound to make out distinctly the extent of the defendants' liability.

But it is said the defendants are responsible for all advances made to Hawkins without limitation or qualification: that their undertaking for him in that respect is different from that which relates to advances to Hopkins. For the purpose of examining the soundness of this distinction, we must recur again to the bond, and look at the whole clause, which embraces both objects. It reads thus: He (Hawkins) "shall well and faithfully account to the war department for all sums of money heretofore advanced by the United States under and in virtue of the late mentioned contract," (thus far relates to advances to Hopkins,) "and also for all such further advances as may hereafter be made to facilitate the execution of the contract." A fair construction of the latter clause, does not make it broader or more extensive than the former. The recitals in the bond showed, that the contract had been assigned to Hawkins, and the object of the arrangement was to put Hawkins in the place of Hopkins under the contract. And he is to account for such further advances as may be made to him. Such advances, necessarily imply like advances to those before made to Hopkins, and of course under the same limitations and restrictions. It was urged on the argument, that there were no limits, but the discretion of the war department, to such advances if they would facilitate the execution of the contract. But this is not a natural or fair construction of the clause. No new object or inducement was presented to justify the conclusion, that more liberal advances were to be made to Hawkins, than Hopkins by his contract was to have made to him. Both were to facilitate the execution of the contract, by furnishing the contractors with funds to pay for the materials as delivered, and to enable them to pay off the workmen monthly. The sureties cannot therefore be made responsible for advances to Hawkins, except for materials delivered at the place, and for work actually done. It is not understood by the contract, that the materials were to be delivered to the agents of the United States so as to become their property, and remain at their risk. The property still continued in the contractor, and the sureties were responsible for its faithful application to the building the fortification according to the contract. Whatever work therefore has been done according to the contract, the plaintiffs have had the benefit of it, and there is no complaint that the materials delivered have been misapplied. Upon this view of the case then, there is no foundation for any claim upon the sureties.

It has been further urged in discharge of the sureties, that by the last contract, Hawkins relinquished all claim to an allowance to which he was entitled, in consequence of the United States neglecting to have an agent at Mobile Point in the fall of 1818, to point out the site of the fortification, and to give the necessary instructions to Hopkins. The case states, that Hopkins in his lifetime did make a claim to a considerable amount on this account. And the very fact, that a relinquishment of it by Hawkins was inserted in the new contract, would seem an implied admission, that some importance was attached to it. And if Hawkins has by any stipulation with the plaintiffs or their agent, relinquished any benefit to which he was entitled under the contract, it was an act to the prejudice of the sureties.

The case has thus far been considered under the supposition, that the original contract with Hopkins remained valid and binding, except so far as it was altered by the new contract with Hawkins; and this may be true as between the parties themselves. But as it respects the sureties, very different considerations are presented. The law is particularly watchful over the rights of sureties; and will not countenance any transactions between the parties that shall lessen the ability of the principal to comply with his contract, or that shall alter the rights of the parties, or enlarge the demand to the prejudice of the sureties. To permit parties to modify and alter their contracts

as they please, and to hold the sureties answerable for the performance of such parts as were not altered, would be transferring their responsibility without their consent from one contract to another. The contract by the modification and alteration becomes a new and a different contract, and one for which the sureties never became responsible.

Under these views of the case, I am satisfied that the defendants are not answerable for the claim set up against them, and I might here dismiss the cause. But it may not be amiss briefly to notice some other points urged upon the argument in support of their defence, and which would certainly be entitled to great weight, were it necessary to draw them into examination and to decide upon them.

It was contended, that the death of Hawkins before the expiration of the time limited for the completion of the work, put an end to the contract and discharged the sureties. Without expressing any opinion upon this point, the facts in the case present an alternative in exoneration of the sureties, that cannot easily be surmounted. If the contract survived, its performance devolved upon the personal representative of Hawkins, who, it appears, offered to go on and execute it, but was refused permission so to do by the agent of the United States; saying he must have instructions from the war department for that purpose. The offer was forwarded to the department, and no answer given, which was equivalent to a refusal. Why this offer was refused is not readily perceived, as by the contract no advances were to be made for materials until delivered, or for work until performed, so that no great risk would have been thereby incurred. And by the recitals in the bond upon which this suit is founded, it would appear to have been the understanding of the parties, that upon the death of the contractor, the obligation, and duty of completing the contract, fell upon his personal representatives. The recital to which I allude is as follows: "Whereas the said Benjamin W. Hopkins has lately died intestate, without having completed the contract, by reason whereof the obligations of performing the said contract, on the part of the said Benjamin W. Hopkins, deceased, has devolved upon the person or persons who may be authorized to administer the personal estate of the said intestate." We find also the same admission in the second contract, made between Col. Gadsden and Hawkins. It recites the death of B. W. Hopkins, and the granting of administration to Roswell Hopkins, who as administrator, was legally authorized to assign the contract to Hawkins.

Again, it was urged that all obligations growing out of the contract are discharged, by congress withholding the appropriation necessary to complete the works. By the original contract, the fortification was to be completed by the first of July, 1821. By the act of the 3d March, 1821, only thirty thousand dollars was appropriated to this object, and it is admitted, that no more could have been applied to it until a further appropriation was made; and the case states, that six hundred and ninety thousand dollars was necessary to complete the fortification. If this act had made it unlawful to proceed further with the works, it might well be urged that the contractor was discharged from all obligations and accountability growing out of the contract, the performance having become illegal by a legislative act. But as the necessary appropriation was only in part withheld, the operation of the law probably ought to be considered only a temporary suspension of the execution of the contract. And should no further appropriation be made, the contractor, were he living, could not be called to account in any manner for a breach of contract. The plaintiffs could not certainly be permitted to stop short when they pleased, and demand a reimbursement of the money advanced. Even admitting that Hawkins was accountable for all advances to Hopkins, there could be no violation of his engagement in this respect until the expiration of the term allowed for completing the contract; and if the plaintiffs by their own act, have either suspended or entirely defeated the performance, it does not lie with them to allege a breach on the other side.

I am accordingly of opinion that the defendants are entitled to judgment.

[This judgment was reversed by the supreme court. 12 Wheat. (25 U. S.) 180.]

Case No. 16,525.

UNITED STATES v. TILTON.

[7 Ben. 306.] [1]

District Court, S. D. New York. May, 1874.

SMUGGLING—CIVIL LIABILITY—EFFECT OF PARDON—PLEADING.

1. T. was indicted for offences against the revenue laws, under the 19th section of the act of August 30, 1842 (5 Stat. 565), and the 4th section of the act of July 18, 1866 (14 Stat. 179). A civil action of debt was also brought against him by the United States, to recover double the value of the smuggled goods for the receiving of which he was indicted, in accordance with the 68th and 69th sections of the act of March 2, 1799 (1 Stat. 678), and the 2d and 5th sections of the act of March 3, 1823 (3 Stat. 781). On August 30, 1871, he was convicted on the indictments, and was sentenced to be imprisoned for five months, and to pay a fine of $1,000, and $1,326 16 the costs of prosecution. He served out the imprisonment and paid the fine, but, being unable to pay the costs, received from the president of the United States, a full pardon, on the 10th of February, 1872. He then pleaded this indictment, sentence and pardon in bar, in the civil suit. The United States demurred to the plea: *Held*, that, under the 5th section of the

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

act of June 1, 1872 (17 Stat. 197), the plea must be tested by the rules applicable, in the courts of record of the state of New York, to an answer to a complaint.

[Cited in brief in Ransdell v. Patterson, 1 App. D. C. 491.]

2. The pardon was a bar to the suit.

3. Whether the conviction under the indictment, and the completion of the sentence imposed on such conviction, would form a bar to such suit, quere.

[At law. This was an action of debt, brought by the United States against David Tilton, under section 69 of the act of March 2, 1799 (1 Stat. 678), to recover double the value of certain goods alleged to have been smuggled into the United States, and bought and concealed by defendant with knowledge that they had been smuggled. Heard on demurrer to the plea in bar.]

Edmund H. Smith, Asst. U. S. Dist. Atty.
Samuel H. Randall, for defendant.

BLATCHFORD, District Judge. The defendant, on the 30th of August, 1871, was convicted in the district court of the United States for the Northern district of New York, on two indictments founded on the 19th section of the act of August 30, 1842 (5 Stat. 565), and the 4th section of the act of July 18, 1866 (14 Stat. 179), and was sentenced thereon to be imprisoned for five months, and to pay a fine of $1,000 and $1,326.16, the costs of prosecution, as taxed. The indictments were consolidated before trial. Both indictments were found in November, 1870. One contained four counts. The first count alleged, that the defendant, on the 22d of October, 1869, did fraudulently, knowingly and unlawfully import and bring into the United States, and assist in so doing, five barrels and two one-half barrels containing nutmegs, to wit, seven hundred pounds of nutmegs, contrary to law. The second and third counts alleged, that the defendant, on the same day, did fraudulently, knowingly and unlawfully receive and conceal the said nutmegs, after their importation into the United States, contrary to law. The fourth count alleged, that the defendant, on the same day, did knowingly, wilfully, feloniously and unlawfully, with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States the said nutmegs, which were subject to duty by law, and should have been invoiced, without having paid or accounted for the duties due and payable on them. The other indictment also contained four counts. It alleged offences committed on the 15th of November, 1869, in respect to five barrels containing nutmegs, to wit, six hundred pounds of nutmegs, and its four counts contained respectively like allegations with the counts in the first indictment.

On the 10th of February, 1872, the president of the United States granted a pardon to the defendant, containing the following recital: "Whereas, on the 30th day of August, 1871, in the United States district court for the Northern district of New York, one David Tilton was convicted of smuggling, and was sentenced to be imprisoned for five months, and to pay a fine of one thousand dollars, and whereas he has served out his term of imprisonment and paid the fine, and satisfactory evidence has been presented of his inability to pay the costs of the prosecution," and then proceeding to say that the president grants "to the said David Tilton a full and unconditional pardon."

The present suit, which is an action of debt, was brought on the 23d of July, 1870. The declaration was filed on the 7th of December, 1871, and demands a recovery for $2,472. It alleges, in substance, that, on the 22d of October, 1869, certain nutmegs, of the value of $1,236, were imported into the United States by the defendant, from Canada, which were subject, on their importation, to the payment of certain duties to the United States, without the payment of the duties which were legally due thereon, in this, that, by false practices, by which they were concealed from the inspection of the officers of the customs, they were smuggled into the United States; that thereupon the defendant, knowing them to have been smuggled into the United States, and thereby made liable to seizure, bought and concealed them, and that, by reason thereof double their value, to wit, $2,472, became and was forfeited by the defendant to the United States, under and by the provision of section 69 of the act of March 2, 1799. It also alleges, that the defendant did receive, conceal, and buy the said goods, knowing them to have been illegally imported into the United States, and liable thereby to seizure under the revenue laws of the United States, by reason of which receiving, concealing and buying thereof, double their value, to wit, $2,472, became and was forfeited to the United States by the defendant, under and by virtue of section 2 of the act of March 3, 1823.

The 69th section of the act of March 2, 1799 (1 Stat. 678), provides, that "if any person or persons shall conceal or buy any goods, wares or merchandise, knowing them to be liable to seizure by this act, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares or merchandise so concealed or purchased." By the 68th section of the same act, it is provided, that goods subject to duty, which are concealed, shall be liable to seizure and shall be forfeited, if the duties on them have not been paid, or secured to be paid. The 89th section of the same act provides, that "all penalties accruing by any breach of this act, shall be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same." The 2d section of the act of March 3, 1823

(3 Stat. 781), provides, that "if any person or persons shall receive, conceal or buy any goods, wares or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares or merchandise, so received, concealed or purchased." The 5th section of the same act provides, that all penalties and forfeitures incurred by force of it shall be sued for, recovered, distributed and accounted for, in the manner prescribed by the said act of March 2, 1799.

The defendant pleads specially, in this suit, that the said two indictments were found against him; that he was arrested, and arraigned thereon, and pleaded not guilty; that the two indictments were consolidated; that he was tried and found guilty of the offences charged therein; that he was sentenced thereon to be imprisoned for five months, and to pay a fine of $1,000 and $1,326 16, the costs of prosecution, as taxed; that he served out the term of imprisonment and paid the fine; that, satisfactory evidence being presented to the president of the United States, of his inability to pay the costs of the prosecution, the president, on the 10th of February, 1872, granted to him a full and unconditional pardon; and that the matters embraced in the said declaration relate to the same acts and transactions recited in the plea, and whereof satisfaction has already been fully had, by the plaintiffs, of the defendant, and that the plaintiffs have no claim by reason thereof, any longer, on the defendant. The plaintiffs demur to this plea, as insufficient in substance, and the defendant joins in demurrer.

In the case of Stockwell v. U. S., 13 Wall. [80 U. S.] 531, an action of debt was brought on the said 2d section of the act of March 3, 1823, to recover double the value of certain shingles alleged to have been illegally imported, and to have been received, concealed or bought by the defendants, with knowledge that the shingles had been illegally imported into the United States. It was contended for the defendants, that the remedy to recover the forfeiture, provided for by the said 2d section, is not by a civil action; that the penalty or forfeiture declared by it is purely a punishment for an offence; and that such penalty is superseded and repealed by the said enactment of the 4th section of the act of July 18, 1866. But the court held, that a civil action of debt can be brought to recover the penalties imposed by the said 2d section of the act of 1823. It also held, that the provision of the said 2d section is not a strictly punitive provision, but is a remedial one, designed to secure the civil right of the United States to seize and appropriate to itself, as forfeited, imported goods, subject to duties, on which the duties are not paid. It is also held, that, while the act of 1823 is remedial, having the purpose of securing full compensation for interference with the rights of the United States, the act of 1866 is strictly penal, and not at all remedial, not having the design to substitute new penalties for those before imposed, but to punish as a crime what had before subjected its perpetrator to civil liability or quasi civil liability; and that the act of 1823 gives a remedy to secure pecuniary compensation for an illegal act which works a private wrong, while the act of 1866 makes the same illegal act a criminal offence and punishes it accordingly. The view of the court is very distinct, that the wrong-doer may, under the act of 1823, be civilly responsible for a given act specified in it, and may, also, under the act of 1866, be criminally responsible for the same act specified in it.

The act of 1799 is the same, in structure, as the act of 1823, and its interpretation must be governed by the same rules. It is not superseded by the act of 1842, or by the act of 1866, nor is the act of 1823 superseded by the act of 1842. It follows, that a person may, for a given act specified in either or both of the acts of 1842 and 1866, be liable to be prosecuted criminally, and be liable to a civil action for the same act under either or both of the acts of 1799 and 1823. But it by no means necessarily follows, that, where a person has been convicted on a criminal prosecution, under the act of 1842, or the act of 1866, for an act constituting a given offence, and has suffered punishment therefor, he may thereafter be civilly prosecuted under the act of 1799 or the act of 1823, for the same act. It may be that the supreme court would, in pursuance of the views announced by it in Stockwell v. U. S., hold, that satisfaction had for the criminal responsibility of the defendant was not a satisfaction for his civil responsibility growing out of the same act; or it might hold that the United States had, on a proper construction of the statutes, only an election to determine whether it would proceed criminally under one statute or civilly under another, and that, after it had elected to proceed criminally, and had obtained a conviction, and the offender had suffered punishment, it was too late for it to resort also to a civil suit. I do not deem it necessary in this case, to decide the question whether the criminal conviction and sentence and punishment of the defendant form a bar to this suit, because I am of opinion that the pardon granted to him by the president constitutes such bar. The president has power, by the constitution (article 2, § 2, subd. 1), to grant pardons "for offences against the United States, except in cases of impeachment." The act denounced by the act of 1799, of concealing goods liable to seizure, and the act denounced by the act of 1823, of receiving, concealing or buying goods, knowing them to have been illegally imported into the United States, and liable to seizure, are offences against the United States. The forfeitures imposed by those acts are forfeitures imposed on the persons committing the acts, because

of the commission of the acts by such persons, and are not forfeitures of property because of the predicament of the property. The commission of the acts constitutes an offence against the United States, such an offence as has always been regarded as within the pardoning power of the president. 10 Op. Attys. Gen. 452; 11 Op. Attys. Gen. 446; 12 Op. Attys. Gen. 81. The forfeitures imposed by the acts of 1799 and 1823 are punishments, and punishments for offences. This view is not at all inconsistent with the view, that a civil action of debt may be maintained to recover the penalty imposed for the violation of law, or with the view, that the act committed may work a private wrong to the United States, and a civil injury reimbursable, pecuniarily, through a civil action. The act committed is still an offence against the United States.

The declaration, in this case, sets forth the offence in such terms as to show that it is one covered by the indictments on which the defendant was convicted, and by the pardon. I am, therefore, of opinion that the pardon is a bar to this suit.

The demurrer specifies certain alleged defects in form in the special plea. But the matters set forth therein, in regard to the pardon, as a bar to the suit, are sufficiently set forth in substance, and, under the 5th section of the act of June 1, 1872 (17 Stat. 197), the plea must be tested by the rules applicable in the courts of record of the state of New York, to an answer to a complaint. I suppose the special plea contains what would be a good answer to a complaint in a suit in the state court for a like cause of action.

The demurrer is overruled, with leave to the plaintiffs to reply to the special plea.

Case No. 16,526.

UNITED STATES v. TINKLEPAUGH et al.

[3 Blatchf. 425.] [1]

Circuit Court, S. D. New York. Jan. 25, 1856.

OBSTRUCTING JUSTICE — RESISTING EXECUTION OF PROCESS—INDICTMENT—DEPUTY MARSHAL.

1. What facts are necessary to be established to constitute the offence, under section 22 of the act of April 30, 1790 (1 Stat. 117), of wilfully resisting an officer of the United States in the execution of process, considered.

[Cited in U. S. v. Martin, 17 Fed. 153. Distinguished in U. S. v. Terry, 41 Fed. 774.]

2. What an indictment for such offence must allege, considered.

3. Where an indictment for such offence showed that the process resisted was a warrant of attachment issued by the district court against a vessel, on the filing, by the district attorney, of a libel for a forfeiture of the vessel: *Held*, that it was not necessary the indictment should show what averments the libel contained.

4. It appearing, by the indictment, that the warrant was valid on its face, any resistance to the execution of the warrant was indictable under the act, even though the libel was not sufficient to authorize the issuing of the warrant.

5. A deputy of a marshal of the United States is an officer of the United States, within said section 22, authorized to serve process.

[Cited in U. S. v. Martin, 17 Fed. 153.]

This was a motion to quash an indictment [against Edward L. Tinklepaugh and others] founded upon the 22d section of the act of April 30, 1790 (1 Stat. 117), in which, among other things, it is provided that, if any person or persons shall knowingly and wilfully obstruct, resist or oppose any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule or order of the courts of the United States, or any other legal or judicial writ or process whatsoever, such person or persons shall, on conviction, be imprisoned, not exceeding twelve months, and fined, not exceeding three hundred dollars.

John McKeon, U. S. Dist. Atty., and Philip J. Joachimsen, for the United States.

Francis B. Cutting and Horace F. Clark, for defendants.

INGERSOLL, District Judge. To constitute the offence created by the act of congress in question, it is necessary that three distinct facts should be established. Those three distinct facts are: (1) That a legal process, warrant, writ, rule or order, was issued by a court of the United States; (2) that such legal process, warrant, writ, rule or order, after the same was issued, was in the hands of some officer of the United States for service, who had authority, by the laws of the United States, to serve the same; (3) that, after such legal process, warrant, writ, rule or order was in the hands of such officer for service, some one knowingly and wilfully obstructed, resisted, or opposed him in serving or attempting to serve or execute the same. These are all the facts necessary to constitute the offence. An indictment founded upon the act must, in order to be adjudged sufficient, distinctly state and charge the existence of those three several facts, and that the act complained of took place within the limits of the Southern district of New York; and nothing more need be charged, to constitute a good indictment. The question, then, is—does the indictment, now the subject of investigation, distinctly and explicitly contain those charges?

The indictment charges, in the first count, that on the 24th of December, 1855, a certain legal and judicial process, directed to the marshal of the United States for the Southern district of New York, was duly issued out of, and under the seal of, the dis-

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

trict court of the United States for said district, against the steamship Northern Light, her tackle, &c., and the arms and ammunition on board of her; and, to show what such process was, it is set out in the indictment, in its words and figures, by which it appears to have been a warrant of attachment issued by the district court against said steamship, &c., upon the filing of a libel by the district attorney, and to have been directed to the marshal of the Southern district of New York, for service. The warrant is in the usual form of all warrants which issue upon the filing of a libel for a forfeiture. It is admitted by the counsel for the defendants, that the warrant is a valid warrant, so far as it respects the action of the marshal, or any persons acting under him, by his authority; and that he and they were not only authorized, but were bound to execute it. But it is contended by the defendants' counsel, that no one is liable, under the act, for any resistance which he may make to the marshal, or to any one acting under him, by his authority, while executing the warrant, unless it appears, by the indictment, that the libel upon which the warrant issued was a good, valid, and sufficient libel; and that the indictment does not show what the averments in the libel were. It is claimed that the district court of the United States has such a limited jurisdiction, that it will not be presumed that the warrant was properly issued, but that it must appear, by the indictment, what particular averments were contained in the libel, before it can be taken (so far as these persons are concerned), that the warrant was regularly issued.

It is not necessary to discuss the question as to how far the district court is a court of limited jurisdiction. I shall not, therefore, go into that question. The necessities of the case do not require it. There is no question that the warrant, so far as it respects the marshal and those acting under him, was legal. It was valid upon the face of it. The marshal to whom it was directed, and those acting under him, were bound to execute it. This was their duty. Nothing would excuse them for the non-performance of this duty. As they were bound to execute it, everybody was bound to yield obedience to it. As everybody was bound to yield obedience to it, no one had a right to resist it, or oppose or obstruct the officer having a right to execute it, in the execution of it. The marshal and his deputies had a right to execute the warrant. The law, in substance, says, that he who knowingly and wilfully obstructs, resists, or opposes any marshal or other officer in serving a warrant which it was his duty to serve, shall be punished. It was the duty of the marshal to serve this warrant, either by himself or by his deputies, and any one who wilfully and knowingly obstructs, resists, or opposes him in the performance of his duty, acts in violation of law, and is subject to its penalties, even though the libel may not have been sufficient to authorize the issuing of the warrant.

The two remaining questions are—does it appear, by the indictment, that the warrant was placed in the hands of a proper officer for service? and is it charged that the defendants, while it was in the hands of such proper officer for service, wilfully and knowingly obstructed, resisted and opposed such proper officer, in the service of the same? These two questions will be considered together.

It is alleged, in the indictment, that the warrant had the following endorsement upon it, signed by "Abraham T. Hillyer, United States Marshal," to wit: "I hereby depute B. F. Ryer and Luther Horton to execute the within process;" and it is charged that afterwards, at the city of New York, the defendants knowingly and wilfully obstructed, resisted, and opposed Benjamin F. Ryer and Luther Horton, in attempting to execute said warrant, they, the said Ryer and Horton, then and there being officers of the United States, to wit, deputies of the marshal of the United States for the Southern district of New York. It appears, then, by the indictment that the warrant was in the hands of the marshal. He, before the resistance and obstruction took place, made his endorsement upon it. It was directed to him to serve. It was, therefore, in his hands for the purpose for which it was issued, which purpose was to have it placed in his hands for service. Although it is not, in so many words, charged that it was placed in his hands for service, yet the fair intendment of the language of the indictment is, that it was so placed. And the charge is direct, that the defendants knowingly and wilfully obstructed, resisted and opposed Ryer and Horton in the execution of the warrant, they at the time being deputies of the marshal. But it is claimed that, although it may appear, by the indictment, that the warrant was placed in the hands of the marshal for service, and although he may have deputed Ryer and Horton to serve the same, yet they, Ryer and Horton, were not, within the meaning of the act of congress, officers of the United States; that they were the mere agents and servants of the marshal; that any obstruction or resistance to them is not within the prohibition of the law; and that, although an obstruction and resistance to them might, in law, be considered as an obstruction and resistance to the marshal, yet no such obstruction or resistance is charged. The question, then, is—were Ryer and Horton officers of the United States, authorized to serve the warrant? They were deputies of the marshal. It is so charged in the indictment. As such deputies, they were authorized to serve the

warrant, without any special appointment. But it is said that, although they may have been authorized to execute the warrant, they were merely agents or servants of the marshal, and were not, within the meaning of the law, officers of the United States. A little consideration of the laws of congress will show that a deputy marshal is an officer of the United States, authorized to serve process; and, if he be such officer, so authorized, resistance to him is prohibited by the act of congress in question. The marshal has power, as there shall be occasion, to appoint one or more deputies, who are removable from office by the judge of the district court or the circuit court sitting in the district, at the pleasure of either. Act Sept. 24, 1789 (1 Stat. 87) § 27. If a deputy marshal can be removed from office, he is an officer before he is so removed, for, he cannot be removed from office unless he is an officer; and, as he has power to serve process, he is an officer of the United States empowered to serve process. Upon the death of the marshal, his deputies continue in office, unless otherwise specially removed, until another marshal is appointed and sworn. Act Sept. 24, 1789 (1 Stat. 87) § 28. Every marshal or his deputy, when removed from office, has power notwithstanding his removal, to execute all such precepts, as are in his hands at the time of such removal. Id. Marshals and their deputies have the same powers, in executing the laws of the United States, that sheriffs and their deputies in the several states have, in executing the laws of the several states. Act Feb. 28, 1795, § 9 (1 Stat. 425). When a witness is material on the trial of a criminal case, a judge is authorized to issue a warrant, directed to the marshal or other officer authorized to execute criminal and civil process, to arrest such witness and carry him before such judge. Act Aug. 8, 1846, § 7 (9 Stat. 74). These several laws show that deputy marshals are officers of the United States, authorized to serve process. There may be persons who, in certain cases, are authorized to serve process, who may not be officers of the United States. In certain cases a private individual may serve process—as, when a marshal or his deputy is a party. In such cases, writs and precepts are to be directed to such indifferent persons as the court, or any justice or judge, may appoint. Act Sept. 24, 1789, § 28 (1 Stat. 87). This last provision also shows that congress deemed deputies of the marshal to be officers of the United States. Ryer and Horton, therefore, being, as charged in the indictment, deputies of the marshal, were officers of the United States, authorized to serve process, within the meaning of the act of congress in question.

The result is, that the facts necessary to constitute the offence created by the act of congress in question, are sufficiently charged in the indictment. The motion to quash must, therefore, be disallowed.

Case No. 16,527.

UNITED STATES v. TOBACCO.

[See Case No. 16,106a.]

Case No. 16,528.

UNITED STATES v. TOBACCO FACTORY.

[13 Int. Rev. Rec. 91; 1 Dill. 264.] [1]

District Court, W. D. Arkansas. May Term, 1870.[2]

INDIAN COUNTRY—JURISDICTION OF UNITED STATES — CONSTITUTIONAL LAW — TREATIES — INTERNAL REVENUE LAWS.

1. The Indian country is within the jurisdiction of the United States, and congress may extend all laws within the constitutional limits of municipal legislation over the same.

2. The internal revenue laws imposing taxes on manufactured tobacco are in force in the Indian country.

3. Though a treaty is the law of the land, under the constitution of the United States, congress may abrogate it, so far as it is a municipal law, provided its subject-matter is within the legislative power of congress.

[Cited in Buckner v. Street, Case No. 2,098.]

4. So much of article 10 of the treaty of July 19, 1866 [14 Stat. 801], between the United States and the Cherokee Nation as is repugnant to the provisions of the act of congress of July 20, 1868 [15 Stat. 125], imposing taxes on manufactured tobacco, is thereby abrogated.

J. H. Huckelberry, U. S. Dist. Atty., W. G. Whipple, and E. D. Ham, for the United States.

Jesse Turner and Granville Wilcox, for claimant.

CALDWELL, District Judge. This is an information against a tobacco manufactory, established and carried on in the Cherokee Nation, in the Indian Territory. The claimant, E. C. Boudinot, alleges that he is a Cherokee Indian, and claims that he has a right to establish and carry on the business of manufacturing and selling tobacco in the Indian country, without complying in any respect with the provisions of the internal revenue laws on that subject. This claim is urged upon three grounds: First, that it is not competent for congress to extend any portion of the internal revenue laws over the Indian country; second, that section 107 of the act of July 20, 1868, nor any other provision of that act, was intended to extend such laws over that country; third, that if that was the intention of the act of July 20, 1868, it cannot have that effect, because it would be inconsistent with article 10 of the treaty of July 19, 1866, between the Cherokee Nation and the United States.

1. Counsel for claimant have argued that the Cherokees are a nation of people independent of the United States, and possessing all the rights of an independent sovereign power, except in so far as they have surren-

[1] [1 Dill. 264, contains only a partial report.]

[2] [Affirmed in 11 Wall. (78 U. S.) 616.]

dered those rights by treaty stipulations with the United States, and the language of certain treaties between the Cherokee Nation and the United States is referred to as tending to establish this position. It must be confessed that the language of some of these treaties is well calculated to flatter the pride of the Indian tribes, and give them a very erroneous notion of the actual legal relation they sustain to the national government. The converse of this proposition advanced by counsel for claimant is the law. The power of the national government over the Indian tribes and the territory occupied by them, within the constitutional limits of municipal legislation, is plenary. To what extent this power will be exercised rests in the sound discretion of congress, limited only by those considerations of policy and humanity that have always marked the action of the government in its treatment of these people.

In Cherokee Nation v. State of Georgia, 5 Pet. [30 U. S.] 1, Chief Justice Marshall says: "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other, * * * but the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. The Indian Territory is admitted to compose part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. * * * They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have sole and exclusive right of regulating trade with them, and managing all their affairs as they think proper. * * * They may, more correctly perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."

In Worcester v. State, 6 Pet. [31 U. S.] 515, Justice Washington says (page 519): "Are not the United States sovereign within their territories? And has it ever been conceived by any one that the Indian governments which exist in the territories are incompatible with the sovereignty of the Union? * * * Does not the constitution give to the United States as exclusive jurisdiction in regulating intercourse with the Indians as has been given to them over any other subjects? Is there any doubt as to the investiture of power? Has it not been exercised by the federal government ever since its formation, not only without objection, but under the express sanction of all the states? * * * Has not the power been expressly conferred on the federal government to regulate intercourse with the Indians; and is it not as exclusively given as any of the powers above enumerated? There being no exception to the exercise of this power, it must operate on all communities of Indians exercising the right of self-government, and consequently include those who reside within the limits of a state, as well as others."

In Mackey v. Coxe, 18 How. [59 U. S.] 100, Justice McLean, in delivering the opinion of the court, says: "A question has been suggested whether the Cherokee people should be considered and treated as a foreign state or territory. The fact that they are under the constitution of the Union, and subject to acts of congress regulating trade, is a sufficient answer to the suggestion. They are not only within our jurisdiction, but the faith of the nation is pledged for their protection. In some respects they bear the same relation to the federal government as a territory did in its second grade of government under the ordinance of 1787. Such territory passed its own laws, subject to the approval of congress; and its inhabitants were subject to the constitution and acts of congress. The principal difference consists in the fact that the Cherokees enact their own laws, under the restrictions stated, appoint their own officers, and pay their own expenses. This, however, is no reason why the laws and proceedings of the Cherokee Territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic territory—a territory which originated under the constitution and laws of the United States. * * * The Cherokee country, we think, may be considered a territory of the United States, within the act of 1812. [2 Stat. 758.] In no respect can it be considered a foreign state or territory, as it is within our jurisdiction and subject to our laws."

The same doctrine is maintained in U. S. v. Rogers, 4 How. [45 U. S.] 567, and "Kansas Indians," 5 Wall. [72 U. S.] 737. In the case last cited Justice Davis, in delivering the opinion of the court, says: "If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a people distinct from others, capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union." In the case last cited the authority of the United States to exercise exclusive power of government over Indian tribes and the territory occupied by them, is maintained even after such tribes and territory have been included within the limits of a state.

Ever since the organization of this court it has sat here administering and enforcing the laws of the United States over the Indian country. Indians are taken from that country, brought here for trial, and are tried and punished—in some instances capitally. They are prohibited from trafficking in certain articles. Until recently they could not sell their

cattle without the permission of the United States agent. 13 Stat. 563, §§ 8, 9. They cannot alienate their lands, neither can they permit citizens of the United States to settle in their country without the consent of the United States. By permission of the United States they have jurisdiction of offences committed by one Indian on the person or property of another Indian. But this power is granted them from considerations of policy, and no one doubts that congress might invest this court with that jurisdiction. They are without a single attribute that marks a sovereign and independent nation or people.

2. Does the act of July 20, 1868, extend the internal revenue laws imposing taxes on tobacco, snuff, and cigars, to such articles produced within the Indian country? Section 107 of that act declares "that the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, shall be held and construed to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not." It is admitted that the Cherokee Nation is "within the exterior boundaries of the United States."

Notwithstanding the comprehensive language of this section, it is claimed that it cannot be construed to embrace the Indian country. It is said that the Indians and the Indian Territory are not to be affected by the general laws of the United States unless they are specifically mentioned. It is true that many of the general laws of the United States have no application to the Indians or the Indian country, and this for reasons that are obvious. But it is not true that an act of congress that by a fair construction includes the Indians and the Indian country, cannot operate upon that people and their territory unless they are specifically mentioned. There is no rule of law or of construction that will authorize the court to disregard the plain words of the act of congress and say that the Indian country is not "within the exterior boundaries of the United States," and that the revenue laws relating to tobacco do not extend to that country and its people. I am unwilling to inject into this statute a clause exempting the Indian country from its operation. Before the court could do this it must be satisfied that such exemption was fairly implied in the statute. The language of the section will not admit of any such implication. On the contrary, when taken in connection with the other provisions of the act extending its operations over the states, the District of Columbia, and the "territories" of the United States, it is plain that section 107 was inserted on purpose to prevent any such exemption or claim as is here set up. We know that the Indian country is within "the exterior boundaries of the United States," and subject to the jurisdiction of the national government, and that it is competent for congress to extend any or all of the internal revenue laws over the same. And this can as well be done by general language that necessarily embraces that country, as by specifically mentioning it. That the general term "territories" in an act of congress, may be held to include the Indian Territory, has been expressly decided by the supreme court of the United States. By the 11th section of the act of the 24th of June, 1812, it is provided "that it shall be lawful for any person or persons to whom letters testamentary or of administration hath been or may hereafter be granted by the proper authority in any of the United States or territories thereof, to maintain any suit or action, and to prosecute and recover any claim in the District of Columbia in the same manner as if the letters testamentary or administrative had been granted in the district." The Cherokees have their own local laws not inconsistent with the laws of the United States, and among them laws regulating the descent of property and the administration of estates. Under those laws letters of administration were granted upon the estate of one Mackey. In a suit brought in the circuit court of the United States, in the District of Columbia, the validity of the letters of administration granted on the estate of Mackey by the probate court in the Indian country was drawn in question, and in that case, as in this, it was contended that the word "territories" in the act of 1812 above quoted did not extend to or embrace the Cherokee country. In answer to this objection, the supreme court of the United States says: "The Cherokee country, we think, may be considered a territory of the United States within the act of 1812. In no respect can it be considered a foreign state or territory, as it is within our jurisdiction and subject to our laws." Mackey v. Coxe, 18 How. [59 U. S.] 100. Not only is the Indian Territory embraced within the letter of section 107, but it is also within the reason and policy of the internal revenue laws relating to the manufacture of tobacco. No one can read the acts of congress relating to the manufacture and sale of tobacco without being forced to the conclusion that it was the object and purpose of those acts to compel the payment of the required tax upon every pound of tobacco manufactured and consumed within the limits of the United States. Congress has taken every precaution that the ingenuity of legislators could devise to secure that end. Every step necessary to be taken by any one engaged in the manufacture of tobacco is hedged in by numerous requirements, all of which are obviously intended to insure the payment of the required tax on every ounce of manufactured tobacco consumed anywhere within the limits of the United States. This luxury may not be enjoyed by any one, be he white man or Indian, without the required tax has first been paid thereon. The same precautions are taken to insure the

payment of the tax on tobacco imported from foreign countries. See section 77.

The claimant in this case insists that he may purchase the raw material outside the Indian country, take it into that country, and there manufacture and sell it to any one who will purchase, be he Indian or white man, without paying any tax thereon; that he is only required to pay tax on tobacco thus obtained and manufactured, when he sells it outside the Indian Territory; that he is not required to conform to the method of packing, marking, and stamping tobacco prescribed by the act; but that he may pack his tobacco as he chooses, or not pack it at all, and transport it beyond the limits of the Indian country, and that until it is so transported and sold he is not required to comply with any of the provisions of the act. If this position be true, then all the precaution and ingenuity taken by congress to insure the payment of the tax upon all the tobacco manufactured and consumed within the United States, and to prevent frauds upon the revenue, become fruitless. If the claimant may lawfully do what he claims, then all must admit that this Indian country will—as indeed in some measure it has already—become the asylum for all tobacco manufacturers who desire to evade the provisions of the act relating to the manufacture and sale of tobacco. It is no answer to say that none but Indians can avail themselves of such privileges. The cases arising under this act at the present term of the court show how easy it is for white men to procure and use the name of an Indian when they desire to avail themselves of the supposed advantages of carrying on this business in the Indian country. The extent and magnitude of the evil that would necessarily grow out of the construction claimed for this law by the counsel for claimant will be appreciated, when we reflect that this country in territorial extent is equal to the largest state in the Union, that it is accessible by railroads and water lines of communication, and it is in the track of the great highways leading from Missouri and Kansas to the Gulf states, and from Arkansas, and other southern states to the western territories and the Pacific coast. It will readily be seen that, under such a construction of the act, the facilities for committing frauds upon the revenue in the matter of the manufacture and sale of tobacco would be boundless, and the territory would at once become the chosen home of smugglers, and all others who desire to grow rich by such practices. These considerations doubtless influenced congress to extend the internal revenue laws imposing taxes on tobacco over that country.

In what I have said in reference to the frauds committed by those who might engage in the manufacture of tobacco in that country, I do not wish to be understood as reflecting on the claimant in this case. There is nothing in this case, as submitted to the court and jury, to show that he was engaged in any such practices. He seems to have acted in good faith, supposing the law to be as he claimed it. In this he was mistaken, and his manufactory and tobacco are as much subject to forfeiture as if he had in fact acted with the most fraudulent motives.

If section 107 does not embrace this Indian country, neither does it embrace other Indian territory, and the result is that in all the territories, and even in some states, where Indians occupy territory not subject to state laws and state jurisdiction, the country occupied by Indians is free from the operation of this act.

But it is said that this Indian country is not within any collection district. The answer to this objection is found in the very language of the section itself, which declares that the internal revenue laws imposing taxes on tobacco shall extend to such articles produced anywhere within the exterior boundaries of the United States, "whether the same be within a collection district or not." It certainly is within the jurisdiction of this court, and this court has the same authority to punish for a violation of the provisions of the act committed in that country that it has to punish for a like offence in this state. And it is no objection to the exercise of this jurisdiction that the Indian Territory was not included within a collection district, and that parties engaging in the manufacture of tobacco in that country could not comply with the requirements of the act if they had desired to do so. Inability to comply with the requirements of the internal revenue act, from whatever cause, cannot be held to justify a violation of its provisions.

Why should these Indians, who have attained to such a degree of civilization, and have so long mixed with the white citizens of the United States as to be scarcely distinguishable from them, enjoy privileges with reference to the manufacture and sale of tobacco not enjoyed by citizens of the United States? Privileges, too, that, in their very nature, must be injurious to the citizens of the United States, and that will inevitably lead to great frauds upon the revenue of that government. The power to tax is an attribute of sovereignty, and the right of the national government to impose and collect taxes within the constitutional limits of that power on all persons within its jurisdiction, be they Indians or not, cannot be questioned.

3. Article 10 of the treaty between the Cherokee Nation and the United States, of the 19th of July, 1866, is in the following words: "Every Cherokee and freed person resident in the Cherokee Nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and

to ship and drive the same to market without any restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian Territory." It is insisted that this article of the treaty is paramount to the act of congress passed July 20, 1868, and that it cannot be superseded or infringed by any act of congress whatever.

Counsel for claimant was mistaken in supposing that congress may not repeal or abrogate a treaty, so far as it is a municipal law, provided its subject-matter is within the legislative power of congress. That identical question has been ruled upon in several cases. In Taylor v. Morton [Case No. 13,799], Mr. Justice Curtis says: "Several questions involved in this position require examination. One of them, when stated abstractly, is this: If an act of congress should levy a duty upon imports which an existing commercial treaty declares shall not be levied, so that the treaty is in conflict with the act, does the former or latter give the rule of decision in a judicial tribunal of the United States, in a case to which one rule or the other must be applied?" The second section of the fourth article of the constitution is: "This constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." There is nothing in the language of this clause which enables us to say that in the case supposed the treaty, and not the act of congress, is to afford the rule. There is, therefore, nothing in the mere fact that a treaty is a law, which would prevent congress from repealing it. Unless it is for some reason distinguishable from other laws, the rule which it gives may be displaced by legislative power at its pleasure. Judge Curtis proceeds in this case, in an able and exhaustive argument, to show that there is nothing in the constitution which makes treaties relating to matters within the scope of municipal legislation, paramount to a subsequent act of congress repealing or abrogating the same. The same learned judge, in his opinion in the case of Dred Scott v. Sandford, 19 How. 629, 630, says: "No supremacy is assigned to treaties over acts of congress. That they are not perpetual, and must be in some way repealable, all will agree." And he reaffirms with emphasis his opinion in the case above cited.

In Re Clinton Bridge [Case No. 2,900], it was contended that the act of congress of February 27, 1867 (16 Stat. 412), was in violation of certain treaties between the United States and foreign nations, which declare, in effect, that the navigation of the Mississippi river shall remain free and unobstructed forever. In response to this objection, Justice Miller says: "In reference to the first of these objections, we need not enquire whether those treaties were designed to affect such cases as the one before us, or not; for we are of opinion that, whatever obligation they may have imposed upon our government, the court possesses no power to declare a statute passed by congress, and approved by the president, to be void because it may violate such obligations. Those are international questions, to be settled between the foreign nations interested in the treaties and the political departments of our government. When those departments declare a treaty abrogated, annulled, or modified, it is not for the judicial branch of the government to set it up, and assert its continual obligation. If the court could do this, it could annul declaration of war, suspend the levy of armies, and become a grand international arbiter, instead of a court of justice, for the administration of the laws of the United States."

In Webster v. Reid, Morris (Iowa) 467, it was contended that the act of congress of 1834 was repugnant to the treaty made in 1824 between the United States and the Sac and Fox tribe of Indians, and was therefore void. Mason, Chief Justice, in delivering the opinion of the court, says: "Nor is it material, so far as the efficacy of this act of 1834 is concerned, whether or not it violates the treaty of 1824 by making a different disposition of those lands from what was stipulated for in that treaty. Government is certainly under the strongest moral obligation to preserve inviolate the faith of all treaties; but if the legislative power, which in such matters is sovereign, sees proper to violate this duty, there is no power in the judiciary to prevent it. True, a treaty is by the constitution declared to be a supreme law of the land, but so is an act of congress. The latter may repeal the former in the same manner that one statute may repeal another."

Upon the authority of these cases, I have no difficulty in holding that the article of the treaty in question is superseded and annulled by the act of 1868, in so far forth as it is repugnant thereto. In no event can the claimant maintain his claim under this article of the treaty. If it is repugnant to the act of 1868, it is abrogated. If it can receive an interpretation to make it consistent with the act of 1868, it will not help the claimant, because he has failed utterly to comply with the treaty itself when so interpreted. The article requires the tax to be paid upon the quantity sold outside the Indian Territory. When and how is this tax to be paid? The article is silent on this point. It evidently contemplates that the tax shall be paid at the place and in the time and manner prescribed by law for the payment of the tax on like articles manufactured elsewhere. All tax upon manufactured tobacco must be paid at the place of manufacture or before removal from a bonded warehouse. The law points out with great particularity how the same shall be packed, marked and stamp-

ed. And it might well be held that the legal effect of the last clause of the article in question is the same as if it read, paying on the quantity—sold outside of the Indian Territory—any tax which is now or may be levied by the United States thereon at the time and place and in the manner that is now or may be prescribed by law for like articles manufactured elsewhere in the United States.

The ruling in this case covers the points raised in a number of other cases of the same character—pending in court, and those cases will be disposed of in accordance with the ruling here made.

[The above judgment was affirmed by the supreme court in 11 Wall. (78 U. S.) 616.]

Case No. 16,529.

UNITED STATES v. TOLBEE.

[See Case No. 3,393.]

Case No. 16,530.

UNITED STATES v. TOLSON.

[1 Cranch, C. C. 269.] [1]

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

COMPETENCY OF WITNESS—LARCENY—OWNER OF STOLEN GOODS—VENUE OF CRIME.

1. The owner of stolen goods is a competent witness, after releasing to the United States his share of any fine which the court may impose upon the prisoner.

2. If goods be stolen in Maryland, and brought by the thief into this district, he may be convicted and punished here.

[Followed in U. S. v. Hankey, Case No. 15,328. Cited in U. S. v. Mason, Id. 15,738; U. S. v. Mortimer, Id. 15,821.]

[Cited in Worthington v. State, 58 Md. 407.]

The prisoner [Frank Tolson] was indicted, under the act of congress of 1790 (1 Stat. 112), for the punishment of certain crimes, for stealing a watch in the county of Washington. The evidence was that he stole the watch in Maryland, and brought it into this county.

Mr. Caldwell, for the prisoner, contended, that as the offence was committed under another sovereignty, the English cases respecting goods stolen in one county and carried into another county, did not apply; for both counties in England are under the same jurisdiction, and governed by the same laws. But here the jurisdiction and laws are entirely distinct. The offence must be complete, within our jurisdiction, or it is no offence. But the offence was complete in Maryland, and if he should be convicted and punished here, it would be no bar to a conviction there.

THE COURT, however, overruled the objection (KILTY, Chief Judge, absent), and the prisoner was convicted and punished by fine and whipping. Upon the trial, the owner of the watch having released to the United States his share of any fine which the court might impose, was examined as a witness in chief. See 1 Hawk. P. C. c 33, § 9; 2 Hawk. P. C. 221; 7 Coke, 2 (a); 2 Hale, P. C. 163; 2 Hawk. P. C. 220; Doug. 796; 2 Hawk. P. C. 247, § 47; 1 Hawk. P. C. 136; and the case of Com. v. Cullins, 1 Mass. 116. See U. S. v. Clancey [Case No. 14,800]; U. S. v. Hare [Id. 15,302]; U. S. v. McCan [Id. 15,655]; and U. S. v. Brown [Id. 14,657].

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

Case No. 16,531.

UNITED STATES v. TOM.

[2 Cranch, C. C. 114.] [1]

Circuit Court, District of Columbia. Nov. Term, 1815.

MANSLAUGHTER BY SLAVE—PUNISHMENT.

A slave convicted of manslaughter in Alexandria, D. C., may be punished by burning in the hand and whipping.

The defendant, a slave, was convicted of manslaughter, and the judgment of THE COURT (nem. con.) was that he should be burnt in the hand by the jailor in open court, and should be publicly whipped with thirty-nine stripes. See Act Va. Dec. 17, 1792, § 34, p. 190.

UNITED STATES v. TOMPKINS. See Case No. 16,483.

Case No. 16,532.

UNITED STATES v. TOMS.

[1 Cranch, C. C. 607.] [1]

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

HORSE STEALING — JURORS — PEREMPTORY CHALLENGES—CONTINUANCES.

Peremptory challenge refused in a case of horse stealing. Continuance, prayed on account of the absence of a witness who could testify that he heard another man confess that he had stolen the horse, refused.

Indictment [against John Toms] for stealing John Cannon's horse. Upon the authority of U. S. v. McPherson [Case No. 15,703], in this court at December term, 1807, the prisoner was refused the right of challenge, the offence having been decided to be simple larceny under the act of congress.

THE COURT refused a continuance on the ground of the absence of a witness who would swear that he heard another man confess that he stole such a horse from John Cannon, the court being of opinion that it was not competent evidence.

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

Case No. 16,533.

UNITED STATES v. TORGE.

[15 Int. Rev. Rec. 11.]

District Court, N. D. New York. Aug., 1871.

INTERNAL REVENUE LAWS—VIOLATION BY BREWER—REMOVAL OF BEER—INTENT.

[The criminal liability of a brewer under the internal revenue act, for selling beer, and allowing its removal from his brewery without affixing the proper stamps, is not dependent on his actual intent to defraud.]

HALL, District Judge (charging jury). This is an indictment framed under one of the provisions of the internal revenue law, and one which provides very stringent measures for the purpose of enforcing the collection of the duty upon fermented spirits or beer. The defendant [Luis Torge] is charged with the offence of selling and allowing to be removed from his brewery certain casks containing beer or fermented spirits without affixing upon them the stamps required by law. In other words, the defendant is indicted for not paying the duty which was due to the government upon the sale or removal of the beer. The statute in this case, gentlemen, does not require that there should be any intention to defraud; the object and intention of congress evidently was that in all cases the duties should be paid by the affixing of these stamps before the fermented spirits were allowed to be removed from the brewery; that the payment of the tax should not be left to any casualty or chance, but that in every instance the duty should be paid before the removal.

The only question which you are called upon to consider is whether or not the United States has made out the fact which necessarily constitutes guilt under this count in the indictment. If the evidence proves conclusively to you that the defendant allowed this beer to be removed from his brewery without having affixed upon the casks the proper stamps, then in my judgment it is your duty to find a verdict of guilty in this case. If you are not satisfied of the fact, of course your verdict will be for the defendant. There is no question of intention to defraud. He should know of the removal of the property; it should not be taken from his brewery by force, but should be taken by his consent; and having been taken with his consent, and with the knowledge that no stamps were affixed, a case is made out against the defendant.

It has been said that these provisions are very stringent and severe. It is doubtless true that they are so in many instances; and in some instances it seems to me as an individual (although I have no right to give an opinion as a judge) that they are unnecessarily severe; but that is not a question for you or me. We are bound to administer the law as we find it, leaving the responsibility of its severity with those who have framed the law. We must carry it out in good faith, in the exercise of such discretion as the law gives, and the consequences must be upon those who have been guilty of the offence, and those who have provided the law for its punishment.

Case No. 16,533a.

UNITED STATES v. TOWN-MAKER.

[Hempst. 299.] [1]

District Court, Territory of Arkansas. Feb., 1836.

HOMICIDE—INSUFFICIENT INDICTMENT—REMAND OF ACCUSED.

Indictment adjudged bad; but prisoner remanded to custody on proof before the court of the commission of homicide.

Indictment for murder.

Before JOHNSON, CROSS, and YELL, JJ.

OPINION OF THE COURT. It is considered by the court that the indictment in this case, and the matters and things therein contained, are not sufficient in law for the plaintiffs to have and maintain this prosecution against the defendant, nor is he bound by the laws of the land to answer thereto; and therefore said defendant by his counsel moved for his discharge from custody, which motion was opposed by Samuel C. Roane, district attorney of the United States, on the ground that he was ready to produce evidence before the court that the defendant had committed the crime of murder. And thereupon the court overruled the motion of the defendant for his discharge from custody, and the district attorney introduced a witness, who proved that the defendant had been guilty of the homicide of a citizen of the United States, in the district of country occupied by the Osage Nation of Indians, and therefore, upon motion of the district attorney, it was ordered by the court that the defendant be remanded to the custody of the marshal, to be imprisoned until he shall be discharged according to law.

YELL, J., dissented from this order.

Case No. 16,534.

UNITED STATES ex rel. HILL v. TOWNS.

[7 Ben. 444.] [2]

District Court, S. D. New York. Sept., 1874.

CONTEMPT OF COURT—POSSESSION—BONDING PROPERTY—EFFECT OF APPEAL—JURISDICTION.

1. H. filed a libel against T. and the yacht A., to recover possession of the yacht. A decree was rendered dismissing the libel, and authori-

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

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

zing T. to give a bond and receive possession of the vessel from the marshal, and also authorizing H. to give a bond and receive such possession, in case T. failed to do so. T. not giving the bond, H. gave it and received the vessel. H. also appealed to the circuit court from the decree, and the return was duly made to that court. T. then took the vessel by force, from one of the sureties on the bond, to whom H. had delivered her. H. then applied for an attachment against T. for contempt of court: *Held*, that the giving of the bond substituted the bond for the vessel, and the taking of the vessel by T., after the bond had been given, was not a contempt of court.

2. The possession of the vessel, which the court had relinquished on the giving of the bond, must be maintained and defended in like manner as if the property had never been in the custody of the court, and not otherwise.

3. T., having taken the vessel, might possibly have lost the benefit of the bond.

4. After the return was filed in the circuit court, if the custody of the vessel was in either court, it would be in the circuit court, by virtue of the appeal.

In admiralty.

R. D. Benedict, for relator.

L. J. Lansing, for respondent.

BLATCHFORD, District Judge. Abraham Hill filed a libel in this court against the yacht Amelia and J. N. Towns, in a cause of possession. The libel alleged that the libellant was the owner of the yacht Amelia, and left her in the custody of Towns, to take care of her, and that Towns wrongfully retained possession of her. The vessel was arrested and detained in custody. Towns answered the libel, and the case was put at issue and heard on pleadings and proofs. A decree was made dismissing the libel [Case No. 6,487], and further ordering that Towns, the claimant, should be at liberty to give a bond or stipulation for value such as is required to be given by the rules of this court, on releasing and delivering up property arrested by process of the court, within three days from the entry of such decree, in the sum of $2,100, and that the vessel should be delivered to Towns upon the giving and perfecting and approval of said stipulation or bond, according to the practice of this court, and that, in case Towns should fail to give such bond or stipulation, the vessel should be delivered to the libellant upon his giving such a bond or stipulation for value in the sum of $2,100, and the perfection and approval of the same, and the payment by him of the marshal's fees. Towns failed to give any bond or stipulation for value, and thereupon the libellant gave the security provided for in the decree, and it was approved, and the vessel was duly delivered to the libellant under the decree. Afterwards, Towns caused the vessel to be forcibly seized and taken from the custody of a person to whom the libellant had delivered her, such person being one of the sureties who had signed the stipulation for value on the part of the libellant, and the libellant having given a bill of sale of the vessel to such person, to secure him for his liability as surety. On these facts an application is made to this court, on behalf of the libellant, as relator, to issue an attachment against Towns, for a contempt of this court in disobeying the said decree, by taking the vessel from the possession of the libellant by force, after she had been delivered to the libellant under the decree.

Towns makes no denial of the facts alleged, but I do not see how the application can be granted. The court dismissed the libel, and then, instead of merely ordering that the vessel be discharged from the custody of the marshal, or merely restoring her to the custody from which she was taken, that of Towns, gave first to Towns the option of taking her on giving a bond for her value, and, on his refusal to take her on such terms, gave to the libellant the option of taking her on giving a bond for her value. But the power of the court to deal with the vessel was gone as soon as the vessel passed from the custody of the court. If the court, on dismissing the libel, had merely restored the vessel to the custody of Towns, and if, after Towns had fully taken possession of her, on such restoration, the libellant had forcibly taken her away from Towns, I do not see how such action on the part of the libellant would have been any contempt of the authority of the court. It would not have been disobedience to any order of the court, or interference with any property in the custody of the court. So, in the present case, not only was the vessel, when Towns seized her, out of the custody of the court, and not held under process, but a bond had, by the direct order of the court, been substituted in place of the vessel. It is well settled, that, where a vessel is released on bond, the bond stands in place of the vessel, and the court has no further power to interfere with the vessel. An interference, therefore, by any person with the vessel, is not in conflict with any authority of the court over the vessel. The possession which the court has relinquished, on receiving the substituted bond, must be maintained and defended in like manner as if the property had never been in the custody of the court, and not otherwise.

The stipulation required and given contains a condition, that, at any time, on the interlocutory or final order or decree of this court, or of any appellate court to which the suit may proceed, and on notice of such order or decree to the proctors for the libellant, the stipulators will abide by the final decree rendered by the court or the appellate court, if any appeal intervene. This stipulation was given for the benefit of Towns. He took the vessel forcibly from the possession of one of the sureties in such stipulation, to whom the libellant had given title to and possession of the vessel, as security for his suretyship. Under such circumstances, it may well be, the libellant having taken an appeal in the suit, to the circuit court, from the decree

made by this court, that Towns would not be allowed to claim any benefit under or from such stipulation, but beyond that I do not see what power either this court or the circuit court would have to take notice of the conduct of Towns in taking the vessel.

It was urged, in support of the application, that the provision of the decree that the vessel should be delivered to the libellant, imported, also, that the court should continue to maintain such possession in the libellant against dispossession by Towns. No such effect ordinarily follows a decree for the delivery of property. If the decree is fulfilled and the property is delivered, it passes out of the control of the court, and its possession must be maintained as if it had come from any source other than the court. If the possession is to be maintained by the court against dispossession by Towns, why not against dispossession by all the world?

There is a further view. The stipulation was given and approved June 12th, 1873. Possession of the vessel was delivered to the libellant, and he, on the 1st of July, 1873, delivered her, with the bill of sale of her, to the surety. The appeal taken by the libellant to the circuit court, was perfected, and the return to the appeal, containing the record and proceedings, was filed in the circuit court, in April, 1874. The vessel was not taken by Towns until July 3d, 1874. Any power of this court to issue the attachment asked for, must be founded on the idea that this court had a quasi custody still of the vessel when Towns so took her. But nothing is better settled than that the vessel, if in the custody of any court at that time, was wholly in the custody of the circuit court, by virtue of the appeal.

The application must be denied.

UNITED STATES (TOWNSEND v.). See Case No. 14,119.

Case No. 16,535.

UNITED STATES v. TRACT OF LAND.

[1 Woods, 475.] [1]

Circuit Court, S. D. Georgia. April Term, 1871.

WAR — RIGHTS OF CONQUEST — LAND OWNED BY CONFEDERATE GOVERNMENT—CONFISCATION PROCEEDINGS.

Land conveyed to the Confederate States government, for the purpose of aiding the Rebellion, became the property of the United States by right of conquest, ipso facto, and no proceedings were necessary for confiscation or forfeiture, and when such proceedings were taken, they were void.

[In error to the district court of the United States for the Southern district of Georgia.]

One Titus filed a petition in the district court as informer, claiming one-half the proceeds of lands seized and sold in the principal case. The court awarded judgment in his favor. [Case unreported.] This is a writ of error to reverse that judgment.

John D. Pope, U. S. Atty.

Henry R. Jackson, for informer.

BRADLEY, Circuit Justice. The land in question in the cause was seized for confiscation under the acts of August 6, 1861 (12 Stat. 319), and July 17, 1862 (12 Stat. 589). The information alleges that it had been conveyed to the Confederate States government for the purpose of aiding the insurrection. If this were the case, it became the property of the United States government by right of conquest, ipso facto; that government succeeding to all the property held by the Confederate States government. The United States needed no proceedings for confiscation or forfeiture. They had plenary title and right of possession, if not actual possession, without any such proceedings. It cannot be presumed that congress intended to authorize a proceeding to forfeit or confiscate the government's own property, and divide the proceeds with the informer. Such a proceeding must be regarded as supererogatory and void.

The judgment is reversed.

Case No. 16,536.

UNITED STATES v. TRACY et al.

[8 Ben. 1.] [1]

District Court, S. D. New York. Jan., 1875.

JOINT AND SEVERAL BOND—DEATH OF AN OBLIGOR—INSOLVENCY—EXECUTORS—PARTIES—PLEADING—STATE PRACTICE.

1. Suit on a joint and several bond may be brought against the executors of a deceased obligor, together with the surviving obligors.

[Cited in Albany & Rensselaer Co. v. Lundberg, 121 U. S. 454, 7 Sup. Ct. 960.]

2. The rule as to showing the insolvency of the surviving obligors, before a suit can be maintained against the representatives of a deceased obligor, has no application to a case of several liability.

3. The state practice is applicable to suits at law in this court.

[Cited in Albany & Rensselaer Co. v. Lundberg, 121 U. S. 454, 7 Sup. Ct. 960.]

This was a suit at common law. The declaration averred the making of a bond by four obligors, a breach of the bond, the death of one of the obligors and the due appointment and qualification of the two defendants [Edward H. Tracy and another] herein named, as his executors, subsequent to the breach. The remaining obligors and the executors were made defendants. The executors demurred on the ground that they

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

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

were not liable jointly with their co-defendants, and that the declaration did not show that the surviving obligors were insolvent, as a reason for joining the executors with the survivors, as defendants.

E. H. Smith, Asst. U. S. Dist. Atty.
C. Tracy, for defendants.

BLATCHFORD, District Judge. The demurrer in this case must be overruled, with leave to the defendants demurring to answer, on payment of costs. The bond is a joint and several bond, and not a joint bond only. The testator of the executors died, as the declaration alleges, after the breach set forth. It is proper, under the state practice, now applicable to a suit at law in this court, to sue in one suit all the parties severally liable on the bond, to enforce the several liability of each. The executors are liable on the bond, if their testator was liable. He was liable, at the time of his death, on the facts set forth in the declaration. The suit is substantially a several suit as to the executors. If a joint suit in form it is not such in substance. A several judgment can be had in it, for or against the executors, in like manner as if the suit were against the executors alone. The form of the suit does not convert a several liability into a joint liability, or a joint and several liability into one wholly joint. As the liability of the testator attached in his lifetime, his death did not discharge it, and his executors are liable to respond for it, in this form of suit. The suit is, to all intents, a suit against all the obligors in the bond. The rule, in regard to showing the insolvency of the surviving obligors, before a suit can be maintained against the representatives of a deceased obligor, has no application to a case of several liability.

UNITED STATES (TRAFTON v.). See Case No. 14,135.

Case No. 16,537.

UNITED STATES v. TRAVERS.

[1 Brun. Col. Cas. 467;[1] 2 Wheel. Crim. Cas. 490.]

Circuit Court, D. Massachusetts. Oct., 1814.

FEDERAL COURTS—JURISDICTION IN CEDED TERRITORY — HOMICIDE IN RESISTING ARREST — MANSLAUGHTER—MALICE PRESUMED—ARMY REGULATIONS—REFUSAL OF DISCHARGE.

1. Where a state grants land to the general government, reserving in it a concurrent jurisdiction in executing process therein, for offenses committed out of it, the federal courts have exclusive jurisdiction of offenses committed within such territory.

[Cited in U. S. v. Penn, 48 Fed. 670.]

2. Homicide in resisting an arrest substantially illegal will, at most, amount to manslaughter.

3. The law presumes malice from the fact of killing, and any circumstances in mitigation or of excuse or justification must be proved by the prisoner.

4. Where a soldier who has served out his term is refused his discharge, he is, nevertheless, while remaining in the barracks, subject to the rules of the establishment.

[Cited in Barrett v. Hopkins, 7 Fed. 316.]

The facts of the case appeared by the evidence as follows: On the evening of the 27th November, at about a half or three quarters of an hour antecedent to the fatal event, the prisoner [George Travers], who had been a mariner in the service of the United States, but whose term of service had a short time previously expired, was, with several of his comrades, engaged in the sport of casting snow balls at each other in the navy yard at Charlestown. In the course of this recreation a person by the name of Stocker accused the prisoner of having unfairly concealed a brickbat in a ball of snow, which he had thrown at him. The prisoner denied the charge. A tumult arose; several blows were exchanged between the prisoner and Stocker; others of the party were soon involved in the affray, and a considerable conflict ensued. Notice of the affray was soon communicated to the principal officer of the guard. An orderly sergeant appeared and ordered the wranglers to desist, and threatened to make known the circumstance to the orderly sergeant. High words and blows were still continued, whereupon the sergeant immediately called at the room where the quarrel was going on, and ordered the principal persons who had been engaged in it to the guard house. Stocker and a person by the name of Livre obeyed the order without hesitation; but the prisoner remained behind, under a pretext that he wanted to take a blanket and some clothes from his bunk. While the sergeant, with Stocker and Livre, were gone to the guard house, a few paces only from the apartment in which the quarrel had originated, the prisoner was heard to declare, and several times to repeat the declaration, that he would not be taken alive to the guard house; that he would be the death of any man who should attempt to force him thither; and immediately retired to a corner of a room, where a number of unloaded muskets had been left in the racks, and taking from a cartridge box, hanging above, two cartridges, he put one of them into a musket, and propelled it down by striking the breech of the gun forcibly upon the hearth; with the other cartridge, after biting off the end, he deliberately primed the gun, and brandishing it about the room declared repeatedly that he would kill the first man who should approach him. While the prisoner was in this situation, and within five or six minutes after, Stocker and Livre were sent to the guard house; the orderly Sergeant McKim and Hasey, accompanied by Sergeant Geary, entered the room; the prisoner instantly accosted them, directing his musket towards

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

the door by which they entered, and saying: "Sergeant McKim, stand off; if you approach me I will take your life." Geary with his sword parried the gun as it was pointed at him, and it was then directed towards McKim, who, being unarmed, endeavored to parry it with his hand. At this moment the prisoner, being nearly in contact with the wall behind him, drew back the musket a few inches, and pushing forward again towards and within a half foot of McKim's breast discharged the piece, and thereby instantly destroyed the lives of McKim and Hasey. The question was whether this was murder or not.

George Blake, U. S. Dist. Atty.

Benjamin Whitman and Alexander Townsend, for prisoner.

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

DAVIS, District Judge (charging jury). The time which has been occupied in this trial has not only given opportunity to have fully presented to you all the facts and principles which have a bearing on the subject upon which you are to decide, but must, also, have had a beneficial tendency to produce that state of mind which it is desirable should be possessed by those who have an agency in the administration of justice. The evidence which you have heard discloses a transaction of a nature to excite great emotion. This ought not to be wholly suppressed, but may require regulation and discipline. Excitement and indifference are both to be avoided. There is a just interest in the melancholy subject which all should feel; but a correct discharge of your duty requires a mental exercise, attention, and discrimination, for which calmness and composure are obviously requisite.

A question has been made by the learned counsel for prisoner, as to the jurisdiction of the court. This is, in its nature, a preliminary question; for if the court have not jurisdiction of the offense alleged in the indictment, it would be superfluous to proceed in the inquiry relative to the guilt or innocence of the prisoner. The objection rests on the terms of cession, by the commonwealth to the United States, of the ground occupied for a navy yard. The act authorizing the purchase of the tract of land in question limited the quantity to sixty-five acres, and preserved a concurrent jurisdiction with the United States, so far as that all civil and such criminal processes as may issue under the authority of this commonwealth against any persons charged with crimes committed without the same tract of land, may be executed therein. The government has been called upon to prove a purchase, corresponding to the terms of the consent, on the part of the commonwealth. The occupation of the place by the United States, for many years past, is of public notoriety; but the deeds of conveyance have also been produced; and to remove any uncertainty, as to the quantity of land, you have had the testimony of the surveyor. Mr. Tufts, who was employed on the occasion, testifies that the whole quantity purchased by the United States was somewhat less than forty acres. If the evidence should render this objection untenable, it is further contended, that the reservation made by the commonwealth does not leave that sole and exclusive jurisdiction in the place, which the law of congress, relative to criminal offenses, requires in order to give this court legal cognizance of the offense charged in the indictment. The object of the condition, annexed to the cession, is obvious. It was to prevent the place from becoming an asylum for fugitives from justice. By a late decision in the supreme court of Massachusetts, it is determined that officers, proceeding to take the benefit of the provision, act under the authority of the United States, and that offenses committed in a territory ceded with such reservation, are not punishable by the courts of the commonwealth. 8 Mass. 72. I am satisfied that this court has jurisdiction upon the alleged offense, and that you should disregard the objection. This being a mere question of law, it is proper that you should be governed, in relation to it, by the opinion of the court. If the direction should be erroneous, any verdict which you may render will not be conclusive against the prisoner in regard to this objection. It may again be brought directly before the court, and sustain a more thorough investigation.

I proceed to the other points presented in the examination and argument. The testimony of the witnesses has been very distinct and deliberate. There is little complexity in the story, and the facts are of a nature to be deeply impressed upon the memory. I shall not undertake to recapitulate the testimony, but shall state the principles by which you are to be guided and governed. In doing this, there must, necessarily, be occasional reference to what may be considered as proved; but you will recollect, that in respect to the evidence, you are the sole and exclusive judges. You are first to be satisfied of the fact of killing, and are to inquire whether the deceased came to his death by the instrumentality of the prisoner. To this point you have the evidence of several of the associates of the accused, and of Sergeant Geary, who testify as to the loading of the gun by the prisoner, the manner of its discharge, and the fatal effect. You have, also, the testimony of Dr. Bartlet, who was immediately called, who found McKim lying dead on the spot where he fell; the body, he says, was perforated, in the direction of the lungs; the wound was, in his opinion, a gunshot wound, and, he has no doubt, was the cause of his death. Whenever the fact of killing is proved, the law presumes it to be founded in malice until the contrary appear; and, of course, all circum-

stances relied on in justification, excuse, or mitigation, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him. It is contended that there are circumstances of such description in this case. You have heard them urged and argued and replied to with much ability. To enable you to form a correct judgment of the transaction, and to determine its proper character, it will be necessary that you should carefully compare the evidence with the rules and principles of law relative to homicide. This may present difficulties, but it may be presumed, not insurmountable. You are, indeed, in a situation in which it is most important that you should think and reason with precision. Popular, or even philosophical ideas on the subject, which the law has not sanctioned, or which are incompatible with its requirements, should not be allowed to prevail. You are to attend to legal language, and to adopt it in a legal sense. This, however, will not be found repugnant to the dictates of a plain understanding, considerately exercised; and our law of homicide, rightly understood, will, I trust, be approved by every intelligent person, as founded on a just survey of the principles of human nature, punishing malignant violence or culpable negligence, and yet reasonably accommodated to cases of necessity and accident, and various exigencies incident to social intercourse. Of homicide, or the killing of any human creature, there are two grand divisions—that which is felonious, and that which is not felonious. Homicide, not felonious, is either justifiable or excusable. It is convenient, in considering the subject, to regard this subdivision; though now the legal result to the party on trial is the same, whether the homicide be justifiable or excusable. In either case he is to be acquitted. In regard to the higher grades of justifiable homicide, a killing by command, or requirement of law, as in the execution of malefactors, or in advancement of public justice, or in the enforcement of arrests, where the officer is resisted, it is not necessary particularly to remark in this case. The defense is not placed on that ground. Homicide is also justifiable in self-defense, and is permitted by the law against one who manifestly intends and endeavors with violence or surprise to commit a known felony on the person, habitation, or property of the party killing. Thus, attempts to commit a robbery, murder, or burglary may be repelled with force; and if in the conflict the invaded person should happen to kill the assailant, such killing is justifiable. So also it is in defense of chastity. But it is not every manner of force, though wrongful, which will justify killing. The rule is that where a crime, in itself capital, is endeavored to be committed with force, it is lawful to repel that force by the death of the party making such attempt; and that the law will not suffer with impunity any crime to be prevented by death unless the same, if committed, would also be punished with death.

You will compare the evidence with this criterion. From the several witnesses who were present, you learn the declared purpose of the interference by the deceased, accompanied by Sergeant Geary. You have it also from Sergeant Geary himself. If you should be satisfied that the only object on their part was to quell a broil in the barracks, that no felony was threatened or contemplated, and that the only injury or inconvenience intended, or which could, under the circumstances, be apprehended by the prisoner, was arrest and confinement, then it is certain that the killing for such cause, or to prevent such a consequence, is not in contemplation of law justifiable.

Excusable homicide is that which occurs by misadventure or in self-defense, under particular circumstances, distinguishing it from justifiable homicide from a similar motive. Homicide, by misadventure, is where a person doing a lawful act, without any intention of hurt, unfortunately kills another. The instance often mentioned in our books, that of the head of a hatchet flying off when a man is at work with it, and killing a bystander, is sufficient to illustrate the principle. Cases of this sort, unfortunately, are not of unfrequent occurrence. Where the act is lawful, and the effect is merely accidental, the party in some measure instrumental of the death is held excusable, and is rather an object of compassion than of punishment. The homicide in self-defense, which is considered in law as excusable, rather than justifiable, is that whereby a man may protect himself from an assault, in the course of a sudden casual affray or quarrel, by killing him who assaults him. In such case the law, however, requires of the party to have quitted the combat before a mortal wound shall have been given, to retreat, as far as he can with safety, and at last to kill from mere urgent necessity, for the preservation of life, or to avoid enormous bodily harm. From the essential characteristics of excusable homicide, it will appear that if you should, as before mentioned, find from the evidence that the prisoner could reasonably apprehend from the deceased nothing more than arrest and confinement, then the killing under such circumstances cannot be considered as excusable homicide. It cannot be excusable by misadventure; for there it is essential that the party killing should be in the exercise of a lawful act. It cannot be held excusable in self-defense, because if such be the evidence, of which you are the judges, there was, of course, no danger of the prisoner's life, or of such enormous bodily harm as would render the killing excusable.

It is contended for the prisoner that the discharge of the musket was accidental. That there is no evidence or not sufficient evidence of a voluntary act of the prisoner

to effect it; but that the lock was sprung, either by the blow from Sergeant Geary's cutlass, or from the grasp of the gun by the deceased, the instant before it was discharged. In regard to this point, you will consider the evidence, and settle in your own minds the question whether from the whole conduct of the prisoner, relative to the death of McKim, you can and must infer that he actually discharged the gun which he had loaded and levelled with a deadly or dangerous direction. Mitchell, to whom the gun belonged, says that the spring of the lock is a stiff one. The same remark is made by Sergeant Geary, who examined the gun in your presence. You have also seen the gun stock grasped, in representation of what took place on that melancholy evening when Mr. McKim fell. If you should think it necessary, you may pursue this examination further by an examination of the piece, and on the whole evidence on this head, will come to a conclusion as to the probability of the supposition advanced on the part of the prisoner. But I must here observe that if you should embrace the explanation which has been offered for the prisoner in this particular, you will then have to consider its legal applicability. Such explanation, if admitted, cannot avail to characterize the case as excusable, by misadventure, unless all the conduct of the prisoner, connected with the supposed accidental act of the discharge of the gun, was lawful. Now, if it was unlawful to kill for avoiding or repelling the purposes for which the officers interposed, it would also be unlawful to load the gun, and to wield and point it in a dangerous direction, from which death or some serious mischief would be likely to ensue. If such appear to be the conduct and views of the prisoner on that occasion, he cannot be considered as in the exercise of a lawful act, and though the discharge of the gun in such case be admitted or proved to have been done without the actual drawing of the trigger by the prisoner, still the proceeding could not be referred to the head of homicide by misadventure, on account of the unlawful acts which were concomitant. Bringing the evidence to the test of these principles, if you do not find the act done by the prisoner justified by the command or permission of law, or excused on account of accident or self-preservation, it must, of course, fall under the remaining division of homicide, and be considered as felonious.

Felonious homicide, which is defined to be the killing of any human being without justification or excuse, is divisible into manslaughter and murder. Manslaughter is the unlawful killing of another without malice, express or implied, and it may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act. I shall not undertake, on this occasion, to specify the various instances of manslaughter; such as should have no relation to the case on trial might only tend to perplex and embarrass you in your inquiries. Those grounds of defense, which have been relied on, as bringing the offense within this description of homicide, will be considered. First, it is alleged that the killing of the deceased was in resistance of an unlawful arrest. Homicide in resisting an arrest substantially illegal, will, at most, amount only to manslaughter. To judge of the validity of this defense, we must consider the situation of the prisoner, and the circumstances under which he acted. According to the testimony of Capt. Anderson, the prisoner had been five years a soldier in the marine corps, in the service of the United States. The term of his engagement expired on the 22d of September last, about two months before the transaction for which he is on trial. He had repeatedly applied to his commander for his discharge, but could not obtain it. For a time the reason assigned was, that some necessary document had not been received from Washington. Afterward, and before the unhappy occurrence referred to, that document was received. Still the discharge was delayed. Under these circumstances, the situation of the prisoner seems to have been equivocal, and, in a degree, irritating. Capt. Anderson says, that he considered him as a volunteer waiting for his discharge, entitled to pay and rations; and that he was occasionally called upon to do duty. I do not recollect whether he was considered as compelled to perform military duty; but it appears that he was considered liable to military discipline, and had been confined, since his time expired, for some alleged misbehavior. From want of sufficient information relative to military questions, I may have some misconceptions on this subject. Capt. Anderson observes, that he did not consider the prisoner at liberty to depart from the station, under these circumstances, without leave. But I should apprehend that in this he is not correct. The prisoner might have been exposed to some inconvenience, suspicion, or loss of other employment, if he had departed without the usual certificate; and this consideration, probably, induced him to remain, though with reluctance, and as appears, with resentment. It is to be regretted that he met with this embarrassment, and that a soldier, whose term of service was accomplished, should be thus retained in a situation so questionable and tending to create difficulties and disgust. In justice to Capt. Anderson, it is proper to suggest a circumstance, from which it may be inferred that he was not influenced by any unkind or injurious motive in his proceedings. Though dissatisfied with the prisoner's deportment in several instances, it was his intention, he says, to aid him in an

application for a pension, on account of some disability incurred in the service. This intention, it appears, he had communicated to the prisoner. Notwithstanding the peculiarity of the prisoner's situation at the navy yard, and admitting that his residence there was, in a degree, involuntary, or that he was an injured man, still, while thus remaining, he was subject to certain obligations incident to his situation, and he certainly was not at liberty to commit acts of disorder and violence with impunity. His attempts or efforts to leave the place, if efforts were necessary, must, I think, be allowable. If resisted or opposed in such attempts, and violence or even death had ensued in consequence, it is not necessary now to say how such an occurrence would have been considered. I would hope that no officer would have the temerity to try the experiment. But you will judge, gentlemen, from the evidence, whether the transactions of the evening, which terminated in the unhappy death of Sergeant McKim, had any reference to such attempt to assert and regain his liberty by the prisoner, or whether they did not merely relate to a quarrel or affray, in which he had participated. The duties of the sergeants, and particularly the orderly sergeant, and of this description was the deceased, have been stated to you. It will, I presume, be admitted, certainly it has not been disputed, that the sergeants might and ought to interpose in the manner and to the extent which they did, in reference to men belonging to the corps, upon the occurrence of a violent affray. Was the prisoner, as he was then situated, also subject to such interposition or restraint? In my opinion he was, while thus remaining in the barracks, subject to the necessary rules of the establishment for the preservation of peace and order. He cannot, though he should be considered as an injured man, violate those rules, always excepting, as before mentioned, any act or exertion, the direct object of which should be to depart from the place. There are offenses which no one would say he could commit and not be subject to restraint, such, for instance, as setting fire to the magazine, or attempting to excite mutiny among the troops. The same may be said of a seaman, who may not have received his pay and discharge according to contract. He may not be liable to duty, though continued in the ship, but there are crimes and disorders essential to be prevented which he could not commit with impunity, and immediate safety and security of life and property might require that he should be subjected to discipline and restraint. If a mere visitor had been in the barracks on that evening, with or without permission, and had been concerned in the affray, he would, in my opinion, have been liable to be put under guard; and if you should be satisfied, from the evidence, that the prisoner was, on that evening, engaged in a brawl, quarrel, or affray, it was, in my opinion, the right and duty of the sergeant to interpose and quell such disorders, and to subject to usual military restraint all who were concerned in it, including the prisoner.

Your attention is called, by the attorney for the government, to some special reasons for securing the prisoner; from the circumstances testified relative to the bayonet with which he armed himself in the affray, and the information communicated by the boy to Sergeant Todd, that the prisoner had loaded a gun. It is further urged, that there was an assault on the prisoner, referring to the manner of Sergeant Geary's approach, and his striking, with his cutlass, the gun with which the prisoner was armed, and in the same connection, your attention is called to the language used by Sergeant Geary to the prisoner. According to the testimony of John Hassell, who reports the language of the deceased as he approached the prisoner, it would appear to have been sufficiently mild. Sergeant Geary's expressions were more harsh, and if words could be of any material import in the case, your attention might properly be employed in deciding what language or mode of address was best suited to the occasion, and whether the manner in which Sergeant Geary accosted the prisoner was or was not adapted to make the desired impression and induce his submission. But the rule of law is, that mere words, though reproachful, are no defense in case of homicide, and will not alone constitute a provocation sufficient to free the party killing from the guilt of murder. Where a man, in the lawful pursuit of his business, is assaulted, and kills the assailant, it may be manslaughter or justifiable homicide, according to the weapon used in the assault, or the danger to be apprehended; but a rightful application of force, against the party killing, can never be considered as an assault. If Sergeants Geary and McKim might rightfully interfere, under the circumstances proved, to disarm and to restrain the prisoner, then the sudden and forcible stroke, by which Sergeant Geary directed the gun from its dangerous aim at his body, cannot be viewed as an assault, but as a necessary operation for his own defense and protection. Of the legality and propriety of those officers' proceedings, I have already remarked, and shall not enlarge on that subject. If the gun was discharged by means of the stroke given by Sergeant Geary, and in the instant of the change in its direction by force of the blow, the consequent death of Sergeant McKim by its discharge would on such supposition be an involuntary act on the part of the prisoner, but would not change the character of the offense if the prisoner were in the exercise of an unlawful act. If the offense

would have been murder or manslaughter, supposing Sergeant Geary to have been killed, it would be the same in regard to the death of McKim. The agency of the deceased, in producing the effect, by grasping the gun, or the stroke given by Sergeant Geary, can make no difference, provided those officers are to be considered as lawfully employed on that occasion, and the prisoner in the exercise of an unlawful act. If a man, liable to arrest, should arm himself with a hair-spring pistol to resist an officer, having a right to make the arrest, and such officer should be killed in the attempt, by the discharge of the pistol, at the moment of contact, it would be no defense to say that his access to the fatal instrument had produced his death. And when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in the prosecution of a felonious intent, or if in its consequences it naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.

The remaining ground of defense under this head is, that the killing was upon a sudden affray and in heat of blood, and thus reducible to manslaughter. If upon a sudden quarrel two persons fight, and one of them kills the other, it is manslaughter; and so it is if they should on such occasions go out, by agreement, and fight in a field. There would, on such supposition, be some intervening space between the commencement of the dispute and the actual combat, but the law considers it as one continued act of passion; "and," say the authorities, "pays that regard to human frailty, as not to put a hasty and a deliberate act on the same footing with regard to guilt." It appears by the evidence that there was, on the evening when Mr. McKim was killed, and just before the occurrence, a quarrel or affray in the room occupied by the prisoner and some of his associates. The circumstances of that affair you will recollect. If a death had ensued on that occasion, from a wound inflicted by one of the combatants on another of them, for instance, with the bayonet seized by the prisoner, it might have furnished a case, which the law, in benignant consideration of human infirmity, would consider as manslaughter. The indulgence which the law extends to cases of this description is founded on the supposition that a state of sudden and violent exasperation is generated in the affray, so as to produce a temporary suspension of reason, and that the transport of passion excludes the presumption of malice. But if you should find, from the evidence, that the affray between the original combatants was at an end, a question would then arise whether the law will extend such benignant consideration of the offense to a state of passion thus excited, when directed against persons who had no agency in giving the provocation. There are instances of such transfer. Innocent and well-disposed persons interposing to quell riots or affrays may happen to be killed in the attempt. Such killing, though of persons thus laudably employed, may amount to manslaughter, from the heat of passion excited, and from the party killing not being able to discriminate, but imagining that they came to take part in the affray. But when officers, or those who have a right to interpose to quell riots and affrays, do interpose for that purpose, and their object is declared and known, and they are resisted, and killed in such resistance, it is murder in the persons thus resisting and killing. In regard to the limitations of this indulgence to human infirmity on sudden provocation, time is an important circumstance. Even as relates to the person giving the provocation and the immediate object of resentment, "if there be a sufficient cooling time," to use the language of the books, "for passion to subside, and reason to interpose, and the person so provoked kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder."

You will consider the evidence, in this case, as to the time which elapsed between the affray and the intervention of the deceased. The attorney for the government has called your attention to other circumstances appearing in evidence, manifesting, as it is argued, the assumption of new views by the prisoner, and a deliberate design to accomplish an unlawful and felonious purpose. Such are the loading of the gun, the manner of loading it, and the accompanying declarations and conduct of the prisoner. Whether the killing shall be mitigated to manslaughter will depend on your views of the evidence with reference to the legal doctrines which have been stated. A killing in one continued state of passion arising merely from the excitement in the affray, and without circumstances implying malignity of heart, may be considered as manslaughter. But if it should be your opinion, from the evidence, that there was sufficient time for passion to subside, and for reason to interpose; if the prisoner had, or might under the circumstances, be reasonably supposed to have sufficient self-possession, notwithstanding the excitement, to know the officers and their object, and the purpose of their interference; and, especially, if he was master of his temper at the time so as to adopt and cherish new and improper views and purposes, not immediately connected with, or excited by the previous quarrel, the act of killing, under such circumstances could not, I conceive, be mitigated to manslaughter, on the ground of

sudden heat from the previous affray. What was his actual state of mind, and all the circumstances appearing in evidence on this point, you will consider. If you should find, from the evidence, that the killing was unlawful, and should not consider it as mitigated to manslaughter on the grounds suggested in the defense, it will then follow, that the offense is of the description alleged in the indictment, and must be considered as murder. The crime of murder has this essential ingredient to distinguish it from manslaughter, that it arises from the wickedness of the heart, denominated by the law, malice aforethought. The malice intended by this expression, as has been observed, is not merely spite or malevolence to the deceased in particular, but an evil design in general, the dictate of a wicked, depraved, and malignant spirit. It may be malice expressed, and be manifested by deliberately formed designs or declarations; or malice implied, to be inferred from such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief.

The doctrines of the law on this as well as the other branches of homicide have been read to you. I do not think it necessary for me to detain you with any further observations.

STORY, Circuit Justice (charging jury). It is not without reluctance that I address you. I am so entirely satisfied with the charge of my learned brother, and so entirely subscribe to his doctrines, that nothing further seems necessary to be said on this melancholy occasion. As, however, the present is a capital trial, and the government and the prisoner have in some sort a right to a full expression of my opinion, and as my brother also wishes it, I will detain you for a short time while I examine the law and the evidence, which are the proper guides for your decision. I will in the first place give you a summary of the facts. (Here followed a statement of the material facts.) Upon the point of jurisdiction I do not entertain any doubt. It is unnecessary to trouble you with reasons of this opinion; but you will consider it as our decided opinion that if the land where this transaction happened had been duly conveyed to the United States (of which there is no dispute between the parties) the jurisdiction of this court to try the offense is clear. The offense in the sense of the law was committed in a place "under the sole and exclusive jurisdiction of the United States."

I will now proceed to lay before you a general view of the principles of law, as to the subject of homicide. Homicide is either justifiable, excusable, or felonious. It is justifiable when the act is done from some unavoidable necessity, or for the advancement of public justice, or for the prevention of some atrocious crime; such as the execution of a criminal convict, and the killing of a person who attempts to rob, murder, or commit some other atrocious felony upon the person or property of another. It is excusable when it happens by misadventure or in self-defense. By misadventure, when in doing a lawful act a person by accident kills another, having used proper precaution to prevent danger. In self-defense, commonly so called, where upon a sudden affray death ensues from necessity, but the necessity is in some measure founded upon the fault of the party who urges it in his excuse. It is felonious, in legal contemplation, when it amounts to manslaughter or murder. Manslaughter is the unlawful killing of another, without malice express or implied; and it may be voluntary, as upon a sudden heat of passion, or involuntary, as when it happens by accident in doing acts which are either unlawful in themselves or are attended with want of due care and circumspection to prevent mischief. When death ensues upon a combat in a sudden quarrel without malice prepense, such act amounts to voluntary manslaughter, being attributed to heat of blood arising from human infirmity. In order to reduce such offense from manslaughter to excusable self-defense, it is incumbent on the party to prove two things: (1) That before a mortal stroke given he had declined any further combat, and had retreated (if he could) as far as he might with safety. (2) That he then killed his adversary through mere necessity in order to avoid immediate death. And in these two circumstances consists the true criterion between manslaughter and excusable homicide. Murder, a crime at which nature shudders, consists in the unlawful killing of another with malice aforethought. It is this malice which distinguishes this crime from every other kind of homicide; and it may be express or implied from circumstances. Malice, in legal intendment, is not confined to that depraved and deliberate determination, where the mind has brooded over its prey and marked out its vengeance in cold blood, or with wicked cunning. Such are cases of death produced by poison deliberately administered, or by midnight and solitary assassination. But the true legal notion of malice extends to all cases of homicide perpetrated under such circumstances of wanton cruelty and implacable revenge as evidently to flow from a wicked, malignant, and abandoned heart, or as Sir Michael Foster expresses it, "a heart regardless of social duty and fatally bent on mischief." If, therefore, upon a sudden provocation of a slight nature one beat another in a cruel and unusual manner so that he dies, though he did not intend to kill him, it is murder by express malice. So if upon such a provocation a person inflict with a dangerous weapon a punishment utterly disproportioned to the offense, if death ensue, it is murder. Much

more will it be murder if upon such a sudden provocation a party fires a loaded gun at another with intention to kill and actually accomplishes his purpose. And if the provocation was even ever so great, and the party has had time to deliberate and cool, and he afterwards kills his adversary, it will be murder. The true consideration in all these cases is whether the party has at the moment of the death acted under the impulse of passion excited by immediate injuries of a serious nature, or has given himself up to a blind and cruel revenge, regardless of consequences. and bent only on the accomplishment of his own malignant purposes. Such is the general outline of the various legal grades and distinctions of homicide. It will be necessary, however, to repeat and enlarge upon such of these principles as the facts of the unhappy case before you may require to be more distinctly examined; and in my subsequent remarks I shall confine myself to such considerations only as are immediately applicable to the defense asserted in behalf of the prisoner.

The counsel for the prisoner contend that this is a case of justifiable or excusable homicide, or of manslaughter. Was it justifiable? This upon the facts can be asserted only, if the prisoner, in defense of his person to prevent a known felony with force against his person, committed the act. If, therefore, Geary or McKim at the time of the affray intended to murder, rob, or do some enormous bodily harm to the prisoner, and he to repel this felonious attempt killed McKim, then it was a strictly justifiable homicide. If no such felony was intended, then it falls under a different consideration. Was it excusable? This must be by misadventure or in self-defense. Misadventure exists where a man doing a lawful act without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately kills another. Can this definition apply to the prisoner's case? Had the prisoner no intention to kill? Did he use proper precaution to avoid any danger to life? Did he kill McKim by mere accident without fault? Was this excusable homicide in self-defense? This may happen when upon a sudden combat blows have passed between the parties, and one of them in order to avoid immediate death, or some bodily harm, or acting under an impression, formed upon reasonable grounds, that such was the necessity, kills his adversary. He is supposed to kill his adversary under the impression of an absolute necessity so to do in order to save his own life; and it differs from justifiable self-defense, properly so called, in this, that the necessity has in some measure arisen from his own fault. But if the party killing is not in any supposed or real imminent danger of his own life, if it was not necessary in order to save his own that he should take the life of his adversary, then it is not excusable homicide; but it falls under the legal consideration of manslaughter. Apply these principles to the facts before you: At the time of firing the gun, did the prisoner believe that he was in imminent danger of his own life from an assault and injury intended by Geary or McKim? Did he, acting under such belief, kill McKim from necessity to save his own life? If not, then he cannot protect himself under the plea of excusable homicide. Was this a case of manslaughter? The prisoner's counsel contend that it was not a crime of a higher grade, because it was killing upon an assault from heat of passion upon a reasonable provocation. It is clear that no words of reproach, how grievous soever, will excuse a man for killing another. Nor will any trivial provocation, which in point of law amounts to an assault, nor even a blow, of course reduce the crime of the party killing to manslaughter. For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner, or in the continuance, and beyond all proportion to the offense, it is rather to be considered as the effect of a brutal malignity than of human frailty. It is one of the true symptoms of what the law denominates malice, and therefore the crime will amount to murder, notwithstanding such provocation. Barbarity will often make malice. This is the language of the most approved authority. For cases of this sort, much also depends upon the weapon or manner of chastisement; for if it be one which immediately endangers life, as a loaded gun, and it is used with brutal violence upon a slight injury, to produce death, the party will be guilty of murder. But if from all the circumstances, the act may fairly be attributed to an intention not to kill or dangerously to wound, but to chastise, or repel the aggressor, and therefore as not proceeding from a cruel and implacable malice founded on a spirit of revenge, it will amount but to manslaughter. Further, there must not only be a reasonable provocation, but the act must be done in the transport of passion and heat of blood. For if there have been an opportunity to cool; if there have been time to pause and deliberate; if other objects have intervened, or if there be evidence of express malice,—the crime will be inflamed into the atrocity of murder. Further, there must not only be a reasonable provocation, and the act be in the transport of passion and heat of blood, but it must be kindled upon reasonable provocation, or under reasonable circumstances of excuse as to the party killed. For if a man have a sudden quarrel, and fight with A. by which his passions are strongly excited, and while his passions are thus excited, he without any supposed or real provocation kill B., who is an utter stranger to the whole affair, and has not interfered in the quarrel, nor been in any way connected therewith, even in the party's own supposition, it will be murder. The law never contemplated that merely because a man had given himself up to a transport of passion

upon a real injury, he is therefore at liberty to wreak his vengeance upon innocent persons, who have never offended him. Such conduct is rather a proof of that wicked, depraved, and malignant spirit which the law deems malicious; and it cannot be extenuated under the pretence of violent passion. Upon this principle, if upon a sudden affray a stranger interfere to part the combatants, and give reasonable notice that such is his intention, and that he means only to keep the peace, and not to interfere in the quarrel, and in so doing is killed by either of the combatants, it is murder; but if he so interfere without giving reasonable notice of his intention, and be killed, it cannot be more than manslaughter.

Apply these principles to the facts of the present case. When Geary and McKim came to the barrack where the prisoner was, did they, or either of them, unlawfully assault or strike, or attempt to strike him? Did they come in the opinion or the knowledge of the prisoner merely to disarm him of his deadly weapon, to restore peace, and suppress the affray? Was the striking of the gun, held by the prisoner, by Geary, to repel an intended injury to himself, and not to injure the prisoner? Was the object of McKim in seizing the gun, and attempting to seize the prisoner, merely to disarm him, or to inflict a serious injury upon him? Even supposing Geary and McKim acted without justifiable cause, was the punishment inflicted by the prisoner outrageously disproportionate to the offense? These are some of the questions which you must ask yourselves before you can decide upon the correctness of the prisoner's defense on this point. Was this a case of manslaughter to prevent an unlawful arrest? If a person unlawfully arrest or hold another under restraint, and the latter, to get rid of such arrest or restraint, kill his adversary without necessity, the crime does not amount to murder. If the arrest or restraint be under lawful authority, it will be murder. But an unlawful arrest or restraint, which is neither felonious nor dangerous to life, will not justify or excuse the homicide; it will at least be manslaughter.

In this view it will be necessary to consider the prisoner's situation; and how far the interference of Geary and McKim to arrest and restrain him was lawful. And in my judgment it is very clear that the prisoner was in point of law entirely discharged from the marine service. His term of enlistment had expired, and he was not compellable further to do military duty. If, indeed, he had before the expiration of his term of service committed a military crime, for the purpose of trying such offense, an arrest or restraint might have been justifiable. None such is pretended in this case. If, therefore, he had been restrained of his liberty, or prevented from leaving the navy yard, the detention would have been illegal. He might, by a habeas corpus to this court, have been liberated; and might well have maintained an action for damages. If under such circumstances he had attempted to depart from the navy yard, and had been forcibly prevented, he would have had a right to repel force by force, and if necessary, to have taken the life of his opponent. And if he had been killed in this attempt to recover his liberty, it might under such circumstances have been murder in the perpetrator. But although the prisoner was thus in contemplation of law discharged, yet he might remain if he and the officers of the garrison pleased. He might remain in expectation of his pay or of a pension, or of a certificate of discharge, which should be a voucher of his good behavior, and of his having left the garrison without desertion. And if he chose to remain (however reluctantly), and to perform military service partially until he could obtain a regular discharge, or receive his pay, although not a soldier, he was undoubtedly liable, in a limited degree, to the regulations necessary to the peace and subordination of a military garrison. And even if he was unlawfully detained, or remained under an erroneous impression that he was bound so to do, this would not authorize him, in collateral things, to violate the laws. For even an unlawful detention will not authorize a man to perpetrate crimes against innocent persons, or on other occasions, disconnected with his attempts to recover his liberty. You will, therefore, consider what was the actual situation of the prisoner at the time of this melancholy occurrence. You will judge whether he was a voluntary resident in the barracks, or at least a reluctant submissive subject, or was then under the effect of peaceable physical restraint, which attempted to withhold him from liberty. But supposing him to be in the most favored condition, and entitled to all the rights of a stranger, still in a military post or garrison every person who is voluntarily there either as a visitor or guest is bound to observe peace and order, and to conduct himself inoffensively. If he excite a riot, if he attempt to stab or wound or kill any one within the lines, he is liable to be arrested and detained until he can be placed in the hands of the proper tribunals having jurisdiction to punish him. It is not competent for mere military officers in such case to apply imprisonment by way of punishment; but it is their duty to apply it, if necessary, to prevent bloodshed, and to restore peace, and to keep the offender to answer over to a competent tribunal. Further, if a party be under a supposed military constraint in a garrison or post as to all other cases not affected by that restraint, he must be subjected to the rules which are essential to preserve the rights of other persons. It would be subversive of all the principles of justice to allow a man in such a predicament to murder or wound any innocent person who was in the garrison, and who was in no shape instrumental in his imprisonment. Surely no person could justify such an act, or the

blowing up of the magazine, or the burning of the buildings, because he was there against his own wishes.

You will attend to all the circumstances of this case, and apply to them the principles which I have stated. It is admitted on all sides that it was the duty of Geary and McKim to preserve the peace of the garrison, and to prevent brawls and riots. You have heard the evidence. The prisoner was engaged in a brawl. He had seized a bayonet with an avowed or supposed intention to stab one of his comrades. He had loaded and primed his gun, and declared that he would kill any one that came near him. His comrades were alarmed, and carried information to the orderly sergeant. Under these circumstances (if the evidence satisfies you of the facts), it was lawful for Geary and McKim to interfere and suppress the brawl, and disarm the prisoner. He was in a great rage, and threatened violent injuries and outrages, and even death, to those about him. It was in the night; and if the guard house was a proper place of security, of which you will judge, it was lawful for Geary and McKim to arrest him and carry him thither. They had no right to apply imprisonment as a punishment. But they had a right to secure him from doing further mischief, and to confine him for a reasonable time, until he could be brought before a competent tribunal. If they intended no more, if they acted reasonably in the discharge of their duty, if the prisoner knew that this was their sole object, then you will consider how far the prisoner can shelter himself under the defense of manslaughter, as upon an unlawful arrest.

Before I quit the subject, I will barely remind you that if taking all the circumstances together you are satisfied that the prisoner perpetrated the act from express malice, or a previous deliberate intention to kill, he is guilty of murder, although he did the act upon a reasonable provocation. And the same is the law if the prisoner made the attempted arrest a mere cover to wreak his vengeance on the party who was killed, and acted with deliberate cruelty and malignity in the execution of his previous purpose. You will weigh all the circumstances with care and tenderness towards the accused. You will allow every reasonable doubt in his favor. But a blind and visionary incredulity, which refuses to be satisfied without the highest possible proof of the most minute parts, ought not to be indulged. Your duty to your country and to the prisoner requires you to act with caution, and in giving your verdict to consult the honest dictates of your consciences.

Prisoner was found guilty of manslaughter.

NOTE. Court-martial—Jurisdiction Over Soldier After Term of Enlistment.—The doctrine as laid down in the above case is cited and sustained in Barrett v. Hopkins, 7 Fed. 316. On the point of jurisdiction of the United States, as a proprietor of state lands, see In re O'Connor, 37 Wis. 384, citing above case.

Case No. 16,538.

UNITED STATES v. TREASURER OF MUSCATINE COUNTY.

[1 Dill. 522;[1] 2 Abb. U. S. 53; 9 Am. Law Reg. (N. S.) 415; 12 Int. Rev. Rec. 56.]

Circuit Court, D. Iowa. 1870.

MUNICIPAL CORPORATIONS—JUDGMENTS—MANDAMUS—MARSHAL AS COMMISSIONER TO COLLECT TAXES—OBLIGATION OF CONTRACTS.

1. Writs of mandamus under the laws of Iowa, are appropriate and proper process to enforce judgments against public corporations; and when issued by the courts of the United States, their execution cannot lawfully be thwarted, or interfered with by the state courts.

[Cited in Rees v. City of Watertown, 19 Wall. (86 U. S.) 118.]

2. If writs of mandamus issued by the federal courts in Iowa, commanding the proper local officers to levy and collect taxes to pay judgments against public corporations are evaded, disobeyed, or cannot be executed, the court has the power to appoint its marshal to execute the writs.

[Cited in Welch v. Ste. Genevieve, Case No. 17,372.]

3. This is a discretionary authority in the court, and the rules or circumstances which will guide the court in exercising it, considered.

4. An act of the Iowa legislature, discriminating specially against taxes levied to pay judgments upon railroad bonds, was *held*, in view of the laws in force when the bonds were issued, to be in contravention of the provision of the constitution prohibiting states from passing laws "impairing the obligation of contracts."

[Cited in Milnor v. Pensacola, Case No. 9,619; U. S. v. Jefferson Co., Id. 15,472; Mount Pleasant v. Beckwith, 100 U. S. 533.]

In the cause above entitled, and in various others of a similar nature, the judgment creditors of sundry counties in this state, who have heretofore had peremptory writs of mandamus issued to the county officers to collect taxes sufficient to pay their judgments, move the court, upon affidavits and verified informations, to appoint the marshal for the district of Iowa to execute said writs and collect the said taxes in the place of the county treasurers.

John N. Rogers, Grant & Smith, and Edmonds & Ransom, for the motion.

Rush Clark, D. C. Cloud, and Mr. Williams, contra.

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

DILLON, Circuit Judge. Heretofore, judgments have been rendered in this court on what are termed railroad bonds and coupons, against the counties of Lee, Washington, Louisa, Muscatine, Johnson, Iowa, and Poweshiek. To enforce payment, writs of mandamus have at previous terms been ordered to be issued, commanding the proper county officers to levy and collect taxes sufficient to pay those judgments. At a term of this court held one year ago, it was shown that the

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

county officers of most, if not all of these counties, had either neglected or refused to levy and collect the taxes required by the mandates of this court. On being attached for contempt they gave as a reason for their non-action, that the bonds upon which the judgments in this court had been rendered were, in the opinion of the state courts, unconstitutional, and that they had been enjoined by the state courts (in proceedings to which the judgment creditors were not parties) from making the levies which this court had commanded.

Following the express decision of the supreme court of the United States on the precise point, this court (Mr. Justice MILLER and Mr. District Judge LOVE both being present and concurring) then held that the state courts had no authority to enjoin or otherwise interfere with the execution of the process of this court; that injunctions issued from the state courts for that purpose were unauthorized, and in law afforded no protection to the county officers for their neglect or refusal to obey the process of this court. But under the circumstances the officers were discharged from actual arrest under the attachments for contempt, on the payment of costs, and on their promise to return home and levy the taxes required by the writs of mandamus. The returns subsequently made to the court show that they did, as promised, make orders levying the taxes; but in respect to some counties, particularly those of Lee, Johnson, and Muscatine, there is a showing made at this term that the taxes thus levied have not to any considerable extent been collected.

It has been made to appear to the court that in Lee county the efforts of the county treasurer to make the taxes have been practically defeated, and the same remain almost wholly uncollected. This has been brought about in part where personal property has been distrained by the county collector, by replevin suits commenced against him by taxpayers in the state courts. It is also shown that there are combinations made to prevent the attendance of bidders at such tax sales, and to deter them from bidding; and in one instance that an agent of one of the judgment creditors who attended at advertised sales of property was prevented by threats from bidding, and forced to leave by apprehensions of personal danger.

It also appears that since the decision of the supreme court of the United States, and also since the decision of the supreme court of the state to the effect that the process, or officers of the federal courts cannot be enjoined or interfered with by state courts, that one or more of the state district judges have issued injunctions against the collectors of Muscatine and Lee counties, undertaking to prohibit them from collecting the taxes which this court has ordered to be made; and that such injunctions have been obeyed, and the collections practically prevented.

The county collector of Johnson county, in answer to an information filed against him, admits that he has not collected more than about one-fifth of the levy; that he is advised and believes that combinations have been formed to prevent the compulsory collection of such taxes; that he finds it impossible, by reason of such combinations to find responsible deputies to assist in making collections, and in view of these facts he "asks the appointment of the marshal of this court to collect the said tax, or proceed under him (the county collector) to make such collection," and for direction as to the interest and penalties he shall collect. A sworn statement of a similar character has been made at this term by the collector of the county of Muscatine, who also asks both the direction and aid of this court. Because the taxes have not been in fact collected in various counties in obedience to the mandates of this court, and because it is claimed by reason of the facts before stated, and others not recited, that it is impracticable for the county collectors to comply with the writs of mandamus which have been issued, the judgment creditors of the counties above mentioned have applied to the court for an order appointing the marshal to execute the writs of mandamus and make collections of the taxes. This is the question now before the court. That this court has the power to make such appointment, and that if the county officers either will not, or cannot, themselves collect the taxes, that it is the duty of the court to appoint its own officers to execute its process, are points not longer open to controversy, because they have been precisely and definitely settled by the supreme court of the nation. This is a power of a very delicate nature, and one which, although affirmed by the highest tribunal in the land to exist, we would not feel inclined to exercise except in case of necessity. But when the necessity exists it is our duty, one from which there is no escape, to exercise the power. When does the necessity exist? Obviously when the county officers will not, or in consequence of public excitement, combinations, or suits in state courts, cannot execute the commands of the writs of this court to collect the taxes.

When a court issues its process it is bound to see that its lawful commands are neither disobeyed nor evaded. That these writs of mandamus are lawful commands, and that the creditors of the counties are entitled to these writs, and also entitled to have them executed and obeyed, are no longer questions open to controversy, since they have been decided not once simply, but time and time again by the supreme court of the United States. They are settled, and any inquiry whether the supreme court of the United States ought to have settled them otherwise, is fruitless, and without any practical value. But this is not all that is settled. The supreme court of the United States has also decided that writs of mandamus are appropriate

and proper process to enforce judgments against public corporations in this state; that the federal courts have the power, and that it is their duty to issue such writs; that they are in the nature of writs of execution, and that state courts have no more right to interfere with their execution than they have to interfere with the marshal when executing an ordinary fieri facias. This court cannot question the correctness of their decisions; and they are equally binding upon the state courts, because the decisions of the supreme court of the United States, as to the extent of jurisdiction of the federal courts, and as to the validity and conclusiveness of their judgments, and as to what process may be resorted to to enforce them, and how such process shall be executed, bind congress, bind all the federal courts, and bind also state legislatures and state judges.

It so happens that every judge who sits in this court is a citizen of this state; and none of them have failed to express and manifest their sympathy, in all proper ways, with those counties and cities which have, unfortunately, become so heavily indebted. It would be no act of kindness to the people of these counties and cities for this court to disregard the decisions of the supreme court or refuse to carry out the principles which it has decided, for in the end, and before long, we too would be compelled to obey its mandates. It is the superior tribunal, and we have no choice but to obey and carry out its decisions. Nor would it be an act of kindness to these cities and counties to pursue any course or to say or do anything which would encourage the hope that any change of views on the part of the supreme court was possible, or that by any litigation there remained any chance whatever to defeat the right of the bondholders to recover and collect their judgments. After a careful study of the decisions referred to, and of the grounds on which they are placed, we feel bound to say, and think it important that the people should understand, that all hope of escape from them by means of further litigation, either in the federal or state courts, is without any sort of foundation, is wholly illusory, and will deceive whoever relies upon it. So far as the state courts are concerned, they are, for the reasons before stated, utterly powerless to afford any relief, since they have no right whatever to interfere with the federal courts or their process or officers. As respects the counties of Lee, Johnson, and Muscatine, it is the opinion of the court upon the showing made to it, that it is its duty to appoint the marshal to execute the writs of mandamus; but in the two counties last named the marshal will not proceed to act unless it shall be shown to the court or some one of its judges that the county officer is either disobeying the writ, or failing duly to cause the same to be executed. In Lee county the showing made to the court is such as to entitle the relators to have the marshal appointed and directed to act at once.

It is proper to add, that his appointment will be rescinded whenever it is shown that the county officers are willing and able themselves to execute the writs of mandamus. It should be understood that the marshal is the officer of this court; that he is not subject in the execution of his official duties to the control of any proceeding or process of the state courts; that any interference with him is unauthorized; that any resistance to him is an offense against the laws of the United States, and punishable as such in the courts of the United States, and that it is the duty of the president to support him with all the power necessary to enable him to execute the process and orders of this court. The people of Iowa are law abiding, and with this plain statement of what the law is, the members of this court gladly avail themselves of this occasion to declare that it is their firm conviction that the law will be respected and obeyed.

It only remains to add that the act of the Iowa legislature of last winter, discriminating specially against the taxes levied to pay judgments upon railroad bonds, is in contravention of the provision of the national constitution prohibiting the states from passing laws "impairing the obligation of contracts."

This is plain upon a comparison of that act with the laws in force under which the bonds were issued (Code 1851, §§ 116–124; Revision, 1860, §§ 252, 260), especially when made in the light of the decisions of the supreme court of the United States, expounding the constitutional provision above mentioned. Van Hoffman v. City of Quincy, 4 Wall. [71 U. S.] 535; Bronson v. Kinzie, 1 How. [42 U. S.] 316; Butz v. City of Muscatine, 8 Wall. [75 U. S.] 575; Lee Co. v. Rogers, 7 Wall. [74 U. S.] 175; Farman v. Nichol, 8 Wall. [75 U. S.] 44; Woodruff v. Trapnall, 10 How. [51 U. S.] 206.

Ordered accordingly.

NOTE. In Supervisors v. Rogers, 7 Wall. [74 U. S.] 175, the supreme court affirmed the power of the circuit court, to appoint a commissioner to levy and collect taxes to satisfy a judgment rendered therein against a public corporation. The decision rests upon the Iowa statute (Revision, § 3770), and the court did not consider whether the authority could be otherwise exercised. See Rusch v. Des Moines County [Case No. 12,142]; Welch v. The Genevieve [Id. 17,372].

NOTE [from 2 Abb. U. S. 53]. Chapter 54 of the Iowa Session Acts of 1870 provides for the funding of county indebtedness. It declares that the supervisors of any county liable for an outstanding indebtedness exceeding five thousand dollars, may fund the same, and issue bonds of the county therefor. These bonds are salable by the county treasurer, at par, and the proceeds applicable to the county liabilities. Provision is made for the levy of a tax for the payment of interest, and ultimate redemption of the bonds. Section 6 of the act then declares that the preceding provisions "shall not be construed to embrace the indebtedness of any county arising from bonds issued to aid in the construction of any railroad."

Case No. 16,539.

UNITED STATES v. TRIPLETT et al.

[3 Cent. Law J. 399; [1] 22 Int. Rev. Rec. 207; 23 Pittsb. Leg. J. 185.]

District Court, D. Virginia. April, 1876.

INTERNAL REVENUE—DISTILLER'S BOND—SALE OF DISTILLERY BY COLLECTOR—PRIOR LIENS.

The defendant, being indebted to the United States, his distillery was levied on and sold to the plaintiff, at the sum due by the defendant to the United States. Subsequently it was ascertained that the property in question was encumbered by liens, existing prior to his commencing business as a distiller, to an amount larger than the value of the property, and the property was again sold to satisfy the prior liens. In a suit brought on the bond of the distiller, *held*, that the sale of the premises to the plaintiff extinguished the debt, and that it made no difference whether the defendant had any interest in the property, or that the purchaser acquired no title; nor is it material that the United States, and not an individual, was the purchaser.

L. L. Lewis, U. S. Dist. Atty.

John S. Mosby, for defendant.

BOND, Circuit Judge. This cause has been submitted to the court, without the intervention of a jury, by agreement in writing, to find the facts and determine the law applicable thereto: The facts have been agreed upon by the parties, and the court doth find them to be as follows: This is a suit upon a distiller's bond. Triplett, one of the defendants, in the year 1872, after the first day of April, was a distiller, and as such executed the bond upon which this suit is brought. In the autumn of that year he was indebted to the United States in the sum of $1,300, for which a distress warrant was levied by the United States collector of internal revenue for the Seventh district of Virginia, and the distillery premises referred to in the bond were exposed for sale at public auction, under said distress warrant, and, there being no other bidder, the premises were bought in by the collector for the United States at the sum due by Triplett to the United States. Subsequently it was ascertained that the property in question was encumbered by liens existing thereon prior to Triplett's commencing business as distiller, to an amount much larger than the value of the property. Sometime thereafter the property was sold under a decree of the circuit court of Fauquier county, Virginia, to satisfy the prior liens, and did not bring a sufficient sum to pay off and discharge them. The United States, on account of these facts, did not realize anything on account of their purchase, and this suit is brought to recover the debt referred to in the declaration. A deed was made by the collector on January 7, 1874, conveying the distillery premises to the United States. And the court finds the law to be from these facts that by the sale of the premises by the collector, as stated, for an amount equal to the debt due by the defendant, that debt was extinguished and paid. And that it makes no difference whether the defendant had any real interest in the property or not, or that the purchaser acquired no title to the same. Nor is it material that the United States, and not an individual, is the purchaser. And the reasons, or some of them, for these findings are these: By section 3199 of the Revised Statutes, "it is provided that the deed from the collector to the purchaser shall be considered and operate as a conveyance of all the right, title and interest the party delinquent had in and to the real estate sold at the time the lien of the United States attached." Even if the doctrine of caveat emptor does apply to this sale, which, however, is not admitted, the provision of this section was noticed to all the world of what was offered for sale. All the collector could offer for sale, and hence all that could be purchased, was the interest of the delinquent. What the bidder may choose to give for that is in his discretion. There is no warrant of title, and the purchaser can not complain if he gets what he bid for. But in this case the law required that the assessor of internal revenue should have a search of the title exhibited to him before the bond in suit was accepted and the distiller allowed to commence business, so that the United States, through its officers, knew or ought to have known, exactly what they were purchasing, and can not be supposed to have been surprised at the discovery of the prior liens and encumbrances on the property of the delinquent.

As there was no warranty of title at this sale, it would have been no answer to a suit on a note for the purchase-money given by an individual purchaser at the sale, that the delinquent had no interest in the property. He would have been told that all that was sold was whatever interest the party had, and that the act of congress referred to was notice to him of that. The same rule must be applied to the United States, when they become purchasers at these sales, as is applied to individuals, and the judgment must be for defendants.

[1] [Reprinted from 3 Cent. Law J. 399, by permission.]

Case No. 16,540.

UNITED STATES v. TROAX.

[3 McLean, 224.] [1]

Circuit Court, D. Ohio. July Term, 1843.

COMPETENCY OF WITNESSES—ACCOMPLICES—CORROBORATION—CREDIBILITY.

1. An accomplice is a competent witness.

2. Unless corroborated in his testimony, a jury will rarely on his evidence alone convict.

3. He appears as a witness under the most unfavorable circumstances.

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

4. When other witnesses establish some material facts, sworn to by an accomplice, the jury will give credit to his other statements.
[Cited in State v. Betsall, 11 W. Va. 739.]

5. The manner of his relation, the circumstances under which he acted, are to be considered by the jury, in weighing his evidence.

The District Attorney, for the United States.

Mr. Swayne, for defendant.

Before McLEAN, Circuit Justice.

This is an indictment for stealing a letter from the mail, containing money. The principal witness against the defendant was the carrier of the mail, who admitted that he was an accomplice, and received a part of the money taken from the letter. The carrier of the mail, it being a horse mail, being young and inexperienced, was influenced, as he stated, to participate in the act, through the persuasion of the defendant.

THE COURT instructed the jury that an accomplice is a competent witness, and that the jury must judge of his credibility. Such a witness always comes before the court and jury under the most unfavorable circumstances. By his own admission, he participated in the offence which he charges and is called to establish against the defendant. And this charge is made by him generally, if not always, under a hope that by making it he may escape punishment. Such a motive is supposed to influence the witness so strongly, as to take from his statements the credit which they might otherwise be entitled to. And in addition to this, the fact of having committed the same offence, goes to impeach his credibility. From these considerations, a conviction is rarely founded alone upon the testimony of an accomplice. But if an accomplice be corroborated in some material circumstances, a jury will the more readily believe his other statements. The corroboration must be of some material part of his relation. That which goes to prove directly or indirectly the offence charged, and not an immaterial fact. An accomplice may impress the jury with more or less respect, from his appearance and the manner of his relation. If, from the circumstance of his youth and inexperience, and the superior capacity and experience of the defendant, it is probable that the witness has been unduly influenced by the defendant, the greater credit will be given to the witness. This remark is made with reference to the present case.

The principal witness in this case is corroborated in several important particulars. There is no doubt that the offence charged was committed. And it does appear, from the facts proved, that the defendant might have committed the act as charged. And beyond this, from the conduct of the defendant, his conversations at different times, and with different persons; and especially his great anxiety to induce the witness to leave the state, and his acts in reference to this object, go to create a probability that he had some agency in violating the mail. Circumstances are proved which, if they do not establish the defendant's guilt, independently of the statement of the accomplice, create a strong ground of suspicion against him. And these circumstances remain unexplained.

Upon the whole, gentlemen, you must bring your minds to a conclusion in this, as in other cases, as to the guilt or innocence of the defendant. Before you convict, you must be satisfied of his guilt, beyond a reasonable doubt. Not that you are to acquit on the ground that he may possibly be innocent; for a jury in such a case cannot act upon possibilities. If you believe him guilty, you will say so.

The jury found a verdict of guilty, and the defendant was sentenced to the penitentiary.

Case No. 16,541.

UNITED STATES v. TROBE et al.

[2 Int. Rev. Rec. 133; 3 Pittsb. Rep. 6; 13 Pittsb. Leg. J. 88.]

District Court, W. D. Pennsylvania. 1865.

INTERNAL REVENUE — LICENSE TO REFINE OIL — CRIMINAL PROSECUTION—INDICTMENT.

1. The internal revenue law [13 Stat. 223] authorizes both a criminal prosecution, and an action qui tam, for failure to take out a license to refine coal oil—and the institution of one is no bar to the other.

2. It does not vitiate an indictment to charge the offence to have been committed on a day certain, "and on divers other days" between that day and the finding of the bill by the grand jury.

The defendants [Henry Trobe and John F. Smith, indicted with F. W. Goodis and Thomas Moritz] were tried, at the late term of the United States district court, for carrying on the business of distilling coal oil without taking out the license required by the revenue law, and convicted. On motion for a new trial, and in arrest of judgment.

Mr. Ferguson, for the motion.

Mr. Carnahan, U. S. Atty., contra.

McCANDLESS, District Judge. First — The act of congress in question was passed to enable the government to meet the exigencies of the public service. It is stringent in its terms, and was designed to prevent any possible escape from the obligation every citizen is under to contribute to the payment of the national debt. It is the duty of the courts to expound it liberally, and not to fritter away its provisions upon mere technicalities. In a certain contingency, the offending property itself is seized and confiscated to the use of the government, and for failure to take out a license, the delinquent is subject, in the discretion of the court, to severe pen-

alties. The 73d section, upon which this indictment is framed, provides for "imprisonment," which is the result of a criminal prosecution, and also for an action qui tam, dividing the pecuniary penalty equally between the informer and the government. Suit brought for this is no bar to an indictment, for the section expressly provides that the United States may proceed for either, "or both." At common law, a party may have several remedies, but he can have but one satisfaction; and when a penalty is imposed by statute, the court will take care that it shall be inflicted but once, although the defaulting party is liable to costs in all the proceedings justified by the act, because the government may seek "satisfaction" by means of "both" or all the remedies. The first reason assigned is, therefore, not tenable.

Second—It is no ground to arrest the judgment that the offence is charged to have been committed on "divers other days" between that day and the finding of the bill. It is not charging divers acts, each constituting a different and distinct offence, but the same offence committed on a day certain, and on a day between ascertained dates. A sentence upon this verdict would conclude any further indictment for the offence, laid on any day between the first of May and the return of the bill by the grand jury. I do not think it necessary to reject the additional days as surplusage, for as Chief Justice Gibson says in 5 Serg. & R. 316: "The prosecutor may give evidence of all offence committed on any other day, previous to the finding of the indictment; and on the plea of autrefois acquit, the defendant is usually under the necessity of proving the identity of the offence charged in each indictment by evidence dehors the record." With him, and in his language, "I am disposed to get over an objection of this sort whenever I can." We must deny this motion, but as it appears upon the trial, and is admitted by the district-attorney, that these two defendants, having entrusted the duty of taking out the license to their financial and business partner, are innocent of any wilful disregard of the law, we shall sentence them only to the payment of costs, reserving to the government their option to proceed for the penalty in the civil action already instituted. The motion is overruled.

Case No. 16,541a.

UNITED STATES v. The TROPIC WIND.

[2 Hayw. & H 374; [1] 24 Law Rep. 144.]

Circuit Court, District of Columbia. June 13, 1861.

CIVIL WAR — AUTHORITY OF PRESIDENT TO DECLARE BLOCKADE—NEUTRAL VESSELS—PRIZE PRACTICE—"FURTHER PROOFS."

1. Where war exists, the president of the United States has the constitutional authority, as a belligerent right, without any act of congress, to institute and declare a blockade.

2. The president of the United States having by his proclamation, with the assertion of the right of blockade, declared in substance that a state of civil war existed, and blockade being a belligerent right incident to a state of war, the blockade of the ports of Virginia was lawfully proclaimed by the president.

3. The blockade of the ports of Virginia became effective on a certain day; fifteen days from that date were allowed to neutral vessels to leave those ports, with or without cargoes; the Tropic Wind sailed from the port within the fifteen days, but with a cargo that was put on board after notice to her that the blockade had become effective. *Held*, that both vessel and cargo were thereby forfeited.

4. After the court had prepared its opinion upon the proofs and papers in its possession, deciding that a forfeiture had been incurred, an ex parte suggestion was made by the counsel for the claimant to the effect that the whole correspondence (a part of which was in the case) would show that the strictness of the blockade had been relaxed, and the court allowed the case to stand open for "further proof" upon this single point.

[Prize. This was a libel against the British schooner Tropic Wind, her tackle, apparel, furniture, and cargo, seeking to condemn the same as prize of war for alleged violation of the blockade.]

Edward C. Carrington, U. S. Dist. Atty.

James M. Carlisle, for Charles Layton, master of the British schooner Tropic Wind.

DUNLOP, Chief Judge. The points made by Mr. Carlisle, of counsel for the owners of the vessel and cargo, were as follows: (1) A blockade, under the law of nations, must be the act of a belligerent. There must be a public war. If a sovereign close certain of his own ports on account of domestic disturbances, and interdict all commerce with them upon certain penalties and forfeitures, this is not blockade under the law of nations, but municipal legislation or decree of the sovereign. This distinction is taken by the supreme court in the case of Rose v. Himely, 4 Cranch [8 U. S.] 241, where the island of St. Domingo being in a state of revolt, a decree similar to that of the president's proclamation was made by the authority of the French republic. The court held that the capture in that case was not jure belli but was jure civili. There is no repugnancy between the two rights, belligerent and of sovereignty. One may be superadded to the other. But, by the authority of the same case and others, it is to be determined by the acts and declarations of the sovereign himself, in which character he is acting, whether simply enforcing his own authority upon his own subjects, and within his own jurisdiction, or carrying on a public war; whether a war between independent nations or a civil war, which is still a war, recognized by the jus gentium as entitling both parties to all the rights of belligerents as to other nations. (2) If the sovereign power had proclaimed and instituted this blockade, the case would then

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

be parallel with that cited from 4 Cranch. But in this case the sovereign power has not acted, unless the president be an absolute monarch. This case arises in a court of justice by the libel of the government and the captors, who ask a decree of condemnation. The court is held under the constitution and laws of the United States. Political necessity, or the temporary will of the people to suspend the constitutional government, and in its place to erect a dictatorship for the preservation of the Union, however justifiable elsewhere, can have no standing in this court. This is the act of the president. Is it an act of war? The answer is, that by the constitution congress alone can declare or recognize war. Is it a municipal decree? The answer is equally clear, the president has no legislative or sovereign powers or attributes. (3) Taking the case either way, and admitting the power, the terms of the proclamation of the 19th and 27th of April clearly show that the act is one which studiously disclaims and denies any actual war or belligerent rights in the states blockaded. It is therefore no case of capture jure belli. (4) Whether a war exists or not is a political question which is to be answered exclusively and conclusively, as to the courts of the United States, by the executive government of the United States, and not by the opinion of the court or bar, or that of all the foreign nations. This is firmly settled by the supreme court of the United States. U. S. v. Palmer, 3 Wheat. [16 U. S.] 463; Foster v. Neilson, 2 Pet. [27 U. S.] 253; Williams v. Suffolk Ins. Co., 13 Pet. [38 U. S.] 415; Luther v. Borden, 7 How. [48 U. S.] 1; and the case of Dorris' Rebellion. All the public acts of the executive pronounce this to be no case of war. The Southern Confederacy is not recognized as a government de facto, those in arms under that supposed authority are merely rebels and traitors on lands and pirates on the seas. It is true that Great Britain, to whom the ship belongs, appears to think differently, But this court takes the political status in question absolutely and solely from the executive government of the United States. The other nations judge for themselves, and their courts follow them. (5) This proclamation assumes to annul the existing treaties with Great Britain by closing a large portion of the ports of the Union. There is at all events no war with Great Britain, regular or irregular. The president can neither make nor unmake a treaty. Ports of entry created by acts of congress can only cease to be such by the exercise of the same power. These ports being, by the theory of the government, in the Union, by what authority are they blockaded? By what authority are neutrals excluded? But (6) waiving these points argumenti gratia, here was no breach of blockade. The schooner neither went into Norfolk nor passed, nor attempted to pass, the blockade at Hampton Roads. She was lying at anchor at the mouth of the James river. The blockade was to prevent ingress from the sea and egress to the sea. This is clear from the notice given by Commander Pendergrast. The mere intention is no breach of the blockade. Wheat. Capt. Mar. 193, 194; Fitzsimmons v. Newport Ins. Co., 4 Cranch [8 U. S.] 186. But there was no intention to run the blockade. It is clear on the proof that the consul and the master thought she might lawfully proceed to sea, having cleared from Richmond within the fifteen days, and with reason. Such was evidently the extent of the privilege, which otherwise was vain. (7) The cargo is not liable to condemnation if all the foregoing points are for the captors. It was owned in Liverpool before the blockade. The master is not agent for the owners; nor is the shipping merchant in the blockading port. This interest, as well private as for the government de facto, is against the owners. He will ship without regard to risk to make his commissions, and to benefit the state by exporting her produce. There was no time to countermand the order. Wheat. Capt. Mar. 203, 209.

After the case was argued by the proctors for the libellants and the respondent and submitted to the court, Judge Dunlop gave the following opinion: A libel has been filed by the United States and the captors in this court sitting in admiralty to condemn as prize the English schooner Tropic Wind and cargo, valued at $22,000 for violating a blockade of the ports of Virginia, proclaimed by the president of the United States on the 27th of April, 1861. The capture was made in or near the mouth of James river by the United States ship Monticello (Captain D. S. Brown, commander) on the 21st day of May, 1861. The blockade of the port of Richmond, Virginia, into which port the Tropic Wind had entered before the proclamation is alleged to have been made effective on the 30th of April, and notice of it brought home to the captain of the Tropic Wind and the British consul at Richmond, at least as early as the 2d of May. Fifteen days were allowed by the United States to neutral vessels to leave the blockaded port of Richmond from the 30th of April, the day of the effective blockade. It appears that the Tropic Wind commenced to load her cargo at Richmond, Virginia, on the 13th of May, completed her lading on the 14th of May, and sailed from Richmond the same day, bound for Halifax, Nova Scotia.

Mr. Carlisle appeared for the vessel and cargo, filed the answer of Captain Layton, and the case has been argued and submitted to me on the libel, answer, evidence taken in preparatorio and official documents.

The authority of the president to institute the blockade is denied by the respondents, who insist that the power, under the constitution of the United States can only be exercised by the national legislature, and this is the first question to be considered. It is true, no department of the federal government

can exercise any powers not expressly conferred on it by the constitution of the United States, or necessary to give effect to granted powers, all others are reserved to the states respectively, or to the people. In article 2, § 2, of the constitution of the United States, is this provision: "The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into actual service of the United States." In the war with Mexico, declared by congress to exist by the act of Mexico (see 9 Stat. 9), the supreme court have maintained, in two cases, that the president, without any act of congress, as commander-in-chief of the army and navy, could exert the belligerent right of levying contributions on the enemy to annoy and weaken him. In the case of Fleming v. Page, 9 How. [50 U. S.] 615, the present chief justice says: "As commander-in-chief he is authorized to direct the movements of the naval and military forces, placed by law, at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." Again, at page 616: "The person who acted in the character of collector in this instance, acted as such under the authority of the military commander, and in obedience to his orders, and the duties he exacted, and the regulations he adopted were not those prescribed by law, but by the president in his character of commander-in-chief. The custom house was established in an enemy's country as one of the weapons of war. It was established not for the purpose of giving the people of Tamaulipas the benefit of commerce with the United States or with other countries, but as a measure of hostility, and as a part of the military operations in Mexico, it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and the burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than contributions levied upon the enemy which the usages of war justify when an army is operating in the enemy's country." The other case to which I allude is Cross v. Harrison, 16 How. [57 U. S.] 189, 190. Judge Wayne, in delivering the opinion of the supreme court, says: "Indeed, from the letter of the then secretary of state, and from that of the secretary of the treasury, we cannot doubt that the action of the military governor of California was recognized as allowable and lawful by Mr. Polk and his cabinet. We think it was a rightful and correct recognition, under all the circumstances, and when we say rightful we mean that it was constitutional, although congress had not passed an act to extend the collection of tonnage and import duties to the ports of California. California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterwards the United States had military possession of all of Upper California. Early in 1847 the president, as constitutional commander-in-chief of the army and navy, authorized the military and naval commanders of our forces in California to exercise the belligerent rights of conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government and of the army which had the conquest in possession, &c. No one can doubt that these orders of the president, and the action of our army and navy commanders in California in conformity with them, was according to the laws of arms," &c. See, also, pages 191, 193, 195, 196, 201.

Blockade is a belligerent right, under the law of nations, where war exists, and is as clearly defined as the belligerent right to levy contributions in the enemy's country. As the supreme court hold the latter power to be constitutionally in the president, without an act of congress, as commander-in-chief of the army and navy, it follows necessarily that the power of blockade also resides with him; indeed, it would seem a clearer right, if possible, because, as chief of the navy, nobody can doubt the right of its commander to order a fleet or a ship to capture an enemy's vessel at sea, or to bombard a fortress on shore, and it is only another mode of assault and injury to the same enemy to shut up his harbors and close his trade by the same ship or fleet. The same weapons are used; the commander only varies the mode of attack. In article 1, § 8, cl. 11, of the constitution, under the legislative head, power is granted to congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." These powers are therefore solely confided to and within the control of the legislature, and cannot be exercised by the president. The president cannot declare war, grant letters of marque, &c., though all the other belligerent rights arising out of a state of war are vested in him as commander-in-chief of the army and navy. But war declared by congress is not the only war within the contemplation of the constitution. In clause 15, art. 1, § 8, among the legislative powers is this: "To provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasions," and the legislature in execution of this power passed the act of 1795 (1 Stat. 424), vesting in the president, under the terms set forth in the statute, discretionary power over the militia in cases enumerated in this fifteenth clause of section 8, art. 1. The status of foreign nations whose provinces or dependencies are in revolution, foreign invasion of our own country, and insurrection at home, are political questions determined by the executive branch of our government. I refer on this subject to the following cases

of the supreme court of the United States: The Santissima 7 Wheat. [20 U. S.] 305. The court says: "This court has repeatedly decided that it will not undertake to determine who are sovereign states, but will leave that question to be settled by the other departments, who are charged with the external affairs of the country and the relations of peace and war. It may, however, be said that both the judiciary and the executive have concurred in affirming the sovereignty of the Spanish colonies, now in revolt against the mother country. But the obvious answer to this objection is, that the court following the executive department have merely declared the notorious fact that a civil was existed between Spain and her American provinces, and this, so far from affirming, is a denial of the sovereignty of the latter." It would be a public, not a civil war, if they were sovereign states. The very object of the contest is to decide whether they shall be sovereign and independent or not. All that the court has affirmed is that the existence of this civil war gave to both parties all the rights of war against each other. In case of invasion by foreign power, or insurrection at home, in which cases, under the act of 1795, the president may call out the militia. The supreme court, in the case of Martin v. Mott, 12 Wheat. [25 U. S.] 29, 30, says it is exclusively with the president to decide whether the exigencies provided for have arisen. These also are political questions, determinable by the executive alone, and the courts follow that branch of the government. In this case the supreme court, at page 32, says: "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy of this as well as for all other official misconduct, if it should occur, is to be found in the constitution itself." Whether insurrection has grown to such a head, has become so formidable in power as to have culminated into civil war, it seems to me must also belong, as to its decision, to the same political branch of the government. The president, in his proclamations relating to the blockade of the ports of the Confederate States, calling out seventy-five thousand militia to suppress insurrection, and the resistance of the federal laws, alleges, "that nine states have so resisted and have threatened to issue letters of marque, to authorize the bearers thereof to commit assaults against the vessels, property and lives of citizens engaged in commerce on the high seas and the waters of the United States, and that he has deemed it advisable to set on foot a blockade of the ports within the states aforesaid," and on his subsequent proclamation, states that "whereas, since the date of his former proclamation, public property of the United States has been seized, the collection of the revenue obstructed, and duly commissioned officers of the United States, while engaged in executing the orders of their superiors, have been arrested and held in custody as prisoners, or have been impeded in the discharge of their official duties without due legal process, by persons claiming to act under the authorities of the states of Virginia and North Carolina; an official blockade of the ports of those states will be established."

These facts, so set forth by the president, with the assertion of the right of blockade, amount to a declaration that civil war exists. Blockade itself is a belligerent right, and can only legally have place in a state of war, and the notorious fact that immense armies in our immediate view, are in hostile array against each other in the Federal and Confederate States, the latter having organized a government and elected officers to administer it, attest the executive declaration that civil war exists, a sad war which if it must go on, can only be governed by the laws of war, and its evils mitigated by the principles of clemency engrafted upon the war code by the civilization of modern times. Nor does the assertion of the right in the proclamation of the 19th of April, 1861, to proceed against privateersmen, under the laws of the United States, as pirates, militate against the construction I have above given of the two proclamations, as averring the existence of civil war. In the case of Rose v. Himley, 4 Cranch [8 U. S.] 272, 273, Chief Justice Marshall, in delivering the opinion of the court, says: "It is not intended to say that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign, who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights and be capable of acting in either character, the manner in which he acts must determine the character of the act. If as a legislator he publishes a law ordaining punishment for certain offences, which law is to be applied by courts; the nature of the law and proceedings under it will decide whether it is an exercise of belligerent rights or exclusively of his sovereign power, and whether the court in applying this law to particular cases, acts as a prize court or as a court enforcing municipal regulations."

In this case I am sitting in admiralty, adjudging a question of prize, under a capture for alleged violation of blockade. I do not find on examination of the writers on public law any difference as to belligerent rights in civil or foreign war, and Judge Story, in 7 Wheat. [20 U. S.], as heretofore cited by me, says they are the same. Blockade being one of these rights incident to a state of war, and the president having in substance asserted civil war to exist, I am of opinion the blockade was lawfully proclaimed by the president.

The next inquiry is when did the blockade become effective, and as such come to the knowledge of the respondents or their government. Notice, actual or constructive,

will do. In the present case Flag Officer Pendergrast, commanding home squadron, officially announced the blockade of the ports of Virginia, whose outlet was Hampton Roads, as effective on the 30th of April, 1861, and the secretary of the navy in his letter of the 9th of May, 1861, states this notice was sent to the Baltimore and Norfolk papers, and by one or more of them published. In a certificate of the British consul, at Richmond, dated 14th of May, 1861, found on board the Tropic Wind, at the time of her capture, he states he had received an authoritative communication of the 11th of May, which he immediately communicated to the captains of British merchant vessels and others interested in British trade, that fifteen days would be allowed to leave port after the actual commencement of the blockade, with or without cargoes, "and whether the cargoes were shipped before or after the commencement of the blockade," and that upon inquiry he found the 2nd of May, 1861, to be the day when efficient blockade begun. There does not appear in the cause any evidence to show that the United States government agreed to relax the law of blockade, so as to allow British vessels to load cargoes and come out of port after knowledge of effective blockade was brought home to them. The letter of Mr. Welles to Mr. Seward, of date 9th of May, 1861, in answer to inquiries of Lord Lyons relative to British vessels in Virginia ports and the operation of the blockade upon them, &c., and which it must be presumed was sent to Lord Lyons does not contain the relation of the law of blockade referred to in the British consul's certificate of the 14th of May, 1861, by which I mean that it contains no permission to British vessels to come out of port within the fifteen days with cargoes laden on board after notice of commencement of effective blockade. I give an extract from that letter of the 9th of May, 1861: "Fifteen days have been specified as a limit for neutrals to leave the ports after actual blockade has commenced, with or without cargo, and there are yet remaining five or six days for neutrals to leave; with proper diligence on the part of persons interested, I see no reason for exemption to any."

It also appears in the evidence of the master (Layton) that he heard in Richmond of the blockade as effective before he began to load his cargo, and was informed that it commenced on the 2d of May. All the testimony concurs in showing the cargo was laden on board the Tropic Wind on the 13th and 14th days of May, 1861. No principle of prize law seems better settled than that such lading violates the blockade and forfeits both vessels and cargo. In Wildman on Search, Capture, and Prize (page 42), "The act of egress is as culpable as the act of ingress, and a blockade is just as much violated by a ship passing outward as inward. A blockade is intended to suspend the entire commerce of the place, and a neutral is no more at liberty to assist the traffic of exportation than by importation. The utmost that can be allowed to a neutral vessel is, that having already taken in a cargo before the blockade begins, she may be at liberty to retire with it. If she afterwards takes on board a cargo, it is a fraudulent act and a violation of the blockade. It is lawful for a ship to withdraw from a blockade port in ballast, or with a cargo shipped bona fide before notice of the blockade." See, also, The Vrouw Judith, 1 C. Rob. Adm. 150; The Juno, 2 C. Rob. Adm. 117; The Nossa Senhora da Adjuda, 5 C. Rob. Adm. 52. In 2 Wildm. Int. Law, p. 205, we find this passage: "Where the blockade is known at the port of shipment the master becomes an agent for the cargo; in such case the owners must at all events answer to the country imposing the blockade for the acts of persons employed by them; otherwise by sacrificing the ship, there would be a ready escape for the cargo, for the benefit of which the fraud was intended." See, also, The James Cook, Edw. Adm. 261; The Arthur, Id. 202; The Exchange, Id. 40; 1 Kent, Comm. (2d. Ed.) 144, 146; Olivera v. Union Ins. Co., 3 Wheat. [16 U. S.] 194. See, also, Wheaton's note to the same case.

It follows, upon the case as it now stands, there must be condemnation of both vessels and cargo.

NOTE. After I had written this opinion on the proofs and papers then before me, but before it was known or copied, I was requested by Mr. Carlisle, by note of the 14th, to ask of the state department the whole correspondence, a part of which only was in the cause; and on Saturday evening the 15th of June, the document A was handed to me. I have formed no opinion of the influence this further correspondence has on the legal aspect of the case, and as the parties concerned on both sides have had no opportunity to see or comment on it, and may wish further proof as to the relaxation by the United States of the strict law of blockade, I will allow further proof to be taken by either party on this point, and postpone any decision till the proof is in and the counsel on both sides heard. This course is, I believe, consonant with prize practice.

James Dunlop.

The following letter from the United States district attorney to the marshal of the District of Columbia, discharging the vessel and cargo from custody, and dismissing the libel, makes further action unnecessary: "Washington, D. C., June 21, 1861. To the Marshal of the District of Columbia—Sir: By authority of the secretary of state, I hereby direct you to deliver up the schooner and cargo Tropic Wind to the master thereof. Edward C. Carrington, United States Attorney for the District of Columbia."

Case No. 16,542.

UNITED STATES v. TROUT.

[4 Biss. 105.] [1]

District Court, D. Indiana. June, 1867.

INDICTMENT UNDER SEVERAL STATUTES—FORGING TREASURY NOTES.

1. When an offense is prohibited by several statutes, it is usual to conclude the indictment contra formam statutorum. But a conclusion contra formam statuti in such a case will not be sufficient to support a motion in arrest of judgment. So, a conclusion in the plural where there is but one prohibitory statute, is not ground for motion in arrest of judgment.

2. An indictment for forging treasury notes need not in terms give them that name. The court will determine what they are by the copies of them set out in the indictment.

3. In an indictment for forging a treasury note, it is not necessary to aver that it was made in the resemblance of the genuine notes.

[Cited in U. S. v. Bennett, Case No. 14,572; U. S. v. Noelke, 1 Fed. 429.]

Hanna & Knefler, for the motion.

Alfred Kilgore, U. S. Dist. Atty., contra.

McDONALD, District Judge. At the present term, the defendant [John B.] Trout was indicted for having in his possession three counterfeit United States treasury notes, of the denomination of fifty dollars, with intent to pass them. On a plea of not guilty, the jury found him as charged in the indictment. His counsel now move in arrest of judgment on this verdict.

There are three counts in the indictment on three several counterfeit treasury notes.

First, it is contended that the judgment ought to be arrested, because the conclusion of each of the counts is bad. The first and second counts conclude "contrary to the form of the acts of congress in such case made and provided." The conclusion of the third is the same, except that "act" instead of "acts" is employed. It is urged that there is but one act of congress on the subject of this indictment; and that therefore the conclusion, "contrary to the acts," in the first and second counts, is bad. "The rule given in the old writers is, that where an offense is prohibited by several independent statutes, it was necessary to conclude in the plural; but now the better opinion seems to be that a conclusion in the singular will suffice." Whart. Am. Cr. Law, § 412. The old doctrine has been followed in Indiana. State v. Moses, 7 Blackf. 244; State v. Hunter, 8 Blackf. 212; Francisco v. State, 1 Ind. 179. But I think the weight of authority is against these Indiana decisions. And if even I am wrong in this view, it would not follow that an indictment on a single statute concluding in the plural is bad. Indeed, the supreme court of Indiana has held that an indictment on a single statute concluding in the plural is good. Carter v. State, 2 Ind. 617. But be all this as it may, it is certain that if there be one good count in this indictment, the judgment cannot be arrested. Here the first and second counts conclude in the plural, and the third in the singular; and there is a general verdict of guilty on all. Under these circumstances, it is impossible to arrest the judgment on the ground that the counts conclude wrong; for one of them at least must conclude right.

Secondly, in support of the motion in arrest, it is urged that, as the indictment is framed on the 10th section of the act of June 30, 1864 [13 Stat. 221], which provides for the punishment of persons who "shall have or keep in possession or conceal any false, forged, counterfeited, or altered obligation or other security" of the United States, with intent to pass the same, the indictment ought to have alleged in terms that the forged notes in question are such "obligations or securities." The 13th section of the act declares that "the words 'obligation or other security of the United States' used in this act shall be held to include and mean all bonds, coupons, national currency, United States notes, treasury notes," etc. 13 Stat. 222. The 10th section of this act, therefore, undoubtedly reaches the forged notes in question. These, as copied in the indictment, on their face purport to be United States treasury notes,—"securities for the United States." There is, therefore, no use in alleging in the indictment the name of these instruments. No name need be given them. Yet, in fact, the indictment does describe them as "false, forged, and counterfeit treasury notes"; and it copies them. This surely is enough, without adding, in the language of the 10th section of the act, that they were "obligations or other securities of the United States."

Thirdly, it is insisted in support of this motion, that the indictment ought to have averred that these counterfeit treasury notes were made in the resemblance of the genuine ones. In describing counterfeit coin, it is usual to aver that it is made in the likeness and resemblance of the genuine. And, in that case, such an averment may be necessary; though there are some English precedents to the contrary. Archb. Cr. Prac. & Pl. 571. But in charging a forgery of paper money, I have found no precedent containing the averment in question. On the contrary, there are many precedents not containing it. Archb. Cr. Prac. & Pl. 289; Whart. Prec. Ind. 313. This view of the question has been sustained by the supreme court of Illinois. Swain v. People, 4 Scam. 178. The motion in arrest is overruled.

NOTE. A conclusion "against the form of the statute" is sufficient when the offense is within more than one independent statute, and a conclusion "against the form of the statutes," would be good, though the offense were punishable by a single statute only. U. S. v. Gibert [Case No. 15,204]. This decision was given on a motion for new trial and in arrest of judgment. In the case of U. S. v. Burns [Id. 14,691], an indictment for counterfeiting coin,—

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

and where there was an averment of its "likeness and similitude of genuine coin,"—the court held that such averment must be proved, and laid down the rule that "if, from incompleteness or the clumsiness of the manufacture, men of very ordinary circumspection and intelligence could not be imposed upon by them [the coins] there is no ground for the inference that they were designed for fraudulent use." See, also, U. S. v. Morrow [Id. 15,819].

Case No. 16,543.

UNITED STATES v. TRUESDELL et al.

[2 Bond, 78;[1] 5 Int. Rev. Rec. 102.]

Circuit Court, S. D. Ohio. Feb. Term, 1867.

INTERNAL REVENUE — TOBACCO MANUFACTURER'S BOND — EXPIRATION OF LICENSE — NOTICE—PLEADING.

1. The liability of the sureties on the bond of a manufacturer of tobacco, given in pursuance of section 34 of the act of congress of March 3, 1863 [12 Stat. 729], does not cease upon the expiration of his license as such manufacturer.

2. The provision of the law, making the neglect of a manufacturer of tobacco to procure a license a punishable offense, was not designed for the benefit of sureties, but to protect the government against the frauds of the manufacturer.

3. Revenue officers are not required to give notice of the expiration of a manufacturer's license. It is a matter within his knowledge, and of which he must take notice at his peril.

4. In a declaration on a bond, several breaches may be assigned in the same count.

R. M. Corwine, U. S. Dist. Atty., and Lewis H. Bond, for the United States.

George Hoadly, for defendants.

LEAVITT, District Judge. This suit is prosecuted by the United States to recover the penalty of a bond executed by James F. Truesdell, as principal, and Gassoway Brashears and John W. Menzies, as sureties. The process has not been served on the defendant Menzies, and he does not therefore appear to the action. The declaration avers, in substance, that Truesdell, being a manufacturer of tobacco at the city of Cincinnati, executed a bond on May 20, 1865, as such manufacturer, pursuant to the internal revenue statute, in the penalty of six thousand dollars, with the said Brashears and Menzies as his sureties. The condition of the bond, as set out in the declaration, is, that Truesdell shall well and truly comply with all the requirements of law as a manufacturer of tobacco; and shall not manufacture, or employ others to manufacture, tobacco without having first obtained a permit therefor; and shall not engage in any attempt, by himself or by collusion with others, to defraud the government of any duty or tax upon any manufacture of tobacco; and shall render truly and correctly all the returns, statements, and inventories prescribed for manufacturers of tobacco; and shall pay to the collector of the district all the duties or taxes which may or shall be assessed and due on any tobacco so manufactured; and shall not knowingly sell, purchase, or receive for sale, any tobacco which has not been inspected, branded, or stamped as required by law, or upon which the tax has not been paid. It is then averred that Truesdell, after the date of the bond, and during the months of April, May, and June, 1866, manufactured and sold large quantities of tobacco; and the breach averred is, that neither Truesdell nor his sureties have paid the duties or taxes assessed and due on such tobacco. Truesdell makes no defense to the claim of the government, and admits his liability on the bond for the sum sued for. The defendant Brashears demurs to the declaration; and the question arising upon it is whether the allegations in the declaration disclose a valid cause of action against him for the whole amount claimed by the United States.

There is but one count in the declaration, and but one breach of the bond assigned, namely, the non-payment of the tax assessed and due for tobacco manufactured and sold by Truesdell during the three months above named, and subsequently to May 20, 1865. And the only question is, are the sureties in the bond liable for the failure of their principal to pay this tax on tobacco manufactured and sold after the expiration of the license granted to Truesdell. It is insisted by the counsel, in support of the demurrer, that as the license by the law in force when it was issued expired on the 1st of May next after its date, the bond had no validity as to duties or taxes subsequently accruing, and that the liability of the sureties did not extend beyond the life of the bond; and consequently they are not responsible for the non-payment of duties, or other default by Truesdell, after that date. In support of this view, it is urged that it was the duty of the collector of the revenue to cause the license of Truesdell to be renewed upon its expiration, and that the bond as to the sureties became inoperative and void upon his failure to do so; and that if Truesdell was permitted by the collector to proceed with his business as a manufacturer after his license expired, it was in violation of law, and the sureties are not chargeable with any default by Truesdell while thus engaged in the illegal prosecution of his business.

This is the first case in which this question has been presented in this court; nor am I aware it has been judicially decided elsewhere. I am not, therefore, favored with any precedent to guide me in my decision. I have not, however, encountered much difficulty in the consideration of the question, and will very briefly state the reasons which have led me to the conclusion that the demurrer can not be sustained. I do this with the recognition of the well-settled legal principle, that the rights of sureties are to be liberally construed, and their liability is never to be extended beyond the strict letter of their undertaking.

As before noticed, the bond on which this

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

suit is brought was executed on May 20, 1865. The declaration avers, that subsequently to its date Truesdell was a duly licensed manufacturer of tobacco at the city of Cincinnati, but the precise date of the license to him is not alleged. As the statute requires bond to be given before the license can issue, it may be assumed it was granted immediately upon the execution of the bond. And under the last clause of section 74 of the internal revenue act of June 30, 1864 [13 Stat. 249], the license expired on May 1, 1866. There is no averment that the license was renewed; and it must, therefore, be assumed upon this demurrer, that Truesdell, after that date, pursued his business of manufacturing and selling tobacco without a license. The declaration avers, that he continued his business up to June 1, 1866; and duties and taxes accrued on the tobacco manufactured and sold up to that date, and after the expiration of his license. Are the sureties in his bond liable for his default in not paying these taxes?

I am clear in the opinion that the bond was valid and obligatory after the expiration of the license, and that the liability of the sureties continued, notwithstanding the failure of Truesdell to procure a new license. It is true section 71 of the statute before referred to, prohibits the prosecution of any trade or business requiring a license, until a license is procured in the manner pointed out by the statute. And by section 73, a punishment by fine or imprisonment is denounced against any one for carrying on his business without such license. But there is no necessary connection between the bond required to be given by a manufacturer and the license which he is to procure. By section 34 of the act of March 3, 1863, a manufacturer of tobacco must give bond before a license can issue. That section defines, with great minuteness, what shall be the conditions of the bond. The bond sued on in this case was taken under, and in pursuance of, that section. This is obvious by a comparison of its provisions with the conditions of the bond, as set forth in the declaration, and before recited. Without restating these conditions, it will be sufficient to notice, that one is, that the manufacturer "shall comply with all the requirements of law," applicable to his business. As the bond precedes the license, it can not be supposed to be executed with any reference to it, or that its validity, or the duration of the liability it creates, can in any way depend upon the license. The undertaking of the sureties is, not that they are bound for the acts of the manufacturer for any specified time, or until the expiration of his license, but generally, that they will be responsible for him while he manufactures and sells tobacco subject to tax or duty, at the place designated. Section 34 of the statute referred to, clearly does not contemplate, nor does it authorize, any restriction or limitation in the condition of the bond as to the duration of its validity. Indeed, I am not aware of any provision of the statute, authorizing a renewal of the bond, unless, perhaps, at the instance of the collector, for the insufficiency or insolvency of the sureties.

I can not, therefore, assent to the conclusion that the manufacturer, by pursuing his business after the expiration of his license, and, therefore, in violation of law, absolves himself or the sureties in his bond from liability. While it is expressly the duty of the manufacturer to renew his license, and failing to do so, if he continues his business, he subjects himself to a severe penalty, I know of no principle by which it can be held that his failure to comply with the law, can inure to the benefit of his sureties. The provision making his neglect a punishable offense was not designed for the benefit of sureties, but to protect the government against the frauds of the manufacturer. And it is worthy of notice, that it is one of the obligations which the sureties expressly assumed in the bond, that the principal shall fulfill all the requirements of the statute. Now, his failure to renew his license, as required by the law, is a breach of this condition, for which an action could be maintained. It would be strange if his failure in his duty in this regard should operate to discharge his sureties from liability.

[They might, perhaps, have exonerated themselves by a specific notice to the collector, before the expiration of the license, that the principal must be required to give a new bond, and that they would not be liable for his acts after the first license expired. If, after such a notice, the manufacturer was allowed to proceed with his business without a new bond, the sureties would have an equitable, and, perhaps, a legal, ground for relief. But nothing short of this, as it seems to me, would discharge them.] [2]

The argument of the counsel of the demurrant erroneously assumes, that it is the duty of the collector, or other revenue official, to give notice to the manufacturer of the expiration of his license, and to require him to renew it; and that if he is permitted to prosecute his business after his license has expired, the government, through its agents, acquiesces in the violation of the law, and thereby the sureties in the bond are relieved from their obligations. But I am not aware of any provision of the statute requiring any officer to give notice of the expiration of a manufacturer's license. This is a matter within his knowledge, and of which he must, by the law, take notice, at the peril of a prosecution by indictment for neglecting it. It was not the policy or the intention of the law, to create the burdensome duty of notifying every manufacturer within a collection district when his license expired, and that it must be renewed. It would be a requirement which in many cases it would be impossible to comply with, and in all cases would greatly embarrass revenue officers in the execution of the law, while it would open the door for the commission of

[2] [From 5 Int. Rev. Rec. 102.]

innumerable frauds on the government. It would impose upon the officers the duty of making rigid inquiry as to every manufactory within his district, and to ascertain who had suspended and who were continuing their business. There is no necessity for this, as the government is protected by the bond which has been given, and the provision making it the duty of the manufacturer to apply for and obtain a renewal of his license. There is certainly no reason why his criminal neglect to do what the law enjoins, and what the sureties covenant in the bond he shall do, shall acquit them of their responsibility.

For the reasons indicated, I am clear that the demurrer to the declaration is not sustainable. The allegations set forth a legal liability, on the part of these sureties, for the non-payment of the duties and taxes accruing after, as well as before, the expiration of the license to Truesdell.

The objection to the declaration as bad for stating several breaches in one count, must be based on a misapprehension of the count. As I read it, it avers but one breach; and that is, the non-payment of the duties and taxes assessed against and due from the principal in the bond. If it were otherwise, the American authorities sanction the assignment of several breaches in the same count, in a declaration on a bond.

The demurrer is overruled.

Case No. 16,543a.

UNITED STATES v. TUCKER.

[Hayw. & H. 269.] [1]

Criminal Court, District of Columbia. June 24, 1847.

OBSTRUCTING HIGHWAY — PROOF OF LEGAL HIGHWAY.

On an indictment for obstructing a public highway, the legality of the highway must be established by the public records of the courts, or the indictment will be dismissed.

The jurors of the United States for Washington county aforesaid, on their oaths to present Enoch Tucker, late of the county aforesaid, merchant, on the 14th day of December, 1846, with force and arms, at the county aforesaid, a certain road being a common highway leading from Bladensburg, Piscataway and the Alexandria Ferry to Bladensburg, known as the old Bladensburg road, used for all the good citizens of the United States, and their horses, coaches, carts, wagons and carriages, to go, return, pass, repass, ride and labor in, on and along the same at their free will and pleasure, unlawfully and injuriously did obstruct and stop up by pulling and placing a certain wooden fence on and across the said common highway, &c., to the great damage and common nuisance of all the citizens going and returning, passing, repassing, riding and laboring in and along the said common highway, to the said example of all others in the like case offending and against the peace and government of the United States. P. B. Key, United States Attorney.

He is charged in the indictment with closing the old road leading from Bladensburg to Piscataway, and which runs through his farm on the east side of the eastern branch of the Potomac river, and which, according to the evidence, has not been used as a road for more than twenty years, as there are two good roads leading to the above place, and always kept in good repair by the bridge company.

P. B. Key, for the United States.
Joseph H. Bradley, for defendant.

THE COURT adhered to the decision in the case of U. S. v. Schwartz [Case No. 16,237], who was charged with the same offence, wherein it was decided that all public roads in the county must be shown as such from the public records of the court, which was not done in this present case. The district attorney entered a nolle prosequi.

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

Case No. 16,544.

UNITED STATES v. The TULIP.

[See Case No. 14,234.]

Case No. 16,545.

UNITED STATES v. TULLY et al.

[1 Gall. 247.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1812.

PIRACY — RUNNING AWAY WITH VESSEL — INTENT.

To constitute the offence of piracy within the act of April 30, 1790, c. 9 [1 Stat. 112], by "piratically and feloniously" running away with a vessel, personal force and violence is not necessary. The piratically and feloniously running away with a vessel, within the act, is the running away with a vessel, with the wrongful and fraudulent intent thereby to convert the same to the taker's own use, and to make the same his own property, against the will of the owner. The intent must be animo furandi.[2]

[Cited in The Ambrose Light, 25 Fed. 424, 426.]

The prisoners [Samuel] Tully and [John] Dalton were apprehended at the Island of St. Lucia, by authority of the government there, on suspicion of having run away with a vessel of the United States, on board of which the former was mate, and the latter a mari-

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

[2] As to what constitutes the offence of piracy against the United States, see U. S. v. Palmer, 3 Wheat. [16 U. S.] 610; U. S. v. Klintock, 5 Wheat. [18 U. S.] 144; U. S. v. Furlong, Id. 134. See 1 Kent, Comm. 183–191, where the authorities are cited and commented on.

ner. Being sent to the United States for trial, they were brought first into Martha's Vineyard, within the district of Massachusetts. On the 29th of October, 1812, they were arraigned, and pleaded, "not guilty" to the following indictment. Peter O. Thacher, and James T. Austin, Esq'rs. had before been assigned to them as counsel by the court, and a list of the jurors, &c. had been furnished agreeably to the law: "United States of America, Massachusetts District—ss.: At a circuit court of the United States, for the First circuit, begun and held at Boston, within and for the district of Massachusetts, on the 15th day of October, in the year of our Lord eighteen hundred and twelve. The jurors for the United States, within and for the district and circuit aforesaid, upon their oath, present, that Samuel Tully, late of the city of Philadelphia, in the district of Pennsylvania, mariner, and John Dalton, late also of the same city of Philadelphia, mariner, on the 10th day of January now last past, with force and arms upon the high seas, near a place called the Isle of May, one of the Cape Verd Islands, and out of the jurisdiction of any particular state, they, the said Samuel Tully and John Dalton, being then and there mariners of a certain vessel of the United States, being a schooner called the George Washington, then and there belonging and appertaining to a certain citizen or citizens of the United States, to the jurors aforesaid as yet unknown; of which said vessel, one Uriah Phillips Levy, a citizen of the said United States, was then and there master and commander, piratically and feloniously did then and there run away with the aforesaid vessel called the George Washington, and with certain goods and merchandize, that is to say, fourteen quarter casks of Teneriffe wine, and two thousand Spanish milled dollars, being altogether of the value of five thousand dollars, which were then and there on board of the vessel aforesaid; they, the said Samuel Tully and John Dalton, during all the time aforesaid, being then and there mariners of the said vessel, and in and on board of the same on the high seas as aforesaid, against the peace and dignity of the United States, and the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Samuel Tully and John Dalton, on the said 10th day of January now last past, then being mariners of, in, and on board the said schooner or vessel called the George Washington, belonging and appertaining to certain citizens of the United States, (to the jurors aforesaid as yet unknown,) with force and arms upon the high seas aforesaid, and out of the jurisdiction of any particular state, near a place called the Isle of May, one of the Cape Verd Islands, in and on board the said schooner or vessel called the George Washington, whereof the said Uriah Phillips Levy, a citizen of the said United States, then and there was master as aforesaid; the same schooner or vessel, and the tackle and apparel thereof, of the value of five thousand dollars, of lawful money of the United States, and certain goods and merchandize, to wit, fourteen quarter casks of Teneriffe wine, of the value of one thousand dollars of like lawful money, and two thousand Spanish milled dollars, of the value of two thousand dollars of like lawful money, of the goods and chattels of certain citizens of the United States, (to the jurors aforesaid as yet unknown,) then and there being in the said schooner or vessel, under the care and custody, and in the possession of the said Uriah Phillips Levy, as master of the said schooner or vessel, then and there upon the high seas aforesaid, near the said Isle of May, and out of the jurisdiction of any particular state, with force and arms as aforesaid, from the care, custody and possession of the said Uriah Phillips Levy, piratically and feloniously did steal, take and run away with; they, (the said Samuel Tully and John Dalton), then and there being mariners of the said vessel, and in and on board the said vessel, upon the high seas as aforesaid—against the peace and dignity of the said United States, and the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the commission of the said offences, to wit, on the 15th of July, now last past, the said Samuel and John, the offenders aforesaid, were first brought into the said Massachusetts district, and that the said Massachusetts district is the district into which the said offenders were as aforesaid first brought. A true bill. Humphrey Devereux, Foreman. George Blake, United States Attorney for Massachusetts District."

On this indictment the prisoners were tried jointly, and the jury, having returned a verdict of "guilty" against both, their counsel filed the following motion: "And now, after verdict and before judgment, the said Samuel and John, by their counsel assigned to them by the court, move the court here for a new trial of the issues joined on the said indictment, for the causes following, viz.: (1) Because the honorable court, in committing the cause to the jury, who tried the issue, misdirected them in a material point of law; in this, that they directed the jury, if they believed from the evidence in the case, that the defendants feloniously ran away with the vessel and merchandize mentioned in the indictment, it constituted the crime of piracy within the meaning of the statute, on which the indictment is founded. (2) Because the verdict of the jury was rendered against the weight of evidence, they having found the said defendants guilty of piratically and feloniously running away with the vessel and merchandize in the indictment mentioned, from the care, custody and possession of Uriah Phillips Levy, the master thereof, though no evidence was offered to them to show that

any force or violence were exercised on the said Levy, or that he or any other person were thereby put in fear; but the evidence on the part of the government proved the contrary. Peter O. Thacher, James T. Austin."

The court, after hearing the arguments of the respective counsel [3] and taking time to consider the objections raised, at a subsequent day in the term, delivered seriatim the following opinions, from which also the principal facts of the case will appear:

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

STORY, Circuit Justice. In order to ascertain the nature of the objections now urged to the court, it will be necessary to state summarily the evidence offered to the jury. On the 9th of January, 1812, the schooner George Washington, mentioned in the indictment, lay in an open roadstead near the Isle of May, moored with two anchors. There were on board $2,500 in Spanish dollars, and fourteen casks of Teneriffe wine. Samuel Tully was mate, and John Dalton was a mariner belonging to the schooner. It appeared from the testimony, that in the afternoon, the captain being on shore, the cables of both anchors were cut off on the windlass. That the mate and Dalton were on board at the time, and gave no explanation. That the vessel was got under weigh by order of the mate; and two of the seamen, having a suspicion of the nature of the intended transaction, refused to go out with the vessel, and were suffered to quit her in a boat. That immediately afterwards, the mate directed the schooner to sea, four persons only being on board, and the next day steered a course apparently for the West Indies. At the time of departure the weather was mild and moderate, and there was no evidence offered to show any pretence for the departure. About eighteen or twenty days after the departure, one of the seamen on board was, about midnight, killed and thrown overboard by the mate and Dalton. The next day land was discovered, which proved to be St. Lucia in the West Indies. The schooner was then scuttled by the mate and Dalton, by boring holes in her bottom with an auger, and was then deserted and left in a sinking condition. The mate and Dalton, and the cook, (who was a principal witness at the trial) took to the boat. the money, and some wine and bread having been previously put into it. They stood out to sea that night, and in the afternoon of the next day they arrived at St. Lucia. The mate and Dalton agreed that a fictitious story should be told, that the schooner struck on a wreck, and foundered at sea; and the cook was directed to tell the same story. The mate divided the money, giving Dalton a large bag of it, the cook a small bag, and keeping a third large bag for himself. The fictitious story was told on landing, and finally, in about a fortnight or three weeks, the cook, from distress of mind and contrition at the offence, voluntarily disclosed the whole transaction. The testimony of the cook was, in all the circumstances in which from the nature of the case it was capable of corroboration, fully corroborated by the testimony of the captain. I omit many interesting incidents and striking facts, because I wish to present only an outline of the case.

At the trial, the court directed the jury to the following effect: That, at the common law, the offence of piracy consisted in committing those acts of robbery and depredation upon the high seas, which, if committed on land, would have amounted to felony there. 2 East, P. C. 796; 4 Bl. Comm. 72. That it was not necessary by the common law, that the offence should be committed with all the facts necessary to constitute the technical crime of robbery. That robbery could be committed only by force and violence to the person, or by putting in fear. 2 East, P. C. 708. But any felonious taking or carrying away of a ship, and the property on board thereof, which, if done on land would have amounted to felony, if done at sea, although there were no violence used to the person of the owner or master, and no putting in fear, would, in point of law, be piracy. That the present was however a statute offence, to be decided by the attentive consideration of the terms, by which it was created, and not otherwise connected with the common law, than as the latter might illustrate or fix the true construction. The statute declares, that "if any captain or mariner of any ship or other vessel shall piratically and feloniously run away with such ship or vessel, or any goods or merchandize to the value of fifty dollars, &c. every such offender shall be deemed, taken and adjudged to be a pirate and a felon, and being thereof convicted, shall suffer death." That the only facts necessary to constitute the crime were those prescribed in the statute, viz. that the vessel should be run away with by a captain or mariner of the vessel, and that it should be done piratically and feloniously. That the statute does not in terms require, that there should be any personal violence or putting in fear; and if the captain and crew were all to confederate and run away with the ship, with a piratical and felonious intent, there could be no doubt that it would be within the statute; yet in such a case there could be no pretence of personal violence or terror. The same might be stated as to a vessel run away with by one of the crew, where no other person was on board. That the terms "piratically and feloniously" did not imply necessarily personal force or violence. That if a theft were committed secretly or without violence, it might amount to felony, and if so, then if

[3] On the argument, Blake cited Stubbs, 590.

committed on the seas, it might amount to piracy. That the "piratically and feloniously running away with a ship," within the statute, was the running away with the ship, with the wrongful and fraudulent intent thereby to convert the same to the taker's own use, and to make the same his own property, against the will of the owner. The intent must be that wicked and depraved intent, that animus furandi, which the law deems felonious. It must be a fraudulent and unlawful conversion of the property for the sake of gain, with the intent to despoil the owner thereof, against his will. In this view of the subject, the terms "piratically and feloniously" seemed used in the statute almost as equivalent to each other. And finally, the court directed the jury, that if they were satisfied from the evidence, that the prisoners at the bar did run away with the vessel, with the felonious intent thereby fraudulently and wrongfuly to convert the same to their own use, it constituted the crime contemplated in the statute.

With this opinion the counsel for the prisoners were dissatisfied, and they have moved for a new trial, upon exceptions filed before us. I have rather stated at large our directions at the trial, because, although the exceptions may be virtually included in our opinion, yet the whole should be connected together, in order to form a deliberate judgment of its legal propriety. After much reflection on the subject, and the examination of authorities, I remain of the same opinion that I expressed at the trial. If I felt any doubt, I should be anxious to have the opinion of another tribunal; but having none, I must give my voice for over-ruling the exceptions.

DAVIS, District Judge. A pirate is one, says Hawkins, who, to enrich himself, either by surprise or force, sets upon merchants or other traders, by sea, to spoil them of their goods: this description, as is observed by a respectable writer of our own country, is applicable merely to piracy by the law of nations. Piracy, by the common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed on shore, would amount to felony there. The description of the offence in the first part of the 8th section of our statute, is analogous to the common law description; but the statute proceeds, in correspondence with the statute of 11 and 12 Wm. III., to make certain other acts piracy, which would not be so at common law; and among the rest, an atrocious breach of trust by any captain or mariner of any ship or vessel, in running away with such ship or vessel, or any goods or merchandize to the value of fifty dollars. To constitute this offence, the act must be done, as the statute expresses it, piratically and feloniously. Unlawful depredation, says a respectable writer of the civil law, is of the essence of piracy; and this I apprehend is true, relative to piracy thus created by statute, as well as to piracies by common law. The animus depredandi, as it is expressed by Molloy, is to be determined by the jury, from facts and circumstances given in evidence, and is comprehended in the term "feloniously," which refers to the mind, will or intention. If the jury find the act of running away with the ship or vessel and goods to be done feloniously, they find it to be done without any justification or excuse; they find it to be done wilfully and fraudulently, animo furandi lucri causa; and having been committed with the other qualities and incidents mentioned in the statute, i. e. at sea by persons bearing the relation to the ship of captain or mariners, and the property plundered amounting to fifty dollars—such felonious act is, in contemplation of the statute, piratical. Thus the jury were instructed, and after the serious deliberation which the nature and magnitude of the case necessarily impose, I do not think the direction erroneous.

In regard to the second objection, if force were necessary to be proved in order to constitute piracy, there was sufficient evidence in the case of a forcible taking of the property in question; nor can it be contended, I think, from the evidence, that no person was put in fear. But it is said that no evidence was offered to show that any force or violence were exercised on Levy, the master, in whose care, custody and possession the vessel and goods were alleged to be, or that he was put in fear. This objection is grounded on an analogy to robbery on land; an analogy too strictly pursued in the argument on this head. Even at common law, piracy might be committed without the characteristics which this objection considers as essential. If a ship shall ride at anchor, says Molloy, and the mariners shall be part in their ship's boat, and the rest on shore, and none shall be in the ship; yet if a pirate shall attack and rob her, the same is piracy. And on this statute there can be no question, as appears to me, that actual force on the master, or other person in possession, is not necessary to constitute the offence. The statute had in view the prevention of atrocious violation of trust, by persons standing in particular relations to the ship. Officers and mariners may combine feloniously to run away with the ship and cargo without any person being put in fear, in the sense considered in the objection, and yet it would be clearly a piratical act, within the true intent and meaning of the statute.

It is not necessary now to consider whether a new trial could properly be directed by the court, if the objections, or either of them, were well founded. Being persuaded that the jury were not misdirected in matter of law, and that the indictment is legally maintainable without proof of actual force or violence on the master or others, or

that they were put in fear, I am of opinion that the motion be over-ruled.

Motion over-ruled.[4]

Case No. 16,546.

UNITED STATES v. TURLEY.

[4 Cranch, C. C. 334.] [1]

Circuit Court, District of Columbia. Oct. Term, 1833.

ASSAULT WITH INTENT TO KILL—INDICTABLE CRIME—ARREST OF JUDGMENT.

1. An indictment will not lie, under the penitentiary act [4 Stat. 448], for an assault with intent to kill; there must be a battery also.

2. The want of the name of a prosecutor, written on the indictment, is not a good ground for arresting the judgment.

The first count in the indictment was for simple assault and battery. The second count was for an assault with intent to kill Basil S. Hurdle. Upon the first count the jury found the defendant guilty, and amerced him $500. Upon the second count they found him "guilty, by an attempt to kill Basil S. Hurdle."

Mr. Hewitt, for defendant, moved in arrest of judgment, (1) because the verdict on the second count is too vague, and (2) because the name of a prosecutor was not written on the indictment.

THE COURT (nem. con.) arrested the judgment on the second count, because the penitentiary act only punishes assault and battery with intent to kill, and this count is for assault only.

THE COURT, also, was of opinion that the objection for want of the name of a prosecutor was too late after verdict; but agreed to hear Mr. Hewitt again, upon that point, in H. Lloyd's Cases [Cases Nos. 15,615–15,617].

Case No. 16,547.

UNITED STATES v. TURNER et al.

[2 Bond, 379.] [2]

Circuit Court, S. D. Ohio. Oct. Term, 1870.

INTERNAL REVENUE — TRANSPORTATION BONDS — EXECUTION BY CLERK OF PARTNERSHIP—RATIFICATION—LIABILITY OF SURETY.

1. A transportation bond, under the law in force at the date of its execution, signed by the obligors in blank, as to the quantity of spirits to be removed, and the amount in money which it was intended to secure, is not binding on the obligors, unless they adopted and ratified the bond, after the instrument was completed, by filling the blanks.

2. Such a bond, executed by a firm, in a partnership transaction, adopted and ratified by one member of the firm, becomes valid as to the firm.

3. The act of delivering the bond to the collector by one of the firm, after the blanks are filled, for the purpose of obtaining a permit for the removal of the spirits from the distiller's bonded warehouse, with the declaration that it was all right, is an adoption and ratification of the bond as completed, that makes it valid as to the parties so adopting and ratifying it.

4. Where such a bond is executed in the name of the firm by a clerk of the firm, who was in the habit of thus using the firm's name, without objection by the members, and who was the active manager of the business of the firm, it is not necessary for the United States to prove that the clerk was authorized thus to sign the bond by an instrument of writing under seal, or any written instrument.

5. If the jury find, from the evidence, that the firm did authorize the signing of their names by their clerk, either by parol or equivalent acts, it will be obligatory on the firm, especially if they used the bond for the purpose for which it was intended, and thus admitted the validity of its execution.

6. As to the surety in the bond, if there is no proof that he, either expressly or by implication, assented to and adopted it, after the additions to it, by filling the blanks, it is not obligatory on him.

At law.

Warner M. Bateman, U. S. Dist. Atty., and Henry Hooper, for the United States.

Burnett, Follet & Wright and Houk & McMahon, for defendants.

LEAVITT, District Judge (charging jury). This is an action brought by the United States against Joseph M. Turner and William Turner, as principals, and James McKhann, as surety, in a transportation bond, authorized by the revenue statute in force when the bond was executed. The defendants, Joseph and William Turner, were engaged in the business of distilling spirits, and the statute required every distiller to place the product of his distillery in a bonded warehouse, connected with the distillery, after which it was under the supervision of an officer of the government, and passed wholly from the control of the owner. If he desired to remove the spirits from the warehouse, for the purpose of sale, he could only do so by the payment of the tax due, or by obtaining a permit from the collector, and giving a bond to the government, with security, the condition of which was that the spirits should be delivered to some bonded warehouse of the class B, to which he desired it to be consigned, and which was specially designated in the bond. If the distiller failed to deliver the spirits according to the condition of the bond, the parties became liable for the sum named in it. This was called a transportation bond; and in this suit, the United States claim that there was a failure to deliver the spirits designated in the bond, whereby it became forfeited, and that the parties to it are liable for the sum

[4] At a subsequent day the sentence of death was pronounced by STORY, Circuit Justice. Tully was afterwards executed; but Dalton, appearing penitent, and it being supposed that he was in a great degree under the influence and authority of the mate, at the intercession of several gentlemen, was, after frequent reprieves, pardoned by the president of the United States.

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

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

now claimed by the United States. The quantity of spirits to be removed was fifty barrels, and the government seeks to recover in this suit the amount of tax due on the spirits.

Joseph M. and William Turner were in partnership as distillers, under the name of Turner & Brother, and carried on an extensive business at Greenville, in Darke county. They undertook, by the bond in question, to deliver the spirits to the bonded warehouse of George W. Leech & Co., at Cincinnati. It is a fact not disputed in the case, and virtually admitted by the pleadings, that the fifty barrels were never delivered at this bonded warehouse, and that the tax has not been paid. How the spirits were disposed of does not appear from the evidence, nor is it a material inquiry in the case.

The result in this case obviously depends on the questions of law, involving the legal validity of the bond. To these questions I will direct the attention of the jury, and briefly state my conclusions. The counsel for the defendants in a very elaborate argument contend: First. That owing to certain additions inserted in the bond after it was executed, the bond sued on is not the bond they signed, and is legally null and void, and that there can be no liability under it. Secondly. That the bond was never executed by either of the members of the firm of Turner & Brother, or by any one duly authorized to sign for them, and therefore is of no obligation on them. These points, as the jury will perceive, are exceedingly technical in their character, and do not involve the real merits of this case.

As to the first point, I may remark, there is no dispute or controversy as to the facts. The bond, at the time the signatures of the parties were affixed, was a blank, printed form, furnished by the revenue department, in which, of course, the quantity of spirits to be removed, and the sum of money to be paid to the government in case of a breach of the condition of the bond, were not inserted. It is also an admitted fact that these blanks were subsequently filled by the insertion of the quantity of spirits, and the sum for which the parties were liable, without their presence, and without any express assent on their part. And the argument is, in support of the invalidity of the instrument, that as it now appears as the foundation of this action, it is not the same that the parties signed. In other words, and such is the plea of the defendants, they deny that the bond sued on is their bond. This point involves a purely legal question, and the weight of the authorities cited undoubtedly are that any addition to, or alteration of, an instrument of writing made after its execution, without the knowledge or consent of the parties, invalidates the instrument and relieves the parties from any liability under it. It may, however, be well doubted whether the law on this subject, as settled by the decisions of the courts, rests on the basis of sound reason. It would seem more in accordance with reason and justice, that where a party gives his signature to an instrument of writing, knowing there are blanks to be filled, and it is afterward made complete and according to the object and intent of the parties, by filling the blanks in good faith, and in the absence of any fraudulent purpose, that parties should not be relieved from liability. Under the circumstances supposed, the intent of the parties is carried out by filling the blanks, and unless it appears they are injured by the completion of the instrument, or it has been done fraudulently, they ought not to be shielded from their liability. And, in relation to filling blanks in commercial instruments, such as promissory notes, bills of exchange, and so forth, their legal validity is not affected thereby. But, as before remarked, the law seems to have been otherwise settled in regard to bonds, and some other instruments. And I do not feel at liberty to decide adversely to the weight of legal authorities on this point. I am clear, however, there is good reason for legislative action to remedy what I must regard a defect in the law, as held by the courts.

But it is insisted by the counsel for the United States, that if the defendants can avail themselves of the law to shelter themselves from liability on the ground adverted to, the principals in this bond have recognized, ratified, and adopted the bond as their bond, after the blanks were filled, and the instrument made complete. And if this position is sustained by the evidence, there can be no question that the bond is operative and valid as against the parties who thus ratified and adopted it. There is testimony to the effect that William Turner did expressly assent to and adopt the bond, after all the blanks were filled; that he took the bond to the collector, after its completion, and delivered it to him, remarking that it was "all right." This was clearly an adoption of the bond by him. And on the faith that it was a legal and valid instrument, the collector issued a permit for the removal of the spirits, and it was accordingly delivered to the firm of Turner & Brother.

But it is claimed by the defendants' counsel, that as to the other partner, Joseph M. Turner, no act is proved showing his assent to the bond as completed, and therefore, as to him it is a nullity. But, as the spirits were the partnership property of the firm of Turner & Brother, and the transaction purely that of the firm, there can be no question that the act of one partner is binding on all the members of the firm. If, therefore, the jury believe that William Turner ratified and adopted the bond as claimed by the United States, it is the act of the firm, and is obligatory on the other member of the firm.

2. But, secondly, it is incumbent on the court to notice the other ground on which the principals in the bond seek to avoid their liability. Their plea is that they did not execute the

bond in its original form, and that it was not executed by any one having authority for that purpose. There is testimony that one John M. Turner, a son of one of the partners, and who largely conducted the business of the firm, affixed the name of the firm, William Turner & Brother, to the bond. There is no direct evidence that the clerk was specially authorized to use the name of the firm in the execution of this bond, and it appears that it was usual with him to sign similar bonds in the name of the firm, and that no objection had ever been made by the firm to such use of the name.

The argument of the counsel for Turner & Brother is, that this bond, which the statute requires to be under seal, could not be executed so as to give it legal validity, without proof of his agency for the purpose, by written instrument under seal. Before stating my conclusion on this legal point, it is proper to remark, if the bond was assented to, adopted, and ratified by the Turners after its execution, it would be equivalent to a waiver of all defects and irregularities in its execution. It would be an admission of the fact that John M. Turner, with the consent and approbation of the firm, placed the name of the firm to the bond, and they could not, in good faith, deny his authority. In this aspect, the question as to his want of authority is not a material one in this case. But I am not prepared to say that the law requires that it should appear that the clerk who signed the name of the firm to the bond had authority under seal, or, indeed, that any written authority was required for that purpose. And I feel justified in instructing the jury that if they find from the evidence, that in the course of the business of this firm the clerk was in the habit of signing the name of the firm to these constructive bonds, and that he did thus use their names without objection, and impliedly with their consent and approbation, and that in virtue of such bonds, they applied for and obtained permits from the collector, from time to time, for the removal of spirits from the distillery bonded warehouse, they may fairly infer, as a legal conclusion, that he had the requisite authority, and that the signing is obligatory on the individual members of the firm.

The court has not had the leisure or opportunity to refer specially to the numerous authorities cited by counsel, or to investigate the question as fully as under other circumstances might be desirable. But I may remark that, in my judgment, the time has come when courts should pause in adopting the ancient law in regard to the necessity and effect of seals in instruments of writing. In the present case I can not give my sanction to the doctrine insisted on, that because the bond was required by law to be under seal, therefore no authority could be given to another to execute it in the character of an agent, except by an instrument under seal. Doubtless there are an abundance of decided cases sustaining this principle as settled law. But for years past there has been an evident tendency in the courts, as also in the legislative department, in this country, to modify and relax the common law dicta as to the effect and importance of seals. While in some matters it may not be expedient to abolish the use of seals, no reason is perceived why, in ordinary transactions of life, they should be required as necessary to the validity of instruments of writing. I submit it, then, as a question for the jury, whether the clerk who signed the name of the firm had authority from the firm thus to act, and that if they are satisfied there was such authority given, either express or implied, that the firm assented to and ratified the signing, the plea of the invalidity of the bond will not avail to acquit them of liability under it. It is proper to remark, that as to the defendant, James McKhann, the surety, there is no direct evidence that he gave any assent to, or recognized or adopted the bond, after it was completed, by filling up the blanks. And under the law, as I have endeavored to state it, on this point, the bond, by the additions and alterations made after the signing, was rendered invalid as to him. And unless the jury can find from the evidence that McKhann expressly, or by fair implication, gave his assent to the bond, after the additions and alterations were made, he can not be held liable in this action.

(The jury returned a verdict against Joseph M. and William Turner for the amount claimed by the United States, and found in favor of James McKhann, as surety.)

Case No. 16,548.

UNITED STATES v. TURNER et al.

[18 Int. Rev. Rec. 5.]

Circuit Court, S. D. Ohio. 1873.

DISTILLERY PROPERTY—LIEN FOR TAXES—BONA FIDE PURCHASER.

[The lien given to the government, by Act July 13, 1866, § 32, for taxes on a distillery, is valid as against an innocent purchaser for value of the premises.]

Warner M. Bateman, U. S. Atty.

J. A. Corbin, for defendant.

SWAYNE, Circuit Justice. This case was heard upon bill brought to subject a distillery in Greenville, Ohio, to payment of tax upon whiskey claimed to be a lien thereon. The tax accrued in February, 1867, while the Turners, then owning, were operating the distillery. It was, in the same month, removed upon transportation bonds, but was, without the payment of tax, sold in the markets. Suits were begun in September, 1867, upon the bonds, and judgment recovered thereon in March and April, 1871, for the aggregate sum of $31,533.26. In June, 1867, the Turners sold their distillery, and in April, 1868, Stoltz became the innocent owner for value. In his

answer Stoltz claimed—First, that, being an innocent purchaser, without notice of the alleged lien of the government, he takes the premises discharged therefrom; second, that the lien of the United States upon the distillery for tax is upon the whiskey, and was discharged by the taking of the transportation bond. Justice Swayne held that the provisions of section 32 of the act of July 13, 1866 [14 Stat. 157], upon which the claim of the plaintiff is founded, providing that the tax in question should be a lien on the interest of said distiller in the tract of land whereon the said distillery is situated from the time said spirits are distilled until said tax should be paid, is absolute and unconditional, and secures to the government a lien upon the distillery premises as against innocent purchasers without notice. Justice Swayne alluded to a case he had decided in this court some years ago, in which he had held, after consideration, that the lien of the government for unpaid taxes, under the same section, upon spirits fraudulently recovered from the distillery, was good as against innocent purchasers. Decree was allowed in favor of the government for sale of the property.

Case No. 16,549.

UNITED STATES v. TURNER.

[2 N. Y. Leg. Obs. 256.]

District Court, D. Connecticut. 1843.

REVOLT AND MUTINY—NEGLECT OF DUTY—SOLICITING SEAMAN TO COMMIT A FELONY.

Charles Chapman, U. S. Dist. Atty.
Colin M. Ingersoll, for prisoner.

JUDSON, District Judge. The prisoner [Peter Turner] was indicted under the second section of the act of congress entitled "An act in amendment of the acts for the punishment of offences against the United States." [4 Stat. 776.] The indictment contained four counts; the first charging the prisoner, a mariner on board the brig Marshall, an American vessel, the vessel being then on the high seas, and within the admiralty and maritime jurisdiction of the United States, with endeavoring to make a revolt or mutiny on board said vessel, and combining, conspiring, and confederating with other persons on board said vessel to make a revolt or mutiny, and soliciting inciting, and stirring up one Charles J. Richardson, then a mariner, and one of the crew on board said vessel, to refuse and neglect his proper duty on board thereof, and betray his proper trust therein, &c. The second count recited as before, and, in addition, charged the prisoner with soliciting and inciting others of the crew, &c. The third count recited as before, and, in addition, charged the prisoner with soliciting Charles J. Richardson to take, steal, and carry away from said vessel a large sum of money, to wit, of the value of $4,000. The fourth count charged the prisoner with soliciting and inciting Richardson, &c., to refuse and neglect his proper duty, &c., and with soliciting Richardson, &c., and others, &c., to take, steal, &c.

On the trial it appeared from the testimony of the commander of the brig that the vessel was lying at a place called Humaco, Porto Rico, for the purpose of taking in a cargo of molasses. The vessel lay midway between the shore and a small island of about a mile in length, in about three fathoms water. Humaco is the only place where vessels take in their cargoes from Porto Rico. It further appeared from the testimony of Richardson, an unnaturalized foreigner, who shipped as second mate on board the vessel, but who did duty, for about a week, and at the time complained of, as a seaman on board the brig, that while he and the prisoner were on shore, the prisoner solicited him to steal the money on board the brig; and that afterwards, the next day, on board the brig, he was solicited to steal, &c. No evidence was offered to show that the prisoner was a seaman at the time of the alleged offence.

The counsel for the prisoner offered no evidence to the jury, but claimed to the court: (1) That the indictment was insufficient. The three first counts charge each three distinct offences; they must fail. (2) That the offence, if committed, was not upon the "high seas," and within the admiralty and maritime jurisdiction of the United States. It was committed on shore, and not within the jurisdiction of the United States, but within a foreign jurisdiction. If the offence was committed on board the vessel, still, under the act of congress which it is claimed has been violated, it was not within the jurisdiction of the United States. (3) That the act of congress provides "that, if any one or more of the crew of an American ship or vessel shall," &c. No evidence has been adduced that the prisoner was one of the crew of the brig Marshall. The laws of the United States provide who shall be considered the crew, &c., of an American vessel, and what shall be the evidence of such fact. No "list" or "shipping articles" have been presented in this case; neither any direct parol evidence that the prisoner was a mariner on board the brig at the time complained of. (4) That the prisoner, if convicted, must be convicted on the fourth count of the indictment, to wit, "soliciting and inciting Chas. J. Richardson, one of the crew, &c., to refuse," &c. The act of congress under which the offence is alleged to have been committed is in words following: "That if any one or more of the crew of an American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall endeavor to make a revolt or mutiny on board such ship or vessel, or shall combine, conspire, or confederate with any other person or persons on board to make such revolt or mutiny, or shall solicit, incite, or stir up any other or others of the crew to disobey or resist the lawful or-

ders of the master or other officer of such ship or vessel, or to refuse or neglect their proper duty on board thereof, or betray their proper trust therein, &c., he shall be punished by a fine not exceeding $1,000, or imprisonment not exceeding five years, or both, &c." Charles J. Richardson, the person alleged to have been "solicited," &c., was not one of the "crew," but, if anything, an "officer" on board the vessel. The act makes a distinction between "officer" and "crew." If Richardson was an "officer," there has been no offence committed. (5) Richardson was legally neither an "officer" nor of the "crew," but only acting as officer. He was an Englishman, shipped under a false name, and cannot be considered either one of the "crew" or an "officer."

The case, after arguments, was submitted to the jury, who after six hours' consultation returned a verdict of not guilty on the three first counts, and guilty on the fourth count. The counsel for the prisoner moved in arrest of judgment. The objections were heard the following morning, and overruled by the judge, and the prisoner was sentenced to six months imprisonment in the county jail.

UNITED STATES v. TURNER. See Case No. 14,248.

Case No. 16,550.

UNITED STATES v. TUSKA.

[14 Blatchf. 5.] [1]

Circuit Court, S. D. New York. Oct. 6, 1876.

GRAND JURORS—DRAWING AND SUMMONING—QUALIFICATIONS—PLEA IN ABATEMENT.

A plea in abatement to an indictment, averred that 48 persons were summoned as grand jurors; that the names of such persons were not drawn by the clerks, as required by the rules; that one of the grand jurors was a non-resident; and that several of them were not possessed of the proper property qualification. It did not aver any prejudice to the accused. On demurrer to the plea, *held*, that the plea was bad.

[Cited in U. S. v. Benson, 31 Fed. 901; U. S. v. Terry, 39 Fed. 361; U. S. v. Ewan, 40 Fed. 452.]

[This was an indictment against Philip H. Tuska. Heard on demurrer to a plea in abatement.]

Benjamin B. Foster, Asst. U. S. Dist. Atty.

Benjamin F. Tracy, John J. Allen, and Edward T. Wood, for defendant.

BENEDICT, District Judge. This case comes before the court upon a demurrer to a plea in abatement. All the averments of the plea relate to the constitution of the grand jury that found the indictment. The material averments are, that 48 persons were summoned by the marshal to attend as grand jurors; that the names of such persons were not drawn by the clerks, as required by the rules; that one of the grand jurors was a non-resident; and that several of them were not possessed of the proper property qualification. These are all the averments of the plea deserving of any particular notice, and they are simple averments of irregularities, unaccompanied by any averment of any prejudice to the accused. The law applicable and authoritative here upon such questions is to be found in the case of U. S. v. Reed [Case No. 16,134], subsequently considered and approved in U. S. v. Tallman [Id. 16,429]. The determination of the court in Reed's Case was, that the statute of the state, adopted by the statute of the United States, having taken away the right of challenging the array of grand jurors, has, by implication, taken away the right to raise the objection in any form. The same case also determines, that an objection founded upon the want of qualification of grand jurors, either as individuals or as a panel, is within the scope of the statute and unavailing.

It has been contended here, that, as, in the cases above referred to, the questions determined were not presented by a plea in abatement, they furnish no authority in the present case, where the objections are taken by plea. But, it is obvious, from the language of these decisions, that their effect was not intended to be dependent upon the form in which the questions were brought up. In neither of the cases were the questions raised by a challenge; and, in the latter case, it is plain that the points in judgment were determined as if raised by plea. Furthermore, I incline to the opinion, that, where there is no averment of injury or prejudice to the defendant, irregularities such as are here complained of become matters of mere form, within the scope of section 1025, Rev. St. U. S., which provides, that no trial, judgment or other proceeding upon an indictment shall be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

In regard to the order directing that 48 persons be summoned to attend, I desire to say further, that it is not open to the charge of irregularity. No statute of the United States fixes the number of persons to be summoned, nor has the state law as to number been adopted; and, moreover, there is no uniform law of the state upon the subject, in force throughout the locality comprising the Southern district of New York. In some parts of the district the state law allows the summoning of 50 persons; in other parts the number is 36. Resort to the common law also fails. Whether, at common law, an irregularity would be committed by the sheriff in selecting and summoning more than 24 jurors to attend as grand jurors, I do not stop to inquire. If such be the rule applicable to an officer charged with the duty not only of summoning but of selecting good and lawful men to compose a grand jury, the

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

reason of the rule fails under our system of procedure, where the marshal has simply to summon designated persons, and the court, in the absence of any other mode provided by statute, must select the requisite number of fit persons from those in attendance. In the absence of statutory regulation, the court must necessarily determine what will be a sufficient number to enable a grand jury to be constituted; and the existence of this power will be found to be implied in section 808, Rev. St. U. S. It should be added, that it has been of frequent occurrence, in this district, to direct that 48 persons be summoned; and, in at least one instance, an order similar to the one in this case was made by the circuit judge. Nor is there any ground to contend that any possible injustice could arise to the defendant from the course pursued. The plea shows, that, of those who were summoned, only 22 persons fit to be sworn attended, and that all these were sworn. As to rule 60, which has been referred to, it has been deprived of effect by the subsequent rules, but it supposes the court to be vested with power to fix the number of jurors to be summoned.

To the averment of the plea, that the names were not drawn by the clerks, as the rules require, the plea itself furnishes a sufficient answer, for, it sets up the certificate of the clerks that the names were drawn in conformity with the rules. It cannot be permitted to a defendant to set up such a certificate as part of the record upon which the court has acted, and then to contradict it by his plea. Moreover, upon the plea as worded, it must be presumed that the drawing was done by the deputy clerks.

In regard to the averment of want of qualifications in some of the grand jurors as to residence and property, there appears to me to be no room to contend that the objection is not fully covered by the decision in Reed's Case. It may, however, be said, in addition, that the ground for a rejection of a similar objection, found by the supreme court of Massachusetts (Com. v. Smith, 9 Mass. 107), in the form of the indictment used in that state, differing, as it does, from the English form, and from the form used in many of the states, is to be found in this case. The averment of the present indictment, in this particular, is similar to the averment in the Massachusetts case. I add further, that the argument from inconvenience and delay, which the courts of this state have given controlling weight adversely to the present objection (People v. Jewett, 3 Wend. 314), seems to me to be entitled to control here. If, in every criminal prosecution, the accused has the legal right, by a plea in abatement, to raise the question of the residence and the property of each of the members of the grand jury, and require that issue to be tried before a jury, before calling upon him to answer the charge, it is easy to see, that, in localities like New York, the practice would substantially render the trial of an offender optional with him, for, in the absence of any better method of selecting juries for courts of the United States than that permitted by existing laws, it doubtless happens that some one of the grand jury is open to question as to his residence or property. It is also easy to see, that, if matter forming ground for a challenge is allowed to be the foundation for an issue for the jury, when set up by plea in abatement, the effect of the provision of the statute requiring that "all challenges, whether to the array or panel, or to individual jurors, for cause or favor, shall be tried by the court" (section 819), will be substantially destroyed.

In the discussion of this case I have been referred to many and conflicting decisions in the courts of the several states, upon the questions under consideration, but, as before stated, the adjudged cases in this circuit, to which reference has been made, must furnish the law for the present case; and they compel the sustaining of this demurrer.

It is ordered that the plea be set aside, and that the accused plead anew to the indictment.

UNITED STATES v. TUTTLE. See Case No. 15,326.

Case No. 16,551.

UNITED STATES v. TWELVE BARRELS OF DISTILLED SPIRITS.

[11 Int. Rev. Rec. 11.]

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

INTERNAL REVENUE—SEIZURE OF DISTILLED SPIRITS—INFORMERS.

Before KNOWLES, District Judge.

In the case of the United States against twelve barrels of distilled spirits, seized for not having any stamps or brands, January 3, 1870, as required by the internal revenue laws. Upon petition of Edward G. Farmer, a decree was entered, adjudging the said Farmer informer, and, as such, entitled to one moiety of the proceeds of the sale of said spirits; and a decree was entered for the proper distribution of the proceeds of the forfeiture previously decreed.

Case No. 16,552.

UNITED STATES v. TWELVE BARRELS OF PARAFFINE OIL.

[6 Int. Rev. Rec. 203.]

Circuit Court, E. D. New York. 1867.

TREASURY REGULATION—VALIDITY.

[The regulation issued September 2, 1867, by the secretary of the treasury, charging informers with a proportionate share of the costs of the proceedings, is valid, the secretary's power to issue regulations on the subject not having been previously exhausted.]

On a motion as to the apportionment of the informer's share of the proceeds of the property forfeited.

BENEDICT, District Judge. The question presented by this motion is whether the regulation issued by the secretary of the treasury on September 2, 1867, charging informers with a proportionate share of the costs of proceedings instituted upon their information, is of any validity; the informer contending that the power to issue regulations upon the subject was exhausted upon the issue of the regulation of August 14, 1866, to which the regulation in question is supplementary. Upon this question I confess to some doubt; but have concluded to sustain the validity of the supplementary regulation. I cannot do so, however, without feeling it my duty to call attention to the fact that the effect of the regulation in question is to render nugatory (in cases involving small amounts) the act of congress which makes provision for compensation to informers. Under this regulation there is no compensation to an informer, as to a small illicit still, or as to such small lots of distilled spirits or of oil as are usually found being illegally transported through the streets, inasmuch as the expenses of seizure and of sale, with the expense of storage and advertising, all made necessary by statute to perfect the forfeiture, will absorb a great portion of the proceeds of the property. But this class of small cases is of great importance in the enforcement of the revenue law, and in no other class is the need of the services of a voluntary informer so absolute. The effect of the supplementary regulation, is therefore to give practical immunity to a very considerable class of violators of the law, by removing all inducement to inform against them, and this without effecting any considerable saving of expense to the government. Unless such was the intention of the secretary, which I cannot suppose, the defect in this regulation should be remedied. So long as it stands it must be complied with, and accordingly the distribution in this case must be according to its terms.

Case No. 16,553.

UNITED STATES v. TWELVE CASKS OF CUDBEAR.

[Gilp. 507.] [1]

District Court, E. D. Pennsylvania. Dec. 8, 1834.

CUSTOMS DUTIES—VALUATION—GOODS PURCHASED AND GOODS MANUFACTURED BY EXPORTER.

1. Where goods, subject to ad valorem duty, are purchased in a foreign place and exported to the United States, a true valuation in the invoice is the actual cost at which they were purchased.

2. Where goods, subject to ad valorem duty, are manufactured in a foreign country, and exported to the United States by the manufacturer, a true valuation in the invoice is the market price or value at the place of exportation.

The information filed in this case by the district attorney, charged that on the 18th July, 1831, certain goods, wares, and merchandise, to wit, twelve casks of cudbear, were imported into the port of Philadelphia, from a foreign place, to wit, Bristol, in England, on board of the brig Achilles, of which Thomas Cox was master, and were entered at the custom house on the 30th July; that these goods were then and there subject to ad valorem duty; and that the invoice thereof was made up with intent, by a false valuation, to evade and defraud the revenue. The law alleged to be violated was the fourth section of the act of May 28, 1830 [4 Stat. 410], which provides, "that the collectors of the customs shall cause at least one package out of every invoice, and one package at least out of every twenty packages of each invoice, and a greater number, should they deem it necessary, of goods imported into the respective districts, which package or packages they shall have first designated on the invoice, to be opened and examined; and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order forthwith all the goods contained in the same entry to be inspected; and if such goods be subject to ad valorem duty, the same shall be appraised; and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation, or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited." On this information, the cudbear being seized and publication made, Philip Bennett, of Philadelphia, appeared and claimed the goods in question, as the sole owner and importer; and, at the same time, denied the allegation that the invoice was made up with intent, by a false valuation, to evade and defraud the revenue.

It did not appear, by the pleadings or otherwise, that the seizure was made on land, and the case was heard by the district judge on the 8th December, 1834, when the following facts and circumstances were proved. On the 18th July, 1831, the brig Achilles arrived at Philadelphia, with the twelve casks of cudbear on board. On the 30th of the same month, Philip Bennett went to the custom house and entered them as the owner and importer thereof; taking at the time the oath prescribed in the fourth section of the act of 1st March, 1823 [3 Stat. 730], to be taken by the owner, "in cases where goods, wares, or merchandise, have been actually purchased;" and declaring that the invoice produced, contained a just and faithful account of the actual cost of them, including all charges. The invoice was as follows: "Bristol, May 7th, 1831. Mr. Philip Bennett bought of Lediard Jones and Mortimer, twelve casks of cudbear, nett 42.0.24. or 4728lb, at 6d. £118.4.0. Lediard Jones and Mortimer. Per Achilles, T. Cox, for Philadelphia."

After an examination of one cask, it was

[1] [Reported by Henry D. Gilpin, Esq.]

deemed necessary, by the collector, that the whole should be examined, which was done on the 2d August, by the United States' appraisers. They carefully inspected the cudbear, and compared the price with that usually paid for what was of similar quality. The result was a report that there was an undervaluation in the invoice, and that the fair market value of the article imported was, at least, eight and a half pence per pound. Mr. Bennett considered this appraisement too high, and according to the provisions of the third section of the act of 28th May, 1830 [4 Stat. 409], two merchants, Messrs. Lowber and Davis, were, with his assent, appointed by the collector, to make a re-appraisement. The result was an increase in the valuation of the cudbear to ten pence per pound. No other evidence of the purchase was offered except the invoice above mentioned. On the 12th August, the cudbear was seized by the collector, on the ground stated in the information. In the month of October following, Mr. Bennett presented to the collector another invoice, being a copy of that exhibited at the time of entry, but now accompanied by a consular certificate, prepared according to the provisions of the eighth section of the act of 1st March, 1823, in cases where the goods are owned by a person not residing in the United States. In this certificate Philip Jones makes oath, before the American consul, at Bristol, that the cudbear in question was consigned by the house of Lediard Jones and Mortimer, of which he was a member, to Philip Bennett; that it was actually manufactured for their own account; and that the annexed invoice contained a true and faithful account of its actual value.

On the hearing, testimony, taken under a commission to England, was given on the part of the claimant, to show that he was the bonâ fide purchaser and actual owner of the cudbear at the time of importation, and not the mere consignee. Much evidence was also produced to prove that it was an article of inferior quality to that usually imported, and from which the appraisers formed their estimate of value.

Mr. Gilpin, U. S. Dist. Atty.
Mr. Broom, for claimant.

HOPKINSON, District Judge. The information claims a forfeiture of the goods described in it, on the ground that the invoice, by which they were entered at the custom house, was made up, with intent, by a false valuation, to evade and defraud the revenue.

The material question, then, is, what is a false valuation, in the meaning of the revenue laws? We come at this by inquiring, what is a true valuation under those laws? Two tests of true value are given by the law: (1) In the case of a purchase of goods in a foreign place, exported to the United States, the true value, at which they must be invoiced and entered, is the actual cost and price at which they were sold and purchased. (2) In case of goods sent to this country by the manufacturer on his own account, the true value, at which they must be invoiced and entered, is the market price or value at the place of exportation.

The claimant alleges that the goods were purchased by him, in England, of the manufacturers, Messrs. Lediard Jones and Mortimer, and that his invoice truly states the price at which they were purchased. If this be true, he fully answers the information and acquits himself of the forfeiture. What is his proof to support this claim? (1) The invoice produced at the custom house for the entry, and sworn to by him. This instrument or invoice is, in form, a bill of sale; a bill of parcels. It is headed, "Bristol, 7th May, 1831, Philip Bennett bought of Lediard Jones and Mortimer." The weights of the twelve casks are then particularly given. The whole is charged at six pence per pound, and carried out at one hundred and eighteen pounds four shillings; and, at that price, the entry is made. (2) The testimony taken under the commission to England, by which two witnesses were examined; one of them, Philip Jones, of the above firm; the other, James Parsons, an accountant in Bristol, and employed by the said firm. The former witness, Philip Jones, swears directly and distinctly to the sale of the cudbear in May, 1831, to the claimant, and that the price charged in the invoice "was the actual price and cost of said cudbear, paid or contracted to be paid by the said Bennett to our firm therefor." Parsons says that he believes the said firm did sell to Bennett the cudbear mentioned, and ship it to him at Philadelphia. These depositions are accompanied and corroborated by an authenticated copy of the account current, between the said firm and the claimant, in which this cudbear is charged to him on the day of the invoice in the regular course of the account, preceded and followed by many articles or charges in due order and apparent fairness. The cudbear is charged in the account at the same price at which it was invoiced and entered at the custom house.

If these depositions and documents may be relied upon, the claimant has made out his two points of defence; that is, that these goods were purchased by him in England, and that he has invoiced and entered them at the actual price and cost he paid for them. Let us suppose that this is not the truth of the case; but that the goods were actually the property of Lediard Jones and Mortimer, and exported by them to this country, consigned to the claimant, and to be disposed of here on their account. How will the forfeiture then stand? The question still is, were they entered by an invoice made up to defraud the revenue by a false valuation. We

must, in this view of the case, put aside the testimony of Mr. Jones, he being one of the firm to whom the goods belong. There being no actual sale of the cudbear, we cannot have the price, at which it was sold, as our test of a true or false valuation. We must resort to the other test; to wit, the market price or value at the place of exportation. What case has the claimant on the evidence in this view?

The evidence of Mr. Parsons. He swears, that he believes the cudbear alluded to, was invoiced at sixpence a pound, "which was its fair value in the English market." That there are usually three qualities made, which differ from fourpence to three farthings a pound; that the cudbear shipped to the claimant to Philadelphia was of the worst quality; that in March, 1831, the claimant bought of Lediard Jones and Mortimer twenty-four casks of cudbear, which were shipped to New York by the Coriolanus in April, 1831, and six casks shipped by the Protector, of the same quality and price with that shipped to Philadelphia. It appears, by a certificate from the deputy collector at New York, that the twenty-four casks mentioned by Parsons arrived there in the Coriolanus, and were then admitted to an entry at the price or value mentioned, that is, sixpence a pound; and in the account current alluded to they were so charged to the claimant. How are these proofs of the market price or value of the cudbear affected by the testimony taken here? It seems to be an article little known here now, and which was still less so at the time of the arrival of this importation; at least, the great difference in the quality and price was not then well understood. The better qualities only seem then to have been brought here, and it was by the prices of those better qualities, and a comparison made between them and this, that the value was fixed upon this by the appraisements of the custom house officers, and the other appraisers subsequently appointed by the collector. The first appraisers put the cudbear at eight pence halfpenny per pound, making the whole invoice worth one hundred and sixty-seven pounds nine shillings. The second appraisers went still higher, valuing it at ten pence per pound, the whole at one hundred and ninety-seven pounds. We have had both sets of appraisers here under examination. They made their estimate, as Mr. Ross says, under information which they took pains to obtain, that the "article was of a fair quality." Other evidence, we have had in this cause, affords good reason to believe that this information was not correct, and of course, that the estimate made upon it ought not to be our rule of value. Mr. Lowber, one of the appraisers appointed by the collector, testifies, that at the time he valued this cudbear at ten pence a pound he believed it to be its true value; he formed his judgment upon what he had paid for the article when imported by himself. His came from London, and he paid one shilling and threepence for some, and one shilling and sixpence for other parcels. His cudbear was made from moss of the Canary Islands, which is considered the most valuable. It was by a comparison with such an article that he valued the importation of the claimant. He adds, that he always imported the first quality, considering the inferior to be of little value. Since he made the appraisement he has ascertained from the manufacturers, who use it, that the inferior quality is not worth buying. With his present knowledge of the article, he would not buy that in question at any price, to sell out of his store. He does not think it has the value he appraised it at. We must remember that Mr. Parsons swears, expressly, that the cudbear shipped to the claimant was of the inferior quality. The testimony of Mr. Bullock seems to be decisive of the value of this article, at least in the Philadelphia market. He is well acquainted with it; is in the habit of buying and selling it; has a great deal of business with the manufacturers who use it; and has examined this cudbear. It is of very inferior quality; the worst he has ever seen. He has a part of that imported by the claimant into New York now on hand. It was sold by auction in New York for eight cents; part of it was sold in the same way in this city, for the same price. He has frequently offered it for sale at that price, but the manufacturers will not touch it. He has seen an invoice from the same house at Bristol, to another person, in which cudbear was charged at the same price, six pence per pound.

Upon this evidence, it is impossible to say, that the invoice of the cudbear in question was made up, by a false valuation, to defraud the revenue, even if we shall consider it to be a consignment made by the manufacturers on their own account, and, of course, to have the truth of the invoice tested by the price or value of the goods at the place of exportation. If, on the other hand, we shall consider it as the property of the claimant, purchased by him of the manufacturers, the testimony is uncontradicted and satisfactory to prove that the price or value stated in the invoice, is precisely that which it cost him in England. No wrong, however, is imputable to the officers of the customs. They obtained the best information on the subject within their reach, and acted on it in good faith.

Decree. That the information be dismissed, and the goods restored to the claimant.

Case No. 16,554.

UNITED STATES v. TWELVE HUNDRED AND NINE QUARTER CASKS OF SHERRY.

[The case reported under above title in 7 Int. Rev. Rec. 114, is the same as Case No. 14,279.]

Case No. 16,555.

UNITED STATES v. TWELVE THOUSAND THREE HUNDRED AND FORTY-SEVEN BAGS OF SUGAR.

[1 Abb. U. S. 407; [1] 1 Am. Law T. Rep. U. S. Cts. 110; 8 Int. Rev. Rec. 129.]

District Court, D. California. Aug. Term, 1868.

COLLECTION OF DUTIES—BOND FOR RETURN OF GOODS SEIZED.

Under section 89 of the duties collection act of 1799 [1 Stat. 695], which allows goods seized for non-payment of duties to be appraised, and delivered to the owner upon his giving a bond for the payment of the appraised value, &c.,—the bond must be for the actual cash value of the property, at the time and place of seizure, without any deduction for duties paid. This rule applies equally, whether the property has ben seized in warehouse or in the hands of the importer.

[Cited in U. S. v. 1,291 Bales of Tobacco, Case No. 15,965.]

Petition for return of goods seized as unlawfully imported.

The custom-house officers having seized a quantity of sugar upon an information that it had been imported without payment of full duties, this petition was now presented by the owner, under section 89 of the duties collection act of 1799, praying that, upon his executing the bond required by the section, and otherwise complying with its provisions, the property might be delivered to him. The only question made, was as to the amount of the bond.

Delos Lake, U. S. Dist. Atty.

Doyle & Barber and C. A. McNulty, for petitioner.

HOFFMAN, District Judge. An application is made by the owner and claimant of the goods proceeded against in this suit, that the appraisers be instructed to appraise the goods at their cash market value less the duties legally chargeable upon them, and that upon giving bond for the value so ascertained, and producing a certificate of the collector that the duties have been paid, the goods be delivered to the claimant.

This application is opposed by the district-attorney, who contends that the goods should be appraised at their full market value, without deducting the amount of the duties. It appears that two separate entries at the custom-house were made of the goods,—a part was entered for consumption, the usual deposit made to cover the duties, and a delivery order obtained by the importer. Before this order was executed the goods were seized. For the remainder of the goods a warehouse entry was made, and the bonds required by the acts of August 30, 1842 [5 Stat. 548], and August 6, 1846 [9 Stat. 53], duly executed. They were still in the warehouse when seized.

The question presented to the court is important. It has been very fully discussed by the learned judge of the Southern district of New York, who has delivered a long and elaborate opinion, in which the whole subject is reviewed. [Case No. 4,986.] The conclusions at which he arrives are, that the bond for value under section 89 of the act of 1799 should represent the full value of the property to the importer at the time of seizure. That when the property is seized in his hands, after the duties are paid, its value to him is its market value, which necessarily includes the duties. But that, where property under bonds for duties is seized in a warehouse, its full value to the importer at the time of seizure is its market value, less the duties; and for this amount the bond on delivery must be given.

I have been unable to assent to the correctness of these conclusions. It is observed by the learned judge that "the interpretation uniformly given to section 89 of the act of 1799 is, that the sum at which the property seized is to be appraised is its value as of the time and place of seizure." No authorities are cited in support of this position. With great deference it appears to me to involve a fundamental error. The government on a seizure of forfeited goods acquires a right of property, which it enforces by a condemnation and sale. As until condemnation the fact of forfeiture is unascertained, the claimant is allowed to obtain his goods on submitting in their stead a bond for their value. The sum for which this bond is to be given should obviously be a sum equal to the value of the goods to the government at the time they are delivered to the claimant, or the equivalent of the amount which might then be realized from them by a sale in the market. Nothing less will put the government in the same position as if it had retained the goods, or prevent its being a loser by the pretended substitution of an equivalent in value.

To estimate this value as of any other time than that of the appraisement and delivery might, according to circumstances, be a hardship and an injustice either to the government or to the claimant. The seizure may have been made months previously. If, in the mean time, the price of the goods has declined, or their value otherwise been impaired, it would be unjust to demand of the claimant a bond for a larger sum than he can obtain for them in the market. If, on the other hand, their price has appreciated, he has no right to ask the government to surrender goods which have become its property by the forfeiture without receiving a bond of an amount equal to their full value when it surrenders them. This value is evidently the price which the goods then command in the market. When the claimant applies to the court for a delivery of the goods seized, on payment of the duties and giving a bond for their value, he, in effect, asks that the property be delivered to him, on which, as soon as it reaches his hands, the whole

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

market value can be realized. This is its true value, both to him and to the government. If he be permitted to give a bond for a less amount, he will obtain his goods at less than their true value, and the government will part with them on a security representing a smaller sum than the goods would be worth if retained in its possession.

It is plain that in case of seizure, as in all other cases where property in the possession of the law is surrendered on substituting a bond for its value, the bond should be for a sum equivalent to the value of the goods at the time of the delivery by the party who surrenders, and to the party who receives. This is evidently a sum no greater and no less than the market value of the goods at the time of the delivery. But even if it were true that the basis of appraisement is the value of the goods to the importer at the time and place of seizure, I do not perceive why that value is to be taken as the market value less the duties. The importer has given bond for the duties, and this bond he is liable for, unless the goods be re-exported. If the goods perish in the warehouse, he still remains liable for the duties, and his loss is the amount of their market value. If he forfeits the goods in consequence of his crime he must still pay the duties, and the loss he sustains is the market value of his goods. This loss the government alleges he has incurred, and if, while the question is undetermined, he seeks to obtain his goods, he must give bond in the sum they were worth to him when his ownership of them was divested by the forfeiture and seizure. Even then, on the hypothesis that the appraisement is to be as of the time and place of seizure, it is clear that the basis of appraisement must be the full market value of the goods at that time without deducting the duties. But for the reasons assigned above, I think it evident that the value must be fixed as of the time the appraisement is made, and the goods delivered to the claimant.

But it is said, in the opinion referred to, that "in case such a bond as the government claims to receive in this present case be given, the importer will lose, if the property is condemned in the suit, not only what was the value to him of the property in warehouse at the time of its seizure, but in addition a sum equal to the amount of the duties chargeable thereon, and if, after thus bonding the property, he withdraw it for consumption, he must pay the duties on it in cash to the collector, notwithstanding the amount has been included in such delivery bond. He will thus, in case of condemnation, lose more than he would if the property was not delivered to him on bond, but was to remain in the hands of the government and be sold by it. In each case the same offense is charged, and has been committed, for which the property is forfeited. In each case the property is in warehouse under bond for duties. The merchant is equally guilty in each case; but if the claimant seeks to avail himself of the privilege of bonding his property when it is seized while in warehouse, he cannot do so according to the views urged by the government, without imposing upon himself a liability in case the property is condemned which he will not incur if he leaves the property in the hands of the government. Such a result is opposed to the spirit and intent of section 89 of the act of March 2, 1799. * * * To require from him such a bond as the government claims, would be to deprive him practically of the benefit of bonding warehoused property seized and prosecuted while in warehouse. But if the property is delivered to the claimant on a bond for its value when seized, not including the duties, then if the property is condemned in the suit the importer will lose the same amount as if he had not bonded the property, and no more, and will thus have the full benefit of the privileges of the warehouse system, and the full benefit of the system of bonding provided for by section 89 of the act of 1799."

I have cited this passage at length, for it contains a full statement of the ground on which the learned judge based his opinion. The fallacy of the fundamental idea on which it rests appears to me evident. The penalty attached by law to the offense charged is the forfeiture of the goods seized, or their value. The payment of duties is not exacted as any part of the penalty. The obligation to pay them attaches absolutely as the consequence of the importation, and this payment is exacted, whether the goods be forfeited or not, as a condition precedent to the delivery of them to the importer. If the goods be entered for warehouse, the importer has the right, within a limited time, to re-export them and procure the cancellation of his bond; but in all cases where the goods are delivered to the importer, as the claimant now asks the court to order, the duties must first be paid. If the goods are condemned the loss to him is precisely the same, whether he bonds them, as the government now claims he must do, or whether he suffers them to remain in the custody of the court and be sold under its decree. In either case he must pay the duties, for his bond for duties can only be canceled by the exportation of the goods, and this, by his own crime, he has put it out of his power to do. Besides the duties, he loses, in either case, the value of his goods, and no more. If he suffers them to be sold, this is evidently the amount of his loss. But if he obtains their delivery to himself on giving bond for their full market value, the bond will represent only what they are worth to him, and the sum he can obtain for them in the market. If the goods are subsequently condemned, he pays over their proceeds in satisfaction of his bond, and his liability is thus precisely what the statute creates—lia-

bility to pay the duties, and as a penalty for his offense, the loss of his goods or their proceeds.

The fallacy of the argument so often urged, that by exacting a bond for the full market value, including duties, and also requiring the duties to be paid, the court obliges the importer to pay duties twice, is also apparent. He pays duties but once, and he gives bond for the amount which the property is worth to him when delivered, and which, if the appraisement be just, he realizes from its sale. If he be permitted to take his goods on giving bond for their market value, less the duties, the inevitable consequence will be that he will save, and the government will lose, a sum equal to the amount of the duties. For though he pays duties in the first instance, he can sell the goods at their market price, and thus be reimbursed the duties he has paid, while the balance of the proceeds will be sufficient to satisfy the bond he has given. The goods will thus have gone into consumption in effect without payment of duties, or, to speak more accurately, the government will, though it has received the duties, recover less, by precisely their amount, than the value of the property, the ownership of which it had acquired by the forfeiture.

The circumstance that the goods have been seized in a warehouse can in no way affect the matter, for the claimant asks, not that the goods be permitted to remain in warehouse, and the seizure be superseded. but that they be delivered to him and go into consumption. This the court can order only on payment of duties. He thus puts himself precisely in the position of one who withdraws goods for consumption, and the value he should give bond for is the value of the goods he receives, which is their market price, or the sum he can obtain for them. Even if the importer, whose goods have been seized in a warehouse, can, on applying to bond them, be considered as retaining any right to avoid payment of duties by re-exporting them, a single illustration of the possible results of the mode of appraisement suggested will expose its erroneousness. Let us suppose the market value of the goods to be equal to or less than the amount of the duties. Such is said to have been until recently the case with regard to whiskey. Their market value, less the duties, will, in such case, be nothing, and the claimant can procure their delivery to him on giving bond in a nominal sum. If, then, he can omit to pay the duty, and re-export the goods, or recover the duty back by way of drawback (as he may possibly do in this case under section 14 of the act of August 30, 1842), he may, by a sale in a foreign market, realize from them a sum which, though less than the duties, may be considerable, while the government, which has established its title, by forfeiture, to the goods, will have neither duties, goods, nor a bond. In view of the late ruling market prices of whiskey, the case suggested does not seem an extreme one, but the case is illustrated in all cases where the amount of the duties bears any considerable proportion to the market value of the goods.

It is observed by the learned judge of the Southern district of New York, that "uniformity of principle and equal justice to importers, in all cases, can be carried out only by varying the basis of appraisement in the manner indicated in cases of delivery bonds on seizures of property in warehouses." With all deference, I must be allowed to observe that the proposed variation seems to me to introduce a discrimination between importers of different classes not justified by reason or law. It is admitted that if the duties have been paid, and the goods are seized in the hands of the importer, he can only obtain them by giving bond for their full market value, or, in other words, by securing the repayment, in case of condemnation, of the value he receives when the goods are delivered to him. On what ground should the importer, who has made a warehouse entry, be put in a better position? He also asks for and receives property which he can at once convert into money, and for which he can obtain by sales the sum he is required to pay in case of condemnation. The goods are worth that sum to the government; and what right has he to ask the government to surrender them without receiving a bond for their full value? I confess, that after the fullest consideration, I have been able to discover nothing, either in the warehouse laws or the provisions of section 89 of the act of 1799, which can give any color to such a pretension.

I regret exceedingly to be obliged to dissent from any opinion entertained by the distinguished judge of the Southern district of New York, especially when it is sustained by that of his eminent predecessor. But I cannot avoid announcing the conclusions which, after the best consideration I can give the subject, I have reached. My belief in their correctness is strengthened by the fact that they seem to be in accordance with the views entertained by the learned judge of the Pennsylvania district, whose decision, which I have not had the advantage of seeing, is referred to in the opinion of the district judge of the Southern district of New York. [Case No. 16,249.]

An order must be entered directing the goods seized to be delivered to the claimant, on his executing a bond for their appraised value, without deducting the duties, and on the production of the collector's certificate that the duties have been paid.

Order accordingly.

Case No. 16,556.

UNITED STATES v. TWELVE THOUSAND THREE HUNDRED AND FORTY-SEVEN BAGS OF SUGAR.

[Nowhere reported; opinion not now accessible.]

Case No. 16,557.

UNITED STATES v. TWENTY BARRELS OF DISTILLED SPIRITS.

[6 Int. Rev. Rec. 141.]

District Court, S. D. New York. Oct., 1867.

INTERNAL REVENUE ACT—FORFEITURE—PAY OF INFORMER.

[The share of an informer in the proceeds of forfeited spirits should be fixed by the law in force at the time of the payment of the proceeds into the registry and the submission of the proofs as to the informer, and not by that subsequently adopted.]

In the matter of the United States against twenty barrels of distilled spirits, before BENEDICT, District Judge, being an application for an order to fix the informer's share in the proceeds of the spirits forfeited under the revenue law. The question was discussed as to the effect of the recent circular of the secretary of the treasury, affecting the informer's rate and the power of the secretary therein; but THE COURT did not pass upon the question: It held that the proceeds of the forfeiture having been paid into the registry prior to the issuing of the treasury circular of Sept. 2, 1867, and the proofs as to the informer having been also submitted prior to that date. it is unnecessary to consider the questions raised as to the construction and validity of the circular, inasmuch as no prejudice should be allowed to result from the delay of the court in signing the order of distribution, but the same should be considered as if made at the time of the submission of the case. The order will, therefore, follow the rule heretofore laid down by this court under regulation of Aug. 14, 1866.

UNITED STATES v. TWENTY BARRELS OF DISTILLED SPIRITS. See Case No. 15,946.

Case No. 16,558.

UNITED STATES v. TWENTY BARRELS OF DISTILLED SPIRITS.

[9 Int. Rev. Rec. 4.]

District Court, S. D. New York. Dec. 28, 1868.

INTERNAL REVENUE—ILLICIT DISTILLING—FORFEITURES—INNOCENT MORTGAGEE.

[Forfeitures for fraudulent distilling extend to the interest of a mortgagee, even if ignorant of the frauds.]

In the case of the United States against twenty barrels of spirits found at a distillery in Fortieth street, between First and Second avenues, the government witness, Revenue Inspector Craig, testified that on the 20th of April last, he was the inspector of the district in which the distillery was located, and early in the morning of that day he went to the distillery and discovered that the superintendent and workman employed on the premises had by some means effected an entrance into the receiving-room and were drawing off spirits from that room into a secret receiving-tub that was concealed under ground. Upon investigation he found that they had drawn off 580 gallons, and immediately seized the premises. On which the government rested.

It was argued, on the part of the claimant, that he was the mortgagee of the property, and that before the time of the seizure he had in good faith lent money to the owner of the property, and taken a chattel mortgage thereof, upon which there still remains $3,000 due him. That he never had any complicity in or knowledge of the fraud.

Mr. Rollins, Asst. U. S. Dist. Atty.

A. B. Dyett, for claimant.

THE COURT [BLATCHFORD, District Judge] charged the jury that the property became forfeited, if at all, whoever owned it, and that the mortgagee had no other rights than the owner.

Verdict for the government after short absence of the jury.

Case No. 16,559.

UNITED STATES v. TWENTY CASES OF MATCHES.

[2 Biss. 47; [1] 10 Int. Rev. Rec. 95; 2 Am. Law T. Rep. U. S. Cts. 48; 1 Chi. Leg. News, 145.]

District Court, D. Wisconsin. Oct., 1868.

CUSTOMS LAWS—LANDING WITHOUT PERMIT—FORFEITURES—INFORMATION.

1. Goods landed without a permit from the proper collector, and naval officer, if any, are subject to forfeiture to the United States.

2. It is no defence that the unlading was without the knowledge or consent of the owner or consignee; that it was at an intermediate port and not at the port of destination; and that it was an unlawful act on the part of the master. The forfeiture attaches upon the unlawful unlading, wherever that may be.

3. The facts that these goods were the production of the United States, and simply transported through a foreign country, and were exempt from duty and that all the laws and regulations relating to such transit had been strictly complied with, does not remove the necessity of procuring a permit.

4. The information is well brought under the 50th section of the act of March 2, 1799 [1 Stat. 665].

Information for violation of the revenue law.

J. B. D. Cogswell, U. S. Dist. Atty.

Palmer, Hooker & Pitkin, for respondents.

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

MILLER, District Judge. The information propounds that the matches were seized at Milwaukee on land. It charges that they were brought in the propeller Montgomery, from Sarnia in Canada; and were unladen from said vessel at the port of Milwaukee without a permit from the collector of said port, there being no naval officer.

It is alleged in the answer of claimants that they manufactured the matches at Portland, in the state of Maine, and packed them in close cases, and shipped them at Portland for Chicago in the state of Illinois, on the Grand Trunk Railway, a corporation of Canada extending from Portland to Sarnia; that the matches were not intended to be delivered at Sarnia, or at Milwaukee, but were shipped direct to Chicago, and to be transported by lake from Sarnia to Chicago. For that purpose the matches were shipped on board the Montgomery, a vessel employed by said railway company running in connection with the railway from Sarnia to Chicago, thereby furnishing a through line from Portland to Chicago. The boxes of matches were unladen from the propeller by the master, at Milwaukee without the knowledge or consent of claimants, and contrary to the agreement under which they were shipped and transported by said railway company. And they were not so unladen with intention of vending them in the district of Wisconsin, or of avoiding any law of congress, or any regulation of the treasury department, or of avoiding the payment of government charges. The answer further pleads and sets out at length the regulations of the treasury department for the transportation of goods through Canada.

The district attorney filed exceptions to the answer, as not being responsive to the information, and no defense against the alleged cause of seizure. Section 50 of the act to regulate the collection of duties on imports and tonnage, approved March 2, 1799 (1 Stat. 665), directs, "that no goods, wares or merchandise brought in any ship or vessel from any foreign port or place shall be unladen or delivered from such ship or vessel, within the United States * * * without a permit from the collector, and naval officer, if any, for such unlading or delivery." The section imposes a penalty for such unlading or delivery, and authorizes the seizure of such goods, wares and merchandise as forfeited; and when their value amounts to four hundred dollars at the port or district where landed, the vessel is also declared subject to like forfeiture and seizure. The seizure was made under this section of the statute.

Milwaukee is a port intermediate the ports of Sarnia and Chicago. The goods could not be delivered at this port without the consent of the owner or consignee. They were put ashore or unladen at this port by the master of the vessel, without the consent of the owner or consignee, and without the required permit. It was an unlawful act on the part of the master of the vessel, if within the prohibition of the section of the act above quoted.

It will be observed that the section embraces all cases of unlading of goods without a permit within the United States. The forfeiture attaches whether the unlading is at an intermediate port, or at the port of destination and delivery, or at any place within the United States. The public mischief is equally great whether the unlawful lading is at a port or elsewhere. The object of the law is to prevent frauds upon the revenue. In the case of The Industry [Case No. 7,028], goods were unladen at an intermediate port without the required permit, and the seizure was sustained. It was contended that the information should have been brought under section 27 of the act, as in U. S. v. The Virgin [Id. 16,625]; U. S. v. Brant [Id. 14,637]; U. S. v. The Hunter [Id. 15,428]. I am satisfied that the information is well brought under section 50 of the act, and that the goods were prima facie subject to seizure at the port of Milwaukee. The onus probandi is thrown on the claimants, and if they fail to remove the presumptions which the law raises, condemnation must follow. The Luminary, 8 Wheat. [21 U. S.] 407. The act to prevent smuggling approved June 27, 1864 (13 Stat. 197), made it the duty of the propeller to put into the port of Milwaukee, the first American port of entry on her route from Sarnia. By chapter 68, approved March 2, 1861 (12 Stat. 194), "goods, wares and merchandise, the growth, production or manufacture of the United States, exported to a foreign country, and brought back to the United States in the same condition as when exported, upon which no drawback or bounty has been allowed, are exempt from duty, provided: that all regulations to ascertain the identity thereof, prescribed by existing laws, or which may be prescribed by the secretary of the treasury, shall be complied with." The matches in every particular were within this act, and were free of duty. The regulations of the treasury department relate to the transportation of goods while in their transit through the foreign country. These regulations may have been strictly complied with, but they have no relation to the duty imposed on the vessel to procure a permit for unlading the matches at the port of Milwaukee.

The law under which this information is brought, prohibits the unlading or delivery of goods, wares or merchandise brought from any foreign port or place, whether they be dutiable, or not, without the permit of the collector. Nor is it any excuse or defense, that the master of the vessel put the goods ashore without the knowledge or consent of the owner or consignee. The revenue laws leave all errors or mistakes of shippers and carriers to be settled among the parties interested. The answer is not responsive to the information, and the exceptions thereto must be sustained.

UNITED STATES v. TWENTY-EIGHT CASKS, ETC. See Case No. 14,281.

Case No. 16,560.

UNITED STATES v. TWENTY-EIGHT CASKS OF WINE.

[See Case No. 14,281.]

Case No. 16,561.

UNITED STATES v. TWENTY-EIGHT PACKAGES OF PINS.

[Gilp. 306.] [1]

District Court, E. D. Pennsylvania. June 2, 1832, and Jan. 10, 1833.

PRACTICE — PRODUCTION OF BOOKS AND PAPERS — PROCEEDINGS IN REM — CUSTOMS DUTIES — UNDERVALUATION — INFORMATION OF FORFEITURE.

1. The affidavit of a party interested, taken without cross examination, is competent evidence on a motion for an order on the opposite party, to produce books and writings, under the provisions of the act of September 24, 1789 [1 Stat. 73].

2. A court of chancery, on a bill of discovery, will not compel a party to produce evidence which would subject him to a forfeiture.

3. A proceeding in rem is not within the provisions of the act of September 24, 1789, which authorise an order to produce books and writings, on the trial of actions at law.

[Cited in U. S. v. Distillery No. 28, Case No. 14,966.]

4. Where an information has been filed under the provisions of the act of May 28, 1830 [4 Stat. 409], against articles alleged to be falsely charged in an invoice, the court will not grant an order on the claimant to produce the invoice on the trial of the cause.

5. To subject goods to forfeiture for a false valuation in an invoice, it must have been produced at the custom house for the purposes of an entry.

6. To make up a false invoice at the place of exportation, with intent to defraud the revenue, is not an offence against the law, until followed up by an actual attempt to use it for the purposes of an entry.

7. The sole object of the laws of impost is the collection of the duties; they are not intended for the punishment of crimes.

On the 17th December, 1831, an information was filed by the attorney of the United States, against twenty-eight packages of pins imported in the ship Monongahela, from Liverpool, which were alleged to be forfeited, on the ground, that "the invoice thereof was made up with intent to evade and defraud the revenue," contrary to the provisions of the act of congress of May 28, 1830, relative to goods subject to ad valorem duty. Pamph. Laws 1830, p. 105. On the 17th January, 1832, William C. Cardwell and John Potter, for and on behalf of Kirby, Beard and Kirby, of London, filed a claim to the goods in question. They also denied the allegation that any invoice thereof was made up with intent to defraud the United States; and submitted, that as no entry of the goods had been made, they were not liable to forfeiture even if that allegation were true. To this claim and answer a general replication was filed on behalf of the United States. On the 28th May, 1832, the attorney of the United States applied to the court for "an order on the claimants and their agents, to produce, at the trial of the above cause, the original invoice of the goods, wares, and merchandise, mentioned in the information; and, on the non-production thereof, that judgment be rendered in favour of the United States of America." At the same time an affidavit of James N. Barker, collector of the port of Philadelphia, was filed, to the following effect: "That the original invoice in question was, as the deponent believed, in the possession or power of Messrs. Cardwell and Potter, the agents of the claimants; that Mr. John Potter, one of that firm, declared to the deponent, in the month of December, 1831, that he had received it and exhibited it to his counsel, and that it was then in his possession or power; that Messrs. Cardwell and Potter had been requested to produce it at the custom house, which they refused to do; and that it contained evidence pertinent to the issue joined in the case." 1 Story's Laws, 59 [1 Stat. 82]; Geyger v. Geyger [Case No. 5,375].

Mr. Scott, for claimants.

This proceeding is novel in its character; such an order as that now asked for has never been made in a penal case; the object is to obtain from the claimants, evidence necessary to sustain the condemnation of their own property. The application is founded on the fifteenth section of the act of September 24, 1789; but that refers only to actions at law; it extends only to books and writings in which the parties are interested; it looks to a person as the defendant; it extends only to cases within the similar rule of chancery proceedings; and it must be preceded by adequate notice. The present case is defective in all these respects: (1) This is not an action at law, for that term is confined to proceedings according to the forms of the common law, where there is a party to act and to be acted on; it does not embrace suits of equity, admiralty, or maritime jurisdiction. (2) An invoice is not such a written instrument as is meant by "books and writings;" a bill of discovery only lies for papers to which both of the parties have a prima facie right, or which relate to a title of lands in dispute. (3) The act of congress expressly authorises a judgment against a person, the plaintiff or defendant, if the order is disobeyed; here there is no plaintiff or defendant, it is an information filed by a public officer against a thing; there can be no judgment, it must be a decree as to the property. (4) The ordinary rules of proceeding in chancery would not compel the production of such a paper; they never oblige a man to betray himself, or to disclose what will subject him to a penalty.

[1] [Reported by Henry D. Gilpin, Esq.]

This proceeding is in fact penal, and to extract papers from the party accused, is to make him a witness against himself. (5) In requiring a preliminary motion and due notice, the act means something more than an ex parte affidavit; here too it is that of the collector, a party interested in the condemnation, and entitled to part of the proceeds; this is not sufficient. 3 Bl. Comm. 115; 1 Bac. Abr. 46; Co. Litt. 289; 2 Fonbl. Eq. 484, 491; Harrison v. Southcote, 1 Atk. 538; Bird v. Hardwicke, 1 Vern. 109; Harris v. Lewis, Whart. Dig. 631; Const. Amend. U. S. art. 5; Hylton v. Brown [Case No. 6,981]; Bas v. Steele [Id. 1,088]; Rose v. King, 5 Serg. & R. 245; Wright v. Crane, 13 Serg. & R. 450.

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This is a case clearly within the spirit of the act. Cardwell and Potter became possessed of this paper as agents; they were bound by law to produce it at the custom house in fifteen days after the vessel arrived; it was sent to them for that purpose; they refuse to do so, although they acknowledge they have it, and give no reason for the refusal. This is an action at law; it is not and could not be brought under the admiralty jurisdiction of the court, for the seizure was on land; in form it is similar to the proceedings in the English exchequer which is a common law court; it is commenced by information which is an old mode adopted in suits at law; there is an issue to the country on a matter of fact; and there must be a verdict of a jury; besides, this court is bound to administer the common law remedy where there is one, that is, to adopt the common law forms, the action at law, as it does in this instance. This invoice is certainly within the letter of the act, for it is "a writing containing evidence pertinent to the issue." Nor is there any difficulty in the court rendering a judgment against the parties, who are the United States and the claimant; judgment of non-suit can be entered against the former, and of default against the latter; and though the right of property is determined thereby, it is not more so than in actions of detinue or replevin; the first stage of proceeding is in rem, but when the claimant appears and issue is joined, the suit continues between the parties; the property may be delivered to the claimant on bond as in replevin. It cannot be said that the production of this paper will criminate the claimants, or that it is such a one as is prohibited by the rules of chancery, for the claimant must suffer on account of a fraudulent intention; the invoice does not show this, but merely the fact of valuation; it does not show whether it is too high or too low, whether it is made intentionally or accidentally wrong; the cases cited, are where the fact disclosed, of itself subjected the party to a penalty. Besides this paper is unlawfully in possession of the claimants, it belongs to the United States; and this precludes them from setting up any ground of privilege; it is exactly a case where chancery would interpose. The notice and proof given are sufficient to found the order upon; if possession is denied, then farther proof may be required; the affidavit of the collector is no more ex parte than the bill of a complainant in chancery, under his own oath. The cases cited for the claimants establish the sufficiency of the affidavit in this stage of the proceeding. 1 Story's Laws, 56 [1 Stat. 76]; The Sarah, 8 Wheat. [21 U. S.] 394; Reniger v. Fogossa, 1 Plow. 1; Weaver v. Earl of Meath, 2 Ves., Sr., 108; Finch v. Finch, Id. 492.

HOPKINSON, District Judge. The question to be decided in this case is one of entire novelty, and considerable importance. It arises on the construction of the fifteenth section of the act of congress of September 24, 1789, "to establish the judicial courts of the United States." Neither the counsel at the bar, nor the inquiries I have made since the argument, have been able to discover any judicial decision or practice, which affords us any aid in determining the question.

The case is this. An informaton has been filed against certain pins and needles, imported into the United States from England, and it is charged that they have become forfeited to the United States, by reason of a false valuation in an invoice, made up with an intent to defraud the revenue of the United States. A claim has been put in by Cardwell and Potter as agents for Kirby, Beard and Kirby, the exporting house in England, and the cause is in order for trial. The invoice, alleged to contain the false valuation, has never been produced at the custom house, and, of course, no entry of the goods has been or can be made, while it is withheld. The district attorney, nevertheless, proceeds for the forfeiture, under the fourth section of the act of May 28, 1830, by which it is enacted that "if any package or invoice be made up with intent, by a false valuation, to evade or defraud the revenue, the same shall be forfeited." On the trial of the issue under this information, the production of the invoice alleged to be false, will be required; and in order to obtain it, the district attorney has taken a "rule on the claimants to show cause, why an order should not be made on them and their agents to produce, at the trial of the cause, the original invoice of the goods mentioned in the information; and on the nonproduction thereof, that judgment be rendered in favour of the United States." This order is claimed of the court, under the fifteenth section of the act of September 24, 1789, above referred to. As a ground for this motion, the district attorney filed, in the first instance, the following affidavit: "James N. Barker, collector of the port of Philadelphia, being duly sworn according to law, deposes and says, that the original invoice of the twenty-eight cases of pins and one case of

needles mentioned in this information, is, as this deponent believes, in the possession and power of Messrs. Cardwell and Potter, the agents of the claimants; that Mr. John Potter, one of the said firm of Cardwell and Potter, declared to this deponent, in the month of December, 1831, that he had received the said invoice, and exhibited the same to his counsel, and that it was then in his possession and power; that the said Messrs. Cardwell and Potter have been requested to produce the same invoice at the custom house of this port, but have refused so to do; and that the same does, as this deponent verily believes, contain evidence pertinent to the issue formed in this case."

An objection was made to the sufficiency of this proof, inasmuch as the deponent is a party interested in the condemnation of the goods, being entitled to a certain portion of the forfeiture. I had no doubt, in looking at the authorities, that there was nothing in the objection; that the affidavit of the party is competent for this purpose; and that the affidavit may be taken ex parte without a cross-examination. Such has been the practice of the state courts, as well as of this court; and as the party on whom the call is made, may extricate himself from the difficulty by making oath that he has not the papers required of him, he cannot complain.

The ground being thus laid by the United States, by reasonable proof of the possession of the papers by the claimants, and of their contents, to show that they are pertinent to the issue, the question comes up, which has been argued at the bar, to wit: whether the case is comprehended within the terms and meaning of the fifteenth section of the act of September 24, 1789. As the decision of the question must turn on the language and intention of the whole section, every word must be carefully attended to. The section is as follows: "That all the said courts of the United States shall have power, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same, by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion, to give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books and writings, it shall be lawful for the courts, respectively, on motion, as aforesaid, to give judgment against him or her by default." Several of the phrases of the act have been commented upon, with great minuteness, to show that its provisions cannot be applied to a prosecution for a penalty or forfeiture; and a strict construction is demanded, because the enactments are highly penal. I do not find it to be necessary to notice all the criticisms that have been made on the language of the law. There are some broad lines of description sufficiently definite, in my opinion, to direct us to the decision of the case. The courts of the United States have a power given to them, to require parties to produce books and writings in their possession or power, which contain evidence pertinent to the issue, "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." Is this such a case? Would a court of chancery, on a bill of discovery, compel a party to produce evidence which would subject him to a forfeiture? I think not. No such order has been shown by a court of equity; and the authorities that have been referred to, hold a different doctrine.

In Fonblanque's Treatise on Equity (page 495), speaking of the objects of a court of equity, in enforcing discovery, it is said: "It may also happen that the situation of the defendant may render it improper for the court to enforce a discovery, as when the discovery might subject the defendant to pains and penalties, or to a forfeiture, or to something in the nature of a forfeiture." A reference is made to Mitford's Treatise on Equity, for a clear and comprehensive view of the same subject.

In the case of Harrison v. Southcote, 1 Atk. 528, the bill sought for a discovery of the defendant, whether S. was not a person professing the popish religion, before he conveyed the freehold and copyhold estates to the defendant, as a purchaser thereof. The lord chancellor (page 538) says: "It is not pretended that the defendant is a papist himself, therefore no penalty could fall upon him on that account: but yet he insists, if he should discover the person, under whom he bought, was a papist, it would defeat his title. To be sure, in general, by the determination in the case of Smith v. Read [Id. 526], it is settled, where there is a plea of a title derived, voluntarily or by a devise, from a papist, and not suggested to be a colourable trust, that by reason of the penal law, which would attach upon him, from the incapacity of the devisor to devise, the defendant shall not be compelled to discover, whether the person, under whom he claims, is a papist." The chancellor goes on to say: "The rule of law is that a man shall not be obliged to discover what may subject him to a penalty, not what must only." Although it should not appear with certainty whether the discovery would create a forfeiture, yet if it eventually may do so, it is sufficient to protect the party from a discovery. Thus it would seem that the penal consequences, which may fall upon the claimants, by the production of the invoice called for by the United States, make it a case not within the provisions of the act of congress.

There is another part of the act, which

describes the kind of suit or action, to which the law was intended to be applied, and brings us to the question whether a proceeding in rem is within its provisions. I mean a proceeding merely and exclusively in rem throughout, and not when parties come in after its commencement, after which the suit is no longer altogether in rem. The act directs, that "if a defendant shall fail to comply with such order to produce books and writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default." This part of the law clearly looks to a person as defendant, against whom a judgment by default may be given, and may be enforced by execution. Can any such judgment, in form or effect, be rendered in a case like that before us? The United States assert that the goods mentioned in the information have been forfeited for the causes therein set forth, and have thereby become the property of the United States. Certain persons come in and deny the forfeiture, and claim the goods as their property. But they are not substituted as defendants in the cause. It stands, in this respect, as it did before the claim was put in. The goods are brought under the authority and control of the court, and two parties appear to claim them, and the judgment of the court is to decide to which of the claimants they rightfully belong. The action or proceeding of both is upon and against the goods in the custody of the court, and there is, legally speaking, no party defendant in the case. If the issue be decided in favour of the United States by the verdict of a jury, or by a judgment for default of any appearance or adverse claim, what is that judgment? Simply that the goods are forfeited for the causes set out, and are accordingly condemned; and the consequence is that they are ordered to be sold, and the proceeds to be distributed according to law. All these proceedings are exclusively against the property, the thing, and not against any person or party defendant whatever. If I were to grant the order moved for, and the claimants on the trial should refuse to obey it, how could I follow the directions of the act; how inflict the penalty appointed for the default? Where is the defendant against whom I could render the judgment required? Could I forfeit and condemn the goods? The act gives me no such authority. Such a judgment might act upon the rights and property of innocent persons, not before the court; for the claimants may, in truth, have no property in the goods, they may belong to other persons. If then the claimants may be considered as a party defendant in this cause, they are protected from the order prayed for by the chancery principles referred to: and if they cannot be considered as defendants, they are not within the provision of the act of congress.

The motion of the district attorney is denied; but he may give his notice to produce the papers he wants, and if they are not produced or accounted for, he will have the advantage of the refusal or neglect before the jury, independent of the provisions and remedies of the act of congress.

On the 10th January, 1833, the case came on for trial. The evidence, on the part of the United States, consisted of the original report and manifest of the cargo of the Monongahela, delivered to the collector at Philadelphia on the 9th November, 1830, wherein the packages mentioned in the information were described as consigned to Cardwell and Potter; of a permit on the 27th November to land those packages (not being claimed) and take them to the custom house; and of a bill of the inspector on the same day, showing they had been accordingly landed and taken there. Witnesses were also called to prove that the packages had remained in store ever since, in the place appropriated to unclaimed goods; that no invoice thereof had been produced, or entry of them made at the custom house; that a formal notice had been served on the attorney of the claimants on the 31st December, 1832, to produce at this trial the original invoice, which was not done. It was then testified, on behalf of the United States, by Edward Ewing, an assistant appraiser, that John Potter, one of the firm of Cardwell and Potter, by whom the claim was made in this case, on behalf of Kirby, Beard and Kirby, had expressly declared, that he had the invoice in question, but would not produce it; that the value of the pins, as stated in the invoice, was similar to that stated in the invoice of the pins imported in the Alleghany, which were forfeited for a false valuation; and that these packages were of the same quality as those. It was also proved, that a subpœna duces tecum had been duly served on John Potter, requiring him to attend at this trial and bring the invoice with him; but he made default and never appeared. It was admitted, on the part of the United States, that they had no evidence of any other invoice of the goods in question, nor of the production of any invoice at the custom house, nor of any entry of the goods having been made or offered to be made. The claimants offered no evidence whatever on their part.

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The consignors of these goods committed the violation of the law in sending a false invoice with them, and they must take the consequence of that act. When goods, subject to ad valorem duty, are imported, if they are accompanied with an invoice fraudulently made up, the forfeiture accrues. On this principle the revenue laws have been founded, from the beginning of the government; they consider the invoice as a necessary title deed, as it were, of all goods, and have uniformly guarded its correctness, and punished its falsi-

fication. Independently of any entry, the invoice is made the subject of numerous provisions, in almost every revenue law from 1789 to the present time. Whenever goods are imported into the United States, they are to have a true invoice, and, if it is wanting, satisfactory reasons must be given by the importer before he makes his entry. The act of March 1, 1823 (3 Story's Laws, 1887 [3 Stat. 734]), is the most elaborate and complete law relative to ad valorem goods; it is the result of much experiment; the thirteenth section, which provides the penalties for fraudulent invoices, looks simply to the importation, not to the entry; if the goods are imported, and the invoice that accompanies them be false, then fifty per cent. is added to their appraised value, to be paid as a penalty. The act of May 28, 1830, is supplementary to this; it changes the penalty to forfeiture; it refers to goods imported, and subjects any package of such goods, made up with intent to evade the revenue, to forfeiture; it is the fraudulent making up of the package and the importation, not the entry, which constitute the offence. Pamph. Laws 1830, p. 105. The Robert Edwards, 6 Wheat. [19 U. S.] 188; The Boston [Case No. 1,670]; U. S. v. Lindsey [Id. 15,603]; Perots v. U. S. [Id. 10,993]; U. S. v. Lyman [Id. 15,647]. Here then the making up and existence of the invoice; its similarity to one ascertained to be fraudulent; the similarity of the goods mentioned in it to those already forfeited, are all proved; the possession by the agents of the claimants and their refusal to produce the invoice are also proved, and afford a legal presumption that its contents are as asserted; finally, the importation of the goods is fully proved. These facts bring the case within the law, whether or not an entry was made or offered to be made.

Mr. Scott and J. R. Ingersoll, for claimants.

The act of May 28, 1830, is intended to punish a fraud on the United States; a mere undervaluation does not defraud them; the goods are in their possession and they can value them as they like; but it is presenting and using a false invoice to mislead and deceive them, that is fraudulent. Here, judicially, we cannot know even that an invoice exists; none has been presented or used. This act of congress evidently presumes that the invoice exists, has been presented, and used with a fraudulent design, when it declares the forfeiture shall accrue. In this respect it is founded on all the previous revenue acts. They all require the invoice to be produced; that requisition is in full force; in no respect repealed. It is always to be produced at the time of entry or the want of it satisfactorily accounted for. Without this there can be no entry and the goods are to be deposited in the public stores If suffered to remain there nine months without invoice or entry, they are to be sold, the duties paid, and the balance put into the treasury of the United States. The present case is exactly such as is contemplated by this provision; ample time has been given to produce the invoice and make the entry; they are not done; the goods should therefore be sold. The officers of the customs cannot substitute a new mode; they cannot sell or forfeit as they choose; the law provides for the different cases, and they must comply with it in each case; if the goods are left in their care, without invoice or entry, they must sell them; if they are accompanied with a fraudulent invoice and entry, they must seize them. Mere intention to violate the law, unless followed by an attempt to do so, cannot be punished; this attempt is not the making, but the presentation of the invoice; the use of it for the fraudulent purpose. In all cases of forfeiture for false invoices, the entry has been made or attempted, and the invoice produced. 1 Story's Laws, 623, 631 [1 Stat. 670, 676]; 3 Story's Laws, 1679, 1680, 1684, 1881, 1887 [3 Stat. 433, 434, 438, 729, 735]; U. S. v. Riddle, 5 Cranch [9 U. S.] 311; U. S. v. 150 Crates of Earthenware, 3 Wheat. [16 U. S.] 232; U. S. v. Six Packages of Goods, 6 Wheat. [19 U. S.] 520; U. S. v. Sixty Pipes of Brandy, 10 Wheat. [23 U. S.] 425; U. S. v. Tappan, 11 Wheat. [24 U. S.] 419; Harris v. Dennie, 3 Pet. [28 U. S.] 304; U. S. v. Sixteen Packages [Case No. 16,303]; Tappan v. U. S. [Id. 13,749]; U. S. v. May [Id. 15,752]; Howland v. Harris [Id. 6,794]; Ninety-Five Bales of Paper v. U. S. [Id. 10,274]; Goodwin v. U. S. [Id. 5,554]; The Tiger, 1 Jour. Jur. 105.

HOPKINSON, District Judge (charging jury). The goods described in the information were sent by the claimants Messrs. Kirby, Beard and Kirby, of London, to the United States, by the ship Monongahela, consigned to their agents, Cardwell and Potter of this city. The ship arrived at this port in November, 1830, having these goods on board. No invoice of them having been produced at the custom house, nor entry made, or offered to be made, within the time prescribed by law, the goods were taken possession of by the officers of the customs, and deposited in the public store house, where they now remain.

It has been testified by Mr. Edward Ewing, that Mr. Potter, one of the consignees, acknowledged to him in the spring of 1831, that he had an invoice of the pins imported by the Monongahela, but that he would not produce it until the other case was decided. The other case he alluded to was a previous importation of pins, sent by the claimants to the same consignees, by the ship Alleghany, which had been entered at the custom house, and were then under seizure for an alleged fraudulent undervaluation in the invoice.

The district attorney having given due notice to the counsel of the claimants to produce, on this trial, the invoice mentioned by the witness, was proceeding to prove its contents, when an objection was made on behalf of the claimants. It was, however, eventually agreed, by their counsel, that the invoice and its contents should be considered as before

the court for the purposes of argument, and that the question should be as to its admissibility as evidence. The district attorney admitted that he has no evidence of any other invoice of the goods mentioned in the information than that testified by his witness Edward Ewing; and that he has no evidence of the production of any invoice of the said goods at the custom house, for the purposes of entry, nor of any entry actually made of them. The object of both parties is to obtain the opinion of the court on a question of law, which if determined in favor of the claimants must decide the cause against the United States, and will save to the court and jury the time and labour of examining a great mass of evidence.

The question arises on the construction of the fourth section of the act of May 28, 1830, "for the more effectual collection of the impost duties." By this section it is enacted, "that the collectors of the customs shall cause at least one package out of every invoice, and one package at least out of every twenty packages of each invoice, and a greater number should he deem it necessary, of goods imported into the respective districts, which package or packages he shall have first designated on the invoice, to be opened and examined, and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order, forthwith, all the goods contained in the said entry to be inspected; and if such goods be subject to ad valorem duty, the same shall be appraised, and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation, or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited."

On the part of the claimants it is contended, that the invoice mentioned in this law, is an invoice which has been produced at the custom house, for the entry of the goods: and that when no invoice has been there produced, nor any entry of the goods made or attempted to be made, no forfeiture accrues, but the goods are to be proceeded with, according to the directions of the revenue laws, in all cases where no invoice is produced or entry made. On the other hand it is argued, on behalf of the United States, that the cases of the non-production of an invoice, provided for by the revenue laws, are those in which no invoice exists; or has not been sent with the goods by accident or mistake; but that in this case the invoice is proved to be in existence and in the possession of the agents of the claimants; and that if the United States can prove that this invoice was made up with intent to evade and defraud the revenue of the United States, the goods are liable to forfeiture, whether the invoice has or has not been produced at the custom house for an entry. The question, in short, is whether the forfeiture inflicted by the act applies generally to any and every invoice, made up to defraud the revenue; or whether the language and true meaning of the section embrace only, the cases in which the false invoice was actually produced at the custom house, and an entry made or attempted to be made by it. This is a case in which a court must be guarded to keep within the judicial pale; and not take a step into the legislative domain, under impulses given by the circumstances of the case. We must look closely and exclusively to what legislation has done on the subject, and be careful to do no more. The formation of a system of revenue laws is. necessarily, a work of progression, experiment and improvement. It has to provide for a continual struggle between the law makers and the law breakers; between the officers of the government, whose duty it is to enforce the revenue laws, and the importers of foreign goods whose interest urges them to invent expedients to evade them. In such a state of things, deficiencies will be discovered by experience, which sagacity could not foresee; and new legislation will, from time to time, be required, to meet new devices of evasion. We accordingly see that, from the first organization of our government, congress have been repeatedly called upon to modify and amend their revenue laws; to add to the security of the revenue by new guards; to increase the penalties; to provide for omitted cases; and to cure doubts and ambiguities; so as to enable the courts to reach and punish the violators of the law. But the courts have never assumed the office of supplying legislative defects; and a judge should especially look to the limitations of his powers, when he approaches a case of evil aspect and bad fame.

The first rule in the construction of a statute is to look to the statute itself for its meaning and intention: and, if they be found clearly and unequivocally expressed, to go no farther. If they be not so, we may turn to other acts on the same subject, and by a full and fair view of the whole, fix and adopt a construction for a doubtful part. Our first duty, then, is to examine the law of May 28, 1830. The information now trying is founded on it; it is laid in the words of the law, and must abide by the provisions of the law. The first three sections do not bear upon the question we are attending to. They relate to the appointment of appraisers, and the manner of making appraisements, without any reference to the invoices. Our case must be decided by the enactments of the fourth section. They are as follows: "That the collectors of the customs shall cause, at least, one package out of every invoice, and one package, at least, out of every twenty packages of each invoice of goods imported, which package or packages, he shall have first designated on the invoice, to be opened and examined, and if the same be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall order, forthwith, all the goods contained in the same entry to be inspected: and, if such goods be sub-

ject to ad valorem duty, the same shall be appraised: and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation, or extension or otherwise to evade or defraud the revenue, the same shall be forfeited." There is, then, a provision, that "no goods liable to be inspected or appraised as aforesaid, shall be delivered from the custody of the officers of the customs, until the same shall have been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector." It seems to me to be impossible to read this fourth section with any other impression or belief than that the invoice, referred to throughout, is an invoice which has been produced to, and been in the possession of the collector. There is not a phrase in the law that can have any other meaning by any form of legitimate construction. Every direction given to the collector supposes and requires him to have the invoice before him; he cannot take a step in performance of the duties imposed upon him; he cannot comply with one of the requisitions of the act, without it. He is to cause one package, at least, out of every twenty to be opened and examined, but, before he does this, he is to designate the packages, which are to be opened and examined, on the invoice. Can this be done with an invoice which he has not, which he has never seen, which remains in the desk of the consignees, and of the existence of which he knows nothing but by report? The act proceeds: if the package, thus designated and examined, "shall be found not to correspond with the invoice." We ask, again, if he has not the invoice, how can he decide whether the package does or does not correspond with it? "Or if the package designated shall be found to be falsely charged in such invoice," the collector then, and only then, shall order all the goods, contained in the entry, to be inspected. This provision supposes not only an invoice in the hands of the collector, but an entry, at least initiate, made by and with it. After all these proceedings have been had, as preparatory to the result, the act inflicts its penalty of forfeiture of goods, subject to an ad valorem duty. But in what event is this forfeiture inflicted? When on an examination and appraisement, any "package shall be found to contain any article, not described in the invoice, or if such package or invoice be made up with intent to defraud the revenue." And where is this false valuation to be made? Certainly in the invoice. And how is the collector to know whether it be true or false if he has never seen it? Is he to be allowed to seize imported goods, not to answer for the duties, but as forfeited, for specified causes mentioned in the act, and to take his chance of finding somewhere and somehow an invoice for them, in which they are falsely charged? Or is he not, before he makes any such seizure, to have the legal, prescribed, statutory evidence of the offence, in his power, in the manner directed by the statute? When a forfeiture for a fraudulent undervaluation of goods was ordained by this act, the proceedings by which it is to be reached, the restrictions and precautions under which it is to be enforced, were distinctly set out, and must be strictly attended to. Antecedent statutes, imposing inferior penalties for the same offence, seem to apply only to cases of false invoices produced at the custom house, for the purposes of an entry. If we do not confine ourselves to the invoice so produced, where are we to look for it? Has the collector any authority to demand of the importer an invoice for his goods, who comes not to the custom house with it? Can he officially know that he has one, when no entry has been asked for the goods? The reply would be: "You have the goods in your possession: they are sufficient to answer any demand you have against them; your security is in your hands, at your disposal, and the means of getting from it the duties of the revenue, are pointed out by the law; follow that guide, and the United States will lose nothing they are entitled to on the importation."

If the true meaning of the law be that which I have given to it, we are bound so to understand and execute it; and if inconvenient or injurious consequences result from it, the remedy must be found in another place. But let us, for a moment, inquire whether it is not right, and according to the sound principles of criminal law, that the act in question should be what I have supposed it to be. We will suppose, as was probably the case, that the invoice before us, was made up with intent to defraud the revenue, by a false valuation of the articles contained in it. Is this an offence punishable by our law? What is it but an intention to defraud; a design contemplated; a scheme formed, but not executed, for that purpose? It cannot be said that the attempt was made, but preparation for the attempt. The machinery was ready but its actual use was arrested by the consignee, to whom the operation was entrusted, but who, for such reasons as he thought good, declined to make the intended use of it. The invoice made up with intent to defraud the revenue was withheld, and no attempt to perpetrate the fraud with it was ever made. It never was used or produced, or, as far as we know, held by the consignee for any purpose connected with the revenue, or in any transaction in relation to these goods with the officers of the customs.

The case of U. S. v. Riddle, 5 Cranch [9 U. S.] 311, appears to me to have been a better one for the United States than this. The

goods in that case had been seized, because they were not invoiced according to the actual cost thereof at the place of exportation, with design to evade part of the duties. The consignee received, with the goods, two invoices: one charging them at about one half the cost of the other, with directions to enter them by the small invoice, and sell them by the larger. Both invoices were delivered by the consignee to the collector: and, of course, one step more was taken in that case than in this. The false invoice was, at least, officially known to the collector, and lawfully in his possession. The entry was made on the larger invoice by the advice of the collector. He, nevertheless, seized the goods as forfeited under the sixty-sixth section of the act of March 2, 1799 (1 Story's Laws, 631 [1 Stat. 676]). The words of that section are: "That if any goods of which entry shall have been made, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, all such goods shall be forfeited." The goods were so far within the words of the law that they had been entered, and were not invoiced according to their actual cost, and the invoice was delivered to the collector. But Chief Justice Marshall, delivering the opinion of the court, said "the case was too plain to admit of an argument, or to require deliberation. He thought it not within even the letter of the law, and certainly not within the spirit. The law did not intend to punish the intention, but the attempt to defraud the revenue." The court, therefore, in that case, could not have thought, as has been contended here, that the making up of a false invoice, at the place of exportation with intent to defraud, was an offence against this law, until followed up by an actual attempt to perpetrate the fraud, by the use of it at the custom house to obtain an entry. The principles of this case are substantially recognised by Judge Washington, in the case of Goodwin v. U. S. [Case No. 5,554], which arose, also, on the thirty-sixth and sixty-sixth sections of the act of March 2, 1799. Judge Washington says: The offence consists in "the making an entry upon an invoice below the actual cost of the goods, with design to evade the duties;" and he also says: "If for want of an invoice, or for any other cause, an imperfect entry is made, so that the particulars of the goods are unknown, the goods are to pass to, and remain in the possession of the collector until the particular cost or value, as the case may be, shall be ascertained, either by the exhibition of the original invoice or by appraisement, at the option of the importer." If he does not choose to exhibit his invoice the alternative is that the goods must be valued by an appraisement.

While we are bound to take the law as we find it, and the legislature must provide a remedy for any evils that may have been overlooked, we may ask, will the construction I have put upon the act of 1830, expose the revenue to losses by fraud? I think not; the revenue laws afford an ample protection against any injury from this construction of that act. We are to remember that the sole object of these laws is the full payment and collection of the duties on foreign goods: they are not intended to be a criminal or moral code, for the punishment of crimes and immoralities. In the case of U. S. v. Sixty Pipes of Brandy, 10 Wheat. [23 U. S.] 425, the supreme court declares "that the government had nothing in view but the security of its own revenue, without interfering with those devices of the mercantile world, which look only to individual profit, without defrauding the government." Can the revenue be injuriously affected by such a transaction as we have before us? Can it, in any way, be defrauded or diminished? It may be increased, inasmuch as the appraised value, made by the officers of the customs, with a view to the duties to be estimated on it, may put that value too high; it is hardly probable that they will fall into the fault or error of an undervaluation. What is the course of proceeding in the custom house when no invoice is produced, or entry made of goods imported? It is one that precludes any possibility of fraud upon the revenue, and probability of loss to it. On the contrary, not only is the payment of all the duties fully secured, but also of all costs and charges which may attend the collection.

The first section of the act of April 20, 1818 (3 Story's Laws, 1679 [3 Stat. 433]), enacted that no goods should be admitted to an entry, unless the original invoice was produced; but such goods, that is, the goods of which the invoice was not produced, were to be deposited in the public warehouse at the expense and risk of the owner; and if the invoice was not produced within the times limited by the act, the goods were to be appraised, and the duties estimated in the manner directed by the act. The act of March 1, 1823 (3 Story's Laws, 1881 [3 Stat. 729]), enacts that no goods subject to an ad valorem duty, shall be admitted to an entry, unless the true invoice of the same be presented to the collector at the time of entry, or unless the same are admitted in the mode authorised and prescribed in the next section of the act. The next section enacts that when no invoice has been received of goods subject to ad valorem duty, and the consignee shall make oath of the same, the collector may, if in his judgment the circumstances of the case render it expedient, admit them to entry, on an appraisement thereof. Bonds are to be given with sufficient sureties, to produce the invoice within given periods and to pay the amount of the duties. The third section provides that when goods, imported into the United States, shall not have been entered in pursuance of this or any other act regulating imposts and tonnage, the same shall be deposited, according to existing laws, in the public warehouse, until such invoice be produced. If, after they have re-

mained there, during the period limited by the act, no invoice is produced, the goods are to be appraised and the duties estimated in the manner directed by the act. Power is given to the collector to make sales, before the expiration of the limited period, to discharge such duties and intervening charges as shall become due; and also to direct earlier sales of perishable articles. Thus the United States hold, in their own hands, a sufficient security, not only for the duties, but are saved from any loss by the power given to sell to pay intervening charges; as well as all articles which might perish in their possession.

The second section of this act of March 1, 1823, contains a provision not found in the law of April 20, 1818. By the latter the secretary of the treasury is authorised, if he thinks it expedient, to direct the collector to admit goods to an entry, without an invoice, on an appraisement, taking bonds to produce the invoice and pay the duties. The act of March 1, 1823, refers this subject to the judgment of the collector, but not in any case of non-production of the invoice as in the former law, but only "when no invoice has been received;" and the consignee makes oath of that fact. We thus see that the requisition of an invoice for an entry is positive and indispensable, as a general provision; but it may be dispensed with in a given case and under certain restrictions; that is, when no invoice has been received by the consignee, and he makes oath of that fact. He is then permitted to make the entry, without the invoice, as an indulgence to a presumed accident or mistake. This indulgence can be allowed only when the non-production of the invoice is owing to the fact that it has not been received, under the promise and expectation that it will afterwards be received and produced according to law. What, then, is to be the course of proceeding with goods of which the invoice has not been produced, nor accounted for in the manner mentioned, nor any promise or bond given for its production at a future day? Clearly, they are not to be admitted to an entry; they are not to be delivered to the consignee or importer, as in the other case, but they are to be deposited in the warehouse, to be disposed of in the manner already described. This is the only difference of treatment I can discover between the non-production of an invoice because it has not been received, and its non-production because it does not exist, is not expected to be received, or is withheld for any cause or reason the importer or consignee may choose to act upon. If he will not produce the invoice, he will not be permitted to enter the goods, and they will remain subject to all the consequences and proceedings provided by the law in such cases.

It is my opinion, therefore, that if the invoice mentioned had been produced, it would not make out the case of the United States, however false it may be, and with whatever intent it was made up, as it is admitted by the district attorney that he is unable to offer any proof that it, or any other invoice of the goods in question, was produced at the custom house for the purpose of making an entry.

The jury found a verdict for the claimants.

Case No. 16,562.

UNITED STATES v. TWENTY-FIVE BARRELS OF ALCOHOL.

[3 West. Jur. 15; 10 Int. Rev. Rec. 17.]

District Court, E. D. Missouri. Oct. Term, 1868.

SEIZURES UNDER REVENUE LAWS—INFORMATIONS OF FORFEITURE—PLEADING—VERIFICATION.

1. No form of general issue is allowable to a libel, information, or libel of information, under the rules of the federal courts; but each article therein should be specially met by a distinct article in the answer, admitting or controverting its allegations, or admitting part, and controverting part, as the case may be.

2. The conclusion should not be to the country, but a simple prayer for restitution.

3. Where the claimant "denies" the allegations of the libel, etc., and swears to his denial, no proper issue is made under oath. The verification should apply to a statement that the allegation is or is not true, as the case may be.

4. The belief of the party should be expressed in the form of verification, not in the body of the pleading.

5. Rules 22, 26, 30, 34, and 36 of the supreme court of the United States construed, and certain passages in Conkling's Treatise criticised.

This was a case brought by the United States against twenty-five barrels of alcohol, in a case of seizure and forfeiture on information filed by the United States district attorney. The proceeding was in rem. The different grounds for forfeiture were set forth in separate articles of information, charging different causes of forfeiture under the several provisions of the internal revenue law. The claimant put in the general issue as to the whole information, and then separately traversed the several articles—the language used being, and as to article so and so, the claimant "denies." Then followed the denial of the several averments of the articles of information. To this oath was made, and the question was raised whether in the first place the general issue was sufficient, and second, whether the language used of "denying" the averments of the article, and swearing to the "denial" was a proper pleading. The answer was excepted to on the part of the government as being informal and insufficient.

J. W. Noble, U. S. Dist. Atty.

Taussig & Kellogg, for claimants.

TREAT, District Judge. The court knows how the difficulty has grown up with regard to pleadings in these matters. Parties pleading have been misled, in part by Conkling's Treatise, and in part by this court, when, at an early day, these matters were first brought before it, relying upon what Conkling had laid down as the rule. Hence, in the Law

Register [1] there is a dictum in a particular case, to which the attention of the court has been called, following Conkling's original text with citations, in addition to Conkling, which, on examination, are found to have nothing to do with the question. Conkling, in his text, page 590, lays down the doctrine in this way: (It is under the general head of cases of seizure for violation of laws of the United States where forfeiture follows.) "It is very rare in the description of actions of which we are treating, and especially in that class of them (by far the most numerous) which arises under the revenue laws, that any other defense than that of a direct denial of the charges of illegal conduct set forth in the libel or information is interposed; the only question in general being whether the illegal acts charged have in fact been committed. In all such cases the only appropriate answer or plea is one which is equivalent to the general issue in personal actions. When the libel or information alleges several distinct offenses or causes of forfeiture, the usual practice is to traverse each one of them. But by a rule of the district court of the Southern district of New York, it is provided that instead of a traverse of each separate cause of forfeiture, the claimant may plead as a general issue, 'that the several goods in the information mentioned did not, nor did any part thereof, become forfeited in manner and form as in the information in that behalf alleged.'" Then he goes on to comment on that rule with approbation, stating that a similar practice had grown up in the Northern district of New York, and as it appears by the Law Register, in the district of Wisconsin.

In the case which is reported in the Law Register, that form used in the Southern district of New York was adopted, but if the counsel will turn to page 884 of Conkling's Treatise they will find the following: "Before the promulgation by the supreme court, in 1845, of the rules and practice in cases of admiralty and maritime jurisdiction, very great diversity is understood to have prevailed in the different districts, and to a considerable extent also in the same districts, in the phraseology employed in framing claims and answers in cases of municipal seizure. In the Southern district of New York, with a laudable view, doubtless, to greater simplicity, it was by the one hundred and eighty-ninth rule of the district court declared that, 'instead of a traverse, etc.' (as read before). Under that rule the practice was to combine the claim and answer in one and the same very summary and brief pleading, and in the Northern district of New York, where there was no express general rule upon the subject, a similar practice prevailed to some extent without objection. In the appendix to the first and second editions to this work, a form was accordingly given for this mode of pleading. It was also mentioned in the body of the work as admissible, and the brief observations upon it here alluded to were, through inadvertence, reprinted in the present edition, the necessity of correction not having been seasonably thought of. But, by the rules of admiralty practice above mentioned, this form of pleading, at least in cases which, by reason of the place of seizure, are of admiralty jurisdiction, must, it is presumed, be considered to be forbidden, and therefore no longer admissible; and, although the rule does not, in terms, embrace cases of the opposite description, a just regard to consistency will doubtless insure its application to them also." The particular rules alluded to as adopted by the supreme court are the twenty-sixth and twenty-seventh (to which reference will be made in a moment). He says: "The rules being obligatory and their language explicit, they will doubtless lead to a greater degree of uniformity of practice. It will readily be perceived that, unlike the twenty-second rule, they have no particular reference to cases of municipal seizure, but that, on the contrary, they were probably framed with a somewhat more especial view to suits by private persons; and although the twenty-sixth rule requires of the claimant a stipulation with sureties, it may well be doubted whether it ought to be considered as having been designed to supersede and displace the bond exacted by the eighty-ninth section of the collection act of 1799." If you will turn to the rules of the supreme court, in connection with those comments, you will find that his (Conkling's) text was written prior to the adoption of those rules. The district courts might then make specific rules to govern practice in them respectively, and the Southern district court of New York adopted what amounted to a general issue in these actions on municipal seizures; and it seems that there was, to some extent, similar modes of pleading and practice pursued elsewhere. That mode of pleading and practice rested on the authority of that court to make rules therefor. But when congress empowered the supreme court to prescribe rules for practice and pleading in all cases in equity, admiralty and common law, the action of that court superseded such district rules as were in conflict therewith. Now rule XXII. of the supreme court reads thus: "All informations and libels of informations upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is." The necessity for that is obvious. In the first place whether it should be tried on the instance side of the court in admiralty, or exchequer side as at common law, depended on the place of seizure; hence it became necessary that the information, or libel of in-

[1] [See U. S. v. Six Fermenting Tubs, Case No. 16,296.]

formation should give the means of determining the jurisdiction. That language is used with precision. An "information" is one thing and a "libel of information" is a very different thing, and a "libel" simply is still a different thing. An "information"—and we suppose the supreme court of the United States is using technical terms with due regard to their legal signification—an "information" is a proceeding against property liable to seizure and condemnation where these proceedings fall on the exchequer or common law side of the court. The old mode of proceeding as you will find in all the text-books and authorities on this subject—I mean as to modes of pleading—was very much like a declaration, where each cause of action was set out in a distinct count, subject, of course, to all the rules governing such technical modes of pleading. "A libel of information" is, of course, for the same cause of forfeiture where the seizure is on water. The information, technically speaking, is a cause of forfeiture, where the seizure is on land, and the case falls on the exchequer side of the court; a libel of information is where the seizure is on water, and falls on the instance side of the court. Now, a libel pure, of course, is a matter in admiralty, and falls necessarily either on the instance side, or the prize side of the court, as the case may be. Now then, the twenty-second rule, after requiring that each different pleading, as the case may be, shall state whether the seizure was on land or water, in order that the court may jurisdictionally proceed as the law requires, goes on to say: "The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute," etc., concluding with the prayer there set out. When the pleading was thus required to be done by articulation instead of the old common forms of counts, it was brought within the general modes used for libels in admiralty, and so in this particular case the pleader adopts proceedings by articulations, dropping the old form of common law pleadings as used in separate counts. It saves—and that evidently was the object of the supreme court of the United States—the pleader from needless repetition in connection with each of the several causes of forfeiture. The first proceeds to a general averment which is applicable all the way through to each articulation, as mere articulations, and not simply counts. Now, the mode of framing a libel of information, then, would follow properly the modes prescribed for a libel, for, though it be true that in rule twenty-second the requisites of a libel are stated, and nothing said about an information or a libel of information; yet, when you come to another rule you will see, necessarily, similar modes of pleading should be adopted. The rule for a libel is—after stating the nature of a case—it shall "propound and articulate, in distinct articles, the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article, and it shall conclude with a prayer, etc." Rule XXVI. speaks of "suits in rem." Now, having previously observed the distinction between the various suits in rem, and between libels in rem, and libels in personam, rule twenty-six makes a general rule applicable to all proceedings in rem. It says: "In suits in rem, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant, by whom or in whose behalf the claim is made, is the true and bona fide owner and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And upon putting in such claim, the claimant shall file a stipulation, etc." Rule XXX. is: "In all cases where the defendant answers." Now technically of course there could be no "defendant" in these matters except in cases in personam. "In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article in the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may by attachment compel the defendant to make further answer thereto," etc. Rule XXXIV. reads: "If any third person shall intervene in any case of admiralty and maritime jurisdiction in rem, for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party, or parties, in the suit may be required, by order of the court, to make due answer thereto," etc. Rule XXXVI.: "Exceptions may be taken to any libel, allegation, or answer, for surplusage, irrelevancy, impertinence, or scandal."

How, then, is the pleader to meet the allegations in an information? The original pleading having been by articulation, the issues should take the form of an answer instead of a plea proper. Having taken the form of an answer, rule thirty-six subjects it to the same principles applying to an answer in admiralty. "Exceptions may be taken to any libel, allegation or answer, for surplusage, irrelevancy, impertinence, or scandal." Which mode of proceeding belongs to equity or maritime cases, in contradistinction to law cases, unless you bring into law cases on the exchequer side of the court, modes of pleading which are prescribed for admiralty cases.

The whole matter seems then, without a careful analysis of all the rules of the supreme court on the subject, to be left in some doubt

as to what is required to be done in the case of an answer to an "information." But such an analysis of the various rules prescribed by the supreme court shows that the design of the court was to have a uniform mode of pleading in the three classes of cases, informations, libels of information, and libels pure. The only reason for a difference between an information and a libel of information pertains to the jurisdiction of the court, or the side of the court on which the case should be tried. If the seizure be on water, and consequently the cause is triable by the court without the intervention of a jury, as a maritime cause, the rules pertaining to admiralty and maritime causes must be followed all the way through, but why, when the seizure for the same causes of forfeiture happens to throw the case on the exchequer side, should there be an entirely distinct and different mode of pleading? No reason therefor really exists, and the supreme court seem to recognize the necessity of uniformity in these matters, and consequently framed these rules to cover all three of the classes. But, if there were any doubt about that matter, as the same power exists in this court to regulate its practice as exists in any other district court, this court, together with the district court for the Western district, caused to be framed rules, which, so far as these two courts are concerned, are the rules of practice in these matters, even if the New York rule as adopted by the Southern district court was not necessarily abrogated by the rules of the supreme court made subsequently to the adoption of the rule there, already referred to. No such rule, however, was adopted at any time; but this court in the exercise of the authority given it, adopted a different rule. Rule XIX. of this district court says: "A libel, information, petition, answer, or other pleading, must state plainly the facts upon which relief is sought or the defense put, without repetition, prolixity, or amplification of charges, and in articles properly numbered." If each article in the libel, or information, or libel of information is met by an article in the answer properly numbered in accordance to the requirements of the rule, then general issues become impossible; and that was the design, to bring down all of these cases to a distinct issue as to such matters as the parties really designed to controvert, so that the case might not be unnecessarily burdened with issues, about which really there could be no dispute if the parties acted conscientiously.

The supreme court requires an oath or verification, and so do the rules of the district court. Therefore, following the articulations of the libel, a defendant in pleading by answer should affirm, admit or controvert the allegations contained in each article, or admit part, and controvert part, as the case may be. The necessity for a formal conclusion, to which reference has been made, it will be seen from the views expressed by the court, does not exist. It is not putting one's self on the country, according to the form in ordinary common law matters, because the distinct issues are thus framed, and they may go to the country, or may not go to the country, in the technical sense of the term, depending upon the fact whether it is an information or libel of information. The same rules must obtain all the way through. The technical conclusion, if there be any for adoption in such cases, should be at the close of the answer to the various articles in the information, and that springs from the very nature of the proceeding. The cause being a suit in rem, there is no "defendant," properly speaking; any one within the rules of law, who has a right to appear and claim such property, may appear. He may appear first to dispute the causes of forfeiture alleged. Second, if the causes of forfeiture are found not to have existed, he may have a restitution of the res, or delivery thereof to him. He is, as all the books say in regard to it, and in principle it must necessarily be so, himself an actor, in the legal acceptation of the term, because he appears before the court that has custody of certain property, demanding of the court the delivery thereof to him, notwithstanding all the allegations made to the contrary, on the part of the government or otherwise. Hence so far as the conclusion is concerned, it would be the ordinary form of conclusion; "wherefore he prays that the said property may be delivered to him," a simple prayer for restitution.

Now, another point that necessarily follows from this. How do you meet, when you plead specially (for the rules intimated require that, not general issues)—how do you meet an allegation where it must be a sworn matter? For a person to swear that he "denies," when he does deny on the very face of the pleading, is to make the oath simply of no avail. How are you going to try that issue? Is it a matter of record, to be determined by inspection of the record? If the fact that a man denies a thing is of itself an end of the suit, no suit whatever could be maintained; and no one will pretend, of course, that any such absurdity exists. But a close analysis of the logic of pleading would show that such must be the conclusion of the law, or such modes of pleading are not to be tolerated. The question is not whether the party "denies." No such issue is to be heard or tried, but the question simply is, are the allegations made in the information true? That is all that is to be tried. Hence the form of the oath. He may come in and assert that it is not true—that makes an affirmative and a negative; and then, of course, if he has no direct knowledge, he may state that the statements made by him in the answer, are true according to his information and belief. There is where the information and belief should be stated. This is what the court wishes particularly to call the attention of the bar to. The pleadings must make issues. The pleadings are for no other purpose. We

care a great deal about the directness of issues therein made, as to the facts averred on the one side and controverted on the other. For illustration, it is not a direct meeting of the allegation by saying that the party believes so and so, but it is for the jury, if the cause goes to the jury, or the court if the case falls to the court without the intervention of the jury, not to determine what either party "believes," but what the "fact" is. Therefore, to make an averment that a party "believes" a thing, if you are to follow the close logic of pleading, would put in issue simply his "belief." That is not what the court is to try, but what is the fact.

Mr. Conkling, in the appendix to the latter editions of his treatise in which he corrects the original text which has misled so many persons, because different editions are in the hands of different parties, changes his forms, and properly so. The forms in the prior edition following the text would not be proper under the rules as prescribed by the supreme court, and hence, the view expressed already in regard to that matter, which this court would entertain, and try to enforce, irrespective of any such authority as he has laid down, is in all accord with the views of Judge Conkling, as to what is now the true practice. After stating what the general allegations should be in the informations or libel of information, he says: "It is very rare, however, that a prosecution is instituted against property not under actual seizure. In general, therefore, the fact of such seizure and of its continuance, is to be admitted as follows: That it is true that the said C. D. in the said libel named, did seize the said ship Juno, her boats, tackle, apparel, and furniture, and now holds the same in custody, as in the said libel is alleged and pleaded." That is the form of admission. Then you come to the causes of action proper: "That it is true that, etc., as in the first article of the said libel is alleged and pleaded." That is where an admission is made. "Or if the charge is untrue, then say that it is not true, that, etc., as in the first article of the said libel is untruly alleged and pleaded." And so all the way through the answer. The averment is that the charge made in a particular article is not true, if it is to be controverted; or if it is to be admitted, say "it is true," etc. Sometimes it happens that there are many matters in one articulation, which the party pleading for the claimant wishes to separate. Then he can state: As to so and so, they are true; as to other matters, they are not true. Or he may take still the third form, and may deny that they are any of them true except as hereinafter stated, and then begin and state what he alleges to be the actual truth in regard to them, which is simply following out the rules as they have been known for pleading in admiralty. Conkling, it is true, seems to imply, in his new forms, that a party may controvert by this language: "It is true" (then he puts in brackets), "or that this respondent has heard, and he believes it to be true." And the same where he wishes to controvert the fact. From the views already expressed this court thinks that is not a correct rule. The simple logic of pleading will tolerate no such rule, especially where the answer is to be verified; and in the verification the party is not required to state of his own knowledge that what he has stated in the answer is true, but must state that it is of his own knowledge, or that he has been so informed, and that he believes it to be true. He must commit his conscience, so far at least as to frame an honest controversy as to the facts to be disputed or which should be investigated. The remarks thus made, without taking up these matters in detail as they appear in the answers, enable the pleaders to make the proper applications in detail.

One other matter, only, calls for comment. There is an affirmative matter set up by way of bar to the government's right of action in one of these cases. If what the pleaders intended to set up there affirmatively be true, of course, that property is not forfeited for any matter that occurred prior thereto, viz.: the adjudication of the court settling or passing upon the cause in rem. If there was such an adjudication in rem about that property, the purchaser thereunder has a complete title, free from all antecedent grounds of forfeiture. How that matter is, is of course known to the party, and should be pleaded with such distinctness as to enable the adverse party to meet the issue directly. The language there is very broad and general. True, it is stated that the proceeds were applied to the payment of the tax, and that the tax was paid out of the proceeds—while we know very well that that is not the way it is done, but what the party really meant was, and it was just as effective, that this property passed into the hands of the claimant at a judicial sale, and, if there was subsequently a misappropriation of the funds by the marshal, or an error of the court in the distribution of the funds, he had nothing to do with that; he received a perfect title of the property when he became the purchaser at that sale, the sale having been made under a decree in rem. That point I suppose he wishes to plead, and that matter will be determined mainly by a transcript of the record, which will probably settle it, unless it should be necessary to prove the identity of the property.

I will enter these exceptions then as sustained, without going into detail. It only requires, in many of them, instead of using the word "deny," the use of the phrase, "it is not true"; that is all.

Case No. 16,563.

UNITED STATES v. TWENTY-FIVE CASES OF CLOTHS.

[Crabbe, 356.] [1]

District Court, E. D. Pennsylvania. May 4, 1840.[2]

CUSTOMS DUTIES—FORFEITURE FOR UNDERVALUATION—CONCLUSIVENESS OF COLLECTOR'S ACTION—COMPETENCY OF WITNESS—EVIDENCE—IRREGULARITIES IN SEIZURE—REPEAL OF STATUTES BY IMPLICATION—REVIVAL—CONSTRUCTION.

1. An officer of the customs who has assisted in the seizure of goods for violation of the revenue laws, is a competent witness on a suit for the forfeiture of such goods; the contingency that an action of trespass will be brought against him, by the claimants, being too remote to constitute a valid objection to his testimony.

2. The repeal of a law by implication and construction of a subsequent statute, should be so clear as to leave no reasonable doubt that such was the intention of the legislature. It should not be deduced by an ingenious course of argument, but should appear at once.

3. Where goods have been passed at a custom-house at the invoice valuation, and a suit is subsequently commenced against them, on the ground of their being fraudulently undervalued in the invoice, such undervaluation may be shown by evidence on the trial; and the United States are not bound by the action of the revenue officers in assenting to such invoice valuation.

[Quoted in 1,209 Quarter Casks and 1,235 Octaves of Sherry Wine, Case No. 14,279.]

4. The counsel for the plaintiffs in a suit for a forfeiture having notified the claimants to produce a certain invoice, the latter declined so doing until the former would say whether they would take the invoice with, or without, a letter which was written on the same sheet, and offered it to the plaintiffs in either way they chose; the plaintiffs declined making a choice without first seeing the letter, and the court ordered that the invoice should be produced, but that the letter should not be included in that order.

5. Where goods in the custody of the United States are being proceeded against by them, an irregularity in the seizure cannot avail the claimants in such suit.

6. The revenue laws of the United States are to be so construed as most effectually to accomplish the intention of the legislature in passing them; and do not fall within the rule that penal laws are to be construed strictly, in favor of those who may be prosecuted under them.

7. When a statute contains an absolute affirmative repeal of an antecedent statute, or part of it, then the expiration of the subsequent statute, by its own limitation, will not revive the repealed act.

8. The sixty-sixth section of the act of March 2, 1799 (1 Story's Laws, 631, 632 [1 Stat. 676, 677]), is in force.

9. Where, in a suit for the forfeiture of goods under the revenue laws, sufficient evidence has been given for the prosecution, to satisfy the court that there was probable cause for the proceeding, the burthen of proof is thrown upon the claimants.

[This was an information of forfeiture against 25 cases of cloths, 15 cases of cassimeres, 1 case of cloths and cassimeres, and 24 pieces of pilot cloths, John Taylor, Jr., and Blackburne & Co., claimants.]

The information contained 13 counts: (1) That the goods were brought from a foreign port into some port or place in the United States, to the attorney of the United States unknown, and were unladen and delivered from the vessel in which they had been brought, without any permit or special license from any collector or naval officer, or any other competent officer of the customs. (2) That the goods were brought into the port of New York, and there unladen and delivered without a permit. (3) That the goods were found concealed in a certain store, in the occupation of William Blackburne & Co., at the port of Philadelphia, the duties on said goods not having been paid or secured to be paid. (4) That the goods were entered at the port of New York, and on each entry an invoice produced and left with the collector, and that the said goods were not invoiced according to the actual cost at the place of exportation, but at less sums than such actual cost, with design to evade the duties thereupon, or some part thereof. (5) That the invoices and packages presented at New York, were made up with intent, by a false valuation, to defraud the revenue of the United States. (6) That the invoices presented at New York were made up with intent, by a false valuation, to evade and defraud the revenue of the United States. (7) That all, and each of the packages contained in the entries, and each and every of the invoices, were made up with intent, by a false valuation, to evade and defraud the revenue. (8) That all and each of the invoices were made up with intent, by a false extension, to evade and defraud the revenue. (9) That all and each of the packages were made up with intent to evade and defraud the revenue. (10) As the fourth count, with the exception of the entry being laid at some port or place, to the attorney of the United States unknown. (11) As the sixth count, with the same exception as in the tenth count. (12) As the seventh count, with the same exception as in the tenth count. (13) As the ninth count, with the same exception as in the tenth count.

The information was subsequently amended: First, by inserting in the first three counts the name of George Wolf, the collector of the port of Philadelphia, as the party seizing the goods, and second, by inserting in the last four counts, the port of New York, for the port or place unknown.

The counts were founded respectively, as follows: The first count on the 50th section of the act of March 2, 1799; the second count on the 50th section of the act of March 2, 1799; the third count on the 68th section of the act of March 2, 1799; the fourth count on the 66th section of the act of March 2, 1799; the fifth count on the 4th section of the act of May 28, 1830 [4 Stat. 410], and on the 14th section of the act of July 14, 1832 [4 Stat.

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

[2] [Affirmed by circuit court, case unreported. Judgment of circuit court affirmed by supreme court in 3 How. (44 U. S.) 197.]

593]; the sixth count on the 4th section of the act of May 28, 1830; the seventh count on the 14th section of the act of July 14, 1832; the eighth count on the 4th section of the act of May 28, 1830; the ninth count on the 14th section of the act of July 14, 1832; the tenth count on the 66th section of the act of March 2, 1799; the eleventh count on the 4th section of the act of May 28, 1830; the twelfth count on the 14th section of the act of July 14, 1832; and the thirteenth count on the same section.

On the 10th March, 1840, John J. Logue, being sworn, on his voir dire, said: I was one of the persons who went to Mr. Blackburne's store, and assisted in making the seizure.

Whereupon Mr. Williams objected to the witness, on the ground of interest, as he might relieve himself from his liability to an action of trespass, and obtain a certificate of probable cause, by means of his own evidence.

Cadwalader and Dallas. Whether an action of trespass will be brought is a remote contingency; it is a collateral matter; the interest is not sufficiently direct. The witness is not interested in the case to the extent of a farthing. Act March 2, 1799, § 91 (1 Story's Laws, 655, 656 [1 Stat. 697]); The Thomas and Henry v. U. S. [Case No. 13,919]; McVeaugh v. Goods, 1 Dall. [1 U. S.] 62.

Mr. Sergeant replied.

Mr. Cadwalader, Mr. Dallas, and Mr. Read, for plaintiffs.

Mr. Meredith, J. Sergeant, and Mr. Williams, for claimants.

HOPKINSON, District Judge. The question is, could the verdict in this case be given in evidence either for or against the witness, in case an action of trespass be brought against him, by the claimants, for the seizure? First. Suppose the verdict should be for the claimants; then in an action by them against the witness, that verdict clearly would be no evidence for him, nor would he desire to give it in evidence; neither would it be evidence on the part of the plaintiffs in such action against the defendant. He is no party to this verdict, and has no direct interest in it; he is to gain or lose nothing by it, and the verdict, which acquits them of the alleged forfeiture of their goods, does not prove a trespass by him. That must be made out by proof of the fact that he did seize the goods in the store of the claimants. It would then be for him to show his justification. In the case of the master sued for the negligence of his servant, and the sheriff for the trespass of his deputy, the verdict against the master or the sheriff, could not be given in evidence by either of them, in a suit against the servant or deputy, to prove either the negligence or the trespass, but merely to show the damage sustained. In this case, the verdict for the claimants will simply restore their goods, and will not ascertain what damage they sustained by the seizure. There will be nothing in the issue between the claimants and the witness for which this verdict can be given in evidence for them, and against him. They must prove the damage, as well as the trespass complained of, by original and independent testimony. But, second, suppose the verdict here should be against the claimants, and they should bring suit for the trespass against the witness—a case so improbable that it can hardly be supposed—could the defendant avail himself of this verdict, as an answer to the action? I apprehend not; for the jury who should try that issue would not be bound by the opinion and conclusions of this jury upon the evidence. Whether the act of congress would or would not acquit the officer, in such a case, I do not say. But, be that as it may, the contingency of an action of trespass, in such circumstances, is too improbable to constitute a valid objection to the witness. Objection overruled.

On the 16th March, 1840, John Siter was offered, on behalf of the plaintiffs, to prove that he had examined and appraised the goods at the instance of the government officers; and that they were undervalued in the invoices. Mr. Siter was one of four private appraisers, that is, those not appointed as official appraisers, who were called upon to examine the goods.

Mr. Meredith objected to the evidence on the ground that the goods having been appraised by the official appraisers, at New York, who had adopted the value as stated in the invoice; having passed through the custom-house on and by that appraisement, according to which the duties had been estimated and paid; and having been delivered to the owners upon the payment; no evidence could be received, on the part of the plaintiffs, to disclaim or contradict that appraisement, or to show that the goods were of a greater or different value; but that that appraisement was conclusive and final against the plaintiffs in this or any other proceeding. Tappan v. U. S. [Case No. 13,749]; U. S. v. One Case of Hair Pencils [Id. 15,924]; U. S. v. Eighty-Four Boxes of Sugar, 7 Pet. [32 U. S.] 453; U. S. v. The Burdett, 9 Pet. [34 U. S.] 682; U. S. v. Tappan, 11 Wheat. [24 U. S.] 419.

Mr. Cadwalader, for plaintiffs.

The effect of the principle contended for by the claimants, would be to repeal and expunge a vast body of the laws of the United States. An attempt to defraud would be punishable, but if the attempt should be successful, the perpetrator and his goods would go free. Our ground is threefold: First, that the appraisement of all goods is not necessary, and did not take place in this case. Second, that an examination and appraisement is not conclusive upon the United States as to a claimant, in

a case of forfeiture. Third, that, no matter how the forms of the law may have been complied with, if there is fraud, we are entitled to go behind those forms, and to consider them as nullities, so far as the question of fraud is concerned. Wilson v. Saunders, 1 Bos. & P. 269; Blewitt v. Hill, 13 East, 13; Bosworth v. Maxwell, Hardin, 208; Reniger v. Fogossa, Plow. 10; Partridge v. Strange, Plow. 82; The Two Friends [Case No. 14,289]; U. S. v. The Union, 4 Cranch [8 U. S.] 217; Tappan v. U. S. [supra]; U. S. v. A Package of Lace [Case No. 15,985]; U. S. v. Sixteen Packages [Id. 16,303]; U. S. v. Riddle, 5 Cranch [9 U. S.] 311; U. S. v. Twenty-Eight Packages of Pins [Id. 16,561]; U. S. v. One Hundred and Twelve Casks of Sugar, 8 Pet. [33 U. S.] 277; U. S. v. Phelps, Id. 700; Ex parte Davenport, 6 Pet. [31 U. S.] 661; Locke v. U. S., 7 Cranch [11 U. S.] 339, 345; Sixty Pipes of Brandy, 10 Wheat. [23 U. S.] 421. Whatever is done in fraud of the law is done in violation of it. Lee v. Lee, 8 Pet. [33 U. S.] 44, 50; The San Pedro, 2 Wheat. [15 U. S.] 140; The William King, 2 Wheat. [15 U. S.] 148, 153; U. S. v. Hathaway [Case No. 15,326]; U. S. v. Lyman [Id. 15,647].

Mr. Williams, for claimants, cited U. S. v. Three Hundred and Fifty Chests of Tea, 12 Wheat. [25 U. S.] 490; U. S. v. A Package of Lace [supra].

Mr. Dallas, for plaintiffs.

The forfeiture attaches at the moment of committing the offence, when the entry was made on the fraudulent invoices, and no subsequent act could purge the fraud and forfeiture, except by the consent of the United States. U. S. v. Breed [Case No. 14,638]; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 311, 316; U. S. v. Certain Bags of Coffee, 8 Cranch [12 U. S.] 398; U. S. v. Six Packages of Goods, 6 Wheat. [19 U. S.] 523; Tappan v. U. S. [supra].

Mr. Sergeant, for claimants, cited against the evidence, U. S. v. Fourteen Packages of Pins [Case No. 15,151]; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 311; U. S. v. Breed [supra]; Tappan v. U. S. [supra]; U. S. v. One Case of Hair Pencils [supra]; U. S. v. A Package of Lace [supra].

HOPKINSON, District Judge. An invoice was produced at the custom-house of New York on the importation of the goods now in question, upon and by which an entry was made. It appears, by a writing across the face of this invoice, that it was received and adopted by the officers of the revenue, as a true invoice, showing the actual value or cost of the goods contained in it. Whether an examination and appraisement was made, or not, does not appear. The duties were estimated by that invoice, and, upon paying or securing them, the goods were delivered to the owner. A prosecution has been commenced against these goods; they have been seized, and are alleged to be forfeited on the ground, amongst others, that this was a false invoice. and did not exhibit the true and actual prices or value of the goods; a witness is now offered to testify that the goods are falsely charged in the invoice, and that they are actually worth, or actually cost, more than the prices of the invoice. It is objected, that this evidence cannot be received; that the invoice, or rather the value of the goods there set forth, having been adopted by the officers of the government, appointed for that purpose, is conclusive upon the United States, and cannot now be disclaimed or contradicted. There is written across the face of this invoice this memorandum—"Passed, case 178, woollens and cassimeres," which is considered, for the purposes of the argument, as a certificate of the appraisers, that the goods were truly valued in their opinion in and by the invoice. This memorandum being part of the same paper which was given in evidence, it was read and received, although it is not quite intelligible in what it means or by whom it is signed. In other circumstances, I presume, a certificate, however formal, could not be received without being here verified by the appraisers on oath.

Several subjects, ranging over the whole case, have been discussed in the argument, which I shall forbear to notice, because, in the view I have of the question, it is not necessary, and therefore it would be improper and premature, to give any opinion concerning them: such as the legality of the seizure; whether any appraisement has actually been made of these goods, or such an one as the law requires; whether all or any part of the sixty-sixth section of the act of 1799 has been repealed, involving the question, whether a forfeiture is incurred by a false invoice,—a question constituting a substantive charge in the libel, and not to be disposed of on an incidental question of evidence; also, whether the proceeding at the custom-house, and the delivery of the goods to the claimants, is final and conclusive in relation to the estimate of duties. The inquiry now is, whether those proceedings are final and conclusive against the United States on a seizure and prosecution of the goods on all or any of the charges laid against them in the libel; whether, if the ascertainment of the true value of these goods is necessary to support the charges that they have been fraudulently imported, entered, and passed through the custom-house at an under value, by false entries, false invoices, or other fraudulent contrivances, it is not competent for the United States to give evidence of the true value of the goods; or whether they are estopped from doing so, by the examination, appraisement, and delivery of them by the officers of the customs.

The framers of the revenue laws of the

United States have been met by two difficulties, which have given them much embarrassment and trouble. The first was to devise a mode by which the true cost or value of imported goods, which were subject to pay a duty according to their value, could be ascertained. The second was to detect and punish frauds. The objects are distinct, and the means provided to accomplish them are equally so. Various modes of examination and appraisement have, from time to time, been adopted, as experience discovered the defects of those in use. The different enactments on this subject have been traced from the first to the last by the counsel in this argument, and it is not necessary for me to retrace them, but in a very general way. It is enough to say, that they all had for their object the ascertainment of the duties that were payable on the goods. Such was obviously the intention of the fifty-second section of the act of 1799. The sixty-sixth section of the same act forfeits goods not invoiced according to their actual cost, and provides, that when the collector suspects that such is the case, he may take the goods and retain them until their value is ascertained by two respectable merchants, and until the duties are paid according to such valuation, the object being a just calculation of the duties. There is an express provision that in case of a prosecution for a forfeiture, such appraisement shall not be construed to exclude other proof upon the trial. It is clear to me that the appraisement made under this act has relation only to the duties, and not to the forfeiture. By the first section of the act of 1818 [3 Stat. 433] which is an act for the better collection of duties, the owner of goods subject to an ad valorem duty, is required to produce the original invoice to the collector. The manner of ascertaining the ad valorem duty is pointed out. The ninth section provides for the appointment of appraisers by the president, all having reference only to the estimate of the duties. By the eleventh section of this act, when the collector suspects that goods have been invoiced below their true value, he is to have them appraised in the manner described in the ninth section, and if they are found to be undervalued, an addition is laid upon them of 50 per cent., on which amount the duties are to be estimated. The twelfth section is of the same import. Every provision in this act, respecting appraisement, and the effect or evidence of such appraisement, relates to the estimation of duties, and not to a prosecution for a forfeiture.

In conformity with this view, the question raised in Tappan v. U. S. was only, whether the appraisement made under the act of 1818 is conclusive of the value of the goods, so far as respects the ascertainment of duties. The act of 1828, § 8 [4 Stat. 273], commences by declaring that the subject is the estimation of duties to be imposed upon goods imported into the United States; and, in cases of ad valorem duties, the collector is to have the actual value appraised, estimated, and ascertained, and the number of yards, parcels, and quantities, and the actual value of every one of them. The duty of the appraisers is then detailed. The whole proceeding refers to the collection and payment of duties, and the appraisement is made for no other purpose, nor is it applied to any other object. The ninth section is equally explicit on this subject, and the invoice is expressly referred to, upon which the additional charge is to be made. The act of 1830 (section 2) provides for the appointment of appraisers. Section 4 directs the collectors to cause at least one package in every invoice, and one at least in every twenty, to be opened and examined, and if not found to correspond with the invoice, or if found to be falsely charged, all the goods in the entry must be inspected. Then is the direction to have an appraisement made, which is applied only to goods subject to an ad valorem duty, and if it shall be found that the invoice was made up with intent to evade or defraud the revenue, the goods are forfeited, &c. Act 1832, § 7: In cases where the duty imposed upon goods is to be estimated by the value of the square yard, or any other quantity, and in all cases of an ad valorem duty on any goods, the collector is directed to cause the actual value to be appraised, estimated, and ascertained; and the number of such yards, parcels or quantities, and such actual value of every of them, as the case may require. The duties of the appraisers are then detailed, in order to estimate the true value, any invoice or affidavit to the contrary notwithstanding. Section 8: The appraisers are empowered to call before them, and examine upon oath, any owner, importer, or consignee, touching any material matter. Section 14: If upon opening any package, the goods shall be found not to correspond with the entry, or if the package contain any article not entered, such article shall be forfeited; or if the package be made up with intent to evade or defraud the revenue, the package shall be forfeited.

Such are the legislative enactments respecting the collection of the revenue, which have been thought to apply to the question before the court. That there is no direct positive rule by which the testimony offered should be rejected or admitted; that there is no declaration that the appraisement, if one was made in the case, or the adoption of the invoice prices by the officers of the customs, shall be conclusive of the value of the goods, against the United States, in the proceeding and trial now pending, cannot be questioned; and the inquiry is,—whether such an intention can be clearly deduced from these enactments, or any of them.

It is proper, in our inquiry into the intention of the legislature as to the effect of these ap-

praisements, to remark that, in the act of 1799, there is an express proviso, that, in case of a prosecution for a forfeiture, such appraisement shall not be construed to exclude other proof upon the trial. No distinction is here made between the United States and the claimant, but the provision is general, that the appraisement shall not exclude other evidence. There is but one other express enactment upon the force or effect of an appraisement. This is found in the eighth section of the act of 1832, giving power to the appraisers to call before them, and examine on oath, any owner, importer, &c. "And if any person so called shall fail to attend, or shall decline to answer, &c., he shall pay a fine of fifty dollars, and if he be the owner, importer, &c., the appraisement shall be final and conclusive, any act of congress to the contrary notwithstanding." So far as any inference to our purpose can be drawn from these enactments, it is, that the appraisement was not intended to shut out other evidence on a prosecution for fraud and forfeiture. In the latter act the appraisement is made conclusive, as a penalty for the neglect or contumacy of the owner. The words "any act of congress to the contrary notwithstanding," seem to imply that it was supposed that preceding acts would not have made the appraisement final and conclusive without this declaration.

There being nothing in any act of congress which declares that, in a case like the present, the appraisement shall be conclusive evidence of the cost and value of the goods, the counsel for the claimants have endeavored to support their objection by reasoning from the general character and provisions of the acts of congress, on the subject of the revenue. The argument most relied upon is that which is drawn from the act of 1832. It is argued that, inasmuch as the appraisers, by that act, may make their appraisement without any regard to the invoice, we must therefore, also, put the invoice aside on the question of value, and take the appraisement as the only evidence of it. I cannot see the force or congruity of this argument. The object of the appraisers was to estimate and ascertain the actual value or cost of the goods, and this they might well do by their own skill and knowledge, and other means of information in their power, without any reference to or reliance upon the invoice or affidavit of the owner. Our inquiry is, whether that invoice, and that oath, are true or false, honest or fraudulent; and this we cannot possibly answer, without having that invoice before us, nor without testing its truth by other evidence than itself; by any evidence by which its truth or falsehood can be made to appear. The appraisers could perform their duty and reach their object without the invoice, but we cannot do so, nor even move a step towards it. The inquiry and proof are equally open to both parties. In the cases tried in this court, the claimants have been let into all the proof they could produce, to overrule the opinion of the appraisers. Commissions have gone abroad to collect testimony for them, and the appraisers were examined and cross-examined as to the means or standards by which they made their estimates. It was the trial of an issue, fraud or no fraud, and the whole question was open to any legal evidence on the one side and the other. The broad and increased power given to the appraisers by the act of 1832, is far from being a reason why they should decide without appeal, without check or control, especially in a new proceeding before a court of law, which in fact will have nothing to try if the doctrines of the claimants are sound. With an invoice false and fraudulent on its face, with a dozen witnesses ready to prove it to be so, it will be a sufficient protection to the offender to say, here is the certificate of the appraisers, and by that the invoice proves its own truth; I have satisfied them, or I have deceived them, I need not say how, and I put the court and the law at defiance. The revenue will be dependent upon the integrity and intelligence of the appraisers; they must be too honest to be tampered with, and too intelligent to be deceived. We may have such men, but it will be hard to find them. Our inquiry has no reference to the amount of duties assessed or paid for these goods. It is nothing to this issue, whether they were too much or too little. There is no attempt to disturb or revise them. The object here is to ascertain whether a certain paper, called an invoice, which was produced at the custom-house of New York on the entry of the goods, is true or false. Suppose the duties had been calculated on a valuation made by the appraisers under the act of 1832, without regarding or looking at the invoice, would it be a less offence against the revenue for the importer to have exhibited an invoice containing a false valuation of the goods, with intent to defraud or evade the duties? Can we try or decide whether it was a false valuation, without information and proof of the true and real value? It is not essential to this offence that the invoice should be used by the appraisers in making their estimate, nor that it was one of the means by which they were deceived. To invoice the goods below their actual value and cost, and to enter them by that invoice, with design to evade the duties, is, per se, an offence which forfeits them whether the invoice was afterwards instrumental in the estimation of the duties for that purpose or not. The evidence must follow the issue and must depend upon the fact to be proved when the question is, whether, when an importer has paid the duties legally chargeable upon his goods, it may be enough for him to say, I have paid all that the officers of the government, appointed to ascertain them, declared to be due, and the question should rest. But when the inquiry is, whether he has been guilty of a specific fraud or not, it would be extraordinary if the acts or opinions of men, in reference to another subject, should be con-

clusive, either for his condemnation or acquittal.

It cannot be doubted that to enter goods with a false invoice, with intent to evade or defraud the revenue, subjects them to forfeiture; this is declared by the sixty-sixth section of the act of 1799, which for the present I consider to be in force, and one of the counts of this information is founded on that section. It is said to be repealed, but, as I have remarked, I shall not, on an incidental question of evidence, decide that question. If it be so, the claimants will have the benefit of it, after the evidence is heard. If that count be good, it must be competent to the district attorney to support it by proof of the allegations and facts contained in it. But, can it be proved as a matter of fact, that the invoice was false, that the value and prices of the goods, as therein exhibited, are false, unless, in the first place the invoice be laid before the jury that they may see what are the cost and value therein charged, and then that proof, common law proof, for the statute prescribes none, be received to show that the cost and value as given in the invoice are not true?

On the subject of the repeal of this section, which is justly considered an important inquiry, it may not be amiss to suggest, that the repeal of a law, by implication and construction of a subsequent law, should be so clear as to leave no reasonable doubt that such was the intention of the legislature; it should be as certain as an express repeal. It should not be deduced by an ingenious course of argument; but should appear at once. It can seldom be satisfactory to arrive at this conclusion by taking a phrase from one section of the subsequent act and putting it into another section, where the legislature had not put it. The general presumption is that, if a repeal was intended, it would have been expressly declared; and such is the usual practice of legislation. If the law-makers have not said so, the intention to do so must be clearly shown from what they have said. In this case the sixty-sixth section of the act of 1799 speaks of an invoice not made up according to the actual cost of the goods, with design to evade the duties, and a forfeiture is inflicted. By the eleventh section of the act of 1818 an addition of fifty per cent. is to be made to the invoice if the appraisement exceed it by twenty-five per cent., making no distinction between a fraudulent intent and an innocent error. These two laws therefore provide for different cases, and are entirely consistent. To meet this view and show that the invoice spoken of in this eleventh section, meant a fraudulent invoice, words are carried from another section of the act to the 11th section; but we do not find them there. The argument however may be a good one: but I am unwilling to adopt it on the question now before the court, although it may serve the claimants hereafter. It will then be more carefully examined.

By the fourteenth section of the act of 1832, if, on opening the package: (1) the goods shall be found not to correspond with the entry; (2) to contain any article not entered; such article is forfeited; (3) if the package be made up with intent to defraud or evade the revenue, the package is forfeited. There are counts in the information on each of these charges or offences. The last is a very broad charge: "If the package is made up with intent to defraud or evade the revenue." It is obvious that the proof of this charge can hardly be found in any single fact, or by direct evidence. It must be effected by a combination of facts and circumstances. The machinery must have several parts to accomplish the end: a false invoice may be—perhaps I may say—must be a part of that machinery; and therefore to prove this offence of making up a package to defraud the revenue, it may be essential to prove that the invoice which came with the goods, and by which they were entered at the custom-house, was false and fraudulent, as a distinct and substantive fact, tending to support the allegation, and the issue upon it. If we should admit that where the direct issue is upon the invoice, or the question was as to the estimate of duties, the appraisement agreeing with it might be paramount and conclusive evidence of its truth, it does not follow that it would be so, when the issue is whether a certain package was made up to defraud the revenue, and the invoice is brought in incidentally, as a circumstance tending to show the fraudulent intention or design with which the package was made up.

I have avoided giving any opinion on many of the topics and questions brought into the argument, because, with my view of the direct question, it was unnecessary, and would have carried me into matters hereafter to be considered, and upon which it is proper to keep myself free. Unless the objection to the evidence were clearly sustained, I should admit it, because it is incumbent on the party taking an objection to the competency of testimony to support it, and because an error in receiving it will be attended with less inconvenience, than an error in rejecting it. It may turn out, after it is heard, not to affect materially the case of the claimants, according as they shall make it out.

The objection is overruled.

On the 4th April, 1840, Mr. Cadwalader, for plaintiffs, moved for an order on the claimants to produce a certain invoice, described in a notice which had been served on the claimants' counsel; and cited, in support of his motion, Withers v. Gillespy, 7 Serg. & R. 10; Towers v. Hagner, 3 Whart. 59; Act Sept. 24, 1789, § 15 (1 Story's Laws, 59 [1 Stat. 82]); Carroll v. Peake, 1 Pet. [26 U. S.] 22, 23.

The counsel for the claimants admitted that they had the paper in their hands ready to be delivered, when the counsel for the plaintiffs would say whether they would take it with a

letter written upon the same sheet, or without the letter, and that they might have it in either way at their option.

The counsel for the plaintiffs replied, that they wanted the invoice, and that they could not say whether the letter annexed to it was within their call or not, until they saw what it was.

Ordered by THE COURT, that the counsel for the claimants produce the invoice described in the notice, but that this order does not extend to the letter annexed to the invoice.

The argument of the case, on the evidence, commenced on the 15th April, 1840, was carried on by Mr. Read, U. S. Dist. Atty., Messrs. Meredith and Sergeant, for claimants, and concluded by Mr. Dallas, for plaintiffs.

HOPKINSON, District Judge (charging jury). It is within one day of eight weeks since you were empanelled and sworn to try this cause. I have no knowledge of any trial in a court of justice of this duration. Perhaps the time that has been consumed is not more than its importance and difficulties required. On the one side, it is alleged that the object of the prosecution is not only to punish the particular fraud complained of, but to expose and break up an extensive combination, in a foreign country, whose artifices and operations are preying upon our revenue, crippling our domestic industry, and driving our honest traders out of the market. On the other side, it is certainly true that the character and property of a citizen are deeply involved in the result of the investigation. Our duty only now remains to be performed. We have had from the counsel all the assistance that learning and labor could produce. We must endeavor to use it carefully and conscientiously. In doing this you must keep in mind, that you are not examining the truth or falsehood of a single fact or allegation. You are investigating a charge of fraud of a complicated character, and such an inquiry calls for your most vigilant attention and care, that you be not deceived. It is of the essence of fraud to be secret in concerting its designs and wary in executing them, to mislead by false appearances, to put on an honest face and front, and to preserve all the regularity and forms of a lawful proceeding. But the danger of being deceived must not make you too suspicious, nor must you suffer your fears to change the true color of things. You have observed that in the course of the trial numerous questions of law, on the evidence, have been discussed and decided. One of them, particularly, was of vital importance to the case, and was argued most elaborately. You will understand that for any errors I may have committed in these decisions the disappointed party has a remedy, and also that for any errors I may fall into in my charge to you he has the same redress. It will be my duty to give you my opinion and instructions on matters of law, clearly and explicitly, not only that you may not misapprehend them, but that the parties may have the full benefit of their right of exception. As to the evidence and facts of the case, I shall no farther interfere with your rights over them, than by reminding you of such as appear to me to demand your particular attention, with such remarks as may afford you some aid in your deliberations upon them.

Before we come to the consideration of the issues presented by the pleadings, we must dispose of some preliminary objections which are asserted, on the part of the claimants, to be destructive of the whole proceeding. It is said that the seizure of these goods was irregular, unlawful, and a violation of the rights of the claimants, and that this prosecution being founded on that seizure, is vitiated by it. And how is this pretension maintained? It is contended that the affidavit on which the warrant of seizure was issued was illegal, that it does not contain charges and specifications to justify the warrant, and that the warrant is equally defective. I see no ground whatever for the objection. The whole proceeding is substantially in conformity with the directions of the act of congress. As to a particular description of the goods, that was obviously impossible, and would be so in nine cases out of ten of seizures for similar offences. So as to the place. These goods were in a room which was a part of No. 24, to which there was no access but by the door numbered on the street 24. It was truly a part of the store of the Messrs. Blackburne, and not of Mr. Worrell, who had no means of communication with it. But all this, I hold to be entirely immaterial to the issue now trying. These goods are now in the possession of the officers of the United States—and they are claimed as the property of the United States by reason of a fraud which forfeited them. The irregularity of the seizure, even if there was an irregularity, cannot avail the claimants on this trial: it is no defence for them against the charge of fraud, or the claim of property in these goods by the United States. If the officers were guilty of a trespass, they must answer for it, if the claimants shall find it expedient to bring their action for it. If they might have forcibly resisted the execution of this warrant, and had done so, then that question would have been tried in another proceeding. But here we have nothing to do with it. Let me explain this doctrine, if it can need any explanation, by a familiar case. It is suspected that stolen goods are concealed in a particular place,—a warrant is issued to search for and seize them,—a great quantity is found concealed,—the person in whose custody they are found is indicted for receiving them. Can it be allowed or believed that he might put his defence on the allegation that there was some informality in the warrant of seizure or the matter of executing it? And that therefore the indictment and all the subsequent proceedings were illegal and void? And would it not be thought strange if the accused, in

such a predicament, and to support such a defence, were to make a clamor about his liberty, and the invasion of his rights, and the sanctity of his home, by the harpies of the law? These goods are now held, not under the warrant by which they were taken, or by the seizure made by virtue of that warrant, but by process issued from this court by the authority of which they were attached, by the marshal of the court, and are now in his custody.

Another, much more important objection, is presented to our further proceeding in this prosecution, and which, were it well sustained, would have terminated this trial almost at its commencement. It is the question already mentioned, and which was so fully argued on a question of evidence, and has been again urged upon the court. I shall give my opinion now, as I did then, so that the claimants may have their exception to it, either on the ground of an improper admission of evidence, or of an error in my instructions to you. I shall speak of it now briefly, having given my reasons at large on the former occasion. It is contended that as these goods were appraised at the custom-house in New York at the invoice prices, that as they were passed through that custom-house on that appraisement, paid the duties according to that appraisement, and were thereupon delivered to the importers, they are now exempted from all further inquiry into their cost or value, not only in relation to the amount of duties legally chargeable on them, but on a prosecution for fraud in making up those invoices, and on any or every other account; that the very fraud by which it is alleged in this prosecution the passing of the goods through the custom-house was obtained, that is, the false invoices, cannot now be inquired into. I can by no means assent to this doctrine, which in my judgment would be to offer a premium for successful fraud, and punishment only to the unskilful. I adhere, on reflection, to the opinion I gave on the trial. I will add but a remark. It is said these officers are the appointed agents of the government, and that the government is bound by their acts. The answer is plain. The government does not claim any right or privilege for itself that every citizen does not possess. Suppose one of you should appoint an agent to sell your house or goods, with even more clear and full powers than those given to the appraisers by the acts of congress. Your agent makes a sale, but it is afterwards proved that he has been grossly defrauded by the purchaser, by false representations, by the suppression of the truth, by that which constitutes fraud in the law. Would you suppose you are bound by such a transaction; that the cheat is safe and may retain your property only by saying that it was delivered to him by your agent?

It has been insisted on the part of the claimants, that our revenue laws, at least those we have been considering, are penal laws, highly penal, and therefore are to receive a strict construction in favor of those who may be prosecuted under them. It does not appear to me that this point is of much importance in the present case, but I have been asked for an opinion upon it. It must not be understood that every law which imposes a penalty, is therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not in the strict sense penal acts, although they may inflict a penalty for violating them. It is in this light I view the revenue laws, and I would construe them so as most effectually to accomplish the intention of the legislature in passing them.

These secondary matters being disposed of, we come to the examination of the matters in issue between the United States and the claimants. They are distinctly set forth in the pleadings. The information, or libel, states the causes for which a forfeiture of these goods is claimed, and the claims and answers set out the defense on the part of the claimants. To these documents your attention will be directed, for it is in them you will find the allegations on which you are to pass by your verdict.

The information contains thirteen counts, as they are called, but in fact many of them are but a repetition of the same charge presented in a different form, so as to meet the evidence as it might come out on the trial. I will briefly recur to them.

The first and second counts of the information charge that the goods were brought into some port of the United States, and were there unladen and delivered without a permit. The first states that the port is unknown, the second, that it was the port of New York. These accounts are not supported by the evidence. It appears that the goods were landed and delivered from the vessel in which they were imported, under a custom-house order, and by the custom-house officers, and were afterwards delivered not from the vessel, but from the stores, to the claimant, on what are called land permits.

The third count charges that the goods were found concealed, the duties thereon not having been paid. This count is founded on the sixty-eighth section of the law of 1799, which gives authority to every collector, naval officer, &c., if they have cause to suspect a concealment of goods, &c., subject to duty, in any particular dwelling-house, store, &c., having obtained a warrant from a justice of the peace, to enter such house, store, &c., and there to search for such goods, "and if any shall be found to seize and secure the same for trial, and all such goods, wares, &c., on which the duties shall not have been paid or secured to be paid, shall be forfeited."

Two questions are to be considered under this law: (1) Were the goods concealed in the

place where they were found? This is a matter of fact which you will decide on a careful review of the evidence. It appears that the claimant, Mr. Blackburne, rented a store in Church alley, No. 24, in this city. That the adjoining store, No. 26, was rented by Mr. Worrell, and that the lower, or ground story, was occupied by him. The second story or floor of this store, which extended over the whole building, was in the occupancy of Mr. Blackburne, and the access to it was by a large opening or doorway from Mr. Blackburne's second story into it. This doorway was usually kept open, and was so in July and August last, and up to the 20th of August, on the day when the seizure was made. On the morning of that day the porter of Mr. Blackburne saw in a newspaper, or was informed by somebody, that a seizure had been made of Mr. Broadbent's goods. Whether the Messrs. Blackburne had the same information or not is not in direct evidence, but you will judge from all the circumstances whether they knew it or not. On the same morning, the hour is not precisely fixed, but at about eight or nine o'clock, this doorway or passage is completely blocked up and concealed by boxes, &c., so that persons going into Mr. Blackburne's second story, saw nothing by which they could discover or suppose there was any communication between the two rooms. The officers on their first visit did not discover it, and went away; but on getting further information, they returned, and by introducing a stick between the boxes, they found where the passage was, removed the obstructions which concealed it, and went into the adjoining room. It was entirely dark, although Mr. Blackburne's porter says he had opened one of the windows that morning. In this room the goods in question were found, some in their cases, some lying on them. This is the evidence of a designed concealment, from the situation in which the goods were found. Are these circumstances of suspicion explained or confirmed by the conduct of Mr. Blackburne? When the officers came to his store he was there. They told him their business; he said they might search. He said he had no goods in his possession but what were imported through the port of Philadelphia. The officers examined the cloths and cassimeres in the lower story, and then went up stairs of store No. 24. After looking at some cloths and cassimeres there, one of them asked Mr. Blackburne, if they were all the cloths in his possession. He answered, "Yes, you have seen all." He was asked if he had no other store in the neighborhood. He answered, "No, you have seen all that we have." The officers did not, on this visit, discover the passage into the next store; they returned in the afternoon. One of them said to Mr. C. Blackburne, that they wished to see the second story over Mr. Worrell's store. He replied, "You have seen all the rooms that we have." The officers went up stairs and searched for the entrance into the next room. He denied that there was any access to that room. They proceeded in their search to discover one, and at last he said, "The entrance is behind those boxes." The officers were then thrusting a stick between the boxes. In the next room the goods were found, and Mr. Blackburne said he was the owner of them. In this short conversation, we have five absolute, undoubted false assertions. No equivocation, no evasion of the questions, but clear and explicit denials of the truth. Counsel say he had a right to refuse to answer, but did he? (2) Such is the question of fact on this part of the case. Such the evidence from which you are to decide whether these goods were concealed or not, in the ordinary acceptance or meaning of the word, and it is in relation to that question I am now adverting to this evidence. What bearing it may have on another part of the case, will be seen.

There is another question on this part of the case, which is partly a question of fact and partly of law. It is not enough that the goods were concealed. They might be so for an object and purpose with which neither the United States nor their revenue laws have anything to do; in which they have no concern. To make this concealment the ground of a forfeiture, the goods, first, must be subject to duty; of this there is no question in this case; second, the duties must not have been paid or secured to be paid. The concealment, therefore, spoken of in the act of congress, must have had relation to these objects. In U. S. v. Three Hundred and Fifty Chests of Tea, 12 Wheat. [25 U. S.] 493, Judge Washington, delivering the opinion of the supreme court, says: "The term 'concealed,' used in this section, is one of plain interpretation, and obviously applies to articles intended to be secreted and withdrawn from public view, on account of their being so subject to duties, or from some fraudulent motive." It has been contended for the claimants, that the concealment relates only to smuggled goods. I do not think so; it relates to any goods subject to duties, and on which the duties have not been paid.

This natural and satisfactory interpretation of the law, brings us to another question, or the meaning of the act, which is a question of law. Were the duties on these goods paid in the meaning of the words in this section? They had been passed at the custom-house of New York, and the duties there assessed upon them had been paid. Does this satisfy the provision of this sixty-eighth section of the act of 1799? In my view of this question, it brings us to the main subject of inquiry in the case, that is, were these goods invoiced at their fair and true cost and value? For the duties were paid according to the value and prices in the invoice. If those prices were the real cost of the goods, then the whole duties due upon them have been paid, and the concealment was not such an

one as is described in the act. But it is contended, that as to the amount of duties payable on these goods, the assessment made at the custom-house is conclusive, and that therefore the concealment of these goods can have no connexion with the duties. In my opinion this proposition is too broad, and cannot be maintained by the true construction of the act. Without deciding what our case does not call upon me to decide, that is, whether the appraisement made at the custom-house is conclusive upon the question of duties, so as to bar any action for an additional amount if that appraisement should afterwards be found to be too low, and where the error was one of the appraisers', without the use of any contrivance, fraud, or deception by which they were misled on the part of the owner of the goods, I am of opinion that an appraisement procured by such fraud and contrivances will be no protection to him by whom they were perpetrated. It is a universal maxim of law, of equity, of morals, that no man shall be permitted to gain an advantage by his own fraud. When, therefore, the sixty-eighth section of the act of 1799 declares that "all such goods, wares, and merchandise, on which the duties shall not have been paid or secured to be paid, shall be forfeited," it means the duties which were justly and legally chargeable upon the goods, and not a part of them, and that if the owner of the goods has obtained possession of them or passed them through the custom-house by paying a less amount of duties than was justly chargeable upon them, and has obtained this advantage by any fraud or contrivance upon the officers of the government, it will not avail him; and that if his goods are found to be concealed within the meaning of the act, he cannot avoid the forfeiture by alleging and showing that he had paid the duties required of him at the custom-house. You will further observe that the supreme court, in the case I have cited, have decided that the concealment spoken of in the act applies to articles intended to be secreted or withdrawn from public view, on account of their being so subject to duties, "or from some fraudulent motive." I understand these general words, "or from some fraudulent motive," to be restricted to a fraudulent motive connected with the duties or revenue laws of the United States. If, then, you shall believe that these goods were concealed, and that they were concealed on account of their being subject to duties, or from some fraudulent motive, such as I have described, they are forfeited by the provision of the sixty-eighth section of the act of 1799.

The fourth and tenth counts of the information bring up the question whether the sixty-sixth section of the act of 1799 has been repealed. This repeal has been contended for on the part of the claimants by virtue of several subsequent acts of congress. The part of the sixty-sixth section important to our present inquiry, enacts, "that if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares, or merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited." Before we look to the subsequent acts by which it is contended that the above provision is annulled, it is proper to remark that no express or declared repeal is to be found in any of them; it is inferred, or implied from certain provisions or enactments in the subsequent laws, from which it is argued that the section in question has been repealed. I had occasion to remark, in an opinion given in the course of this trial, "that the repeal of a law, by implication and construction of a subsequent law, should be so clear as to leave no reasonable doubt that such was the intention of the legislature; it should be as certain as an express repeal. It should not be deduced by an ingenious course of argument, but should appear at once. The general presumption is, that, if a repeal was intended, it would have been expressly declared, and such is the usual practice of legislation." In the laws that have been occasionally referred to in the argument of this case, it has been seen how frequently repeals of sections and parts of sections have been declared.

It is not necessary in the duty I am now discharging, to detain you with a minute examination of all the acts of congress, from which the repeal of the sixty-sixth section of the act of 1799 has been inferred. As to the law of 1818, of 1823 [3 Stat. 729], and 1828, they appear clearly to me, to provide for cases entirely different from those described in that section, which relates to goods invoiced below their actual cost, with design to evade the duties thereupon. None of the acts just mentioned provided for any such case. With this understanding of these acts, it is unnecessary for me to inquire whether the expiration of the act of 1818, by its own limitation, would revive the sixty-sixth section of the act of 1799, if it were admitted to have been supplied by the law of 1818. On this subject I would suggest, that when a statute contains an absolute affirmative repeal of an antecedent statute, or a part of it, then, the expiration of the subsequent statute, by its own limitation, would not revive the repealed act; but where there is no such express repeal, but the first statute is taken to be repealed by the implication that it is supplied by the subsequent law, then it would seem that we might well consider that the second law was rather a suspension than a repeal of the first; and if the legislature, after the experiment, allowed the second act to expire, it was their intention to go back to the provisions of the first. Otherwise, there would be no legislation on the subject. The difficulty of this question arises on the fourth section of the

act of 1830. This section, after directing the collector to have a certain number of packages opened and examined, and in what cases he shall order all the goods contained in the entry to be inspected, proceeds, "and if such goods be subject to an ad valorem duty, the same shall be appraised, and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited." This seems on a superficial view to provide for a case very similar to that described in the sixty-sixth section of the act of 1799. That enacts that if any goods, &c., shall not be invoiced according to the actual cost thereof, with design to evade the duties thereupon, then, that if the invoice be made up with intent, by a false valuation or extension, or otherwise, to evade or defraud the revenue, a forfeiture shall follow. Before we examine and compare more closely these two enactments, we should remark, that immediately following that in the act of 1830, there is an express repeal of the fifteenth section of the act of 1823, and also of certain parts of other acts of congress, but not an intimation of any intention to repeal or affect the sixty-sixth section of the law of 1799. We must examine this question under the restriction, that repeals of laws by implication, by construction, by conjecture, however plausible, are not to be favored. The law has given a strict rule by which we are to measure and try the case. I shall take it, for it appears to me to be truly stated, from the opinion of Judge Thompson, in the case of U. S. v. One Case of Hair Pencils [Case No. 15,924]: "It is admitted, that a repeal, by implication, of a former by a latter statute, is not to be favored. But such effect and operation is indispensable in some cases. As when the subsequent statute is inconsistent with the former, and the two cannot be reconciled. So, where the latter is on the same matter with the former, and introduces some new qualifications or modifications, the former must necessarily be repealed; the two cannot stand together. And in most cases the question resolves itself into the inquiry, What was the intention of the legislature? Did it mean to repeal or take away the former law, or was the new statute intended as merely cumulative? Affirmatives in statutes that introduce new laws, imply a negative of all that is not in the purview, so that a law directing a thing to be done in a certain manner, implies, that it shall not be done in any other manner." The judge has given us the true rule by which we must be governed in deciding whether a clear affirmative statute has been repealed by implication, by supposing a repeal where none has been declared by the legislature. Such a repeal has been insisted upon in this case, by virtue of the enactments in the acts of 1818 and 1823. In an opinion delivered on a question of evidence in the course of this trial, I had occasion to look to this argument, for the presumed repeal was elaborately argued on that question. I adhere to the opinion then delivered, that there is no repeal to be drawn from those statutes, of the provision in the sixty-sixth section of the act of 1799, declaring that if any goods, wares, &c., "shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, &c., or the value thereof, to be recovered of the persons making entry, shall be forfeited." Here are two strong defences provided by congress to protect the revenue from the depredations of fraud and perjury. I am now asked to remove them by an implication, by an argumentative construction, by assuming that congress have intended to do what they have not declared; that they have surrendered or abandoned them. That for the forfeiture they have substituted an increase of duty, and for the right of recovery against the offender, in case the goods are put out of their power, nothing. Surely there was nothing in the experience of the government to induce them to weaken their defences against fraud; on the contrary, their efforts have been to strengthen themselves, to meet and defeat, by their laws, the strategems and devices from time to time invented by those whose interest it was to evade them. The statutes do not relate to the same matter; they describe and provide for dissimilar cases; the first for a false invoice with a design to evade the duties, that is, with a fraudulent intention, the other for an undervaluation of the goods without any such design. It is obviously just and reasonable, that the penalty in the former case should be an entire forfeiture of the goods, but that the error in the latter should be repaired by imposing an additional duty upon them. This act, then, of 1818, and all the provisions in it for appraisement, have for their object the ascertainment of duties, while the law of 1799 inflicts forfeiture for a designed fraud, consummated by a wilful perjury. Can I say that the act of 1799 was supplied by that of 1818, or that it is inconsistent with it; that they cannot stand together, and one or the other must fall? Is the first swallowed up, in the language of the counsel, by the latter? I cannot believe in any such view. I believe that the two acts were intended to provide for different cases, that they are entirely consistent, and that it would be a bold stretch of my judicial power, to imply or presume that congress intended to repeal one by the other. In truth, the repeal would be by the court, and not by the legislature.

The doctrine contended for by the claimants, and founded on the repeal of the act of 1799 is, that there is no longer any forfeiture for entering goods by a false and fraudulent invoice, designed to evade the

revenue, and that, by the subsequent laws, the fraud must be discovered in the custom-house, on the examination and appraisement of the goods, and the seizure made before the goods leave the custom-house. The practical result of this doctrine is, that goods may be invoiced and entered at a false valuation, with the undoubted design to defraud the revenue, and nevertheless, if the fraud is so well contrived, so artfully concealed, or so well managed in the custom-house, that the owner can get his goods over the threshold, they are safe from pursuit and forfeiture, and the fraudulent owner cannot be called upon for their value. I do not see where this doctrine stops, nor why it does not extend to cases where the goods were fraudulently withdrawn from the stores of the custom-house, nor do I see how the additional duties directed under the act of 1818, are to be assessed upon them or recovered. This doctrine is too strong for me to take upon myself. When congress shall say that such is their intention, I will obey their command, but I will not take upon myself to presume or imply such an intention, on conjectural arguments and ingenious constructions. The system adopted by congress, so far as concerns our inquiries, appears to me to be this. (1) By the act of 1799, if an invoice contains goods that are undervalued, with design to evade the duties, the goods so undervalued are forfeited. (2) When this undervaluation shall exceed a certain amount, the consequence to the importer was, that he should pay an additional amount of duties according to the circumstances of the case, although there may have been no design to defraud the revenue. This was by the act of 1818. (3) Where a package or invoice has been made up with intention to defraud, the package or invoice so made up is forfeited. This is under the act of 1830. I cannot say that I have any doubt or difficulty in deciding that there is nothing in any act of congress antecedent to that of 1830, from or by which I could imply or suspect that congress intended to repeal the part of the sixty-sixth section of the law of 1799 to which I have referred; much less is there that clear, distinct, and irresistible evidence of such intention, which would justify a court sitting to administer and not to make the law, in pronouncing that such was the intention. My difficulty, and I have had some, has been with the act of 1830, and that demands a particular examination. Are the provisions of that act repugnant to or inconsistent with the sixty-sixth section of the act of 1799, or is that section fully supplied or swallowed by the enactments of the law of 1830? The fourth section of this act is that which is most relied on, and certainly has the strongest bearing on the question. By this section, the collectors are directed to have a certain number of packages out of every invoice opened and examined, to be designated by the collector. If on this examination it shall be found: (1) That the packages opened do not correspond with the invoice, by which I understand, do not correspond in the description of the goods, their quality, quantity, &c.; (2) or that the goods are falsely charged in such invoice, clearly referring to their price, value, cost, then all the goods in the entry are to be inspected. After this inspection, if it shall appear to the collector that the goods are falsely charged in the invoice, that is, are charged at false prices, at prices below their actual value or cost, as the case may be, if the goods are subject to an ad valorem duty, they are to be appraised, in order to ascertain their true value, and (1) if any package shall be found to contain an article not described in the invoice, or (2) if such package, or (3) if such invoice be made up with intent, by a false valuation, extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited. What "same" shall be forfeited? It is clear to me that it refers to each and all of the cases before stated, that is, the same package which shall be found to contain an article not described in the invoice, the same package which shall be made up with intent to defraud, and the same invoice which shall be made up with such intent. If the package be so made up by containing goods of a different quality, quantity, &c., with those described in the invoice, they are forfeited; or if the invoice be made up, by a false valuation, to defraud, in either case, the forfeiture of the package in the one case and of the invoice in the other, is inflicted. A verbal criticism has been made on this clause, that is, that an invoice cannot be forfeited. I have no difficulty in understanding this to mean the goods contained in the invoice, and because, by the very force of the criticism, the language can have no meaning at all if it has not this. The thing containing, is often spoken of for the thing contained in it. If, as has been contended for the claimants, the words "if the package be found not to correspond with the invoice," embrace price or value as well as quantity, quality, &c., then the subsequent words, "or to be falsely charged in the invoice," are mere surplusage, have no meaning or effect whatever, and must be overlooked or expunged, contrary to a sound rule in the construction of statutes, indeed of every written instrument. What change has the act of 1832 made in the provisions of this section of the act of 1830? It has been seen that, by this section, if an article was found in a package not described in the invoice, the whole package was forfeited; by the act of 1832 this penalty is moderated to a forfeiture of the article not entered, and as the entry must conform to the invoice, it is the same as if it were said not contained in the invoice. So the forfeiture is continued where the package has been made up to defraud the revenue, so far as respects the package; then as to the invoice, so much of the said fourth section of the act of 1830 as prescribes a forfeiture of

goods found not to correspond with the invoice, which I have understood to mean not to correspond in quality or quantity, is repealed, but there is no repeal of that part of the section which relates to goods "falsely charged in the invoice, or to an invoice made up with intent to defraud."

With this view of the act of 1830, we must inquire whether its provisions are inconsistent with or repugnant to the enactment in the sixty-sixth section of the act of 1799, now in question. Are they so irreconcilable that they cannot stand together, that they cannot be both in force? Is this so clear and demonstrable as to force upon us the conclusion that congress, in enacting the last, must necessarily have intended to abrogate the first? The act of 1799 speaks of the actual cost of the goods, that of 1830 of a valuation to be made by an appraisement. Do they mean the same thing? The one refers to a standard of value known to the party, and infallible, the second to a standard of opinion, and which may be mistaken. The case cited of U. S. v. Tappan, 11 Wheat. [24 U. S.] 419, 427, decides strictly no more than that the words "true value," in the eleventh section of the act of 1818, import the same thing as actual cost, and other cases have been cited to the same purpose in the construction of the acts there under consideration; but it is not to be inferred from these decisions, that in all cases or in every act of congress they are always used in the same sense. The inquiry always is with respect to the basis on which, in the particular case, the ad valorem rate of duties is to be estimated; whether upon the actual cost or the current market value thereof; the act then in question is examined, and it is concluded that the word "value" cannot be understood in any other sense than the words "actual cost," in the act then under consideration (pp. 420, 421). Their natural meaning would not seem to be the same; the one would ordinarily be applied to the goods purchased, the other to goods sent by the manufacturers, or procured in some other way than by purchase. This distinction is recognised in the fifth section of the act of 1823. It directs, that ad valorem duties shall be estimated by adding "to the actual cost of the same, if the same shall have been actually purchased, or to the actual value, if the same shall have been procured otherwise than by purchase."

This inquiry goes as well to the question whether the act of 1830 embraces the same case with that of 1799, and therefore supplies it, as to the question whether they are inconsistent. If they do not relate to the same subject-matter, then the act of 1830 is neither a substitute for, nor inconsistent with that of 1799. I leave this part of the argument with these observations, and go on to the inquiry whether in any other respects these acts are inconsistent, so that both cannot be executed. How are they inconsistent? Why may they not stand together? They appear to provide for different offences, and to inflict different penalties, and that both may be executed, both may stand and be applied to the cases as they fall under them. The act of 1799, declares that if goods shall not be invoiced according to their actual cost, with design to evade the duties, all such goods shall be forfeited. The offence is having goods in an invoice put down not according to their actual cost; the penalty is a forfeiture of the goods; and there is nothing in this act from which it can be inferred, as has been done in relation to the subsequent acts, that the fraud of the invoice must be discovered before the goods leave the custom-house, or that they must be there seized. If they have been falsely and fraudulently invoiced, the forfeiture attaches to them when the fraud is committed, and they may be taken and forfeited for it anywhere and at any time. But the offence designated in the law of 1830, is entirely a different one, and the penalty is different, and neither of them inconsistent with the act of 1799. I shall speak only of the invoice. By the act of 1830, there is no provision for the forfeiture of individual goods which are falsely charged in an invoice, but the provision is, if the invoice be made up with intent to defraud, then the invoice is forfeited. The offence is the making up, the preparing and entering on an invoice with design to defraud, and this deliberate concoction of such an attempt upon our revenue and its laws, infects and forfeits the whole invoice, although it may contain goods properly charged. Is there not reason for this? When goods are found, perhaps but one or two articles in a large invoice, it would be harsh to forfeit the whole on that account, although these individual articles may have been introduced into the invoice with a fraudulent design, all the rest having been honestly invoiced without any intention to defraud. It was therefore thought sufficient to guard against such a practice, to forfeit the offending articles. But when the whole invoice was fabricated, prepared, made up with a design, traced back to its formation, it was manifestly right and just to visit the deliberate contriver of the scheme with a forfeiture of all the goods contained in the invoice, without any discrimination in favor of such as may have been invoiced at a proper price, perhaps to assist in deceiving the officers and defrauding the law. In this particular these acts appear to me to be consistent, to provide for different cases, to direct different proceedings, and to impose different penalties. The latter is therefore no substitute for the former. On a different construction there would be no penalty or no forfeiture of goods for invoicing them at false prices, unless you could go on and show that the whole invoice was made up with that design. No penalty but such an increase of duty as is imposed upon the most innocent error in charging the goods.

But there is another important particular in which the sixty-sixth section of the act of 1799 is neither supplied by nor inconsistent

with any of the subsequent acts. I have already adverted to it. I mean that provision which gives to the United States a right of recovery of the value of goods which have not been invoiced according to their actual cost, with a fraudulent design. This proceeding was intended to be applied to a case where the goods could not be reached by a seizure and forfeiture, but have been got through the custom-house, had been removed from its stores, and so disposed of as to be out of the power of the United States. This is obviously a most important and effective instrument in the hands of the government. It teaches the offender that however he may succeed in deceiving or in corrupting the officer of the custom-house, however he may succeed in putting his goods where the law cannot reach them, he will not be safe in the perpetration of his crime, but will be personally answerable for the goods which were forfeited to the United States and became their property by the fraud. Has congress in any manner, express or implied, abandoned this most valuable guard over their custom-houses and their revenue? If they have not, have I a right to do it for them by a judicial construction of acts that have no reference to it in any way? If this enactment is to be taken away, it must be done by the authority that made it. It is not for a court, bound to execute the law, to construe away by remote implications and argumentative constructions, such a salutary provision as this. I will add another observation upon this part of the case. The counsel for the claimants have contended, it is not necessary for me now to say with what success, that by the provisions of the act of 1830 and the subsequent acts, the whole proceeding, as respects the goods, must take place in the custom-house, the examination and appraisement must be there, the fraud must be there discovered, and the seizure there made. What is the effect of this argument upon the question of the repeal of the sixty-sixth section of the act of 1799? If the argument be sound, and the claimants must stand by it, or they will escape the act of 1799 only to fall under that of 1830, if the argument be sound, and the sixty-sixth section of the act of 1799 is repealed, then it follows that the fraudulent owner of goods passed through the custom-house by a false invoice and a false oath may, an hour afterwards, exhibit them and hold them in open day safe from all danger, intangible by the law and the officers of the law, and furthermore, be not personally responsible for the value of the goods he has thus taken from the United States, and which in truth and fact were the property of the United States. Could congress have intended this? This would be to lay the revenue bare to the hand of the spoiler, and to say to him, Do your business adroitly, avoid immediate detection, and you may do it with impunity! Every citizen may follow and take his goods fraudulently taken out of his possession; but this just and necessary right is denied only to the United States. Can this be so? The right and property, whatever they were, which the United States had in these goods, could not be divested by a fraud.

I have now disposed of the most important questions of law which have been raised and discussed in the course of this trial. My decisions may be erroneous, and if they be so there is a means for correcting them. I have given to them a close and anxious attention, both on the argument here, and in my researches in my library. I have not therefore fallen into error from inattention or an indisposition to labor. I have given the result of my researches and reflections, and it is my highest satisfaction to know that another tribunal may be resorted to, to review my opinion.

We now approach the evidence and facts of the case. But here a preliminary question of law meets us, which must be considered before we enter upon the evidence and facts. I allude to the question so strongly contested at the bar. On which party does the law throw the burden of proof: or the onus probandi? Are the United States bound to prove the charge of fraud affirmatively, to your full conviction, or have they done enough to make it incumbent on the claimants to prove their innocence? The answer to this question is not submitted to your discretion or to mine, but is given by an act of congress which has been forty years in force, and the justice and policy of which have not been denied. By the seventy-first section of the act of 1799, it is declared that, "In actions, suits, or informations, to be brought where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case the onus probandi shall lie upon such claimant;" at the conclusion of the section, separated from this clause by other matter, it is added, "but the onus probandi shall lie on the claimant only where probable cause is shown for such prosecution, to be judged of by the court before whom the prosecution is had." When must this probable cause exist? When must it appear and be known? It is contended on behalf of the claimants that it must be antecedent to the seizure, must have been known to those by whom the seizure was made, and be the ground and warrant for their proceedings. I can by no means assent to this construction of the law. It has no reference whatever to the seizure but to the trial; there must be probable cause for the prosecution, not for the seizure; and the court is to judge of it, by what appears to the court, by what comes to the knowledge of the court on the trial of the prosecution. If, then, the evidence adduced on the part of the prosecution shall in the judgment of the court show a probable cause for the prosecution, the law says, the burden of proof shall be thrown upon the claimant, that is, he must discharge himself from the prosecution, he must prove his innocence, that he has not committed the offences charged upon him, to the satisfaction

of the jury, or he must stand condemned. At first blush this would seem to be unreasonable and unjust. If it were so we are bound to obey and execute the law; we have no power as a court, as jurors, or as citizens, to disregard it. We shall see presently, I think, that it is neither unjust nor unreasonable.

On the close of the evidence on behalf of the prosecution, how did the case stand before the court? (1) I refer generally to the circumstances attending the seizure; to the attempts to conceal the goods that the officers of the law were in search of; to the repeated, deliberate, and confessed untruths declared to the officers by the claimants, to divert their pursuit and prevent the discovery of the goods, which were hidden with great skill. It has been said again and again by the counsel for the claimants, that they were not bound to answer the questions of the officers; that they might lawfully refuse to answer them. Let this be granted; but can it be denied that if they did answer they were bound to answer truly? They showed no reluctance to answer: they did so, promptly and freely, but falsely. Does this raise no presumption against their innocence? Is it not a strong ingredient in the probable cause required by the act of congress? As to the panic, caused by the suddenness of the attack, you will judge of that. I see no evidence of it. They had taken the alarm before the officers came there; they had time to deliberate and determine the course they would take, and they did determine to get clear of the difficulty and suspicion they labored under, not by the open, candid proceeding of men conscious of innocence and fearing no investigation, but, to protect themselves, to escape from it by a concealment of the property sought after, and by a tissue of falsehood to prevent a discovery. This began in the morning and was continued in the afternoon. Where was the sudden surprise by which this conduct is now excused? (2) A second ground of probable cause shown by the evidence of the prosecution, is found in the testimony of the appraisers, public and private. We are not on this question to consider the effect of the claimants' evidence to diminish the force of that testimony. On the testimony of these appraisers a very important undervaluation of the goods appears, and may be considered by you a probable cause at least for the prosecution. But there is a sort of negative testimony on this question of the onus probandi, which must have a powerful influence on the judgment of every man. It is, that the claimants have made no attempt, no pretence to meet the direct question in issue, that is, what was the actual cost of these goods, although it is undeniably in their power. And it is now that you will perceive that in a case of this sort, there is nothing unjust or unreasonable in throwing the burden of proof upon them, in calling on them to prove their innocence, after the United States have shown probable cause for the prosecution. We have on this point, the opinion of as great a judge and as just a man as ever sat upon the bench to administer the laws of his country. In The Thomas and Henry v. U. S. [Case No. 13,919], an opinion is delivered on this seventy-first section of the act of 1799. The chief justice says: "In this case, the United States are not required to establish guilt, but the claimants must prove their innocence. It is not the duty of the judge to justify the legislature, but surely, if, in any case such a legislative provision be proper, it is in this. The fact is generally premeditated, and is perpetrated under all the precautions and in all the secrecy which ingenuity can suggest, and the means of proving innocence, at least, to a reasonable extent, which is all that can be required, are in possession of the accused. In such a case he may, without a violation of principle, be required to prove his innocence. In such a case, the absence of testimony clearly in the power of the claimant, if not supplied by other equivalent testimony, must be fatal." The same doctrine is maintained by Judges Washington and Story, and by the supreme court of the United States. Indeed it has never been questioned, and that it is just and reasonable is manifest to common sense. U. S. v. The Hunter [Case No. 15,428]; U. S. v. Hayward [Id. 15,336]; [The Luminary] 8 Wheat. [21 U. S.] 407.

Apply these principles, so obviously just and reasonable, to this case. The question is, what did these goods cost in England? The claimants are the importers and purchasers. They know to a cent what they cost, they know of whom they purchased them, and they know precisely where to go for the proof, if they have it not in their pockets. But they have made no such attempt, nor have they given any reason for the omission. What says the chief justice to such a case? That "the absence of testimony clearly in the power of the claimants, if not supplied by other equivalent testimony, must be fatal." The only attempt at a reason for the absence of this conclusive evidence, clearly in the power of the claimants, was made by one of the counsel. It was this, that the seizure was made for non-payment of duties, and gave them no notice that the cost of the goods would come in question. It was forgotten that the information was filed in September, which sets out precisely the grounds on which the forfeiture would be insisted on, and among the rest, that the goods were not invoiced at their actual cost. On this question of the burden of proof, I am clearly of opinion that the United States have shown probable cause for the prosecution, and that the onus probandi is there by thrown upon the claimants.

The important questions you have to decide in this case are, whether the goods in question, or any, and which of them, were invoiced below their actual cost, and wheth-

er the invoices, or any, and which of them, or the packages, or any, and which of them, were made up with the design, to evade the duties legally charged upon them, and to defraud the revenue of the United States. In pursuing this inquiry, you will always bear in mind the principle just decided, to wit, that the burden of proof lies on the claimants; that it is incumbent on them to prove to your satisfaction that the goods are invoiced at their actual cost. If they have not done so, their defence must fail. The first step in this inquiry is to ascertain what was the actual cost of these goods; and how has this been done on the part of the United States? By certain appraisements made in the first place by official appraisers of the custom-house of this city, and further by certain private appraisers selected for that purpose. I will here make a remark upon an argument strongly and repeatedly urged on behalf of the claimants. It is this, that there cannot be but one official appraisement of the goods, and that that must be made in the custom-house at which the goods are entered. I think it is not necessary to affirm or deny this doctrine. If the opinions of Messrs. Stewart and Simpson have not the authority of an official appraisement or act, they have nevertheless the weight of the judgment of men accustomed to value goods of this description, and who from their appointments, as well as their experience, may be presumed to have competent knowledge and skill in ascertaining their value. In this light you may consider their evidence and give credit to it accordingly. The evidence of the cost or value of these goods, offered on the part of the United States, is found in these appraisements. But a preliminary objection is made to this evidence, which must be attended to before it is examined. It is said that you are to pronounce upon the fact of an undervaluation, and that you have no evidence of the fact, that is, no proof that the goods are invoiced below their actual cost; and why? Because you have no proof of what the actual cost was; that you have the opinions and valuations of certain persons here in this city, but these do not and cannot prove the fact. You have been asked with great energy, and no small plausibility, Will you pronounce a sentence of fraud upon the claimants? Will you condemn and take away their goods on mere opinions and valuations, when you ought to have proof of the fact that they were undervalued? In reply to these pointed inquiries may you not ask: Why is it that you have not the direct evidence of the fact of actual cost? Why are you obliged to resort to inferior evidence to come at the fact? It is because the claimants who urge this objection upon you, who have in their knowledge and at their command the positive proof of the cost of the goods, have not produced it to you. It is indeed remarkable that, having such proof in their power, they have resorted to, relied upon precisely the same evidence they condemn when used by the United States, that is, opinions and valuations obtained here. Is this course of proceeding characterized too strongly, if you should consider the claimants as saying to you: We know what these goods cost; we have the proof in our hands, but we will not produce it; we will compel you to resort to valuations and opinions, and then they say they are not facts; we know that your appraisers will not exactly agree in their valuations, it is not possible they should, and then we will use them to destroy each other, and we will claim to be acquitted of all wrong, because half a dozen men cannot agree upon the amount of the wrong; your witnesses must differ, if they are honest, and in this confusion we will escape. "The absence of testimony," says the late chief justice, "clearly in the power of the claimants, if not supplied by other equivalent testimony, must be fatal." I will say to you that in such circumstances, you are justified in making the strongest presumptions against the party thus withholding the truth from you. This principle, so obviously just and reasonable, is fully recognised in a case reported (Armory v. Delamirie, 1 Strange, 505), well known in our courts. A chimney-sweeper boy found a jewel, and carried it to the shop of the defendant, who was a goldsmith, to know what it was, and delivered it to an apprentice in the shop. He under pretence of weighing it, took out the stones, and said it came to three half pence. The master offered the boy the money, who refused to take it, and insisted upon having the jewel again. They gave him the socket without the stones. The boy brought an action of trover to recover thier value. But the value was unknown, and the defendant would not produce the jewel. Whereupon, witnesses of the trade were examined to prove what a jewel of the finest water, to fit the socket, would be worth. The chief justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they did accordingly. The application of this case to that before us is plain; as the claimants will not show the actual cost of these goods, you may presume the strongest against them, and estimate them at the highest appraisement that has been made of them.

You are now to make up your verdict upon such testimony as you have received upon these questions: Were these goods invoiced not at their actual cost? And was this done with a design to evade the duties chargeable upon them? Were the invoices or packages made up with intent, by a false valuation, to defraud the revenue of the United States? For the ascertainment of the cost or value of the goods you have various appraisements, made at different times and places and by dif-

ferent persons. The first at New York, by Mr. Lounsbury, an assistant appraiser, duly appointed and sworn, and by Mr. Tripler, not an appointed appraiser, but the clerk of the appraisers. This appraisement appears to have been made with the greatest possible speed, and the least possible examination. The time occupied was very short; and of the seven hundred and twenty-one pieces, but thirty-two were examined at all. Mr. Lounsbury told you that he has examined one hundred packages a day, which, on his own average of four pieces from each package, would be four hundred pieces examined in a day. You have seen how many hours it took here to examine thirty or forty pieces, and you must judge what sort of an examination Mr. Lounsbury gave to his four hundred, and what reliance you ought to place upon his estimates. You will say whether you will take such a valuation as a safe standard for the whole. I do not intend to speak to you of the examinations and valuations made by Mr. Robinson and other gentlemen of New York, nor of the objections made by the United States to the confidence that should be placed in their opinions and testimony. You have heard their evidence; you have heard the objections, repeated again and again by the counsel, and it is a question of credit of which you are to judge. Of the appraisements made here you are more able to make a just estimate. The witnesses are your fellow-citizens, well known to you, and individually entitled to your respect. Their means of information will, then, be the particular object for your consideration, on the one side and the other. You have for the United States, Messrs. Stewart, Simpson, Siter, Lewis, Churchman, Kennard, Tingly; and for the claimants, Burk, Bernard, Williamson, Newlin, Richardson, Maybury, and some from New York. Your attention should be more directed to the knowledge, the experience, the skill, in judging of the value of cloths, than to the number. One competent witness would outweigh many incompetent ones; but where competency is equal, numbers will preponderate. It is not like evidence of a fact, where the honesty of the witness gives him credit; it is evidence of opinion; of judgment, where the honesty of the witness will not sustain him, unless he has the knowledge and skill to give confidence to his opinion. As to the variance between the valuations made here in court, and those previously made by the same persons at the custom-house, you will remember that Mr. Siter, Mr. Lewis (I think), and Mr. Churchman declared that they could not pretend to form as satisfactory an opinion here as that made at the custom-house; that they would themselves have but little confidence in it, and, in case of a difference, should adhere to the appraisement at the custom-house. With these explanations and qualifications, you will enter upon the examination of all the appraisements, and come to the conclusion you shall conscientiously believe to be just and true. It is, I think, a very clear proposition, that a valuation made by four or five judicious persons all meaning to do right, who shall compare their separate opinions, hear each other's reasons and agree upon a result, is more to be relied upon as coming at the true value, than the judgment of any one of them, or of any individual. This was done by the appraisers on the part of the prosecution. It is thus that juries make up their verdicts. When they retire to their room, there is generally a variety of opinions, but on comparing their opinions, and hearing each other's reasons, they come to a result in which they all agree, and which is more to be depended upon than any of the separate opinions.

Supposing that you shall find that these goods are undervalued in the invoices, how are you to decide upon the fraudulent intent or design? In doing this you will be influenced by the extent of the undervaluation. Is it enough to have been a temptation to fraud; could it on a large business afford a great profit? Does it run generally through all the invoices, or is it only an occasional undervaluation, that might have happened by accident, by mistake, without any design? These and other considerations will suggest themselves to you on this question of intent. But you will not overlook the conduct of the parties at the time of the seizure. Was it that of upright men in the lawful pursuit of their lawful business? I will not enlarge upon this part of the case. You have heard much of it, and I doubt not will judge of it rightfully, neither refusing it its fair and reasonable influences, not pressing it to an unjust extremity. On this question of fraudulent intention, you cannot put aside the circumstance so often mentioned, and which indeed meets the claimants and frowns upon them at every turn of their case, in every path by which they would escape, their declining or omitting to show the actual cost of these goods, their orders for the importation, their correspondence with the persons in England from whom they were bought, in short every document relating to the purchase, which had a tendency to show the truth and honesty of the transaction.

Finally: As to the first and second counts, I have told you that I think they have not been sustained by the evidence, and that on them your verdict should be for the claimants. The third count. If you shall be of opinion that these goods were found concealed, as charged, and that the duties on them had not been paid or secured, by which you are to understand the whole amount of duties legally chargeable upon them according to their actual cost and value; in that case the goods are forfeited, and the verdict should be for the United States. The fourth and tenth counts are founded on the sixty-sixth section of the act of 1799, which not being repealed, the verdict on these counts should go for the United States, provided that on the evidence you shall

believe that the goods were entered in the office of the collector of New York, and were not invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof. The sixth count is founded on the fourth section of the act of 1830, as are also the eighth and eleventh counts. If, on the evidence, you shall believe that the invoices were made up with intent, by a false valuation or extension, to evade or defraud the revenue, your verdict on these counts should be for the United States. The fifth count charges that each and every of the packages, and each and every of the invoices, were made up with intent, by a false valuation, to defraud the revenue, and if you shall so find them, the verdict should be for the United States. The ninth and thirteenth counts are founded on the fourteenth section of the act of 1832. If, on the evidence, you shall believe that the packages were made up with intent to evade or defraud the revenue, your verdict should be for the United States. The seventh and twelfth counts contain a similar charge under the fourth section of the act of 1830, it being laid in these counts that the packages were made up with intent, by a false valuation, to evade and defraud the revenue.

You will observe that many of the counts are substantially the same, varying only in form, or the manner of laying the offence. With the exception of the count for concealment, they may be resolved into these general charges: That the goods were not invoiced according to their actual cost, with a design to evade the duties; that the packages were made up with intent, by a false valuation, to defraud the revenue; that the invoices were made up with that intent; that the packages were made up with intent to evade or defraud the revenue.

This interesting cause will now be committed to you. Seldom has any jury had submitted to them one of equal importance. If, as you have heard, there has been a combination anywhere to defraud your revenue, and depress the honest business and industry of your fellow-citizens, you will be happy to be instrumental in punishing the offenders and breaking it up. On the other hand, if the claimants have had no lot or part in any such combination or practices, it will give you equal pleasure to say so by your verdict.

Verdict for the claimants on the first two counts of the information, and for the United States on the eleven remaining counts.

On the 8th May, 1840, a motion was made, on behalf of the claimants, for a new trial; which was refused on the 1st June. On the 22d April, 1841, a writ of error was taken to the circuit court of the United States for the Third circuit, and on the 25th November of the same year the judgment of the district court was affirmed with costs. [Case unreported.] On the same day a writ of error was taken to the supreme court of the United States, and in January term, 1845, the judgment of the circuit court was affirmed. See 3 How. [44 U. S.] 197.

Case No. 16,563a.

UNITED STATES v. TWENTY-FIVE CASES OF CLOTH.

[2 Haz. Reg. U. S. 374.]

District Court, E. D. Pennsylvania. June 1, 1840.

CUSTOMS DUTIES — FRAUDULENT INVOICES — FORFEITURES.

[Where large quantities of imported goods were seized at the same time and in the same place, and, in a proceeding to forfeit the same, on the ground that the invoices were made up with intent to defraud the revenue, the claimants were charged with a systematic arrangement, not confined to the particular importations, to defraud the revenues, and the jury found that all the goods were subject to forfeiture, *held* that a new trial should not be granted in respect to a particular package merely because the appraisement thereof by the customs officers was actually below the invoice value; for, even if the invoice were correct, the court would not be warranted in holding that it was not so made up with intent to aid in the general design, and in the expectation that it would be selected for examination, and would thus furnish the standard for the appraisement of the other packages.]

This was an action by the United States against 25 cases of cloths, 15 cases of cassimeres, 1 case of cloths and cassimeres, and 24 pieces of pilot cloths, seized at the store of W. Blackburne & Co.

HOPKINSON, District Judge. I certainly can have no inclination to set aside a verdict which has been the result of so much laborious investigation, unless it were clearly necessary to vindicate some principle of law; especially when the objection applies but to a small part of the property affected by the verdict. [See Case No. 16,563.] No principle of law is involved in the question now brought before the court, nor is the verdict against the direction of the court on any matter of evidence. The allegation mainly, and indeed altogether, relied on for support of the motion for a new trial is, that certain goods, imported in the ship Virginia, and included in the information, have been condemned by the jury, when there was no evidence to warrant their condemnation; that the appraisements made of them, on behalf of the government, actually valued them lower than they were charged in the invoice, and therefore there could have been no valuation of them with design to evade or defraud the revenue. As regards the appraisement, this is true, but it does not therefore necessarily follow that there was no evidence in the case to justify the verdict. This might be a fair and legal inference, if a single fact had been put in issue, and the question was only as to the particular packages of goods thus invoiced and appraised. But in a case in which a charge is made of an artful and extensive fraud, of an organized combination, to evade the duties payable to the revenue, it is clear that acts which, standing each by itself, may have the appearance of entire innocence, when taken as a part of a general plan, may be in-

fected with the general fraudulent character; may, even by their correctness, be intended to deceive, and form a part of the machinery to accomplish the design of fraud. I cannot therefore consider the question, as it has been treated by the counsel of the claimants, as being the same as if these particular packages only were the subjects of the prosecution, and a verdict had been rendered against them, or the proof which applied only to them. I must take the case as it was presented to the jury, as a charge of a systematic arrangement to defraud the revenue, not confined to this particular importation, but by a large and extensive course of operations, carried on by the same importers about the same period, and with one common design.

The packages now especially in question were seized in the store of Messrs. Blackburne, in the same place, and under the same circumstances, with other goods which have been condemned as falsely orfraudulently imported by invoices, in which they were undervalued, to defraud the revenue. As to the other packages contained in the same invoice with these goods, we know nothing of them, whether they were or were not undervalued. If they were charged below their cost, a suspicion might well be cast upon those in question, and an inference not unreasonably drawn that the invoice was made up with the intention of fraud, and that a deception was to be affected, by the low rate at which these goods were invoiced. No account has been given of the other goods in the same invoice, nor any reason why these were charged even below the real value or cost. This, as an insulated circumstance, would not afford a strong ground of suspicion, but in inquiries of this sort, in searching a question of fraud, we must look to small circumstances; obvious and striking proofs will, of course, be avoided. Again, the claimants have omitted, as to the goods, as well as the others, to show by direct proof what was their actual cost. They left them to their fate, or the same defence or the same chance, to which they committed the rest; and this was not because of the appraisement made of them being below the invoice prices, for that was unknown to them, and was disclosed for the first time on the trial. From the observation made by one of the jurors when the verdict was rendered, I understood that this omission had weight with them in making no discrimination in favor of these packages. They certainly were liable to the objection, so weighty in such cases, that the claimants had not produced the best evidence in their power of their true and actual value and cost; not on the ground of the onus probandi being cast upon them by the act of congress, but on the general rule of evidence in all cases.

The whole case submitted to the jury was one laid in a charge of a deep and extensive system of fraud, which would necessarily consist of many parts, and be effected by various contrivances of concealment and deception. It is not for me to say the jury had no warrant for believing that even the low valuation of the packages was in question. A valuation below their actual value or cost was not made for the purpose of assisting the general design, and of blinding suspicion as to the greater quality. Nor can I say that the jury had no ground to believe that there was an expectation by the importers, that these packages would be selected at the custom house as the standards by which the other packages would be judged. I cannot say what reason they may have had for indulging such expectations, and acting upon them. With such examinations as we have seen were made in the custom house of New York, very flimsy covers may have been trusted for concealment.

It has been said that these packages and pilot cloths were withdrawn from the jury by the counsel for the United States. I do not so understand it. A statement was made, for the convenience of the jury, to show at one view the amount of the undervaluations of all the cloths seized, and the duties that had been thereby lost to the United States. These packages were not included in that statement, because they were not undervalued, and no duties had been lost by them. But their condemnation was insisted upon by the counsel of the United States, for the reasons I have mentioned. The jury have thought them sufficient; they had a right to do so, and their having done so affords no ground for disturbing their verdict.

The motion is refused.

Case No. 16,564.

UNITED STATES v. TWENTY-FIVE THOUSAND GALLONS OF DISTILLED SPIRITS.

[7 Int. Rev. Rec. 206.]

Circuit Court, S. D. New York. June, 1868.[1]

INTERNAL REVENUE ACT—FORFEITURE OF SPIRITS —PAY OF INFORMER.

[A decree condemning liquor was entered by the consent of the claimant, but, before a sale thereunder, the decree, and all proceedings thereon, were vacated on claimant's motion, and he was allowed to come in and defend. After he filed his claim and answer, the cause was postponed for one term, and a final decree of condemnation was then rendered and carried into execution. *Held*, that the share of the informer in the proceeds was to be determined by the law in force at the time of such final decree.]

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

NELSON, Circuit Justice. This suit was commenced March 3, 1866, by information, in the district court, to forfeit certain property

[1] [Affirming Case No. 14,282.]

for a violation of the internal revenue laws; and the question before us, arising on the decision of the court below, is as to the portion of the proceeds resulting from the condemnation that rightfully belongs to the reformer. The amount is large—$56,946 50. It is admitted that, according to the law as it stood at the time the information was given, and the seizure made, the informer was entitled to a moiety, but that, before the final decree of condemnation, the law had been changed, and the amount placed under the regulation of the secretary of the treasury, according to which, the amount to be allowed would be $5,000.

If the question rested alone on the facts above stated, it would be a very plain one, as we consider it to be a well settled rule, and which has been uniformly adhered to in practice, that the right of the informer does not attach until after the case has passed into judgment. Till then, the right is inchoate and imperfect. It appears, in this case, that a decree of condemnation had been entered by the consent of the claimants, March 10, 1866, which was before the change of the law, and when it gave to the informer the moiety. But before the execution of the decree by a sale of the property, on a motion by the claimant to the court, this decree and all proceedings thereon were vacated and set aside, and the party allowed to come in and defend the suit. In pursuance of this order he appeared, filed his claim and answer, and the cause was set down for trial for the May term, but was, in December following, postponed till the next term, when a final decree of condemnation was rendered and carried into execution. In the meantime the law providing for the share of the informer had been changed, as already stated.

We are of opinion that the history of the proceedings as above detailed, occurring after the first decree, do not vary the effect to be given to the final decree in the case. The power of the court to open the first is undoubted, and left the case in judgment of law, as if no decree had been entered till the final one in December. Whether or not the right of the informer does not attach irrevocably till the money is paid in on the decree does not arise, and, therefore, no opinion is expressed upon the question.

Decree below affirmed. [Case No. 14,282.]

Case No. 16,565.

UNITED STATES v. TWENTY-FIVE THOUSAND SEGARS.

[5 Blatchf. 500.] [1]

Circuit Court, E. D. New York. Oct. 14, 1867.

INTERNAL REVENUE LAWS—RIGHTS OF INFORMERS—TREASURY REGULATIONS.

1. The treasury circular of September 2, 1867, respecting the shares of informers, in cases of forfeiture under the internal revenue laws, does not apply to a case where the proceeds of the forfeiture had been received by the marshal prior to the issuing of that circular.

2. The right of the informer became fixed, on the receipt by the marshal of the money, to receive the amount to which, by the then existing regulation, he was entitled.

BENEDICT, District Judge. This motion presents the question, whether the treasury circular of September 2, 1867, respecting the shares of informers, in cases of forfeiture under the internal revenue laws, is applicable to a case where the proceeds of the forfeiture had been received by the marshal prior to the issuing of that circular. The same question has recently been considered by Judge Blatchford, in the district court for the Southern district of New York, in the Case of Eight Barrels of Distilled Spirits [Case No. 4,316], and I concur with him in the conclusion, that the right of the informer became fixed on the receipt by the marshal of the money, and that the subsequent circular of the secretary of the treasury can have no effect to reduce the amount to which, under the then existing regulation, the informer was entitled. The distribution in this case will, therefore, be made in accordance with that view.

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

Case No. 16,566.

UNITED STATES v. TWENTY-FOUR COILS OF CORDAGE.

[Baldw. 502.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1832.[2]

CUSTOMS DUTIES—OMISSIONS FROM MANIFEST—SEA STORES — SHIP'S TACKLE, ETC. — CONSTRUCTION OF STATUTE—MERCANTILE TERMS—INFORMATION OF FORFEITURE.

1. Cordage, ravensduck and sail cloth found on board of a vessel on her return from a voyage, are not sea stores within the forty-fifth section of the collection act of 1799 [1 Stat. 661].

2. If intended for the use of the ship, they are a part of its tackle, apparel or furniture; if not, they are a part of the cargo.

3. Mercantile terms used in a law are to be taken in the sense intended, which is to be ascertained by the laws in pari materia.

4. The words of a law imposing a forfeiture or penalty shall not be construed to embrace a case not within the parts of the law which prohibit the act done, or direct the performance of an act, by the omission of which the penalty or forfeiture is incurred.

[Cited in Cargo Ex Lady Essex, 39 Fed. 767.]

5. On an information against specific articles, as sea stores forfeited, the court cannot adjudge them to be forfeited as a part of the cargo or merchandise, or as a part of the tackle, &c. of the ship.

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

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

[2] [Affirming Case No. 16,573.]

This was an appeal from a decree of the district court [Case No. 16,573], on an information filed by the United States against twenty-four coils of cordage, three bolts of ravensduck, and four pieces of sail cloth, alleged to have been forfeited, by not having been reported on their importation. These articles were found on board the ship Eliza, on her return from a voyage to Cronstadt with a cargo composed partly of similar articles, but those in question were not included in the manifest presented on the entry of the vessel at the customhouse, they were seized as sea stores forfeited by the forty-fifth section of the collection act, for not being reported pursuant to the twenty-third section thereof. The only question of law which arose in the case was whether these articles were to be considered as sea stores within the law.

Mr. Gilpin, U. S. Dist. Atty.

The object of the law was to collect a duty on articles, which, under any circumstances, could become dutiable, by requiring a report of all stores remaining on hand at the end of the voyage; the quantity of cordage taken on board for the use of the ship, was more than was requisite for the voyage which was completed, to which the law refers. They are considered as a surplus, though they may be wanted for another voyage. They were entered on the ship's books as stores for the ship, so considered by the mate and the witnesses, and must be considered as sea stores, unless they are a part of the tackle, apparel or furniture of the ship, as a part of the ship itself. But taken either way, they ought to be reported to the collector, so that he may judge whether they were required for the use of the ship, or were intended for sale; for the intent with which they were taken on board, gives them the character of ship or sea stores, or makes them a part of the cargo. The term "ship or sea stores" does not apply merely to provisions for the crew and passengers, they embrace "anchors, cables and other ship stores." Holt, Shipp. 532; Abb. Shipp. (Ed. 1829) 416. In a mercantile sense they include every thing for the use of the ship or persons on board, in which sense they are used in the law. When the article is in use for the ship as part of her tackle, apparel or furniture, then it is a part of the ship; but till used, it is a part of the ship, or sea stores.

J. S. Smith, for claimants.

No article is subject to duty, unless it is enumerated in the law or comprehended in some term which embraces it by necessary implication, otherwise the article is exempt from duty; so where any thing is expressly made duty free, the exemption goes to whatever comes within the description of the article exempted. The exemption of the ship, her tackle, apparel and furniture, extends to every thing necessary to equip and navigate her as a part of the ship itself. The term "sea stores," as adopted in the act of congress, from general acceptation and usage, applies to those things which are for the use of the persons on board, which are consumed in being used by the crew and passengers. Ship stores for the use of the ship are wholly distinct, not being consumed or destroyed by such use, so these terms are used in the law in plain contradistinction. This being a penal law it must be construed strictly, the information in this case being for not entering these articles as sea stores, cannot be sustained if they are not strictly such; if they are ship stores, and were not intended for the use of the ship, they would be liable to forfeiture as part of the cargo, but not as sea stores. A superfluous quantity does not change the character of the articles, though it might be good ground for the imputation of fraud, whether they are considered as sea or ship stores. Here the information is not against the cordage as merchandise, but as sea stores; the question is not what the mate or witnesses call them, but how they are classed by congress; in Abbott and Holt, anchors, &c. are called ship stores, not marine or sea stores. The sails and tackle of a ship are a part of the ship; though they are removed to the shore, they still remain so, and may be seized for sailors' wages; 1 Sho. 177; the materials for the sails and tackle, which are laid in to meet the contingencies of the voyage, are as much a part of the ship as if they had been or were in use, as well as any spare articles actually made up.

The counsel on both sides entered into a detailed argument on the words and provisions of the twenty-third, twenty-fourth, thirtieth, thirty-fourth, forty-fifth, forty-sixth, fifty-second and sixty-third sections of the collection act in support of their positions, which are not reported. They will be found referred to in the opinion of the court, so far as they were deemed applicable to the case.

BALDWIN, Circuit Justice. These articles were brought into this port in the ship Eliza, from Cronstadt, and not reported by the master in the manifest; they were found on board after it was made out, and seized as forfeited under the forty-fifth section of the revenue law, as "sea stores" not specified in the entry. This is the only ground of forfeiture alleged in the information. The case therefore presents the single question whether these articles are sea stores within the meaning of the section of the act of congress; not being alleged to be a part of the cargo, or merchandise belonging thereto, or consigned to the master, officers or crew. This law does not define or designate what are to be considered as sea stores, as distinguished from articles composing a part

of the tackle, apparel or furniture of the ship, or such as may be necessary or usual to have on board, for the purpose of repairs and emergencies during the voyage, parts of which remain on hand at its termination. In directing the form of the manifest, and the articles to be returned, the law enumerates, among others "the remaining sea stores, if any;" the head under which they are to be entered in the manifest is, "vessel and cabin stores." 1 Story's Laws, 593, 594, § 23 [1 Stat. 644, 645]. In the forty-fifth section prescribing the forfeiture, they are named as "sea stores" generally. 1 Story's Laws, 612 [1 Stat. 661]. If we were to decide on the meaning of these words in a charter party or a policy of insurance, we might find no difficulty in ascertaining it, by the custom of merchants and the usage of trade, and should adopt the meaning and practical definition thus given to them; presuming that the parties intended to use them in the sense in which they had been and were used, received and accepted among merchants. But when the words have received a legal and settled interpretation, usage alone would not overrule it. So if the same words are found in a law, and they are used in a sense, denoting the intention of the legislature, to give them an application and meaning, different from that which had been adopted by mercantile usage, the court must so consider the law.

"Admitting that the words 'sea stores,' in a mercantile instrument, comprehend all those accompaniments of a ship that are essential in its present occupation (though not direct constituents of a ship), without which it cannot execute its mission, or perform its functions" it by no means follows, that the words would receive the same construction in an act of parliament. 1 Hagg. Adm. 122, 124; 4 D. 206, &c.; Marsh. Ins. 626, 627; 1 D. 127, 132; 1 Dow, 32; 3 Dowl. 58, 60. They may be used in a much more restricted sense, which will be taken not merely from particular laws in which they may be found, but from other laws on similar or analogous subjects, which may serve as a key to unlock the law in question; such appears to be the law of July 20, 1790, for the government and regulation of seamen in the merchant service. 1 Story's Laws, 102 [1 Stat. 131]. In the third section, it enumerates the several particulars, in which a ship may be defective after the voyage is begun, and before she has left the land, "in her crew, body, tackle, apparel, furniture, provisions or stores." It directs a report to be made, of "what additions of men, provisions or stores, or what repairs or alterations in the body, tackle or apparel, may be necessary," and again uses the words "men," "provisions," "stores," "repairs or alterations." In the sixth section, prescribing a remedy for seamen to recover their wages, it directs a summons to the master to show cause why process should not issue against "the ship, her tackle, furniture and apparel." The eighth section directs, that every ship bound on a foreign voyage, shall be provided "with a medicine chest," the ninth section prescribes the quantity of water, meat and bread, which shall be provided for each person on board, over and besides such other "provisions, stores and live stock, as shall by the master or passengers be put on board," and in like manner for shorter or longer voyages. Taking these provisions of the different parts of this law together, there is an obvious discrimination, between those articles which form a part of the body, tackle, apparel or furniture of a ship, and those intended for the health and sustenance of the crew or passengers; between those necessary for the ship itself, and those who navigate, or are transported in her; between articles which, from their nature, are consumed in their use, and those which become merely deteriorated, or so injured by use, as to require their being repaired or replaced by new materials. The words of the ninth section are a definition of stores, not applicable to any articles laid in for the use of the ship itself, which are not put on board by passengers; they are something over and besides medicine, water, beef, bread or provisions, which are specified in the same clause. From the juxta-position of the word "stores" between provisions and live stock, and their being noticed as put on board by the master "or passengers," they must be considered as intended to refer to other stores, intended for the same purpose and use, as the enumerated articles, provisions and live stock. It would be a very strained, if not a forced construction, to interpret the word "stores," in this section, as referring to the articles on board, necessary or usually taken on board to meet the exigencies of the voyage, for the repairs of the ship, or her security while performing it; this would be to read it, "such other provisions, cordage, duck, sail cloth or live stock, as shall by the master or passengers be put on board," and thus exclude liquors, groceries, and other articles of comfort, luxury, or fancied necessity, as may have been provided for the officers, passengers and crew of the ship. Such is obviously not the meaning of the law, or the just and legal interpretation of the words used in this section; they clearly exclude the articles in question, they as clearly include all stores put on board, for the purpose of consumption, by the persons in the ship; and they must be taken to have been used in the same sense in the other sections of the same law, in the absence of any words or expressions denoting the intention of the legislature, to give any different meaning or application to them.

In ascertaining the legislative meaning of the term "remaining sea stores," as used in the twenty-third section of the revenue law, it is found to be in perfect accordance with the ninth section of the act of 1790, and plain-

ly, if not necessarily, refers to it. It directs a manifest of the cargo to be made out, "together with the name or names of the passengers, distinguishing whether cabin or steerage passengers, or both; their baggage and packages belonging to each, together with an account of the remaining sea stores, if any." To the question, what are such sea stores? a plain answer is furnished; such articles of provision and stores, as were put on board by the captain or passengers, and not consumed on the voyage, but remaining on hand at its termination. The words "vessel and cabin stores," in the form of the manifest, are not inserted for the purpose of introducing any distinct class or kind of sea stores, but merely as the head, under which those designated in the preceding part of the section should be entered on the manifest, as the "remaining sea stores." These views of the law are very fully apparent in the thirtieth section, prescribing the form and requisites of the oath of the master to the manifest. "And I do further swear, that the several articles specified in the said manifest, as the sea stores for the cabin and vessel, are truly such, and were bona fide put on board for the use of the officers, crew and passengers thereof; and are intended to remain on board, for the consumption of said officers and crew." If the ship has on board wines, spirits or teas, the captain is, by the same section, required to report the quantity and kind on board, as sea stores, to enter them in the manifest under that head, and to superadd his oath, as in the case of other sea stores on board.

As it cannot be pretended, that the duty of the master under the twenty-third section, is broader than the oath required under the thirtieth, we must take them to mean that the sea, the vessel and cabin stores remaining unconsumed, shall be entered in the manifest, and sworn to, and were such and such only as were provided for the consumption of those on board during the voyage, and should remain on board after its termination, or on a new one. It is therefore clear, that these sections of the law do not embrace those stores which are intended for the use of the ship itself, distinct from those provided for the officers, crew and passengers, among which the articles in question cannot possibly be comprehended. It only remains to consider the forty-fifth section, under which these articles are claimed by the United States as forfeited. This section is professedly introduced, in order "to ascertain what articles ought to be exempt from duty, as the sea stores of a ship;" for this purpose the master is directed to specify them in the manifest, "as the sea stores thereof, and in the oath declare that they are truly such, and are not intended for merchandise or sale, whereupon the said articles shall be free from duty." This clause evidently refers to the preceding sections of the law, the one requiring the manifest, the other the oath prescribed as to the articles therein specified as the stores of the ship; but it neither embraces any other articles, by any enumeration, reference, or the use of any words admitting of such a construction. The proviso creating the forfeiture, refers to the same subject matter: "and if any other, or greater quantity of articles, are found on board of such ship or vessel as sea stores, than are specified in such entry," or be landed without a permit, "all such articles shall be forfeited and seized." Though named in the various parts of the law, as the "remaining sea stores," "vessel and cabin stores," the sea stores of a ship or vessel, "or sea stores," their meaning and application is the same as to all these articles put on board by the captain or passengers for their use, or the use of the officers and crew, and intended for consumption on board, they are duty free if entered and verified according to the twenty-third and thirtieth sections of the law. But if the articles, or the full quantity of any given ones on board, are not entered and sworn to, or are landed without permit, they are forfeited; this is consistent with the declared object of the forty-fifth section. It creates the forfeiture, as a punishment for the omission of the duties previously prescribed; to give it any other construction, would be to adjudge a forfeiture of an article, for not doing an act in relation to which the law did not enjoin any duty, and inflict the punishment, when no offence had been committed. By no just construction can the penalties of the law be incurred, where no prohibited act has been done, and no enjoined one omitted. The penal provisions of a law cannot be made broader than the directory or prohibitory ones, and we cannot declare an article to be forfeited as sea stores, for not being entered and sworn to, unless it is one directed to be so done by some other part of the law. There is no provision in it, which either expressly, or by plain legal intendment, brings the articles in question within it, all the words used can be fully satisfied, without embracing them, and they were obviously intended only for such sea stores, as were taken on board for the use of the officers, crew and passengers.

The district attorney has placed much reliance on the seventh and eighth sections of the English statute of 1 and 2 Geo. IV., c. 76, in which "anchors, cables, and other ships' stores, materials, merchandize, sea and marine stores," are enumerated together as forming the same class of articles; but although that may be considered as the sense in which they are used, and must be taken in and by that particular act of parliament, it can have no bearing on an act passed more than twenty years before, even in England. It is no evidence that such was the legal meaning or acceptation of the words by the common law, but is rather to be considered as a mere statutory provision.

As no doubt can be entertained about the meaning of the act of congress on which this information is made, it has not been deemed necessary to examine the meaning and re-

ceived acceptation of the terms, "sea or ship stores," in mercantile instruments, or according to commercial usage; they are undoubtedly more comprehensive than by the terms or meaning of the laws referred to. It is enough for the decision of this case, that the articles in question are not brought within either the directory, or the penal provisions of the collection law, as sea stores; whether they are to be considered as a part of the ship, its body, tackle, apparel or furniture, being intended for such use; or whether by their not having been so applied, they can be considered as a part of the cargo, and as such subject to forfeiture or penalty, under any other provisions of the law, it is unnecessary to inquire. Neither is the object for which they were purchased or retained on board, or their quantity, a material subject of inquiry; if purchased for sale, they would be deemed goods, wares and merchandize; if the quantity was excessive, it might be evidence of a fraud subjecting the party to a forfeiture or penalty, at all events the excess would be liable to duty. Having been libelled for being found, on board, as sea stores not entered in the manifest, every point in the case is disposed of, by considering them as not embraced within the twenty-third, thirtieth or forty-fifth sections of the law, as ship, vessel, cabin, or sea stores.

The decree of the district court awarding restitution to the claimants is therefore affirmed.

UNITED STATES v. TWENTY-NINE AND ONE-HALF BOXES OF SUGAR. See Case No. 15,098.

Case No. 16,567.

UNITED STATES v. TWENTY-ONE BARRELS OF HIGH WINES.

[6 Int. Rev. Rec. 213.]

District Court, D. Iowa. 1867.

FORFEITURE OF PROPERTY—EFFECT.

[When a statute denounces a forfeiture of property as a penalty for the commission of crime, the forfeiture takes place when the offense is committed, if the denunciation is in direct terms, and then operates as a statutory transfer of the property to the government.]

This was a suit brought to forfeit the distillery, with its engine and other machinery, with 700 bushels of corn, with 21 bbls. high wines. and other property, of Louis Bangemann, situated at Guttenburg, Iowa, for violation of internal revenue laws. B. H. Pelzer intervened for the distillery and all its machinery, and Henry Thorman intervened for the 700 bushels of corn. Pelzer claimed under a mortgage in which the land was described, and the words added "with the buildings thereon." The government claimed that this mortgage did not cover the machinery in the distillery. The question was also raised as to the time the forfeiture of the property took effect. LOVE, District Judge, held that when a statute denounces a forfeiture of property as a penalty for the commission of crime, if the denunciation is in direct terms the forfeiture takes place at the time the offense is committed, and operates as a statutory transfer of the right of property to the government —following the decision of the United States supreme court therein—case of U. S. v. 1,960 Bags of Coffee, 8 Cranch [12 U. S.] 398. In this case Judge Story filed a dissenting opinion, claiming that the forfeiture did not take effect until actual seizure; but Judge LOVE adhered to the opinion of the majority of supreme court.

The jury returned a verdict in favor of Pelzer, giving him all he claimed, and in favor of the government for the balance of the property, as the issue raised by Thorman was no claim against the United States for the corn.

Case No. 16,568.

UNITED STATES v. TWENTY-ONE BARRELS OF WHISKEY.

[Cited in McGlinchy v. U. S., Case No. 8,803. Nowhere reported; opinion not now accessible.]

Case No. 16,569.

UNITED STATES v. TWENTY PACKAGES OF DISTILLED SPIRITS.

[24 Int. Rev. Rec. 54.]

District Court, D. Massachusetts. Feb. 8, 1878.

INTERNAL REVENUE—INFORMATIONS OF FORFEITURE —PROCEEDINGS AT LAW—OPENING JUDGMENT AFTER TERM.

Ordinary proceedings for a forfeiture under the internal revenue laws of the United States are proceedings at common law, and must be governed by the practice of courts of common law; and by that practice the court has lost the power to open a judgment when the term at which it was entered has gone by.

L. S. Dabney, for claimants.

P. Cummings, Asst. U. S. Atty.

LOWELL, District Judge. In this case the goods were seized by the United States on land for an alleged breach of the internal revenue law governing the rectification of spirits, and upon a default and an ex parte hearing were condemned, and a warrant for their sale was issued. After the term had passed in which the judgment of condemnation was entered, but before the warrant for sale had been executed, the owners of the spirits applied by a written motion to have the case opened, and to be permitted to interpose their claim. The motion was accompanied by affidavits tending to show a meritorious defence to the charges of the United States, and explaining the delay.

The point argued was whether the court had power to open the case on motion. It being understood that Judge Shepley had

decided a case in the circuit court supposed to be similar to this, I have consulted with him. My opinion is that this proceeding is at common law, and must be governed by the practice of the courts of common law, and that by that practice the court has lost the power to open a judgment where the term at which it was entered has gone by. Where, however, the judgment is entered by mistake of the court or of one of its officers, it is not truly the judgment of the court; and such mistake may be corrected after almost any lapse of time if the rights of third parties have not intervened. If the judgment is in all respects regular, and the mistake or misfortune is one of the party, he must seek redress by a petition for review, or whatever other remedy may be given him by the statutes or by the practice of the court. The cases cited (Stickney v. Davis, 17 Pick. 169, and Capen v. Stoughton, 16 Gray, 364) come within the distinction above noticed, though in the former the mistake was one of a fact which could not be known to the court, namely, the death of one of the parties; but it was one which rendered the judgment wholly erroneous, and the question of remedy was therefore one of form merely. Judge Shepley informs me that he has always acted on this view of the law; that the case to which he supposes reference was made was one in which judgment had been entered by mistake. I have not thought it fit to suggest what remedy there may be in this case.

Motion denied.

Case No. 16,570.

UNITED STATES v. TWENTY-SIX BALES OF RUBBER BOOTS.

[3 Ware, 205;[1] 20 Law Rep. 444.]

District Court, D. Massachusetts. Nov., 1858.[2]

CUSTOMS DUTIES—FORFEITURE FOR UNDERVALUATION—MANUFACTURING IMPORTER.

1. An information against 26 cases of rubber boots as liable to forfeiture under the 66th section of the act of March 2, 1799, c. 128 [1 Story's Laws, 631; 1 Stat. 677, c. 22], for the production of an invoice by the importer at the entry not according to the actual cost but below it, with the design to evade the duties.

2. Plea, that the importer was the manufacturer of the goods, adjudged good.

3. The 36th section of the act requires the importer in all cases to enter his goods at the actual cost, and verify his entry by oath, and to produce at the entry the original invoice and bill of lading; and by the 66th section, if the invoice thus produced is made not according to the actual cost, with a design to evade the duties or a part of them, the goods or their value shall be forfeited.

4. The act of 1823 [3 Stat. 729] excepts from the act of 1799, the case of an importer who is the manufacturer of the goods, or who has obtained them otherwise than by purchase, and requires of him an invoice stating the true market value.

[5. The case at bar distinguished from Wood v. U. S., 16 Pet. (41 U. S.) 342.]

Chas. Levi Woodbury, U. S. Dist. Atty.

Milton Andros, for claimants.

WARE, District Judge. This is an information against twenty-six cases of rubber boots, which were entered at the custom-house at Rouse's Point, in the Northern district of New York, January 29, 1857, and thence transported to Boston, and on the 12th of February seized by the collector of the district of Boston and Charlestown, as forfeited to the United States. The alleged cause of forfeiture is that the entry was made on an invoice produced at the entry in which the goods were invoiced as is alleged not according to the actual cost at the place of importation, but at a less price, with the design to evade the duties or some part of the same in fraud of the United States, and in violation of the 66th section of the act of congress of March 2, 1799. To this information the claimants, protesting that the allegations in the information were not true, have put in a plea in bar that they were the manufacturers of the goods, and imported them as such. To this plea the United States have demurred.

The question which arises on the pleadings, and has been argued at the bar, is whether the 66th section of the act of 1799, so far as it is applicable to this case, is in force, or has been repealed by subsequent legislation. The 36th section of the act directs that the owner, on the entry of his goods, shall state their prime cost, including certain charges, which are enumerated, and also shall produce the original invoice of the goods in the same state as when received, and then goes on to prescribe the form of the oath to be administered on the entry. This affirms among other things, that the entry contains a just and true account of the cost, and that the invoice and bill of lading produced are genuine and true, and the only invoice and bill of lading received. In the 66th section it is then enacted: "That if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof, at the place of importation, with the design to evade the duties thereupon or any part thereof, all such goods, wares, and merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited." 1 Stat. 677. Thus the law appears to have remained until 1818. The act of April 20, 1818, supplementary to the act of 1799 (4 Stat. 433, c. 79), like the former act, requires the production of the original invoice on the entry, and the 5th section provides, in addition to the oath then required of the owner by law, that he should declare on oath that the invoice produced of goods subject to an ad valorem duty exhibits the true value of such goods at the place of exportation. And by the 8th section it is pro-

[1] [Reported by Geo. F. Emery, Esq.]

[2] [Affirmed in Case No. 16,571.]

vided that when the importer is not a resident in the United States, the invoice shall be verified by the owner's oath before a consul of the United States, and he shall further declare, on oath, whether he is the manufacturer, and if so, that the goods are charged in the invoice at their current value at the place of manufacture. This act was by the act of April 18, 1820 (3 Stat. 505), continued in force till 1823. The act of March 1, 1823, § 1 (3 Stat. 729), in like manner with the preceding statutes, requires, on the entry, the production of the invoice, and the 4th section gives the forms of three oaths, one of which, according to the nature of the case, is to be administered to the owner, importer, or consignee, "in lieu of the oath now prescribed by law in such case." The third is the one applicable to this case, and is called the manufacturer's oath, to be administered in cases where the goods have not been actually purchased. In this, the owner is required to swear that the goods "were not actually bought by him or his agent, in the ordinary mode of bargain and sale, but that nevertheless the invoice produced, contains a just and faithful valuation of the same at their fair market value, including charges," etc. The 5th section directs that the ad valorem rates of duty shall be estimated on the actual cost if obtained by purchase, and the actual value if obtained otherwise, as in this case, and not on the cost as directed in all cases by the act of 1799. One of these oaths is to be administered in lieu, that is as a substitute, for the oath then required by law. That, as it appears, was the oath required by the 36th section of the act of 1799, as modified by the act of 1818; and it is a violation of the act of 1799, in relation to the entry of the goods, that is charged in the information as the cause of forfeiture in this case. The act of 1823, appears to be still in force, so far as relates to the entry of goods, and the oaths to be administered on the entry. At least no act repealing this part of the law was referred to in the argument, and I have found none. The oaths required by that act are declared to be a substitute for the oath then required, which was that prescribed by the act of 1799, as modified by the act of 1818. The character of the invoice to be produced and sworn to is different from that required by the act of 1799. That was the actual cost, and for this is substituted the fair market value when not obtained by purchase; and these it is plain may be different. By the act of 1799, the duties were to be assessed on the actual cost,—by that of 1823, on the actual value in cases like that now under consideration. The latter act then necessarily repeals the former. It expressly repeals it as to the oath, and by unavoidable implication as to the invoice, when the importer is the manufacturer, by requiring a different invoice. It cannot be pretended that two invoices must be produced and sworn to, one of which must necessarily be false. The acts of 1830 (4 Stat. 409), of 1832 (4 Stat. 423), of 1842 (5 Stat. 563), and of 1846 (9 Stat. 43), do not, as far as I can find, reinstate the oath, and the regulation respecting the invoice, of the act of 1799, in cases like the present, when the manufacturer is the importer. If repealed by the acts of 1823, they remain repealed, and there can be no forfeiture for the violation of a repealed and extinct law.

This is the conclusion to which I should have come free from difficulty, if the case was not embarrassed by former judicial decisions, which are binding on this court. But in the case of Wood v. U. S., 16 Pet. [41 U. S.] 356, it was decided that the 66th section of the act of 1799 was in full force. That was a seizure of 22 packages of piece goods, imported into New York in the years 1839 and 1840. The information contained a large number of counts, but the one relied on, and on which the goods were condemned, was founded on this section of the law of 1799; and the forfeiture was claimed on the ground of making use of a fraudulent invoice, not according to the actual cost in making the entry. That decision was followed by the case of Taylor v. U. S., 3 How. [44 U. S.] 200, the case of Clifton v. U. S., 4 How. [45 U. S.] 242, and U. S. v. Sixty-Seven Packages of Dry Goods, 17 How. [58 U. S.] 89, in 1854. All these cases followed, and affirm the decision in Wood v. U. S. [supra], and hold that the 66th section of the act of 1799, on which this information is founded, is still in force. If these decisions cannot be distinguished from the case at bar, then, whatever may be my private opinion, the plea in bar must be adjudged bad, and judgment rendered for the forfeiture.

In all these cases there were counts on the 66th section of this act, claiming a forfeiture for producing an invoice not according to the actual cost. But in none of them does it appear from the printed reports that the importations and entry were made by the manufacturer. By subsequent legislation, as well as by the act of 1799, imported goods, bearing an ad valorem duty, when obtained by purchase, were required to be invoiced according to the actual cost. And though in some of them a different penalty for the use of a false and fraudulent invoice was imposed, the court has steadily held that the penalty prescribed of a forfeiture of the goods or their value by the 66th section was not repealed but is still in force. The doctrine of the court is that prior laws for the collection of the revenue are not impliedly repealed by subsequent legislation, except so far as there is a direct repugnancy between the later and the earlier law, and then only so far as the repugnancy exists. In none of these cases was the law brought to the attention of the court in the precise point of view now presented. And, if we refer to the reasoning of the court in the case of Wood v. U. S., which is referred to and approved

in the subsequent decisions, it appears to me, that it will admit of a distinction, while holding the section of the act in question to be generally in force and unrepealed, that will take this case out of it. If we suppose in these cases what seems to be a fact, that a fraudulent invoice below the actual cost was used in the entries by purchasers of the goods, the identical offence was committed, for which the penalty in this section of the law was intended. Though later laws have made provisions for the same offense and armed them with penalties, these may be considered as cumulative, and as this section has not been expressly repealed, the adding of a cumulative remedy in fiscal law is not held to be an implied abrogation of a preëxisting law. It may be conceded that the government cannot claim both penalties, and they may be still at liberty to prosecute for one or the other, at their election.

The fiscal laws of the country, though bristling with forfeitures and penalties, are not held to be penal laws in the technical sense of the word, and like them to receive a strict and narrow construction. [Taylor v. U. S.] 3 How. [44 U. S.] 210. The penalties are for the prevention of fraud, and the protection of the revenue, and they operate incidentally for the benefit and protection of the honest importer and trader, against his fraudulent competitors. For the common interest as well of the government as of honest trade, they are to be allowed a fair and reasonable operation in furtherance of the intention of the legislature. But, giving this construction to our complex revenue laws, it appears to me that the act of 1823 necessarily repeals so much of the 36th and 66th sections of the act of 1799 as applies to this case. It excepts out of the general rule requiring the importer to produce an invoice stating the cost, the case where he is the manufacturer, by requiring of him to produce a different invoice. The two laws appear to have that repugnancy, that both cannot stand together, and that the latter must be held to repeal and annul the former in this particular.

The result is that the plea in bar is adjudged good.

[The cause was taken to the circuit court upon a writ of error, where the judgment was affirmed. Case No. 16,571.]

Case No. 16,571.

UNITED STATES v. TWENTY-SIX CASES OF RUBBER BOOTS.

[1 Cliff. 580.] [1]

Circuit Court, D. Massachusetts. May, 1860.[2]

CUSTOMS DUTIES—FORFEITURES FOR UNDERVALUATION—IMPORTATIONS BY MANUFACTURER—AFFIDAVIT OF COST.

1. It is very doubtful if the sixty-sixth section of the act of March 2, 1799 [1 Stat. 677], ever had any application to a case of importation and entry made by the manufacturer and producer, as such.

2. By subsequent acts the basis of dutiable valuation has been changed from the actual cost to the actual market value or wholesale price.

3. Persons who have purchased the goods, and have the means of knowing the cost, are still required to make oath that their invoices contain a true and faithful account of the actual cost; but this is not now applicable to the manufacturer, who is not supposed to have the means of knowledge to enable him to do so.

4. By the act of March 1, 1823 [3 Stat. 729], provision is made for the importation of goods by the manufacturer, and the form of oath to be taken in such cases is there prescribed. It also makes discrimination between goods procured by purchase and such as are procured otherwise.

5. By this act the sixty-sixth section of the act of March 2, 1799, so far as relates to importations by the manufacturer, if it ever had any application to that case, is repealed.

[In error to the district court of the United States for the district of Massachusetts.]

The original suit was commenced February 24, 1857, and was an information framed on the sixty-sixth section of the act of March 2, 1799, filed by the district attorney, to enforce a forfeiture of twenty-six cases of rubber boots, imported from Canada into the United States at Rouse's Point, and there entered for warehousing and transportation to Boston. After being transported to Boston, they were seized on land by the collector of the port. The entry was made by and for certain persons under the name and style of Cheney, Fisk, & Co., and was duly signed on the 29th of January, 1857, at the office of the deputy collector, and an invoice of the goods was produced and left with the deputy collector. It was alleged that the goods included in the entry were invoiced at a less price than the actual price at the place of exportation. Certain issues of fact were tendered by the claimants in the first instance, but subsequently they presented a plea in bar of the information, which was filed by consent. The plea set up that the United States ought not to maintain the information, because the claimants were the manufacturers and producers of the goods, and that the goods were imported by them as such. To this the district attorney demurred, and the court overruled the demurrer. [Case No. 16,570.]

C. L. Woodbury, U. S. Dist. Atty.

Nowhere is the sixty-sixth section of the act of 1799 repealed in words. It is still in force. Wood v. U. S., 16 Pet. [41 U. S.] 343; Clifton v. U. S., 4 How. [45 U. S.] 250; Buckly v. U. S., 4 How. [45 U. S.] 251; U. S. v. Sixty-Seven Packages, 17 How. [58 U. S.] 92. The suggestion of an implied repeal rests on the comparison of the words "actual cost" and "fair market value." The "actual cost" in section 66, Act 1799, is not the original or prime payment. It says, "shall not be invoiced according to the actual cost thereof at

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

[2] [Affirming Case No. 16,570.]

the place of importation." Other things must be added afterwards, to make up the document required by the sixty-sixth section. The purpose of the acts of 1818 [3 Stat. 433] and 1823 was to give further security for the correctness of the basis on which the levy of duty depended, namely, the invoice. Also to establish equality in the invoices produced by manufacturers and by purchasers, so that like duties should be paid by each. The sixty-sixth section being still in force, and the invoice still required, can the act of 1823, § 4, be treated as repealing by implication or by inconsistency this clause quoad a manufacturer's invoice. (1) It relates only to the oath on making the entry. (2) He must still enter by invoice. (3) The supreme court have declared all succeeding acts cumulative to this sixty-sixth section. (4) Were all oaths to entries repealed, the sixty-sixth section would be unaffected. (5) If the oath is at all directory or mandatory as to section sixty-six, it should be interpreted to mean, "that such an invoice so sworn should be taken and deemed a sufficient compliance with the sixty-sixth section, provided no fraudulent intent appears." If this is not so, then he is not relieved from the sixty-sixth section. In 1818, the words "true value" were used as a basis for duties; they were held to mean "actual cost." U. S. v. Tappan, 11 Wheat. [24 U. S.] 419. The object of the oath of 1823 is not within the sixty-sixth section; these proceedings relate to the invoice, and are independent of the fact whether an oath is taken or not. The object of the two acts does not relate to the same thing, and there is no necessary repugnancy between them. From these sections it is apparent that two terms of value are used,—"actual cost" and "fair market value,"—and that the invoice of goods entered by the manufacturer must contain the "fair market value," and that he must make solemn oath that it does.

It is held in U. S. v. Sixteen Packages [Case No. 16,303], that the phrase "actual cost," as used in the sixty-sixth section of the act of 1799, refers and is only applicable to cases where the goods have been acquired by purchase in a bona fide transaction between buyer and seller, and means the actual price paid. See, also, Alfonso v. U. S. [Id. 188].

In Belcher v. Lawrason, 21 How. [62 U. S.] 254, the court recognizes the distinction between the purchaser's and the manufacturer's oath.

M. Andros, for claimants.

The thirty-sixth and sixty-sixth sections employ three terms expressive of value,—"actual cost," "prime cost," and "real cost,"—and "they are all phrases of equivalent import, and mean the true and real price paid for the goods upon a genuine bona fide purchase." U. S. v. Sixteen Packages [supra]. Thus the law remained for nearly twenty years, or until the act of April 20, 1818 (3 Stat. 433). The fifth section of this act required inter alia that the owner, &c., should, in addition to the oath now required by law,—that is, in addition to the oath provided for in the thirty-sixth section of the act of 1799,—declare on oath that the invoice produced exhibits the true value of the goods, &c., in their actual state of manufacture at the place from which the same were imported. The eighth section provided that the owner should declare whether he was the manufacturer or not, and if he was, then that he should make oath that the prices charged in the invoice were the current value of the same at the place of manufacture, and such as he would have received if the same had been sold in the usual course of trade. Congress drew a distinction between the oaths to be taken by the manufacturing and the purchasing importer. That there is a positive repugnancy between the provisions of the act of 1823 and the sixty-sixth section of the act of 1799, so that the two cannot as to the present case coexist. Wood v. U. S., 16 Pet. [41 U. S.] 362. To the point of repeal by implication. The fourth section of the act of 1823 provides three forms of oaths, one of which is to be administered according as the person making the entry shall be the consignee, importer, agent, owner, or manufacturer. And this oath it is expressly stated is "in lieu of the oath now prescribed by law," that is, in lieu of the oath prescribed by the acts of 1799 and of 1818. The fifth section provides that the duties shall be assessed upon their actual cost if the goods shall have been actually purchased, and upon their actual value if the goods have been procured otherwise than by purchase. Alfonso v. U. S. [supra].

CLIFFORD, Circuit Justice. Passing over any mere formal objections to the plea in bar, the record presents but two questions for the consideration of the court. It is insisted by the counsel for the claimants that the sixty-sixth section of the act of March 2, 1799, is inapplicable to the facts of this case, as set forth in the plea in bar, and if applicable, that the section is repealed by the fourth section of the act of March 1, 1823. That proposition, which is twofold in its character, is wholly denied by the district attorney, and he insists that the provision in question is in full force, and that it is applicable to importations made by the manufacturer or producer, as well as to those made by the owner where the goods have been actually purchased. No other questions were discussed at the bar, and the inference is a clear one, both from the state of the record and the course of the argument, that the counsel on both sides desire that the decision of the court may turn upon the solution of those questions. Under the circumstances, mere formal defects in the plea, if any, will not be noticed in determining the cause. Regarding the case as one of considerable importance, I think it proper to say in the outset that the questions presented for decision are not unattended with difficulty and perhaps are involved in some doubt.

It is provided by the sixty-sixth section of the act of March 2, 1799, that if any goods, wares, or merchandise, of which entry shall have been made in the office of the collector, shall not be invoiced according to the actual cost thereof at the place of exportation with the design to evade the duties thereupon, or any part thereof, all such goods, wares, and merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited. 1 Stat. 677. Whether that clause of the section is repealed or not, so far as respects importations acquired by purchase in the foreign market, is a question which has been twice before the supreme court; but after a careful examination of the respective opinions given by the court in those cases, in connection with the facts on which the decisions were based, I am of the opinion that the supreme court has not decided the questions involved in this record. Wood v. U. S., 16 Pet. [41 U. S.] 357; U. S. v. Sixty-Seven Packages of Dry Goods, 17 How. [58 U. S.] 93. Referring to the case first cited, it will be seen that the only count considered by the court was framed upon the same section as the information in this case; but all the importations, as well as the entries at the custom-house, were made by the purchaser of the goods, and not by the manufacturer or producer. Forfeiture takes place, say the court, in the second case, if the goods described in the invoice are set out under the cost value, with the design stated in the act of congress; and the court add that the object of the act is to prevent frauds upon the revenue in passing goods through the custom-house by means of this device at an undervaluation. Importation and entry, however, in that case, as well as in the former, were made by the purchaser who had the means of presenting the true and genuine invoice. Those cases decide undoubtedly that the provision in question is in full force and unrepealed in all cases where the importation and entry are made by the purchaser, but they do not touch the questions involved in this record. On the contrary, it still remains to be considered whether the provision under consideration ever had any application to a case where the importation and entry were made by the manufacturer or producer, and if so, whether it has not in that respect been repealed. Entry of goods imported by any owner or consignee is required by the thirty-sixth section of the before-mentioned act to be made in writing, with the collector, by such owner or consignee, or in his absence by his agent or factor, within fifteen days after the master's report of the arrival of the vessel. Such entry is required to specify the vessel, the name of the master, the port or place from whence the goods were imported, the particular marks, number, denomination, and prime cost of the goods; and the owner or consignee is also required to produce the original invoice of the same, or other documents received in lieu thereof, or concerning the same in the same state in which they were received, together with the bill of lading. In addition to the foregoing requirements, and some others which need not be noticed, the same section prescribes a form of entry, and provides that the same shall, "as the nature of the case will admit or require, be agreeably to that form," but it also provides that the form shall and may be varied and adapted to any alterations that may be made in the rates of duties. Looking at the language of the section, it is obvious that the form of entry prescribed is not obligatory where, from the nature of the case, it would not speak the truth, and it is expressly provided that it shall be varied whenever alterations are made in the rates of duties on imports. Every such entry made by any importer, consignee, or agent is required to be verified by the oath or affirmation of the person making the same, and the same section also prescribes the form of the oath. According to that form, the importer, consignee, or agent is required to certify, among other things, that the entry contains a just and true account of the goods, and a just and true account of the cost thereof, including charges, and also that the invoice and bill of lading produced are the true, genuine, and only invoice and bill of lading received of the goods, and that both are in the actual state in which they were received. Where the particulars of the goods, however, are unknown, a very different entry and oath are prescribed by the last proviso of the same section. Authority is given to the importer, consignee, or agent in such cases, to make an entry of the goods, which is described therein as one in lieu of the entry before mentioned, and the clause provides that it shall be made and received according to the circumstances of the case, the party making the same declaring upon oath all he knows or believes concerning the qualities and particulars of the goods. 1 Stat. 655, 658. Ad valorem rates of duty upon goods at the place of importation were required by the sixty-first section of the act to be estimated by adding a certain percentage to the entire cost thereof, including outside packages, and all charges and commissions except insurance. Further regulations for the collection of duties on imports were made by the act of April 20, 1818, and by the fifth section of the act every owner, consignee, agent, or importer is required, in addition to the oath previously prescribed by law, to declare on oath that the invoice produced exhibits the true value of the goods in their actual state of manufacture at the place from which the same were imported. Regulations for ascertaining whether or not the owner was the manufacturer of the goods imported was first made by the eighth section of the last-named act, which provides that non-resident owners shall further declare on oath whether they were the manufacturers in whole or in part of the importation, or were concerned directly or indirectly in the profits of any art or trade by which the goods had

been brought to their present state of manufacture, and if so, they are required to make further oath that the prices charged in the invoice are the current value of the same at the place of manufacture, and such as they would have received if the same had been sold in the usual course of trade. 3 Stat. 435. New and still more important provisions for the collection of duties on imports were made by the act of March 1, 1823, which is the act relied on by the claimants as repealing the provision on which the information in this case is founded. Id. 329. True invoice of importations is required, by the first section of that act, to be presented to the collector at the time of the entry, and unless that be done the same section provides in effect that the goods, if subject to ad valorem duty, shall not be admitted to entry, unless the same be admitted in the mode authorized and prescribed in the second section, which has no application to this case. Wrecked goods are saved from the prohibition by a proviso to the first section, and by the twenty-first section goods damaged in the course of the voyage are placed upon the same footing. Collectors are required by the fourth section of the act, in all cases where the goods are imported and entered by invoice, to administer according to the nature of the case one of three oaths therein prescribed to the owner, consignee, or agent, "in lieu of the oath now prescribed by law in such case." Of these, the first form is prescribed for the consignee, importer, or agent, and the second for the owner in cases where the goods have been actually purchased.

1. When the entry is by a consignee, importer, or agent, he or they are required to make oath, among other things, that the invoice and bill of lading are the true and only invoice and bill of lading received of all the goods, for account of any person for whom he or they are authorized to enter the same, and that those documents are in the state in which they were received; that the entry contains a just and true account of the goods according to the invoice and bill of lading; and that, to the best of his or their knowledge and belief, the person therein named as such is the owner of the same, and that the invoice produced exhibits the actual cost of the goods if purchased, or the fair market value of the same if otherwise obtained, at the time and place when and where procured.

2. Where the goods have been actually purchased, and the owner makes the entry, he is required in all cases to make oath that the entry contains a just and true account of all the goods, and that the invoice produced contains a just and faithful account of the actual cost of the same, and of all charges thereon which are particularly specified in the form of the oath. Both of the preceding oaths, it will be seen, have respect to the nature of the case, and were evidently framed so as to avoid any necessity for false swearing, but at the same time to elicit all the material facts within the knowledge of the affiants.

3. Those remarks indeed apply to all the previous legislation upon the subject, and the intention of congress in that behalf is equally well exemplified in the third form prescribed in the same section. That form of oath applies when the entry is made by the manufacturer or by the owner, in cases where the goods have been procured otherwise than by actual purchase. Such parties are required to make oath that the entry contains a just and true account of the goods imported, and that the same were not actually bought by the person making the entry or his agent in the ordinary mode of bargain and sale, but that, nevertheless, the invoice produced contains a just and faithful account of the same at their fair market value, including charges. Unmistakable discrimination is also made in the fifth section of the act between goods actually purchased and such as are procured otherwise than by purchase, in the mode there prescribed for estimating ad valorem duties. Actual cost, actual value, and appraised value are severally recognized as a basis of the calculation. Duties were levied upon the invoice and entry in the preceding acts, and that is true of the act under consideration, except when the collector is of the opinion that there is just ground to suspect that the goods are invoiced below their true value in the place from whence imported, and in that event the collector is required, by the thirteenth section of the act, to direct the same to be appraised, and if the appraised value exceeds by twenty-five per cent. the invoice prices, then, in addition to the per centum laid upon correct and regular invoices, under the fifth section of the act, he is required to add fifty per centum on the appraised value. Unless appraised, therefore, goods actually purchased were valued at the actual cost, as specified in the invoice, and goods procured otherwise than by purchase were estimated, subject to the same qualification, at the actual or fair market value, as specified in the same document; but if either class was directed to be appraised under the thirteenth section of the act, then the goods were estimated at the appraised value. These explanations are sufficient to show the correctness of the remark, that actual cost, actual or fair market value, and appraised value are severally, according to the nature of the case, recognized by that act as a basis of dutiable valuation.

Additional regulations upon the subject were made by the act of May 28, 1830 (4 Stat. 409); and by the seventh section of the act of July 14, 1832 (Id. 591). It is made the duty of the collector, in all cases where an ad valorem rate of duty is imposed on any goods, to cause the actual value thereof at the time purchased, and place from which imported, to be appraised, estimated, and ascertained; and it is made the duty of the

appraisers, by all the reasonable ways and means in their power, to ascertain, estimate, and appraise the true and actual value of such goods, any invoice or affidavit to the contrary, notwithstanding. All duties were required to be paid in cash, by the twelfth section of the act of August 30, 1842 (5 Stat. 563), and in all cases where any ad valorem rate of duty was imposed, it is made the duty of the collector, by the sixteenth section of the act, to cause the actual market value or wholesale price of the goods, at the time when purchased, in the principal markets of the country from whence imported, to be appraised, estimated, and ascertained. Cost and charges are to be added to such value or price; and in that mode the collector is directed to estimate the dutiable value of the importation "as the true value at the port where the same may be entered, upon which the duties shall be assessed." Where the cost or value given in the invoice is too low, the owner, consignee, or agent is allowed, by the eighth section of the act of July 30, 1846 (9 Stat. 43), to make such addition thereto in the entry as will raise the same to the true market value of such imports. By that act also ad valorem duties are required to be assessed upon the true market value of the imports in the principal markets of the country whence the importation shall have been made; and it is made the duty of the collector to cause the dutiable value of such imports to be appraised, estimated, and ascertained in accordance with the provisions of existing laws. Actual market value or wholesale price is also the rule in all cases, under the appraisement act of March 3, 1851 (9 Stat. 629), and the first section of the act provides that to such value or price shall be added all costs and charges, except insurance, as the true value at the port where the same may be entered, upon which the duties shall be assessed. Such value or price must still be ascertained by appraisement; but the third section of the last-named act provides that the appraisement shall be final and conclusive, and deemed and taken to be the true value of the goods; and the duties shall be levied thereon accordingly. Clearly, therefore, the duties are now calculated from the report of the appraisers, and not from the invoice and entry, as was the case under several of the earlier acts of congress. But the entry, if practicable, must still be accompanied by the invoice and bill of lading; and no doubt is entertained that in all cases where the goods are actually purchased, and the entry is made by the owner, or any other person having knowledge of the fact, it is incumbent on him to make oath that the invoice contains a true and faithful account of the actual cost of the goods. Appraisers, it is true, are required to ascertain, estimate, and appraise the true market value, or wholesale price; but it is obvious that any evidence showing what was the actual cost of the importation would greatly facilitate that inquiry; and in practice the invoice produced of the actual cost of the goods furnishes the principal guide for the appraisers in the performance of their duty. Purchasers know what the actual cost was, and therefore are required to state that fact in the invoice; and the fact is scarcely less important under the present rules of appraisement than it was when the duties were levied on the invoice. Manufacturers or the producers of the goods do not know the actual cost of the articles, as in the case of the purchaser; and consequently a different form of oath is prescribed, corresponding in its requirements with the nature of the case. It is insisted by the district attorney, however, that actual cost and true market value mean the same thing. Three terms, to wit, "actual cost," "prime cost," and "real cost" are employed in the first-named act, as expressive of value; and the term used in the fifteenth section of the act of April 20, 1818, is the "true value" of the goods in their actual state of manufacture. Shortly after the passage of the last-named act, a case arose in which it was contended that the provision last referred to changed the basis of valuation established in the first-named act, and introduced a new one equivalent to the actual market value of the importation. But Judge Story held otherwise, admitting, however, at the same time, that if the words had been "market value," instead of "true value," as they were, he would have been of a different opinion. Tappan v. U. S. [Case No. 13,749]. "Fair market value" is the term employed in the act of March 1, 1823; and subsequently to its passage the question was again presented to the circuit court for this district. On this last occasion, the same learned judge held that the phrase "actual cost," in the first-named revenue act, means the actual price paid in a bona fide purchase, and not the market value, and added, that he was very much inclined to hold the opinion that the provision on which this information is founded, so far as it inflicts a penalty, did not apply, except to cases where an actual purchase had been made, and of course where the invoice ought to be of the actual cost upon such purchase. Alfonso v. U. S. [supra]. Prior to that decision, the same point, substantially, had been ruled by the supreme court in Tappan v. U. S., 11 Wheat. [24 U. S.] 423; and it is worthy of remark that Mr. Justice Thompson, in the course of the opinion given in that case, admits that there is a distinction between actual cost and current market value. Strong doubts are entertained whether the provision in question ever had any application to a case like the present, as exhibited in the plea in bar; but it is not necessary to place the decision entirely upon that ground, because it is clear and unmistakable that the basis of dutiable valuation has been changed from the actual cost to the actual market value or wholesale price. Persons presenting invoices, who

have purchased the goods, or have the means of knowing the actual cost of the articles in the foreign market, are still obliged to make oath that it contains a true and faithful account of the actual cost; but that requirement is not now applicable to the manufacturer or producer, because they are not supposed to have the means of knowledge to enable them to comply with its terms. It is admitted by the demurrer that the claimants in this case were the manufacturers and owners of the importation, and that as such manufacturers and owners they imported the goods; and consequently I am of the opinion that the judgment of the district court must be affirmed.

Case No. 16,572.

UNITED STATES v. TWENTY-SIX DIAMOND RINGS.

[1 Spr. 294; [1] 18 Law Rep. 250.]

District Court, D. Massachusetts. June, 1855.

CUSTOMS DUTIES — FORFEITURES — OMISSION FROM MANIFEST—CONCEALMENT OF GOODS—CONSTRUCTION OF LAWS—CERTIFICATE OF PROBABLE CAUSE OF SEIZURE.

1. In a libel of information against certain goods, under the 68th section of the revenue collection act (Act 1799, c. 22 [1 Stat. 677]), it is necessary for the government to prove that the goods were "concealed;" and the fact that the goods were not entered upon the manifest, was held not sufficient for this purpose. The concealment which subjects goods to forfeiture, under the 68th section, must be a concealment from the officers of the customs.

[Cited in The Gala Plaid, Case No. 5,183.]

2. The penalty of the 24th section of the same act does not apply to articles imported in a foreign vessel. The vessel must be owned in whole or in part, by citizens or inhabitants of the United States, to make the penalty attach. A certificate of reasonable cause may be granted for doubts of the law.

[See The Antilles, Case No. 489.]

This was a libel of information, filed by the United States, against certain goods brought into the port of Boston, in the British steamer Africa, and contained two counts; the first framed upon the 68th section of the revenue collection act (Act 1799, c. 22 [1 Stat. 677]): "That every collector, &c., shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, wares or merchandize, subject to duty, are concealed, and therein to search for, seize and secure any such goods, wares or merchandize; * * * and all such goods, wares or merchandize, on which the duties shall not have been paid, or secured to be paid, shall be forfeited." And the second, upon the 24th section of the same act: "That if any goods, wares and merchandize shall be imported or brought into the United States, in any ship or vessel whatever, belonging in the whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, from any foreign port or place, without having a manifest or manifests on board, * * * or which shall not be included or described therein, or shall not agree therewith, in every such case, the master or other person having the charge or command of such ship or vessel, shall forfeit and pay a sum of money equal to the value of such goods not included in such manifest or manifests, and all such merchandize not included in the manifest, belonging or consigned to the master, mate, officers or crew of such ship or vessel, shall be forfeited."

B. F. Hallett, U. S. Dist. Atty., for libellant, cited U. S. v. Certain Hogsheads of Molasses [Case No. 14,766].

F. E. Parker, for claimant, cited U. S. v. Three Hundred and Fifty Chests of Tea, 12 Wheat. [25 U. S.] 486.

The libellant's witnesses testified, that when the steamer came to her moorings in Boston, and before she was made fast, the master notified the revenue officers that there had been a robbery on board, and that no passengers were to land, until police officers were sent for, to make a search. No notice to this effect, however, was given to the passengers, though they were stopped from landing, and some of them seemed to expect a search. After the steamer was made fast, and before any passengers or baggage had landed, two of the passengers, named Salmon and Blanckensee, came to the purser, on the main deck, and the latter openly handed him a small parcel, which was afterwards found to contain twenty-six diamond rings, with the request to enter it on the ship's manifest. This was done in the presence and hearing of a revenue officer, who stepped up to the parties, told them it was too late, and seized the parcel. It was further admitted, that Salmon and Blanckensee had also four large cases of jewelry on board, which were on the manifest, and were stowed with the cargo. The claimant introduced, as a witness, C. M. Salmon, the passenger who had charge of the rings, who testified that he left England in the Africa, pursuant to a written agreement with one Isaac Blanckensee, jeweller, of London, for the purpose of establishing the latter's son, Julius Blanckensee, (his fellow-passenger,) in the jewelry business at Montreal; that the four cases were shipped by Isaac Blanckensee's agents at Liverpool, before his (Salmon's) arrival at that place, and that the twenty-six diamond rings arrived afterwards, late on the night before sailing, and the agents declined to put them on the ship's manifest, as too late; that he took them on board, in his portmanteau; and being on his first absence from England, and a stranger to the usages of foreign custom-houses, he took the advice of certain fellow-passengers, whose names he gave, to whom he showed the parcel, and directed it in the saloon, and in their presence, to Hill, Sears & Co., Boston, and that before the vessel's arrival at the wharf, he gave it to Julius

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

Blanckensee to hand to the purser, from whom the purser soon after received it. He further stated that he had never made any concealment of this parcel, and that, with all his goods, it was destined to Montreal, and was to be entered in bond at Boston.

SPRAGUE, District Judge. On the first count two questions arise: (1) Were the rings, in point of fact, concealed? (2) In order to be subject to forfeiture, should they not be found concealed?

The first question only need now be considered. The government witnesses testify only to the fact of the seizure; that they went on board the steamer directly upon her arrival, and soon after saw Salmon, a passenger, step up to the purser, in company with a young man, and ask the purser to put the parcel on the manifest. The officer then interfered, and said it was too late. That is the whole evidence, as to the situation of the rings, prior to the seizure. There is some testimony introduced for the purpose of showing a motive for the delivery on the passenger's part; to wit, that the master told the officers that a search was to be made for stolen goods, and that the passengers were to be detained, on that account. But no proclamation was made, nor was anything said that was intended for the passengers. No notice was given to them in general, much less to Salmon and Blanckensee, in particular. The government testimony fails to prove the concealment. The only fact proved, is the open production of the rings to the purser. Where they had been before, is not stated; and no officer can say that they had not been, during the whole passage, on the captain's table. This is a highly penal statute; the government must prove its case. It utterly fails to do so. There is ground for suspicion; but all the circumstances are consistent with innocence. The goods were not on the manifest. For that there is a distinct count. It may be one circumstance tending to show concealment under the first count; but it goes very little way. The district attorney relied on discrediting the testimony of Salmon; but if he had succeeded in discrediting it, the government still fails, on its own evidence. But I must say, in justice to Mr. Salmon, that his whole statement appears to me consistent and credible.

As to the second count, I think the statute perfectly clear; that the vessel must be owned, in whole or in part, by citizens or inhabitants of the United States. It is suggested that the word "belonging" must apply to "goods," and not to "vessel." In this case, both the goods and the vessel are foreign. But there are sound reasons for applying it to the words "ship or vessel." This regulation as to manifests is a matter of municipal law, which citizens and inhabitants are presumed to know. But foreign vessels, which come within our jurisdiction, cannot be expected to know that a particular document is required by our laws; nor is it reasonable that property on board should be forfeited for the want of such a document.

Libel dismissed.

On a subsequent day, B. F. Hallett, Dist. Atty., moved the court to grant a certificate (under the 89th section,) that there was "reasonable cause of seizure," and cited [Locke v. U. S.] 7 Cranch [11 U. S.] 339.

F. E. Parker, contra, cited [Wood v. U. S.] 16 Pet. [41 U. S.] 366; Conkl. Prac. 317.

SPRAGUE, District Judge. This is a balanced question, and I have not been without serious doubts, as to the proper decision of it. The true interpretation of the words, "reasonable cause" (which seem to be equivalent to "probable cause") I think is given in the case of Wood v. U. S., 16 Pet. [41 U. S.] 342. "Reasonable ground of presumption that the charge is, or may be, well founded;" and that this was intended to qualify the less guarded interpretation put upon the words, in the case of Locke v. U. S., 7 Cranch [11 U. S.] 339. There is no law that makes it in any degree culpable, on the part of the owner of goods, to omit entering them on the manifest; and it would seem hard to allow them to be seized, when no law has been violated. But it seems to be the custom of masters of foreign ships, (though not required by law,) to have a manifest of their cargo. And in this instance, there was a manifest, purporting to contain a schedule of goods subject to duty. This would be no ground of suspicion against a passenger, without some evidence that he was apprised of it. In this case, there is such evidence. He had other similar goods on board, which were actually entered upon the manifest. And the first apearance of the articles in question, was their presentation to the purser, with a request by the passenger, that they should be entered upon the manifest. These diamonds, of the value of more than $1,000, might be carried in the hand, and were kept by the owner, until the vessel was in the dock, and then, some stir being made, they were brought forward. There was another circumstance somewhat suspicious. Accompanying the jewels, was a bill of sale thereof to the passenger, Salmon, himself, indicating that he was the owner; but he stated to the officer that the goods were owned by a third person. Although this was afterwards explained, the discrepancy was, at the time, ground of suspicion. It was under these circumstances that the officer acted. And if a prior concealment, at any time during the passage, was sufficient ground of seizure, the officer had "reasonable cause." But what concealment is sufficient? If goods were concealed, and the vessel should never come into port, the property would not be forfeited; nor if a passenger coming on board of a ship filled, as in this instance, with strangers, secretes his jewels for safety; nor if he keeps them out of the view of the officers of the ship, who have no

right to know of them. I have no doubt that to incur a forfeiture, there must be a concealment from the revenue officers; and there can be no concealment from them, till the vessel is within their jurisdiction. If there had been a previous concealment, with the intent of defrauding the revenue, and the passenger had changed his purpose, before arriving within such jurisdiction, it would not have been a concealment, within the meaning of this statute, but an act preparatory thereto. In this case, soon after the revenue officer came on board, the passenger, without search, openly presented the diamonds. There was very slight ground to suspect any concealment from the officer. And if he knew of the true interpretation of the law, there would be no reasonable cause of seizure. But it is a new interpretation, and the officer may reasonably have been mistaken. U. S. v. Riddle, 5 Cranch [9 U. S.] 311. I grant the certificate of "reasonable cause;" but I wish this decision to be made known; and if a second seizure be made, under similar circumstances, I shall not feel bound to grant a certificate.

Case No. 16,573.

UNITED STATES v. TWENTY-THREE COILS OF CORDAGE.

[Gilp. 299.] [1]

District Court, E. D. Pennsylvania. April 6, 1832.[2]

CUSTOMS DUTIES — FORFEITURES — OMISSION FROM MANIFEST — SEA STORES — ARTICLES OF EQUIPMENT.

1. Where articles are purchased abroad for a vessel, to be used as part of her equipment, they are not sea stores within the meaning of the act of March 2, 1799 [1 Stat. 627].

2. Where articles purchased abroad for the equipment of a vessel, are not used and remain on board at her arrival in the United States, they need not be reported by the master in his manifest.

On the 3d December, 1831, an information was filed by the attorney of the United States, against twenty-three coils of cordage, three bolts of ravensduck, and four pieces of sail cloth, found on board of the ship Eliza. It appeared that they were the residue of a purchase made at Cronstadt, as was alleged, for the use of the vessel during the homeward voyage. The vessel was regularly entered at the custom house on the 7th November, 1831, the manifest of her cargo was delivered to the collector but contained no account of these articles, nor were they included in the report of sea stores, not intended for merchandise or sale. On the 28th November, the cargo was entirely discharged. On the following day the articles in question were found remaining on board. They were seized by the officers of the customs, and were alleged to be forfeited on the ground that they were sea stores, and not so specified or designated in the report or manifest of the master of the vessel. On the 2d April, 1832, Thomas and William Haven filed a claim to the articles seized, and denied that the same were liable to seizure or forfeiture.

Mr. Gilpin, U. S. Dist. Atty.

The act of congress of March 2, 1799, is intended to provide for the collection of duties on all articles, coming from a foreign country. Its provisions are most minute and comprehensive; they direct the mode of collecting all duties due, and of ascertaining exactly when foreign goods are exempted from them. They divide all foreign articles imported into three classes; first, merchandise; second, baggage; third, stores. Under one or other of these, all articles are embraced. For each class there is a particular form of report to be made by the master at the custom house on his arrival. Not only is such report requisite under the law, but its necessity as a revenue provision is apparent. 1 Story's Laws, 606, 612 [1 Stat. 655, 661]. These articles are neither merchandise nor baggage. They are sea stores. They were so spoken of by the master. They were purchased for the use of the vessel; a portion of the quantity so purchased was used and has become part of her tackle, apparel, and furniture; these are not yet so used; they clearly remain as necessary stores of the vessel. They are articles so designated in naval language; they are classed for instance, as marine stores with anchors and cables in the British navigation laws. They are comprehended, in commercial instruments, among the stores necessary for a vessel to perform her functions. If they are not sea stores then is there no provision whatever in regard to them; no means designated to ascertain whether or not they are superfluous, whether or not they are exempt from duty; but an extraordinary omission, to which there is no other similar, has existed in the whole revenue system. Abb. Shipp. 416; 2 Holt, Shipp. 248; Marsh. Ins. 181, 225. Did the master comply with the law relative to these superfluous stores? It declares that, "in order to ascertain what articles ought to be exempt from duty as sea stores, he shall particularly specify them in his report." This has not been done. It further declares that "if any greater quantity of articles are found on board than are specified in the entry, they shall be forfeited and may be seized." Here the fact that these articles were not entered or reported is admitted. It is also admitted that they were found on board, some time after the cargo was entirely discharged. They are therefore liable to seizure and must be forfeited. 1 Story's Laws, 612 [1 Stat. 661].

J. S. Smith and Mr. Chauncey, for claimants.

The great object of the revenue laws is to secure the payment of duties on merchan-

[1] [Reported by Henry D. Gilpin, Esq.]

[2] [Affirmed in Case No. 16,566.]

dise, and to prevent frauds. This is not merchandise; it was not bought as such, it is not to be sold as such. There is not the slightest imputation or allegation of fraud. This seizure has been made by the officers of the customs on a ground purely technical, and it cannot be sustained. These articles are not sea stores according to the meaning of the law. This has been already decided; a cable landed from a vessel without a permit, was seized on the same ground, and judgment was given by this court for the claimant; there is no distinction between a cable and the cordage and sail cloth now in question. Nor are they sea stores on a fair construction of the act of congress; that evidently refers to the provisions and supplies for the crew and passengers; it is a phrase frequently found in other acts of congress, which show that such is its signification. This is the proper test, not the mercantile use of the terms in commercial instruments, even if that ever applied it to such articles as those now in question, which does not appear to be the case. The occasional use of the phrase in a foreign statute is no proof of general maritime usage. 1 Story's Laws, 103, 106, 593, 599 [1 Stat. 132, 135, 644, 649]. In fact these articles are part of the tackle apparel and furniture of the vessel. They are like her anchors, yard arms, and spars. Are all the spare anchors or spars sea stores? The law under which this forfeiture is claimed refers to revenue cases, and is meant to protect the revenue. This case is not one of that class; these were not dutiable goods, but articles bought bona fide for the use of the ship, and intended to constitute part of her rigging and equipment.

Mr. Gilpin, U. S. Dist. Atty., in reply.

The act of March 2, 1799, was not a mere revenue law; at least not a mere law to collect revenue, it was meant quite as much to prevent evasions. Is baggage subject to duty, or are cabin stores? They are not, yet they are expressly referred to and must be entered. The slightest excess must be specified. It is therefore evident that congress meant that their officers should examine all articles; that they should ascertain what was exempt. The claimant's construction gives this privilege, not to the officer of the government, but to the owner or master of the vessel; thus substituting an interested party for a disinterested public officer. It establishes a provision different from all the rest of the revenue system. Who is to judge of the quantity of these articles that is necessary? If bought bona fide for the use of the vessel they are not merchandise; and if not sea stores they are then free from all inspection. They may be introduced in any quantity; they may be used for rigging the vessel entirely anew; and the owner of the vessel may be placed in a position of unfair advantage over every person in the United States, obliged to purchase or use a similar article.

HOPKINSON, District Judge. The information in this case charges that the articles above mentioned, on the 29th November, 1831, were found on board the ship Eliza, whereof William Haven, Jr., was master, as sea stores, which had not been and were not included in the report and manifest delivered on oath to the collector of the port of Philadelphia by William Haven, Jr., the master, on the 7th November, 1831. The twenty-third section of the act of March 2, 1799, directs that no goods shall be brought into the United States, from any foreign port, in any ship or vessel belonging to a citizen or inhabitant of the United States, unless the master shall have on board a manifest in writing, signed by him. The act goes on to prescribe with great particularity what the manifest must contain, concluding the enumeration with the words, "together with an account of the remaining sea stores, if any." By the twenty-fourth section of the same act, goods not included in the manifest are declared to be forfeited; but this section has no bearing on the case before the court, as the articles now in question are not informed against as goods not included in the manifest, but as sea stores not reported. This prosecution is founded on the forty-fifth section of the law, which enacts, "that in order to ascertain what articles ought to be exempt from duty, as the sea stores of a ship or vessel, the master shall particularly specify the said articles, in the report or manifest to be by him made, designating them as the sea stores of such ship or vessel;" and he is to declare on oath that they are "truly such and are not intended by way of merchandise or for sale." If the quantities are excessive, the collector is to estimate the amount of the duty on the excess, which shall be forthwith paid by the master. The act then proceeds, "and if any other or greater quantity of articles are found on board such ship or vessel, as sea stores, than are specified in such entry, or if any of the said articles shall be landed without a permit, all such articles as are not included, as aforesaid, in the report or manifest, shall be forfeited, and may be seized." It is under the enactments of this section that the present prosecution has been instituted. It relates to the sea stores of the ship, and provides for two cases: (1) When the stores are duly reported in the manifest, but it shall appear that the quantities are excessive; and in that case the duties are to be estimated on the excess, and paid by the master. (2) When articles are found on board the vessel, as sea stores, which are not included in the manifest, all such articles are forfeited; and it is on this ground that the United States claim the forfeiture of the articles in question. They were certainly found on board of the ship, after the report

and manifest were made to the custom house, and they are not included in that report. If, then, they are sea stores within the meaning and intention of the act of congress, the law has been violated and the articles are forfeited.

The same question arose in the case of an information against a cable, tried and decided a short time since, in this court. That trial was by a jury, the seizure having been made on land; this is by the court, the seizure having been made on board of the vessel. It was my opinion in the former case, and the verdict was in conformity with it, that articles purchased for the ship, to be used as part of her tackle and apparel, as part of her equipment, for her navigation, cannot be considered as her sea stores, sometimes designated as the "vessel and cabin stores;" but that these stores mean the provisions taken on board for the use of the passengers and crew, and not such articles as the anchors, cables, spars and cordage of the ship. I will not now repeat the reasons given for this opinion in the charge to the jury; I have carefully reviewed it, and find no cause to change it. I therefore think that the articles mentioned in the present information were not a part of the sea stores of the Eliza; that the master was not bound to report them in his manifest as such; and consequently, that the prosecution against them as such cannot be supported.

A question has been agitated in the argument of this case, on which I do not find it necessary to give any opinion; that is, whether a ship of the United States may take on board, at a foreign port, any quantity of articles, such as cordage, for the use of the ship, beyond what she can require for the immediate voyage she is about to proceed on, and may lay in a supply of such articles for as many subsequent voyages as the master or owners may think proper. The quantity cannot change their character, and turn them into sea stores; if unauthorised, they ought to be proceeded against as cargo or merchandise; but whether justly or not I do not intimate an opinion. In the present case I have no doubt that the articles in question were truly purchased for the use of the ship; the objection is to the quantity. As to the ravensduck and the sail cloth, the evidence is satisfactory, I believe uncontradicted, that the quantities were not more than such a vessel, by ordinary usage, would take for her voyage home. As to the twenty-three coils of cordage, there is more doubt about the necessary quantity in relation to that voyage; but they were truly intended for the ship when purchased, and actually used on board of her, part in coming home, and the rest in fitting her out for her next voyage, or during that voyage. I mention these things to remove any impression of a fraudulent or illegal design on the part of the master of this ship, in omitting to report these articles in his manifest; and not because they are of any importance to the principle on which the case is decided.

Decree. That the information be dismissed and the goods restored to the claimants.

[On an appeal to the circuit court, the decree of this court was affirmed. Case No. 16,566.]

Case No. 16,574.

UNITED STATES v. TWENTY-THREE GALLONS OF DISTILLED SPIRITS.

[See Case No. 15,280.]

Case No. 16,575.

UNITED STATES v. TWO BARRELS.

[6 Int. Rev. Rec. 44; 14 Pittsb. Leg. J. 529.] District Court, D. Wisconsin. 1867.

DISTILLER'S LICENSE—WHEN NECESSARY—MANUFACTURE OF VINEGAR.

[One who, in order to manufacture vinegar, makes a mash, such as is used for the production of spirits, boils the same in a still, from which the vapors pass into a tub containing water, in which the vapor is condensed, until a fluid containing 5 to 7 per cent. of spirits is obtained, and who does not use machinery capable of producing a higher per cent. of spirits, is not bound to take out a distiller's license.]

John D. B. Cogswell, U. S. Dist. Atty.

Smith & Solomon, for claimant.

MILLER, District Judge. The information propounds that the collector of internal revenue seized two barrels containing distilled spirits, for the cause that the owner and superintendent of a still, boiler, and other vessels, used in the distillation of spirits, neglected to make true and exact entries and reports as required by law. A claim and answer being put in, the following agreed statement of facts was submitted. The two barrels were seized on the premises of the claimant, used by him as a vinegar factory, where the contents of said barrels were produced by him in the ordinary course of manufacturing, and for the purpose of making vinegar. In order to manufacture vinegar, he makes a mash such as is ordinarily made by distillers for the production of spirits. This mash is put into a still and boiled. The vapor arising from such boiling, passes through a pipe into a tub, partially filled with water or a mixture of vinegar and water, thus condensing the vapor until a fluid is obtained, containing from five to seven per cent. of spirits. The fluid so produced is then used for the manufacture of vinegar, and can be used for no other purpose; and especially not for the purpose of producing spirits, without the process of redistillation. In the ordinary production and manufacture of spirits by distilers for sale, the vapor produced by the boiling of the mash is carried through a doubler and worm, in order to condense the same. The claimant does not use a doubler or worm,

and consequently he cannot by the machinery used by him, produce spirits of a higher degree than from five to seven per cent., not even if he should redistill the fluid produced and contained in the said two barrels hereby seized. The fluid in one of the barrels was produced by condensation of the vapor in water only, that of the other by condensation in a mixture of water and vinegar. The spirits sold in the market always contain more than fifty, usually about seventy-five per cent. A fluid containing less than thirty per cent. is not a commercial article. The claimant has not applied for or taken out a distiller's license.

This information is brought under section 25 of the act approved March 2, 1867 [14 Stat. 483], and by section 16 of that act, every person who distills or manufactures spirits or alcohol, or who brews or makes a mash, wort or wash, for distillation in the production of spirits, shall be deemed a distiller, and the making or keeping by any person of grain, mash, wash, wort or beer, prepared or fit for distillation, together with possession by such person of a still or other apparatus capable of use for distilling upon the same premises, shall be deemed and taken as presumptive evidence that such person is a distiller. So far as concerns the use of mash and a still in the same premises, claimant is within the statute definition of a distiller. But an article is not produced and cannot be produced, even by redistillation, entitled to the name or description of distilled spirits. The doubler and worm necessary to the production of a merchantable article, are not used. The still is used in the manufacture of vinegar, an article free of duty or tax, and not for the production of a dutiable article. The intention and object of the law should enter into its construction. Distilled spirits are taxed as an article of luxury; vinegar, being an article of necessity, is free.

Congress is presumed to know the ordinary process of producing this free article, and might have imposed a tax on stills used in its manufacture. It is well known that a sufficient amount of alcohol for the manufacture of vinegar can be produced without the use of a still, but by a slower process. The process of creating the five or seven per cent. of alcohol by claimant, is not distillation of spirits, which is the evaporization and subsequent condensation of a liquid by means of an alembic or still and refrigerator, or a retort and receiver. In this case there is merely an absorption of the vapor in water, or in water and vinegar. The final product is vinegar, and in no sense spirits. The resolution approved February 5, 1867, that all products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, be considered and taxed as distilled spirits, has no application to this case. The vapor produced by means of the still enters into and becomes a component part of an article free of duty or tax. It is not a product of distillation of the character of distilled spirits. It is contended that the still, being used for the purpose of distilling in the building where vinegar and other articles mentioned are manufactured, is within the prohibitions of section 25 of the act of July 13, 1866 [14 Stat. 154]. But I do not so consider it. The keeping of a still, boiler, or other vessel, for the purpose of distilling, in the building where vinegar and other articles mentioned are manufactured, is denounced under the penalty of the forfeiture of such stills, boilers, or other vessels, so used, and all the spirits, is an explanation of the section of the act in regard to this case. Here the still is not used for the purposes of distilling spirits as above shown, and the article manufactured or in process of manufacture, is not distilled spirits and not to be forfeited as such. The process of making vinegar does not come within that section.

It is further contended, in support of this information, that the claimant having possession of a still, may distill spirits in violation of the laws. While the establishment is open to the visitation of vigilant officers, and the sole business of making vinegar is carried on without suspicion, the argument that there might be a possible violation of the law is not sufficient to authorize condemnation in advance of the commission of a statutory offense. The information must be dismissed.

Case No. 16,576.

UNITED STATES v. TWO CASES OF WOOLENS.

[5 Hunt, Mer. Mag. 171.]

Circuit Court, S. D. New York. April Term, 1841.

CUSTOMS DUTIES—UNDERVALUATION—MARKET PRICE.

[On a proceeding to forfeit goods as having been invoiced at less than their actual cost at the place of exportation, the market price at that place at the time is admissible as the surest test of the honesty of the transaction.]

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

BY THE COURT (THOMPSON, Circuit Justice). This was a writ of error to the district court, upon a judgment acquitting the goods. The information charged the goods with having been invoiced at less than their actual cost at the place of exportation. On the trial, evidence was given of their actual purchase at the invoice price; but this was contested by evidence on the part of the United States. The claimant then showed the current market value at the time and place of exportation. The United States attorney insisted that, if the jury were not satisfied of the actual purchase on the terms set up by the claimant, they should find against the claimant, and could not look at the actual general market value. The judge, however,

charged that they might look to the actual market value. And this is the error complained of.

The actual cost was no doubt in issue. There was no question as to the admissibility of evidence of the actual market value. The question was as to the mode in which the jury should consider it; and upon this the decision of the district judge was correct. The evidence was relevant to the issue. Unless the actual seller can always be produced, it may be impossible to give proof of actual cost; it may be impossible to produce the witnesses actually present at the sale. The market price is the surest test of the fairness and honesty of the transaction, and of the question whether the price in the invoice was probably the price really paid. It would be a very harsh rule to lay down that no other evidence would suffice but that of actual purchase. Judgment affirmed.

Case No. 16,577.

UNITED STATES v. The TWO FRIENDS.

[1 Hall, Law J. 483.]

District Court, D. Pennsylvania. 1808.

EMBARGO LAWS—SEIZURES FOR VIOLATION.

Mr. Dallas filed a libel against the sloop Two Friends, a French owned vessel, and her cargo [Baptiste Genanty, master], seized by the collector, for a breach of the laws relating to the embargo; and process of monition was ordered to issue in due form.

Case No. 16,578.

UNITED STATES v. TWO HORSES.

[9 Ben 529.] [1]

District Court, E. D. New York. May, 1878.

INTERNAL REVENUE—FORFEITURE—SECTION 14 OF THE ACT OF JUNE, 1866—EVIDENCE—KNOWLEDGE OR INTENT.

1. Where distilled spirits, which were being conveyed contrary to law, upon a truck, were seized, and also the truck and horses were seized, and all proceeded against to obtain a decree of forfeiture, and a decree by default obtained against the spirits, but a defence interposed for the truck and horses: *Held*, that in a trial for the forfeiture of the truck and horses, the decree of condemnation entered against the spirits, by default, was not conclusive evidence against the owner of the truck and horses that the spirits were being removed with intent to defraud the revenue.

2. Knowledge or intent on the part of the owner of a conveyance used in transporting spirits subject to tax that are being removed contrary to law is not required to be shown in order to a forfeiture of such conveyance and by virtue of section 14 of the internal revenue act of 1866 [14 Stat. 151].

A. W. Tenney, U. S. Dist. Atty.

P. S. Crooke, for the owner of the property.

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

BENEDICT, District Judge. This case comes before the court upon a motion for a new trial. It is a proceeding in rem against two horses and a truck alleged to have become forfeited to the United States by virtue of section 14 of the act of July 13, 1866 (14 Stat. 151). The facts are as follows: This truck and horses, while engaged in conveying certain distilled spirits under circumstances of suspicion, were seized as forfeited to the United States. The spirits forming the load of the truck were also seized at the same time. The truck, horses, and spirits were all proceeded against by one information. The owner of the truck and horses asserted no interest in the spirits, but filed his claim to the truck and horses, and an answer denying the allegations of the information. No person appeared to claim the spirits, and they were accordingly adjudged forfeited by default, and have been condemned and sold as forfeited to the United States. The proceeding went to a trial as to the horses and truck before the jury, when a question arose which I have been requested in behalf of the claimant to re-examine upon this motion. The evidence on the part of the government showed that the spirits seized upon the truck, although branded as rectified spirits, were in fact raw spirits, and that these spirits had been condemned by default as forfeited to the United States by reason of having been removed with intent to defraud the United States of the tax thereon. The claimant offered evidence tending to show that the driver of the truck and horses, who was in this case the owner, had no knowledge of the fraudulent character of the spirits, or of any fraudulent intent in connection with the removal thereof, and had no intention, in carting the spirits, to aid in defrauding the government. This evidence was excluded, and a verdict for the government was directed, subject to the opinion of the court.

On the part of the United States the contention is that evidence having been given requiring the conclusion that the removal of the spirits in process of accomplishment by the claimant's truck at the time of seizure was for the purpose of defrauding the government of the tax, the forfeiture of the truck and horses must follow, and whether the owner of the truck knew the fraudulent character of the transaction in which he was engaged is an immaterial fact in a proceeding to forfeit the truck and horses under the statute referred to.

That it is competent to forfeit property by reason of its use in facilitating fraud without any guilty intent upon the part of the owner, has been settled by repeated decisions. The question in this case is whether the statute under consideration has made a guilty intent on the part of the owner of a conveyance which is used in the unlawful removal of spirits, to be a necessary fact, to be proved in order to make a case of forfeiture of such conveyance. I find no words in the statute that indicate an intention to make the knowledge

or intent of the owner of a conveyance which is used in transporting goods subject to tax that are being removed within the meaning of the 14th section of the act of 1866, with intent to defraud the United States of the tax, a material fact. The context seems to point to the opposite conclusion, for the cart and horses used in the removal are mentioned in connection with the casks containing the commodity, and both are made subject to forfeiture by the same words. It can hardly be supposed that proof of knowledge of the fraud on the part of the owner of casks used to transport spirits was intended to be required, as in most cases it would be wholly impossible to obtain such proof. If such proof of knowledge be not required in respect to the casks, it cannot be in respect to the cart and horses used in the removal. Furthermore the provision in respect to casks containing the commodity, and the cart and horses used in the removal, is by this section expressly made a general provision, applicable to every case where any goods shall be forfeited under this act or any other act of congress relating to the internal revenue; whence it must be inferred that the intent mentioned in the beginning of this section was not intended to be made a requisite of the forfeiture provided in respect to the casks, carts, and horses.

The reason why this express provision was made in respect to the forfeiture of things used in removing spirits contrary to law was to link the fate of the vehicle with that of the articles conveyed, in order to deter parties from putting their vehicles at the disposal of those who would be likely to use them for purposes of fraud. There are many instances of a similar intention in the statute. Thus, under the act of 1818 (3 Stat. 451, § 2), the forfeiture of the cargo of a vessel is made to depend upon the liability of the vessel herself to condemnation. So when a boiler was used for the purpose of illicit distillation by persons unknown to the owner, and without his knowledge, permission, or consent, it was held by this court and on appeal by the circuit court (Woodruff, J.) that the fact that the owner of the vessel was innocent, and had no knowledge of the use to which his boiler was put, did not relieve the boiler from forfeiture. U. S. v. Two Steam Boilers [Case No. 16,588], July 9, 1874. See U. S. v. Seven Barrels of Distilled Oil [Id. 16,253], and also U. S. v. Distilled Spirits [Id. 3,923], Blatchford, J. So the 12th section of the act of 1872 [17 Stat. 238] provides that when spirits which have been withdrawn and shipped for exportation shall be intentionally relanded, the spirits, the vessel from which the same were landed, and all boats, vehicles, horses, and other animals, used in relanding and removing such spirits, shall be forfeited. In respect to which statute Judge Woodruff remarks: "It is expected that the owner of property will see to the use made of it at his peril." U. S. v. Distillery at Spring Valley [Case No. 14,963].

There is yet another question suggested on the brief, but which I do not understand to be deemed of much importance in the present case, and that is whether the record of the condemnation of the spirits by default is conclusive as against the defendant to show that the spirits had become forfeited by reason of the removal with intent to defraud. My opinion is that the record of the condemnation by default is not conclusive against the defendant. The fact that no person appeared to claim the spirits, and that they were condemned by default, is competent evidence bearing upon the question of intent, but it is not conclusive in this proceeding. As the evidence stood I think the jury would properly find that the spirits when seized were being removed with intent to defraud, and the verdict was directed upon the idea that no controversy was intended upon that question; but if the claimant now desires to go to the jury upon that question, he may have a new trial to enable him to do so.

UNITED STATES v. TWO HUNDRED AND FIFTY BARRELS OF MOLASSES. See Case No 14,293.

Case No. 16,579.

UNITED STATES v. TWO HUNDRED AND FIFTY-SIX BARRELS OF BEER.

[2 Bond, 395.] [1]

District Court, S. D. Ohio. Oct. Term, 1870.

INTERNAL REVENUE — FORFEITURES FOR FRAUD — INTENT—ILLICIT SALES OF BEER—EXTENT OF FORFEITURES.

1. Under section 9 of the internal revenue act of July, 1866 [14 Stat. 146], it is a necessary element of the frauds specified in it that there should be an intent to defraud, by evading the payment of the tax or duty imposed by law.

2. Under said section, not only is beer proved to have been illicitly sold or intended for sale, without payment of the tax imposed by law, subject to forfeiture, but all the beer found in possession or custody of claimants, and the raw materials, fixtures, and appliances of the brewery are, by law, infected with fraud.

Warner M. Bateman, U. S. Dist. Atty., and Lewis H. Bond, for the United States.

Richard Harrison, James Sloane, and Mr. McClelland, for claimants.

LEAVITT, District Judge (charging jury). The United States claim, in this proceeding, the forfeiture of two hundred and fifty-six barrels of beer, and numerous articles of personal property, found at and pertaining to the brewery of the claimants, Weber & Beihl, at the town of London, in Madison county. The property has all been seized, by order of the collector of revenue, and is now proceeded against as forfeited to the United States, for alleged frauds by the said claimants. The case is one of great interest to these claimants, not only as it involves a large amount of property, but as its result

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

may affect their position in the community. It is not necessary to detain the jury by an elaborate statement of the different charges set out in the information as the grounds on which the counsel for the United States ask for a verdict of forfeiture against the property in question. The controlling and decisive inquiry for the jury is, whether the charge of fraud in the manufacture of beer by these claimants is established by the evidence. If the fact of fraud, as charged, is made out, there is no room for doubt that, under the stringent operation of the internal revenue laws, not only is the specific beer proved to have been illicitly sold or intended for sale without the payment of the tax imposed by law, subject to forfeiture, but all the beer found in possession or custody of the claimants, together with all the raw material, fixtures, and appliances of the brewery. Upon the theory that fraud has been perpetrated in the establishment, all the property and effects pertaining to it are, by law, infected with fraud and liable to forfeiture. This results from the comprehensive and far-reaching operation of section 9 of the revenue act of 1866, under which the charge of fraud set forth in the first count of the information is based. Without attempting to state all the provisions of that section, the court may remark that it is a necessary element of the frauds specified in it, that there should appear to have been an intent to defraud by evading the payment of tax or duty imposed by law. And, in the absence of proof warranting the inference of such fraudulent intent, there can not be a conviction under that section. It will be for the jury to say whether, from the evidence, fraud is proved.

It will be obvious to the jury, that the only issue on which they are to pass in this case is, whether these claimants, as manufacturers of beer, have sold the article, or offered it for sale, without the proper stamps on the barrels or casks, showing the payment of the tax as required by law. This is the sole question in this case. The charge in one of the counts in the information, that beer was removed, sold, or offered for sale with stamps which had been before used, is not insisted on by the attorneys for the government. The only fact of fraud, relied on as proved, relates to the seven kegs of beer sent by the claimants from their brewery to the town of Washington for sale, and which were found deposited in a cellar in that place. It is claimed, by the district attorney, that these seven kegs were without stamps, and were therefore removed and in the market without any evidence of the payment of the tax. If the jury are satisfied that this fact is established by the evidence, it would warrant a verdict of forfeiture as claimed by the government. The fact, that the beer had been sent from the brewery without the payment of the tax, would justify the legal conclusion that there was an intention to evade the tax, and involved a violation of section 9 of the statute before referred to. On the other hand, if the United States has failed to convince the jury that these seven kegs were without stamps, this prosecution fails and your verdict must be for the claimants. As to the point indicated, the jury will have perceived there is conflict in the evidence of the parties. If the testimony of the witnesses for the government is credible and uncontradicted, the jury will have no hesitancy in concluding that the seven beer kegs, when discovered at Washington, were without stamps, and that the law had been violated and a forfeiture incurred. But there is testimony tending to prove that all the beer sent from the claimants' brewery to Washington was stamped at the brewery, with the exception of one load, and as to that, as the day was wet and there was danger the stamps might be destroyed or defaced by the rain, stamps were furnished to the driver of the wagon, to be put on the kegs after their arrival at Washington; and the driver swears they were put on according to instructions.

It seems quite unnecessary to notice the evidence in detail. The jury have doubtless a clear understanding of the issue on which they are to pass, and the evidence which applies to it. I leave it with them to decide which way the evidence preponderates. It may not be out of place to remark, that several witnesses for the claimants testify, affirmatively, that all the beer kegs shipped from the brewery, with the exception before noticed, were duly stamped; and as to that exception, a satisfactory reason is given why the stamps were not put on at the brewery. Opposed to this, the jury have the negative testimony of the government witnesses that there were no stamps on the seven kegs they examined. The jury will bear in mind, that the failure to place stamps on the seven kegs is the only fact of fraud charged against the owners of the brewery. The evidence of the revenue officers, at London, is in favor of the integrity of the owners in regard to government taxes. They swear, with all their vigilance in the detection and punishment of frauds on the revenue, they found nothing in the management of this brewery to induce a suspicion that it was not honestly and fairly conducted, so far as the rights of the government were concerned. This testimony is highly creditable to these claimants, and the jury may properly inquire what should be its effect as bearing on the specific fraud charged against them. It would certainly be legitimate, as repelling any presumption of the fraud, and put the government, if it would claim a forfeiture, under the necessity of proving it by clear and indubitable evidence.

I have purposely avoided any discussion or notice of the sections of the statute other than the ninth, to which I have adverted. There seems no necessity for bringing other sections specially to the notice of the jury, for the plain reason that if the jury should find

the fraud charged, the case would be clearly within the scope of section 9; and on that a verdict could be based. The case is therefore simplified, and more intelligible to the jury, by limiting their inquiries to the counts framed under that section.

The verdict of the jury was, that there was no cause of forfeiture; and an order of court was entered for the restoration of the property seized to the possession of the claimants.

UNITED STATES v. TWO HUNDRED AND FORTY BUNDLES OF CIGARS. See Case No. 15,066.

Case No. 16,580.

UNITED STATES v. TWO HUNDRED AND SEVENTY-EIGHT BARRELS OF DISTILLED SPIRITS.

[3 Cliff. 261;[1] 10 Int. Rev. Rec. 164; 16 Pittsb. Leg. J. 250.]

Circuit Court, D. Massachusetts. May Term, 1869.[2]

INTERNAL REVENUE — BONDED WAREHOUSES — FRAUDULENT WITHDRAWALS — KNOWLEDGE OF AGENT — MIXTURE OF FRAUDULENT WITH INNOCENT SPIRITS — FORFEITURE — EVIDENCE OF INTENT — BILL OF EXCEPTIONS.

1. Where goods are withdrawn from a United States bonded warehouse by fraud, the permit so obtained is a mere nullity, and the person perpetrating the fraud has no more right to the possession of the merchandise than if the same had been taken by force or had been stolen by him.

2. Goods removed from a United States bonded warehouse by consent of the collector obtained by fraud are subject to forfeiture.

3. Where a person purchases goods as agent for another, knowing that the same had been removed before the taxes were paid, from a United States bonded warehouse by fraud, the principal would be bound by the knowledge of the agent.

4. The jury must find in such case that the agent was cognizant of the fraud at the time he made the purchase, else they would not be justified in finding that the principal was affected by the antecedent knowledge of the agent.

5. The only office of a bill of exceptions is to bring before the appellate court such questions as were duly raised and properly saved in the subordinate court.

6. Where spirits fraudulently withdrawn from a bonded warehouse were seized for nonpayment of the taxes thereon, after they had been mixed at a rectifying establishment with others belonging to the claimants, so that they could not be distinguished, it was held that the United States were entitled to a forfeiture of a fair proportion of the mixture, even though the mixture might have been innocently made, provided the jury were satisfied from the evidence, and under the instructions of the court, that the spirits fraudulently withdrawn would have been by law liable to forfeiture, if they had not been so mingled with others.

7. The right of the United States to a forfeiture cannot be destroyed by the intermixture of the liquors fraudulently taken from the warehouse, with others not subject to forfeiture.

8. If spirits liable to forfeiture in consequence of fraudulent removal from a United States bonded warehouse and for nonpayment of taxes, were fraudulently mixed with others by the claimants and belonging to them, in order to destroy the identity of the goods so fraudulently removed, then the entire quantity is forfeited.

9. This rule is never applied where the goods can be separated and distinguished.

10. If the claimants knew, when they made the mixture, that the spirits which they mixed with their own had been fraudulently withdrawn from the bonded warehouse, then the spirits seized would be liable to forfeiture.

11. The rule might be otherwise where the effect of the intermixture was to convert the substances into a new species, unless the new species can be reduced to its elements.

12. Wherever goods of a similar kind are innocently intermixed, so that they cannot be distinguished, and they are not substantially destroyed, as by the production of a different species, the several owners may reclaim their respective shares, and take possession of the same wherever they can find them, if they can do so without a breach of the peace, or they may bring trover for the value of their proportions, against the person in possession, after demand and notice.

13. Under the act of July 13, 1866 [14 Stat. 98], where spirits on which taxes were imposed were found in the custody of the claimants, after fraudulent removal from the warehouse, with the taxes unpaid, it must be assumed, under a finding of the jury like the one in this case, that the claimants held them for the purpose of selling and removal in fraud of the revenue.

Error to the district court of the United States for the district of Massachusetts.

Certain distilled spirits, described in the information, were seized at Boston in this district, on April 27, 1867, and the original information was filed in the district court on May 15 following. [Case unreported.] The cause of seizure, as alleged, was that the spirits in question were manufactured in the United States, and that having been so manufactured they were at the time of seizure, and had been for a long time before, subject to a tax imposed thereon, under the acts of congress relating to internal revenue; that the barrels containing the spirits were then and there found elsewhere than in a bonded warehouse, to wit, in a store and building occupied by the firm of one of the claimants, which was not a bonded warehouse; that the tax so imposed on the said distilled spirits had never been paid, and that the said distilled spirits had not then and there been removed from a bonded warehouse according to law. Subsequent to the filing of the information, the claimants [Joseph A. Boyden and John H. Harrington] appeared and severally pleaded that the goods did not, nor did any part thereof, become forfeited as alleged in the information, and that none of the allegations in the information were true. Issue was joined upon each of those pleas, and the verdict of the jury was in favor of the United States. Exceptions were taken by the claimants to the refusal of the court to instruct the jury, as requested, and also to the instructions of the court as given to the jury. Separate claims were filed by the respective

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

[2] [Affirmed in 11 Wall. (78 U. S.) 356.]

claimants for distinct portions of the spirits seized, and in making their defence they set up, in certain aspects of the case, very different theories, both in the pleadings and by the bill of exceptions. Prior to the seizure several hundred barrels of spirits of domestic manufacture deposited here, in the bonded warehouses of the United States, had been withdrawn upon application made in due form to the collector of the district. The application represented that the spirits were to be transported to Eastport, in the state of Maine, for exportation to a foreign market; but the several bonds given in the case, as required by law and the regulations of the department, proved to be false and fraudulent; and the bill of exceptions stated that the spirits were not so transported, nor were they intended to be transported, as represented in the application to withdraw the same, but were removed for sale and consumption in this district without the payment of the taxes.

The spirits seized in this proceeding were found in this district, as the evidence tended to show, in a building occupied by the claimants, but not a bonded warehouse, and were at the time of seizure in their possession. The theory of the United States was, that the spirits seized were a certain part of the spirits previously withdrawn from the bonded warehouses, by means of those false and fraudulent bonds, and that the claimants were parties to the conspiracy by which the same were so withdrawn without the payment of the taxes, and in fraud of the laws of congress providing for the assessment and collection of the internal revenue. The claimants denied that the spirits in controversy were any portion of the spirits so fraudulently withdrawn from the bonded warehouses, and insisted that the one hundred and twenty-four barrels embraced in the claim first filed had been put in leaches, with other lots of spirits, and mixed and rectified so that it was impossible to identify any one lot from another, as when originally put into the leaches. Several answers were made by the government to that defence. It was insisted that the spirits in question were a part of the indentical spirits so fraudulently removed from the bonded warehouses, and denied that they had ever been mixed with any other lots as alleged. That the mixing of the spirits, if done as alleged, was intentionally and fraudulently done by the claimants, with the knowledge that the same had been so withdrawn by fraud from the bonded warehouses, and for the purpose of destroying the identity of the spirits, and to defraud the United States of the tax imposed on the spirits. Harrington contended that he bought the spirits described in the claim through and by means of the other claimant, as his agent, and they both claimed that they purchased the spirits in open market, and without any knowledge that the same had been fraudulently withdrawn from the bonded warehouses; but the government insisted that the spirits were in the possession of the claimants at the time of seizure, and that they intended to sell and remove the same, in fraud of the internal revenue laws, and with the design to evade the payment of the taxes.

Evidence was introduced, as stated in the bill of exceptions, tending to prove the facts as claimed both by the United States and the claimants, and it was admitted that the seizure was made before the expiration of the time allowed by the regulations of the department for the completion of the transportation. Forfeiture of the spirits seized was alleged, in the first count of the information, for a violation of the provisions contained in section 44 of the act of July 13, 1866, which enacts that persons who shall remove any distilled spirits from the place where they were distilled, otherwise than into bonded warehouses, as provided by law, shall be liable to a penalty or to imprisonment, and the provision is, that all distilled spirits so removed, and that all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed on the same not having been paid, shall be forfeited, and may be seized and sold for the tax and expenses of seizure and sale. See 14 Stat. 163.

G. S. Hillard, U. S. Dist. Atty.
R. M. Morse, Jr., for claimants.

CLIFFORD, Circuit Justice. Merchandise, articles, or objects on which taxes are imposed by the provisions of law, found in the possession or within the control of any person, in fraud of the internal revenue laws, or with the design to avoid the payment of such taxes, may be seized as provided in section 9 of the act of July 13, 1866, and the provision is, that the same shall be forfeited on that account. 14 Stat. 111.

Founded, as the second and third counts are, upon that provision, it is quite clear that they are drawn with technical accuracy, and it is not necessary to examine the fourth and fifth counts, as they were withdrawn before verdict. See, also, 13 Stat. 240; 14 Stat. 160, 162. All necessity for any discussion in regard to facts of the case is removed by the verdict of the jury, which shows that the theory assumed by the United States is correct: that the spirits described in the information were parcel of the spirits previously withdrawn from the bonded warehouses by means of the false and fraudulent bonds, and that the claimants were parties to the conspiracy by which the same were so withdrawn without the payment of the taxes to which they were subject under the internal revenue laws. Nothing, therefore, remains to be considered but the exceptions to the rulings and instructions of the court. Examination will first be made of the exceptions taken by the claimants to the rulings of the court in refusing the prayers they presented for instructions to the jury. They requested the court to instruct the jury that the spirits, if they had been deposited in a bonded ware-

house, and had been removed therefrom upon application to the collector and by his authority, for rectification or transportation for exportation, were not liable to forfeiture. Unlimited as the language of the request is, argument is hardly necessary to show that it was properly refused, as the language is broad enough to save the spirits from forfeiture, even if found in the possession and within the control of the party who fraudulently withdrew them from the bonded warehouse.

Fraud, it is sometimes said, will vitiate anything, but the request in this case makes no distinction between a possession obtained by fraud and that acquired according to law. Strictly examined, the theory of the request is, that the spirits were not liable to forfeiture if they had been formally withdrawn (no matter by what means) from the bonded warehouse where they had been deposited; but the court is of the opinion that a permit obtained by fraud from the collector to withdraw the spirits, as respects the perpetrator of the fraud, is a mere nullity, and such a party would have no better right to the possession of the spirits than he would have had if they had been stolen by him, or than he would have had if he had taken them by force from the public warehouse.

Precisely the same objections apply to the second request for instruction to the jury, which was that if the spirits had been removed from a bonded warehouse upon application to the collector, and upon giving bonds to his acceptance and upon his permission, and were seized before the expiration of the time allowed for the rectification or transportation, then the spirits were not liable to forfeiture. Like the preceding, this request is based on the theory of law, that if the spirits passed out of the bonded warehouse by consent of the collector, no matter if his consent was procured by the grossest fraud, or even by force, the spirits are not liable to forfeiture, even in the hands of the guilty party. Such a theory cannot be adopted, and need not be further examined. Apart from the qualification appended by the court to the third request, it would need no explanation, as it was given as requested, so far as respects the first-named claimant. The substance of the request was, that if the spirits had been removed from a bonded warehouse, as supposed in the preceding request, and had been bought by the claimants of the party who withdrew the same, or his agent, without knowledge of the fact that the bonds furnished were worthless, or that the spirits were removed from the warehouse with intent to defraud the United States, then the spirits were not liable to forfeiture. Given as the request was, so far as respects the first claimant, he has no grounds of complaint, unless it be with the verdict of the jury, as will presently more fully appear. Stated in the exact words of the court, the qualification annexed to the request was that if Boyden bought the spirits as agent for Harrington, and Boyden was cognizant of the fraud, Harrington would be so, and by his knowledge. Whether the knowledge Boyden had of the fraud was acquired before or after he was agent, to make the purchase for his principal, does not appear, but for the purpose of this investigation it must be assumed that it was before he was so employed, as the instruction, as given, is broad enough to include both theories. Authorities are not wanting where it is held that the principal is not bound by any such knowledge of his agent, unless the agent acquired the knowledge subsequent to his employment. Bank of U. S. v. Davis, 2 Hill, 460; Howard Ins. Co. v. Halsey, 8 N. Y. 274; Weisser's Adm'rs v. Denison, 6 Seld. [10 N. Y.] 77; New York Cent. Ins. Co. v. National Protection Ins. Co., 20 Barb. 476; 1 Pars. Cont. 75; 2 Lead. Cas. Eq. 164. Those authorities hold that unless notice of the facts in question come to the knowledge of the agent while he is concerned for the principal, and in the course of the very transaction in which he is employed, the principal is not affected by the knowledge of the agent; but Judge Story admits that if the knowledge was acquired by the agent so near the transaction that the agent must be presumed to recollect it, the principal is affected by that knowledge. Story, Ag. (16th Ed.) § 140. Such was the express ruling of the court in the case of Hovey v. Blanchard, 13 N. H. 145, and the reasons assigned in support of the ruling appear to be correct. Patten v. Merchants' & Farmers' Mut. Fire Ins. Co., 40 N. H. 375; Hargreaves v. Rothwell, 1 Keen, 158; Fuller v. Bennett, 2 Hare, 404; Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252; 13 Am. Law Reg. 138.

Contrary decisions have been made upon the point in the courts of the past century. The court of common pleas held, in the case of Dresser v. Norwood, 108 E. C. L. 585, that the principal was not affected in the sale and purchase of merchandise with any knowledge acquired by his agent before his employment, but the case was carried to the exchequer chamber, where the judgment of the common pleas was unanimously overruled. Where the agent of the buyer purchases, on behalf of his principal, goods of the factor of the seller, the agent having present in his mind, at the time of the purchase, that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, says the court, is the knowledge of the principal. Dresser v. Norwood, 17 C. B. (N. S.) 481. By the instruction in this case, the jury were told that if the agent was cognizant of the fraud at the time of the purchase, the principal was bound by that knowledge, and I am of the opinion that the charge was correct, whether the knowledge of the agent was acquired at that time or the day before, as the requirement of the instruction was, that the jury must find that the agent was cognizant of the

fraud at the time he made the purchase, else they would not be justified in finding that the principal was affected by the antecedent knowledge of the agent. Beyond question, the jury found that the first-named claimant was in the possession of the spirits with knowledge, at the time he made the purchase for the other claimant, that they had been withdrawn by fraud from the bonded warehouses, and that the tax to which they were subject had not been paid. Suggestion is made that the evidence did not warrant the finding of the jury, but the decisive answer to that suggestion is, that the only office of a bill of exceptions is to bring before the appellate court such questions as were duly raised and properly saved in the subordinate court.

Exception was also taken to the ruling of the court in refusing to give the fourth request for instruction, which was to the effect as follows: That if the spirits, proved in the case not to have paid a tax, had passed through the rectifiers in which there were other spirits, and had in that way become mixed with them, then no portion of the spirits when rectified would be liable to forfeiture; but the court refused to give the instruction as requested, and instructed the jury to the effect following: That if the spirits seized came from the rectifiers in which the spirits so fraudulently withdrawn from the bonded warehouses were mixed with other lots belonging to the claimants so that they could not be distinguished, the United States were entitled to a forfeiture of a fair proportion of the mixture, even though the mixture might have been innocently made, provided the jury were satisfied, from the evidence under the instructions given by the court, that the spirits so fraudulently withdrawn would be by law forfeited if they had not been so mixed with other lots. That if the jury were satisfied, as aforesaid, that the spirits so fraudulently removed would have been forfeited if they had not been so mixed, and the jury also find that they were fraudulently so mixed by the claimants with knowledge that they had been so removed by fraud, and for the purpose of destroying the identity of the spirits and of defrauding the United States, then the entire quantity seized is forfeited. Extended reply to the objections taken to the ruling of the court in refusing to give the fourth request for instruction is unnecessary, as it obviously assumed that the rights of the United States were wholly lost by the intermixture, however made and by whomsoever the act was done. Such a rule cannot be adopted, as it merges all distinction between an innocent and fraudulent act, and requires the same finding by the jury, whether the mixture was occasioned by mistake or was the result of fraudulent design. Cases where the intermixture is made by mutual consent or by the act of a third person need not be considered, as it is conceded that the intermixture in this case was by the act of the claimants, and it is not pretended that the United States consented to the act. Where the intermixture was made willfully and not by mutual consent, by the rules of the civil law, he who made it acquired the whole upon the ground of conversion, but the common law adopted the opposite rule, and with more policy and justice to guard against fraud, gave the whole property, without requiring any account, to him whose property was originally invaded, and its distinct character destroyed. 2 Kent, Comm. (11th Ed.) 448; Ryder v. Hathaway, 21 Pick. 305; Hart v. Ten Eyck, 2 Johns. Ch. 62; Willard v. Rice, 11 Metc. (Mass.) 493; Wingate v. Smith, 20 Me. 289; Taylor v. Jones, 42 N. H. 25. Many exceptions, however, exist to that rule, and it is said that it is never carried further than necessity requires, and it is certain that it never applies in cases where the goods can be distinguished and separated, as in that case no change of property takes place. 3 Bl. Comm. 405; Frost v. Willard, 9 Barb. 440; Curtis v. Groat, 6 Johns. 168. Divested of immaterial matters, the case before the court presents the following facts. Distilled spirits fraudulently withdrawn from the bonded warehouses, and liable to forfeiture on that account, were mixed by the claimants with other similar spirits of their own property, and the mixture so made by the claimants was passed through the process of rectification; and the question is, whether the rectified product was subject to seizure and forfeiture, because one moiety of the mixture had been fraudulently withdrawn as aforesaid from the bonded warehouses.

Examined carefully, it will be seen that the fourth request for instruction affirms that no portion of the spirits under those circumstances would be liable to forfeiture, and as framed it admits of no exception or qualification, and therefore is plainly erroneous, as it is clear that the spirits seized would be liable to forfeiture if the claimants knew, when they made the mixture, that the spirits which they mixed with their own had been fraudulently withdrawn from the bonded warehouses, and were then and there liable to forfeiture on that account. Exceptional cases undoubtedly arise even under the rules of common law, where it is held that an undistinguishable confusion of goods with other goods of similar species works a conversion, and that the title passes to the party in possession; but the general rule is certainly the other way, unless the effect of the intermixture was not only to destroy the identity, but to convert the substance into a new species. Different rules apply where the intermixture is of goods or substances of different species, or where the effect of the intermixture is to produce something of a different species, unless the new species can be reduced to its former rude materials or elements. Pratt v. Bryant, 20 Vt. 333. Several cases decide that where the effect of the intermixture is to produce an entirely different species, then it may be held that there is a conversion, and the person whose property has been innocently taken

loses his property, but has a right of action to recover its value. Silsbury v. McCoon, 3 Comst. [3 N. Y.] 379; Davis v. Easley, 13 Ill. 192; Betts v. Lee, 5 Johns. 348; Brown v. Sax, 7 Cow. 95. Whenever goods of a similar kind are innocently intermixed, so that they cannot be distinguished, and they are not substantially destroyed, by the production of something of a different species, the several owners may reclaim their respective shares, and may take possession of the same wherever they can find it, if they can do so without a breach of the peace, or they may bring trover for the value of their respective proportions against the person in possession, after demand and notice. Ryder v. Hathaway, 21 Pick. 298; Pratt v. Bryant, 20 Vt. 333; Colwill v. Reeves, 2 Camp. 576; Bryant v. Ware, 30 Me. 295; Beach v. Schmultz, 20 Ill. 185; McDowell v. Rissell, 37 Pa. St. 165. Apply these rules to the first instruction given by the court, and it is clear that it was quite as favorable to the claimants as they had any right to expect. Rectification did not change the species of the spirits, but the effect of passing them through the rectifiers was to remove impurities, and perhaps to raise their value, and the instruction given by the court saved to the claimants the benefit of any such improvement in the spirits. The correctness of the second instruction is too obvious to require any argument in its support. Objection is also made that the ninth section of the act of July 13, 1866, affords no legal foundation for the second and third counts in the information. Taxes were imposed on these spirits by the provisions of law, and they were found in the possession and custody of the claimants, and within their control, and it must be assumed, under the finding of the jury, that the claimants held the spirits in possession, for the purpose of selling and removing them, in fraud of the internal revenue laws, and with design to avoid the payment of the taxes, and the provision is, that all such merchandise, articles, or objects may be seized by the collector, and the same shall be forfeited. U. S. v. One Still [Case No. 15,954].

Judgment affirmed.

[Affirmed by supreme court in 11 Wall. (78 U. S.) 356.]

Case No. 16,581.

UNITED STATES v. TWO HUNDRED AND SEVENTY-EIGHT BARRELS OF DISTILLED SPIRITS.

[4 Law & Eq. Rep. 237.] [1]

Circuit Court, D. Massachusetts. July 19, 1877.

INTERNAL REVENUE—INFORMER—SPECIAL TREASURY AGENT.

A special agent of the government appointed to investigate a fraud is not an informer in respect to facts found in the ordinary and regular discharge of his duty.

Cornelius Stagg filed a petition to share, as informer, in the forfeiture in this case, which was prosecuted under the internal revenue laws and resulted in favor of the United States. The petitioner's rights were dependent upon the statute of 1866 (14 Stat. 145), which gave to the person who should first inform of the cause, matter or thing, whereby any fine, penalty or forfeiture shall be incurred, such share thereof as the secretary of the treasury should by general regulations provide, not exceeding one moiety, nor more than five thousand dollars; the informer to be ascertained by the court which shall have imposed the fine, etc. The petitioner alleged that he held an appointment as special agent of the treasury department, and that he came to Boston at the request of the collector of internal revenue for the Third district to investigate the fraud by reason of which the forfeiture was incurred, and while so employed he acquired information which led to the forfeiture and gave the information to the collector. The United States filed an answer, which amounted to a demurrer.

P. Cummings, for the United States.
G. M. Reed, for petitioner.

LOWELL, District Judge. It was decided by the district court for this district, that a special agent detailed to investigate a known or suspected fraud and making useful discoveries in the direct line of the investigation, was not to be considered an informer under the statute of 1866. U. S. v. One Hundred Barrels of Distilled Spirits [Case No. 15,946]. The scope of this decision was explained in a later case, in which I gave an informer's share to a deputy collector. U. S. v. Thirty-Four Barrels of Whiskey [Id. 16,462]. Judge Hoar, when attorney-general, in a very elaborate and able opinion, traced the history of legislation on this subject, and while abstaining from any intimation of his opinion touching the precise case now before us, that of a special agent or detective, dissented from so much of the decision in U. S. v. One Hundred Barrels, supra, as held an officer of internal revenue not to be entitled to call himself an informer in respect to facts discovered in the ordinary and regular discharge of his duty. Such I understand to be likewise the meaning of Judge Benedict's decision in U. S. v. Chassell [Case No. 14,789], while Judge Blatchford agrees with my decision. Four Cutting Machines [Id. 4,987].

In this state of opinion two judges of this court have reviewed the law upon the subject, and we adhere to the opinion that it is not the intention of congress that a special agent appointed to investigate a suspected fraud shall have an informer's share, because he investigates thoroughly and discovers facts which were only surmised. As it has fallen to my part to pronounce the opinion, I can only

[1] [Reprinted by permission.]

say that my decisions already cited give all the reasons that I consider it necessary to give at this time. Petition denied.

UNITED STATES ex rel. AMES v. TWO HUNDRED AND SEVENTY-FIVE CADDIES OF TOBACCO. See Case No. 15,881.

Case No. 16,582.

UNITED STATES v. TWO HUNDRED AND SIX BARRELS.

[See Case No. 16,503.]

Case No. 16,583.

UNITED STATES v. TWO HUNDRED AND SIXTY-NINE AND ONE-HALF BALES OF COTTON.

[Woolw. 236; [1] 25 Law Rep. 451; Rev. Cas. 1.]

Circuit Court, D. Missouri. Oct., 1868.

PROCEEDINGS IN PRIZE—JURISDICTION ON RIVERS—ATTACK FROM SEA—THE LOCALITY—THE VESSELS AIDING.

1. Great laxity is tolerated in proceedings in prize courts; and irregularities, such as the captors not being parties, and not bringing the prize into court for adjudication, may be corrected.

2. The admiralty courts of the United States have jurisdiction in prize over captures made on the Mississippi river during the current Rebellion.

3. There are certain reasons, founded on the general principles of international law, why every capture on the high seas, jure belli, shall be carried before a prize court.

4. The exclusive jurisdiction of the admiralty over the great rivers is now well established.

5. The naval contests thereon have been of great magnitude during the current Rebellion, and numerous captures, jure belli, have been made, and the so-called "Confederate States" have been recognized as belligerents.

6. The prize jurisdiction has been sustained only when the naval arm has made, or co-operated in making, or, by its presence and active assistance, contributed immediately in effecting the capture.

7. The force operated from the sea.

8. The capture has been of some place used in naval warfare, as an island, &c.

9. Vessels not commanded by government officers, nor armed, and used merely as transports for troops, are not war vessels, and do not bring within the prize jurisdiction a capture on land by military forces.

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

This was a proceeding in prize for the adjudication of certain cotton. The facts [2] appear from the libel, which was as follows: United States of America, Eastern District of Missouri, ss.: In the District Court of Said United States for Said Eastern District. To the Honorable Samuel Treat, Judge of Said District Court: The libel of William W. Edwards, attorney of the United States for said Eastern district of Missouri, who, being here in his own proper person, prosecutes in the name and on behalf of the United States, against 269½ bales of cotton, marked "C. S. A." and other marks, and against all persons lawfully intervening for their interest therein, does hereby propound, allege, and articulately declare to this honorable court as follows:

Firstly. That said 269½ bales of cotton, marked as aforesaid, are now in the city of St. Louis, in the said Eastern district, and are in the possession and custody of the marshal of this court; that the same were first seized by said marshal on the 13th day of October, A. D. 1862, the said bales of cotton being, at the time of said seizure, on board of the steamboat John H. Dickey, and on the Mississippi river, a public navigable water of the United States, and within the admiralty and maritime jurisdiction of this court.

Secondly. That on or about the 26th day of September, A. D. 1862, in pursuance of the in-

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission. 25 Law Rep. 451, contains only a partial report.]

[2] NOTE [from 25 Law Rep. 451]. This lot of cotton, after having been captured, as stated in the opinion, was brought to Helena, and there got into private hands. It was taken from Helena to Memphis as private property, there seized by the quartermaster, and shipped to the military authorities at St. Louis, by whom it was turned over to the collector of that port. He reported it to the district attorney for violation of the revenue laws. That officer filed a libel against the cotton for violating the "nonintercourse" act of July 13, 1861 [12 Stat. 255], and, also, to provide for contingencies which need not be here described, filed a libel, or rather information, containing two counts,—one under the act of August 6, 1861 [12 Stat. 319], "to confiscate property used for insurrectionary purposes," and one under the confiscation act of July 17, 1862 [12 Stat. 589]. He besides filed the libels which gave rise to the present decision. Various conflicting claims were filed, and the claimants excepted to the second and third libels, principally on the ground of jurisdiction. The constitutionality of the confiscation act of July 17, 1862, was also discussed at bar, but not decided; Judge Treat of the district court holding, in a very able and elaborate opinion, covering all those points, that this cotton was not, within the 7th section of that act, either "found" or "first brought" within the Eastern district of Missouri, as appeared from the libel, and that, therefore, under that act, the court had no jurisdiction. This decision left the second libel standing upon the count based upon the act of August 6th, and this case is still pending in the district court. The exceptions to the third or "prize" libel were sustained, and the libel dismissed, and from this decree an appeal taken, the result of which is seen in the present decision. The court states that the libel is not "aptly framed" as a prize libel. This was intentional. It is obvious that the proceedings previous to the filing of the prize libel were, as prize proceedings, wholly irregular. None of the machinery of prize courts was prepared or in operation at St. Louis. The object was to file such a libel as would raise on its face the objections that would certainly be made. If the case were really one of prize jurisdiction, irregularities of procedure would not divest the jurisdiction. The Dos Hermanos, 2 Wheat. [15 U. S.] 76.

structions of the president of the United States, Captain William Sands, being a duly appointed and commissioned officer of the army of the United States, and being there in the military service of the United States, in the army called the "Army of the Southwest," the said army being then stationed near the town of Helena, in the state of Arkansas, and then and there operating in military warfare, under and by command of the president of the United States, against the rebels in arms against the government of the United States; that the said Captain Sands, with and in command of a battalion of the 10th regiment of Illinois cavalry, which was then and there a part of said army of the Southwest, and then and there in the military service of the government of the United States, and acting under the order of the president thereof against said insurrectionists, left the encampment of said army near said Helena, and embarked on the Mississippi river on board the boats Jatan and Conway, which were then and there vessels of the United States, and in the service of the government thereof, for the purpose of going on an expedition of war, called a scouting expedition or reconnaissance, into a certain district of the state of Mississippi, held, possessed, and controlled by said insurrectionists, so in arms against said government of the United States; that said detachment, being so embarked, did proceed by way of the Mississippi river, and land in said state of Mississippi, and then and there penetrated into the country so occupied and controlled as aforesaid; that said captain and his command, while so employed, discovered, and by force of superior numbers overpowered, certain insurrectionists then and there in arms against the government of the United States, and commanded by a certain insurrectionist styling himself a lieutenant in the army of the Confederate States of America, and took said so-called lieutenant prisoner; that said captain and his command captured from, and then and there took out of the possession of, said rebels in arms, the said 269½ bales of cotton, together with some twenty or thirty other bales of cotton, and seized the same as a prize of war; that said cotton was captured, seized, and taken away by said soldiers of the United States, in the service of the government thereof, in time of war, when on a hostile expedition into an insurrectionary state and district, from insurrectionists waging war, and aiding and abetting the rebellion against the government of the United States; that it was by said soldiers of the United States conveyed to said river, and was taken thence to said state of Arkansas, within the lines of the army of the United States in said state; that said 269½ bales, after being detained there, were afterwards brought to said St. Louis. And the said attorney of the United States says, that said 269½ bales of cotton were, on being so captured, ever since have been, and yet are, the property of the United States, and of no other person whatever; that as property so captured in war from insurrectionists in arms against the government, by troops of the United States, the said 269½ bales of cotton are forfeited and confiscated to the United States.

Thirdly. And for other and further matter in this behalf, the said attorney for the United States says, that in addition to the matters set forth in the second article of this libel, it is also true that the said detachment was greatly aided and assisted in said capture by the said vessels so in the service of the United States as aforesaid; that said detachment embarked on board said vessels on the said river, being then and there a public navigable water of the United States, and within their admiralty jurisdiction, and was by said vessels conveyed on said water nearly to the place of said capture, at or near which place the said vessels, their officers and crews, co-operated with said troops in making said capture; that said capture was made by the combined force of said troops and said vessels, with their officers and crews, and could not have been made except by such co-operation and assistance. But the said attorney is not informed in regard to the names of any of said officers or crew of either of said vessels, the said cotton not having been brought by them, or any of them, within the jurisdiction of this court.

Fourthly. That all and singular the premises are true, and within the jurisdiction of the United States, and of this honorable court; that the matters hereinbefore stated are matters public and notorious.

Wherefore the said attorney on behalf of the United States prays the usual process and monition, according to the course of practice in such cases, and that all persons claiming any interest in the said property, or any part thereof, may be cited to answer the premises; and that all due proceedings being had, the said 269½ bales of cotton may be condemned as forfeited, and for such other orders, decrees, and relief as is right and proper in the premises.

To which libel Daniel Wolf interposed his exceptions as follows: The United States v. 269½ Bales of Cotton. Libel No. 940, 1862. In the District Court of the United States for the Eastern District of Missouri. To the Honorable Samuel Treat, Judge of Said District Court: Daniel Wolf, claimant of ninety-three bales marked "D. W." of said 269½ bales of cotton, now comes and demurs and excepts to said libel, on the following grounds, and for the causes following: (1) That the supposed facts alleged in said libel do not constitute a cause or ground of forfeiture or confiscation of said 269½ bales of cotton, or any portions thereof, under any law or usage of the United States or of nations. (2) That the supposed facts alleged in said petition do not bring the said cause and

subject matter of said libel within the jurisdiction of this court. (3) Because said libel is indefinite and vague in its statements, and bad for general uncertainty in that respect. (4) Because the subject matter of complaint, as in said libel stated, is not a matter or subject for prosecution by libel.

And William M. M'Pherson also interposed exceptions as follows: The United States of America v. 269½ Bales of Cotton. No. 940. In the District Court of the United States for the Eastern District of Missouri. To the Honorable Samuel Treat, Judge of Said District: The exceptions of William M. M'Pherson to the libel of William W. Edwards, attorney of the United States for the Eastern district aforesaid, alleges that: First. The court has no jurisdiction in the premises, as the same is set forth in said libel. Second. That any forfeiture for the matters and things in said libel mentioned, would be contrary to the constitution and laws of the United States. Third. That upon the matters and things in said libel contained, this court could give no judgment against the libelled goods. Wherefore the said claimant is not bound to answer the same, and prays that said libel may be dismissed.

In the district court these exceptions were sustained and the libel dismissed. [Case unreported.] Thereupon the United States appealed to this court.

Mr. Noble, for the United States.
Mr. Glover, for claimants.

MILLER, Circuit Justice. This is an appeal from the decree of the district court for the Eastern district of Missouri, dismissing the libel upon exceptions taken to its sufficiency. In the prayer for an appeal, the case is alleged to be one of prize of war. The counsel state distinctly that they so understand it; and that the district court, in hearing it, was sitting as a prize court in admiralty. No claim is made under any of the acts concerning confiscation or forfeiture of the property of rebels in the present war, nor under any act prohibiting trade or intercourse with the enemy. The proceeding against the property in question is based solely on the ground that it is captured jure belli; and application is now made to this court for condemnation of its proceeds as prize of war.

But very few lawyers of the present day have any experience in prize courts; and it is no reflection upon the general professional character of the learned counsel who drew the libel in this case to say, that though perhaps more nearly a prize libel than anything else, it is not, as such, aptly framed. In substance the statement of facts in the libel, on which the condemnation of the cotton is asked, is as follows: On the 26th day of September, 1862, Captain William Sands, an officer of the United States army, embarked at Helena on the boats, Jatan and Conway, with a battalion of the 10th regiment of Illinois cavalry, said "vessels being vessels of the United States, and in the service of the government thereof." It was a scouting expedition or reconnaissance into a certain district in the state of Mississippi, then held and controlled by the enemy. The detachment, proceeding by the river and by land, penetrated into the district just mentioned, and there came upon, and by force of arms overpowered, a body of the enemy's troops. They took prisoner a lieutenant in command, and from the possession of the force under him took the 269½ bales of cotton herein libelled. These were marked "C. S. A.," and were seized as prize of war. The soldiers conveyed the cotton to the river; thence it was taken to the state of Arkansas, and it was finally brought to this city. It is averred that it is now the property of the United States, and is forfeited and confiscated. It is then alleged that the Mississippi river is within the admiralty jurisdiction of the courts of the United States; that the capture was made by the joint action of the vessels aforesaid and the soldiers, and that it could not have been made without the co-operation of the vessels.

There are many irregularities in the proceedings, as disclosed by the record. Thus, the captors are not parties to this proceeding, and did not bring the prize into any court for adjudication. Moreover, as appears from the certificate of the clerk, the property has been sold, and the proceeds cannot be remitted to this court, because they are held to answer to other libels, filed before the present one, on the instance side of the district court. But these irregularities are not fatal to the proceeding. Great laxity is tolerated in prize courts. This is stated with his customary fulness and learning by Mr. Justice Story in The Emulous [Case No. 4,479]. And if this case shall be found, in its substantial elements, to constitute prize of war, the libel may be reformed, and the proceedings corrected.

The first point which is pressed upon the attention of the court is, that on the waters of the Mississippi, remote from the ocean, and from any territory belonging to foreign or independent nations, there can be no captures that call for the interposition of a prize court. I confess that, previous to the argument of the case, and the investigation which I have made in consequence, I was strongly inclined to that opinion. There are certain reasons, founded upon the general principles of international law, why every capture upon the high seas, jure belli, shall be carried before a prize court. The oceans and seas are the great highways of the world. Free transit over them is the common right of all nations; exclusive jurisdiction or control is possessed by none. Civilized states also claim and exercise the right of trading and mooring their ships in each other's ports; and, subject to such restrictions as each government may impose for its own security, or the protection of its own trade, this is conceded by the rules of international law. And when nations go to war,

when hostile fleets encounter, and ports are blockaded, the law of nations, where for peace it has established these privileges and limitations, calls into operation, as a recognized part of itself, the laws of war. There must be a jurisdiction administering those laws, and this is found alone in the prize courts. These courts decide questions of the existence of such a war as confers belligerent rights; of the validity of blockades; of the lawfulness of captures; and various other matters which no other court can reach, and which, affecting as they do the rights of neutrals and enemies, who are not subject to the jurisdiction otherwise than by the international laws applicable to a state of war, can be determined only by those laws.

It is urged, with great force, that none of these principles are necessary, or can properly be applied, on a river wholly within the boundaries of one government; that all captures made thereon should be subject alone to the law of the country which has the sovereignty, to the exclusion of those rules of the law of nations which govern the common highways of the world. However conclusive this argument might have been fifty years ago, if taken in the admiralty court of Great Britain, there are many reasons why it should not, in more modern times, in an American court, and during the present war, have the same force.

The supreme court of the United States, in The Prize Cases, 2 Black [67 U. S.] 635, at the last term, decided that between the government of the United States and the rebels a war exists, which confers upon our government at least, the rights of war; that the success of the rebels has enabled them to establish military lines, south of which is enemy's territory and property. This must apply as well to the waters within those lines, as to the land; and it would seem necessarily to bring the laws of war into action as to captures made on those waters. While it was the well settled doctrine of the admiralty court of England, that its jurisdiction as an instance court did not extend beyond tide water, and even in tide water was excluded from all places in the body of a county, as from havens, and within reaches between headlands, no such restrictions were placed upon the jurisdiction of the prize courts.

In the case of Lindo v. Rodney, reported in 2 Doug. 613, note, Lord Mansfield said: "As to a matter done in the ports, havens, or rivers within the body of a county of the realm, the admiralty is excluded. But the prize court has uniformly, without objection, tried all captures in ports, havens, &c., within the realm. It happens often. We all know of such cases."

In the case of The Genesee Chief, 12 How. [53 U. S.] 443, the supreme court of the United States says that the reason why the English courts of admiralty hold tide water to be the limit of their jurisdiction, is that the rivers of England are navigable only as far as the tide ebbs and flows; and tide water and navigable water being thus rendered synonymous and interchangeable terms, the former has been substituted for the latter as more convenient and easily determinated. Of the lakes in the interior of this continent, in the same decision, it is said: "These lakes are in truth inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them, between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance, and for the prize power of the admiralty court to administer international law, and if the one cannot be established, neither can the other."

These sentences are pregnant with meaning; and at the time they were delivered, except that we have here no foreign nation, every word of them applied with equal force to the great river on whose banks we are now sitting. And since the same court has recognized a belligerent foe in the rebel forces, that difference for our present purpose has no longer any significance. Hostile fleets have encountered upon its waters, prizes have been made, and it has become the theatre of naval contests of greater magnitude than, at the time that opinion was rendered, were dreamt of, on the lakes. In the case last mentioned, the initiation and rapid increase of our inland steam navigation, and the new relations of commerce which it established, were given as additional reason for the recognition of admiralty powers in the western waters. But gunboats with iron plates and immense guns capable of demolishing the strongest forts and intrenchments, had not then been thought of. The present war has developed on these rivers a naval power unknown to former times. In a case like the present, we cannot shut our eyes to these facts. Our gallant tars have been sent from the seaboard to man these vessels on the rivers. When, by their valor, and by the use of vessels of war, they have captured an enemy's vessel, shall they have no court in which their prizes may be condemned? The introduction of steam, as a motive power, into vessels of war, enabling them to penetrate on inland waters, far into the interior of the country, has revolutionized naval warfare in this respect, as in many others. The presence in the waters of this great stream of a hostile fleet of a foreign nation, is among the contingencies for which we must be prepared. Again, captures may be made on this river, and others similarly situated, of property belonging to neutrals, who have a right, before it is condemned to the captors, to the judgment of a competent court upon their claims. We have then a court which, by the constitution and laws, is authorized to deter-

mine this question of prize or no prize; and we see that the exigency may arise, in which the question between the captor and the claimant should, by the adjudication of this court, be answered. We certainly cannot decline the jurisdiction, and, in the face of the fact, hold, that on the Mississippi river no such case can arise.

The question then presents itself, whether the facts of this capture, as set forth in the libel, make a case of prize of war. The appellant insists that the case is one of conjunct capture by land and naval, or, at least, by land and water forces; and that this circumstance brings it within our jurisdiction, as a prize court. This position may seem to be supported by the language of Mr. Justice Story in the case of The Emulous [Case No. 4,479]. He says, on page 575: "However the question may be, as to the right of the admiralty to take cognizance of mere captures made on the land, exclusively by land forces, as to which I give no opinion, it is very clear that its jurisdiction is not confined to mere captures at sea. The prize jurisdiction does not depend upon locality, but upon the subject matter. The words of the prize commission contain authority to proceed upon all, and all manner of captures, seizures, prizes and reprisals, of all ships and goods, that are and shall be taken. The admiralty therefore not only takes cognizance of all captures made at sea, in creeks, havens, and rivers, but also of all captures made on land, where the same have been made by a naval force, or by co-operation with a naval force. This exercise of jurisdiction is settled by the most solemn adjudications." But this general language of the learned judge is to be qualified by the case then before him. The property proceeded against was 550 tons of pine lumber, part of the cargo of the American ship Emulous, which was seized as enemy's property after the same had been discharged from said ship, and, as the statement of the case as reported by Gallison shows, while afloat in a creek or dock at New Bedford, where the tide ebbs and flows. And the learned judge expressly says: "Had it been landed and remained on land, it would have deserved consideration, whether it could have been proceeded against as prize under the admiralty jurisdiction; or whether, if liable to seizure and condemnation in our courts, the remedy ought not to have been pursued by a process applicable to municipal confiscations. On these points, I give no opinion." The case was carried to the supreme court, where the decree of the circuit court was reversed. The case is reported under the title of Brown v. U. S., 8 Cranch [12 U. S.] 110. In a dissenting opinion, characterized by the most extended and learned research, Mr. Justice Story expressly says: "As to the right of the admiralty to take cognizance of mere captures made on the land, exclusively by land forces, I give no opinion."

The case of The Rebeckah, 1 C. Rob. Adm. 227, decided in 1799, was a contest between the admiralty and the captors. The circumstances were, that the vessel, on putting into St. Marcou for safety, was fired at from the fort, and struck her colors, and was taken by a boat's crew sent out from the fort. St. Marcou was a small island, occupied exclusively as a naval station for naval supplies, and for the temporary accommodation of ships of war. The question was between the admiralty claiming the vessel as droit of admiralty, and the captors. Sir William Scott, in his judgment, holds it a maritime capture, because, although made from the shore, "the whole force, such as it is, upon this little spot, is entirely subservient to these vessels, and for their use, and for no other purpose, as the certificates declare. Such a place, so selected and so employed, is hardly to be considered as anything else than as a part or appendage of the naval force; it is a sort of stationary tender, rather attached to and dependent upon these vessels, than having the vessels attached to and dependent upon it. This peculiar character of the place distinguishes it most essentially from the case of a land fortress possessed by a military garrison. The capture then was effected by naval commissioned persons, using a force immediately subject to their use; and from its peculiar circumstances sufficiently naval in itself to be distinguished from an ordinary land force, subject to military persons. It is a maritime capture, effected regularly by a maritime force, and in a spot where the right of the admiralty had not yet commenced upon the thing itself at the time of the surrender." And he clearly indicates that, had the force by which the capture was effected been under the command of the military instead of naval officers, it would have been droit of admiralty. He says: "Upon this subject I entirely accede to what has been laid down, that a capture at sea, made by a force upon the land (which is a case certainly possible, though not frequent), is considered generally as a non-commissioned capture, and inures to the benefit of the lord high admiral. Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that ship would a droit of admiralty, and the garrison must be content to take a reward from the bounty of the admiralty, and not a prize-interest under the king's proclamation." And again, he holds that, even when naval forces land and use arms of the military, and fortifications by which to effect the capture, the result is the same.

This, then, is the case of a capture by naval forces of property on the same footing as if it were afloat.

The Island of Trinidad, 5 C. Rob. Adm. 95, decided in 1804, was a claim on behalf of several ships to share in the capture, among other things, of the island and its dependencies. Without entering into any consideration of the principle here involved, and occupying himself with a question whether the vessels

were present at the close of the conflict, the same learned judge pronounced some of them entitled to share in the capture of the island. This, then, is the case of a capture by naval forces operating from the sea, of property on land.

The capture of The Chinsurah, Act. 179, decided in the high court of appeals in 1809, by Sir William Grant, was the case of the capture of the Dutch town and fort by a vessel of the squadron, and a detachment of the East India Company's troops. Previous to the capture, the Dutch East India Company had entered into many contracts with neighboring merchants for supplies of certain articles of merchandise. The governor of the place, among others, had entered into such contract with one Halsey, and had on account thereof advanced to him £23,200. At the time of the surrender, this contract remained unperformed, and the question was presented, whether it should be condemned for the English Company or for the naval forces, each seemingly claiming the whole fund. The court condemned the property generally as prize to the crown, to be distributed. From this sentence both parties appealed. The sentence was affirmed. The reasons for the judgment on the point before us here are not assigned. But it is plain that the case was one of conjunct capture, which was effected by operations from the sea, and by the aid of naval forces, and, as it would seem, all under the vice-admiral's command.

Nor does the case of The Thorshaven, Edw. Adm. 102, throw much light on the question. It is enough to say here that, whichever command should be deemed the captors, the capture was by naval forces operating in naval warfare.

In The Buenos Ayres, 1 Dod. 28, the single clause with which Sir William Scott commences his judgment shows the circumstances of the case, and how summarily the question of jurisdiction is disposed of by him. He says: "This is a proceeding originating in the capture of the Spanish settlement Buenos Ayres. A claim is set up by Captain Honeymoon and the other officers and crew of his Majesty's ship the Leda, to share as joint captors in the proceeds of the property captured at that settlement."

I think these cases as nearly support the jurisdiction as any English cases which can be cited. In this country, besides The Emulous [supra], we have the case of Six Hundred and Eighty Pieces Merchandise [Case No. 12,915]. These articles of merchandise were ferried across the Chowau river, in North Carolina, at Reddick's ferry, and landed on a wharf, preparatory to their being taken to Weldon. The river was at the time occupied by a naval force of the United States, for blockading and other purposes of war of the Rebellion. The goods were captured soon after they were landed by a force sent for the purpose from the United States steamer "Hunchback," under Lieutenant Calhoun. In his brief opinion, Judge Sprague says: "The authorities cited show that the jurisdiction of the admiralty over matters of prize certainly extends far enough to cover the circumstances of this case. How much farther it may extend it is not necessary to consider. Here, the merchandise being enemy's property, was ferried across a river occupied by our naval forces for all purposes of war, acting under strictly naval authority; and it was soon afterwards seized on the wharf by a naval force sent from one of our vessels for the purpose. It is not necessary to decide whether this property might not be liable to municipal confiscation or forfeiture on the instance side of this court, under any of the special statutes passed to meet this rebellion. It is not proceeded against as forfeited or confiscated, but for condemnation as prize of war; and I am satisfied that the admiralty jurisdiction of this court is sufficient to embrace the case."

In every one of the cases where the court has sustained its jurisdiction in prize, it appears that the force making the capture, or co-operating in the act, was the naval arm, or, by its presence and active assistance, it contributed immediately in effecting the capture; that it operated from the sea; that the place captured was an island, town, or fortress, itself established to resist naval attack, and to support and succor naval expeditions, and accessible from the sea, so that the attacking squadron could directly bring to bear upon it the stress of its armament. In the present case we do not discover any of these conditions. It is true there is an averment in the libel that the vessels, and officers, and crews co-operated with the troops in making the capture, and that it could not have been made without such co-operation. Perhaps if this allegation stood alone, under the very loose mode of pleading permitted in prize cases, the libel might be sustained, and the parties remitted to their proofs. But the libel, in its preceding part, sets out the substantial facts of the case, and the language just referred to is evidently but the conclusion deduced by counsel from those facts.

The facts thus stated, and not the legal conclusions drawn from them by the pleader, constitute the real foundation of the case, and we cannot reject as surplusage the part of the libel containing them. We must, for the present, consider them as constituting the case presented and relied on by the libellant. From that statement it is not at all inferrible that the vessels named were any part of the naval force of the United States. Indeed, we know that no naval force then existed in those waters. The gunboats were made a part of the navy by order of the government on the 1st day of October, several days after the capture. It is not supposed or alleged that any of these vessels were officered by government officers. They

were not even armed vessels, and could not take part in any action, or contribute in any manner, by belligerent force, to the capture. It is not shown that they remained after they landed the forces; and the fair inference is, that they did not. It is averred that the cotton was conveyed by the soldiers to the river, and that it was taken thence to the state of Arkansas; but it is not alleged that it was so taken by the vessels. In short, the entire statement is consistent with the fact that the vessels and crews were in the employment of the war department, and were used merely as transports to carry the troops; and it is consistent with no other supposition. It is also evident that the capture was not made on the banks of the river, but some distance inland, where the vessels could render no other assistance than to land the forces, and receive them again. I cannot conceive that the employment by the government of unarmed steamboats for the mere purpose of transporting troops from one point to another on the Mississippi river, can render every capture made by the troops or detachments so transported prize of war, and let in the crews and officers of those vessels to a share of the prize money. Such vessels are in no sense war vessels, and are neither expected nor fitted to take part in engagements.

In The Cape of Good Hope, 2 C. Rob. Adm. 274, the same claim was interposed on behalf of vessels, which, by reason of many circumstances, were much more nearly connected with the service than these two steamers. Sir William Scott, in his judgment says: "In the next place, it is argued, that these ships were actually employed in military service, although there is no such averment in the plea. It comes out in evidence only (by which I must observe the other party is deprived of the opportunity of counterpleading) that their boats were employed in carrying provisions and military stores on shore: that was a service certainly, but not a service beyond the common extent of transport duty. They landed them, probably at the same time with the troops for whose use they were intended; and if not at the same time, still it is no more than what they were bound to do with the stores and provisions they carried." If now we consider the case as a capture on land of enemy's property, the question seems to me, notwithstanding Mr. Justice Story's intimation cited above, even if it can be allowed the force of an intimation, to be free from doubt. It is conceded that the history of neither American nor British jurisprudence furnishes an instance of the exercise of such a jurisdiction by a prize court, unless it has been conferred by statute. My own researches, and the far more laborious and learned examination of my brother who decided the case in the district court, confirm the propriety of the concession. Even in the cases which I have cited above, the jurisdiction was conferred by statute. In the cases of conjunct capture by the two arms of the service, the provision in the act of parliament was: "That in all conjunct expeditions of the navy and army, against any fortress upon the land, directed by instructions from his majesty, the flag and general officers, and commanders, and other officers, seamen, marines, and soldiers, shall have such proportionable interest and property as his majesty, under his sign manual, shall think fit to order and direct." [2 C. Rob. Adm. 287.] And in the other cases, the provision is contained in the 3d section of the prize act, and confers upon the ships of the crown power to capture "any fortress upon the land, or any arms, ammunition, stores of war, goods, merchandise, and treasure belonging to the state, or to any public trading company of the enemies of the crown of Great Britain upon the land."

The Army of the Deccan, 2 Knapp, 152, a leading case on the subject of military booty, in England, on account of the magnitude of the sum involved, and the great consideration upon which the decision was made, rested entirely on the army prize money act (54 Geo. III. c. 86).

In the case of Lindo v. Rodney, already quoted (decided A. D. 1782), Lord Mansfield said that he had caused the register to be examined as far back as A. D. 1690, and that he had also made an examination himself, and that no case had been found of the exercise of such a jurisdiction. Since that time, the wars of Bonaparte in Europe have occurred; the British wars in India and China; and our own wars of the present century, with Great Britain, and with Mexico. In each of them enemy's territory was invaded; and if the jurisdiction in question had been seriously supposed to exist, they must have afforded numerous instances of captures of valuable personal property on land, by land forces, where the aid of courts of prize would have been called into requisition. There are no such cases. But strong as the inference is, arising from this total absence of the exercise of such power for nearly two hundred years, during which we have records of the courts of prize, we are not left to that alone. Dr. Phillimore, in the third volume of his "Treatise on International Law" (side p. 186), speaking of prize courts, says: "It will be seen that by this tribunal, international justice is wisely, carefully, and honestly dispensed, and it is a matter of reasonable surprise that such a jurisdiction should have been strictly confined to sea prize, and without cognizance over land booty, except in cases where the two, owing to the co-operation of the army and fleet, have been blended together." He then goes on to show that land captures had probably at one time been a subject of the jurisdiction of the ancient court of chivalry, which, having fallen into desuetude, had left no successor to exercise its authority in this matter. He also states (side p. 197) that in 1840, a British

statute was passed to improve the practice, and extend the jurisdiction of the high court of admiralty, in which it was enacted that said court shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please her majesty, by the advice of her privy council, to refer to the judgment of the said court; and in all matters so referred, the court shall proceed as in cases of prize of war. It would be difficult to find a stronger legislative implication of opinion, than that here given of the normal want of this jurisdiction in a court of admiralty.

In The Two Friends, 1 C. Rob. Adm. 271, Sir William Scott says: "I know of no other definition of prize goods, than that they are goods taken on the high seas, jure belli, out of the hands of the enemy; and there is no axiom more clear than that such goods, when they come on shore, may be followed by the process of this court. In such cases the common law courts hold they have no jurisdiction, and are even anxious to disclaim it. The case of The Ooster Eems [1 C. Rob. Adm. 284, note], which has been alluded to, was very different from this. In that case there was a material distinction as to the origin of the subject matter; for it was there expressly said by the great person who then presided 'that those goods had never been taken on the high seas, they had only passed in the way of civil bailment on delivery into civil hands, and were afterwards arrested on shore as a prize.' It was held that there was no act of capture on the high seas, and therefore that they were not to be considered as prize.".

In the case of Elphinstone v. Bedreechund, 1 Knapp, 316, certain moneys of the Mahratta chiefs Nawobaoutra, with whom the British were at war, were seized. After the war, suit was brought in the municipal court of Bombay in an action of trover for the money, alleging that it had been seized after the war was ended. In that court the plaintiff recovered judgment, but on appeal to the privy council, that judgment was reversed, on the ground that it was a hostile seizure, made, if not flagrante belli, yet nondum cessante bello; and consequently the municipal court had no jurisdiction. But do they say that the plaintiff could have relief in a prize court? On the contrary, they say that if nothing was done amiss, recourse could be had only to the government for redress.

In all the works on international law, captures of personal property by land forces on land are spoken of as booty. That term is used, as we have already seen, in the extract from Phillimore, in contradistinction to the term "prize." See Wheat. Int. Law, p. 405, and Mart. Law Nat. pp. 288, 289. Vattel, in his Law of Nations (page 365), says: "As the towns and lands taken from the enemy are conquests, all movable property taken from him comes under the denomination of 'booty.' This booty naturally belongs to the sovereign making war, no less than conquests. But the sovereign may grant the troops whatever share of booty he pleases." In the note on page 288, Mart. Law Nat., it is said that the distribution of booty between sovereign and soldiers depends on the military code of the state to which they belong. It is a matter that does not come within the law of nations. By article 58 of the articles and rules of war adopted by congress in 1806 (2 Stat. 366), "all public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage, or provisions, shall be secured for the service of the United States; for the neglect of which the commanding officer is to be answerable."

In the case of Brown v. U. S., 8 Cranch [12 U. S.], 110, Mr. Justice Marshall, delivering the opinion of the court, says: "It is urged that, in executing the laws of war, the executive may seize and the courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated. This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. The rule is in its nature flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary. Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will, not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary." The great judge, and the court for which he spoke, proceeds upon the doctrine of the definition of Sir William Scott, quoted above. The property in question was not captured on the high seas, and although it had been but imperfectly landed, yet as it had been placed beyond the action of the water, it was removed from the prize jurisdiction. Mr. Justice Story, in

his dissent, insists that the jurisdiction extends to captures on land by a naval force. And it is in this, as well as in several other positions of his very learned opinion, that he is overruled by the court. The result of the case, in the court of final resort, certainly is, that property on land is not, without the aid of the statute, liable to capture and condemnation as prize of war.

Slocum v. Wheeler, 1 Conn. 429, was an action for trespass, for breaking and entering the plaintiff's dwelling-house on an island in the state of Massachusetts, and taking and carrying away several articles of personal property. The defendants justified, as the commander and crew of a boat commissioned by the president as a privateer, and a condemnation of the property by the United States district court as prize of war. The jurisdiction was questioned, on the ground, among others, that the alleged capture was made on the land. The discussion at the bar seems to have been exhaustive, and the decision made on great consideration. Chief Justice Swift delivered the opinion of the court, and he says on this subject: "It further appears from the record, that the property in question was taken on the island of Nashawinna, in the district of Massachusetts, within the territorial limits of the United States, and not on the high seas, or within the British dominions. The act of congress and the commission of the president gave the defendants no authority to capture British effects in such place. They could not be lawful prize of war. The district court had no jurisdiction; and the sentence of condemnation is no protection to the defendants."

However desirable it may be that, in a war between nations, there should exist a tribunal similar to the prize court, to administer the law of nations with reference to property captured on land, we find no warrant for asserting that any such authority exists in the admiralty courts of the United States, unless the circumstances of the capture show some element of a force operating from, or on, the water, which would bring it within the recognized rules on that subject.

As a result of these views, the decree of the district court dismissing the libel will be affirmed, unless the district attorney, upon further consideration, shall be of opinion that he can make a case on the facts which will justify the condemnation of the property libelled as prize of war; in which case he is at liberty to amend his libel as he may think proper.

NOTE. Since the above decision, the Banda and Kirwee Booty Case, L. R. 1 Adm. & Ecc. 109, has been decided in the high court of admiralty of England. In his judgment Dr. Lushington says: "But with respect of booty—property captured on land by land forces—the court of admiralty had no jurisdiction until the passing of 3 & 4 Vict. c. 65." He then sets out the section of the statute, and the order in council issued in pursuance of the act.

Case No. 16,584.

UNITED STATES v. TWO HUNDRED AND THIRTY-SIX DOZEN BOXES OF COSMETICS.

[6 Ben. 543.] [1]

District Court, S. D. New York. June, 1873.

INTERNAL REVENUE — STAMPS ON COSMETICS EXPORTED—FORFEITURE—CONSTRUCTION OF STATUTES.

A manufacturer of cosmetics in New York, having received an order from a customer at Havana, put up the goods and sent them, without any internal revenue stamp being affixed to any of the boxes, to the wharf of the Havana steamer, for transportation to Havana. The owners of the steamer gave a receipt for them. They were then seized by the government, and an information was filed to forfeit them, on the ground of their not having stamps on the boxes. The goods were not manufactured in the warehouses prescribed by section 28 of the internal revenue act of March 3, 1873 (12 Stat. 727), section 168 of the act of June 30, 1864 (13 Stat. 296). *Held* that, under section 167 of the act of June 30, 1864, as amended by section 1 of the act of March 3, 1865 (13 Stat. 482), the goods should have been stamped, although they were intended for exportation, and, not having been stamped, were liable to forfeiture.

[Cited in Alkan v. Bean, Case No. 202.]

Thomas Simons, Asst. U. S. Dist. Atty.

Thomas Harland, for claimant.

BLATCHFORD, District Judge. This is an information on a seizure of 236 dozen boxes containing cosmetics, known as "Lily White," which are alleged to be forfeited to the United States for a violation of the internal revenue laws. It comes before the court on an agreed statement of facts. The information avers that the articles seized were articles or commodities mentioned in Schedule C of the act of June 30, 1864, and acts amendatory thereof, and were subject thereby to a duty of one cent on each of said boxes, and were manufactured by Felix B. Strouse, a manufacturer of said articles or commodities at his manufactory, number 84 Duane street, in the city of New York, and that Strouse, on the 18th of February, 1873, at the city of New York, sold, sent out, removed, or delivered the said articles or commodities, so manufactured, before the duty thereon had been fully paid, by affixing thereon the proper stamp, as provided by law, and removed, or conveyed away, or deposited the same in some place, to evade the duty chargeable thereon, contrary to the statute of the United States in such case provided, whereby the same became forfeited to the United States.

The goods were found on the wharf of the Havana steamer, in New York, in a case addressed, "G. D. M., Habana." They were manufactured in New York, by the claimant, and were a cosmetic, with no admixture of

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

domestic spirits. The claimant had received from G. Del Monte of Havana, Cuba, a merchant there, an order, sent from Havana, in these words: "Send 25 gross cascarilla, oval, medium size, equal to what I had before." Del Monte was not an agent of the claimant, but was a frequent purchaser of goods from the claimant. The claimant put up the goods in question, in pursuance of this order, and sent them, without any internal revenue stamps being fixed to any of the boxes, to the wharf of the Havana steamer in a case, addressed as above for transportation to Havana. The owners of the steamer received the case from the claimant, and gave him a receipt therefor, containing its address, as above. The case was then seized. In the ordinary course of business, if the goods had not been seized, the claimant would have received from the owners of the steamer a bill of lading for the goods, expressing their consignment to Del Monte, and would have forwarded such bill of lading to Del Monte at Havana; and the claimant would have had the goods insured on his own behalf against the risks of the voyage to Havana. The retail price or value of each box and of the cosmetic in it did not exceed 25 cents, and the boxes were, in all respects, such packages as could not be lawfully sold in the United States, or lawfully removed for consumption or sale in the United States, without having a revenue stamp, denoting the payment of a tax of one cent, affixed to each package.

The 167th section of the act of June 30, 1864 (13 Stat. 296), as amended by the 1st section of the act of March 3, 1865 (13 Stat. 482), provides, that every maker or manufacturer of any of the articles or commodities mentioned in Schedule C of that act, who shall "sell, expose for sale, send out, remove, or deliver any article or commodity, manufactured as aforesaid, before the duty thereon shall have been fully paid, by affixing thereon the proper stamp, as provided by law, * * * or who shall remove, or convey away, or deposit, or cause to be removed, or conveyed away from, or deposited in, any place, any such article or commodity, to evade the duty chargeable thereon, or any part thereof, shall be subject to a penalty of one hundred dollars, together with the forfeiture of any such article or commodity." Schedule C of the act imposes a stamp duty of one cent on every packet, box, or other enclosure, containing any cosmetic, "made, prepared, and sold or removed for consumption and sale in the United States," where such packet, box, or other enclosure, with its contents, shall not exceed, at the retail price or value, the sum of 25 cents. The same Schedule C imposes a stamp duty of one cent on every packet, box, or other enclosure, containing any medicinal preparations or compositions, "made and sold, or removed for consumption and sale, * * * wherein the person making or preparing the same has, or claims to have, any private formula, or occult or secret art, for the making or preparing the same, or has, or claims to have, any exclusive right or title to the making or preparing the same, or which are prepared, uttered, vended, or exposed for sale under any letters patent, or held out or recommended to the public, by the makers, venders, or proprietors thereof, as proprietary medicines, or as remedies or specifics for any disease, diseases, or affections whatever affecting the human or animal body," where such packet, box, or other enclosure, with its contents, shall not exceed, at retail price or value, the sum of 25 cents. In the portion of Schedule C which relates to cosmetics, the words are, "made, prepared, and sold or removed for consumption and sale in the United States." In the portion of Schedule C which relates to medicinal preparations, the words are, "made and sold, or removed for consumption and sale." On this difference in language, it is contended, for the claimant, that the goods seized in this case were not subject to a stamp duty. It is claimed, that the goods were not sold in the United States, and that they were removed for consumption and sale in Havana, and were not removed for consumption and sale in the United States. It is claimed, that the words, "in the United States," in the clause respecting cosmetics, must have some meaning, and that the only proper meaning they can have, in respect to cosmetics not sold in the United States, is to understand the provision as reading, that the duty is imposed on cosmetics made in the United States, and then removed to be consumed in the United States, or to be sold in the United States. In other words, it is contended, that, while the medicinal preparations specified are taxable whenever made in the United States, and then sold or removed for consumption or sale, cosmetics, and the other articles classed therewith in Schedule C, are taxable only when made in the United States, and then sold here or removed for domestic consumption or for domestic sale.

A consideration of the history of the legislation on the subject of taxing the articles taxed by Schedule C of the act of 1864 will show that the view urged by the claimant cannot prevail. Schedule C, following section 110 of the act of July 1, 1862 (12 Stat. 484), contained like provisions with those of Schedule C in the act of 1864, in regard to taxing medicinal preparations, and like provisions to those of Schedule C in the act of 1864, in regard to taxing cosmetics. The 109th section of the act of 1862 contained the same provisions which are found in the 167th section of the act of 1864, and this additional proviso, not found in the act of 1864: "Provided, that medicines, preparations, compositions, perfumery and cosmetics, upon which stamp duties are required by this act, may, when intended for exportation, be manufactured and sold, or removed, without having

stamps affixed thereto, and without being charged with duty, as aforesaid; and every manufacturer or maker of any article, as aforesaid, intended for exportation, shall give such bonds, and be subject to such rules and regulations, to protect the revenue against fraud, as may be from time to time prescribed by the secretary of the treasury." It is manifest, from this proviso, that congress regarded Schedule C of the act of 1862, in its imposition of a tax on medicines, preparations, compositions, perfumery and cosmetics, as imposing such tax on articles intended for exportation as well as on articles not intended for exportation, because it proceeds, in the proviso, to enact how such articles, when intended for exportation, may be relieved from the tax to which they would otherwise be subject, by reason of being made here and sold here, or made here and removed from their place of manufacture for consumption or for sale. It follows, therefore, that congress regarded the words, "in the United States," found in the clause of Schedule C respecting perfumery and cosmetics, and not found in the clause of Schedule C respecting medicines and preparations, as not having any such effect as is here contended for by the claimant.

It serves to confirm this view, that congress, by the 27th section of the act of March 3, 1863 (12 Stat. 727), enacted that any person, who should, after September 30, 1863, offer for sale any of the articles named in Schedule C of the act of 1862, whether the articles so offered were imported, or were of foreign or domestic manufacture, should be deemed the manufacturer thereof, and subject to all the duties, liabilities and penalties imposed by the act of 1862 in regard to the sale of such articles without the use of the proper stamp or stamps as required in the act of 1862. This enactment is reproduced, in substance, in the 169th section of the act of 1864, with the addition of the proviso, that, when any such imported articles shall be sold in the original and unbroken package in which the bottles or other inclosures were packed by the manufacturer, the person so selling said articles shall not be subject to any penalty on account of the want of the proper stamp.

But, congress, probably finding that the provision for exportation in the 109th section of the act of 1862 did not sufficiently "protect the revenue against fraud," in the words of such proviso, enacted, by the 28th section of the act of 1863, "that all medicines, preparations, compositions, perfumery and cosmetics, intended for exportation," as provided for in section 109 of the act of 1862, "in order to be manufactured and sold or removed, without being charged with duty, and without having a stamp affixed thereto, may, under such rules and regulations as the secretary of the treasury may prescribe, be made and manufactured in warehouses known and designated, in treasury regulations, as bonded warehouses, class two." The 28th section then goes on to provide for the giving of bonds by "such manufacturer," and then says: "Such goods, when manufactured in such warehouses, may be removed for exportation, under the direction of the revenue officer having charge thereof without being charged with duty and without having a stamp affixed thereto." The same section then goes on to provide, that such manufacturer, having such bonded warehouse, may, under regulations, convey therein any materials to be used in such manufacture which are allowed by the provisions of the act of 1862 to be exported free from tax or duty, as well as the necessary articles for the preparation, putting up and export of the said manufactured articles, and that every article so used shall be exempt from stamp and excise duty; that articles and materials so to be used may be transferred from any bonded warehouse, under regulations, into any bonded warehouse, class two, in which such manufacture may be conducted, and may be used in such manufacture, and, when so used, shall be exempt from stamp and excise duty; and that any materials imported into the United States may, under regulations, be removed in original packages from on ship board, or from bonded warehouses, into the bonded warehouse, class two, in which such manufacture may be carried on, for the purpose of being used in such manufacture, without payment of duties thereon, and may be there used in such manufacture. The same section then goes on to say: "No article so removed, nor any article manufactured in said bonded warehouse, class two, shall be taken therefrom except for exportation, under the direction of the proper officer of the customs having charge thereof." It is very evident that congress intended that these regulations of the 28th section of the act of 1863 should supersede the provision for exportation made in the proviso to the 109th section of the act of 1862; and that, if it was desired to export the manufactured articles without paying a stamp duty on them, they should be manufactured in the warehouses prescribed and under the regulations provided, with the additional privileges in regard to the use of raw materials, domestic and imported, without paying excise or customs duties thereon. These provisions of the 28th section of the act of 1863 are re-enacted, in substance, in the 168th section of the act of 1864, while, as before remarked, the proviso to the 109th section of the act of 1862 is not found in the 167th section of the act of 1864, which latter section is otherwise a re-enactment of the said 109th section. The articles in question here were not made in any such bonded warehouse as is provided for, and, therefore, could not be removed from the place of manufacture, or exported, without payment of the stamp duty provided for in Schedule C of the act of 1864.

A judgment of forfeiture of the articles seized must be entered.

Case No. 16,585.

UNITED STATES v. TWO HUNDRED BARRELS OF WHISKY.

[2 Woods, 54.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1874.[2]

INTERNAL REVENUE — FORFEITURE OF SPIRITS — WHAT PROPERTY FORFEITED.

1. The spirits forfeited by section 96 of the act of July 20, 1868 (Rev. St. § 3456 [15 Stat. 164]), as a penalty for the offenses therein mentioned, are the spirits owned by the distiller, rectifier or wholesale liquor dealer, or in which he has any interest as owner at the time of the discovery of his offense.

2. The failure of a rectifier to cause spirits to be gauged and stamped, as required by the 25th section of the act of July 20, 1868 (Rev. St. § 3320), is punishable by the 57th section, not by the 96th section, of this act (Rev. St. § 3456).

[3. Cited in Coffey v. U. S., 6 Sup. Ct. 435, 116 U. S. 433, as one of the instances in which suits of this character have been brought originally in the circuit court.]

Heard on exceptions to the information.

J. R. Beckwith, U. S. Atty.

J. D. Rouse, for Karstendicke.

WOODS, Circuit Judge. The libel alleges that on the 18th of April, 1874, the whisky, being the property and in the possession of Otto H. Karstendicke, was seized by the collector of internal revenue, and its forfeiture is claimed on these grounds: (1) Because Karstendicke, being engaged in the business of a rectifier, did, on the 5th of January, 1874, fill for shipment, sale and delivery, on his rectifying premises, a large number of barrels with rectified spirits, and willfully omitted to procure and cause a United States gauger to gauge and inspect the same, and place thereon the stamps required by law. (2) Because, being on the 5th of January, 1874, a rectifier of distilled spirits, he did, on that day and at other times, empty, for the purpose of rectifying the same, the contents of a large number of casks containing distilled spirits, and neglected to file with the collector of internal revenue any notice or statement, giving the number of said casks, the serial number of the same, the number of gallons in each cask, the kind of stamps on the same, and the particular name of said spirits as known to the trade, by whom and in what district said spirits were produced, and by whom and when they were inspected.

The first count of the information is based on the 96th section of the act of July 20, 1868 (15 Stat. 164; Rev. St. § 3456). This section provides that if any distiller, rectifier, etc., shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in carrying on or conducting his business, or shall do any thing by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act, for the neglecting, omitting or refusing to do, or for the doing or causing to be done the things required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be a distiller, rectifier, etc., all distilled spirits owned by him, or in which he has any interest as owner, or if he be a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory, shall be forfeited to the United States.

The exceptions raise these questions: (1) Whether the spirits or liquors, which the law forfeits for a failure to comply with its provisions, are those owned by the distiller at the time of the commission of the offense, or at the time of its discovery, or at some other time, say the time of seizure. (2) Whether the failure by the rectifier to cause the liquors to be gauged and stamped, as required by the 25th section of the act of July 20, 1868, is punishable under the 57th section of the act, or whether it is one of those cases where no specific penalty or punishment is imposed, and is therefore punishable under the 96th section.

1. I think the fair construction of the 96th section is that the spirits or liquor owned by the distiller at the time of the discovery of the offense are what the law forfeits. Any other construction would render the penalty so difficult of application as to render it harmless. If the offense is discovered some time after its commission, it would be impossible, in most cases, to know what liquors and spirits the distiller had at that time, and his stock on hand at the date of the commission of the offense may have been sold, shipped and consumed before the discovery of the offense. It cannot be fairly held that the spirits or liquors owned at the time of the seizure can be forfeited, for that would put it in the power of the revenue officers to postpone seizure until the distiller should have a larger quantity of spirits on hand, and thus put it in their power to determine the amount of the penalty. I conclude, therefore, that the spirits owned by the distiller at the time of the discovery of his offense, and these only, are subject to forfeiture under the 96th section. The counts of the information do not inform us when the offense was discovered, or whether the property seized was owned by the claimant at the time of the discovery. It is therefore defective, in that it does not show whether the property seized was owned by the distiller at the date of the discovery of his offense, or was subsequently acquired. It does not appear from the information that the property seized is liable to forfeiture.

2. The 96th section of the act of July 20, 1868, only inflicts a penalty where there is no specific penalty imposed by any other section for the act or omission. The 25th section of the act provides, that whenever any

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

[2] [Affirmed in 95 U. S. 571.]

cask of rectified spirits shall be filled for shipment, sale or delivery on the premises of a rectifier, a United States gauger shall gauge and inspect the same, and place thereon an engraved stamp signed by the collector, showing the date when affixed and the number of proof gallons. Now the matter complained of in the information is, that the claimant did not cause this to be done, and a seizure was made, not of those packages which were not thus stamped according to law, but of other spirits owned by the claimant at a date three months subsequent to the alleged act of neglect. The question is therefore, whether the neglect to cause these casks and packages to be stamped is punishable by any other section of the act save the 96th. I think the 57th section was intended to inflict a penalty for such neglect. It declares that all distilled spirits found after thirty days from the time this act takes effect, in any cask or package containing more than five gallons, without having thereon each mark and stamp required by this act, shall be forfeited to the United States. This covers the precise case stated in the information. The offense charged is the neglect to cause the casks and packages to be stamped according to section 25. Here in section 57 we find the penalty of such omission to be merely the forfeiture of the property. We cannot then say that the omission to stamp or cause to be stamped falls under the 96th section, for the penalty imposed by that section is only applicable to cases where there is no specific penalty imposed by any other section of the act. My conclusion on this branch of the case is therefore, that where there is a neglect to cause casks or packages to be stamped as required by the 25th section, such casks or packages, and such only, are liable to forfeiture, and that other spirits or liquors of the distiller or rectifier cannot be seized and condemned for the offense.

Exceptions sustained.

[The libel was afterwards dismissed by the court, and thereupon the case was taken by appeal to the supreme court, where the judgment of this court was affirmed. 95 U. S. 571.]

Case No. 16,586.

UNITED STATES v. TWO HUNDRED BUSHELS OF CORN.

[9 Ben. 186.] [1]

District Court, E. D. New York. July, 1877.

PRACTICE IN INTERNAL REVENUE CASES—BILL OF PARTICULARS.

Where an information on behalf of the United States had been filed, for violation of the internal revenue law, as entries upon the books and other offences, and a quantity of corn, spirits, and other property seized, *held*, that the information filed being vague, claimant of the property was entitled to a bill of particulars.

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

BENEDICT, District Judge. The claimant's motion for a bill of particulars must be granted. Under an information so vague as this it would be impossible to make due preparation for trial. He is entitled to such a description of the spirits referred to in the second count as will enable him to identify the spirits on which it is claimed the tax was not paid. He is also entitled to be informed as to what entries in his books it is intended to show he should have made and has not done so under the third count. This information should be sufficiently definite to enable the claimant to know what materials and what grain it is charged that he did not enter, and by date, quantity, or other description informed what spirits distilled have not been entered at all, and what entry of material made or spirits it is intended to show has been omitted. He is also entitled to be informed as to what entries in his books it is intended to show are false.

The order must be that the district-attorney, within forty days from this time, furnish a bill of the above-named particulars to the claimant in this action.

Case No. 16,587.

UNITED STATES v. TWO HUNDRED QUARTER BOXES OF CIGARS.

[N. Y. Times, Dec. 24, 1858.]

District Court, S. D. New York. Dec. 23, 1858.

VIOLATION OF CUSTOMS LAWS — FORFEITURES — FRAUDULENT INVOICE.

[1. The fact that the appraisers have materially raised the invoice value of imported goods is prima facie, but not conclusive, evidence of undervaluation in a subsequent proceeding to forfeit the goods on the ground of fraudulent invoice.]

[2. If the fact of a material undervaluation is established, it will be presumed that it was done with intent to defraud the revenue, in the absence of clear and credible testimony excusing such undervaluation.]

This was a libel of information filed to forfeit for undervaluation two hundred quarter boxes, one hundred and twenty-five fifth boxes, and eleven hundred and forty tenth boxes, of cigars, imported in the brig Lyra in March last, by Alvarez Hein, manufacturer. The cigars were invoiced at $2,789, but on appraisement their value was raised in the average 19 per cent., whereupon this information was filed. The testimony was conflicting as to what was the actual market price of such cigars at Havana, whence they were imported. at the time of importation.

Mr. Hunt, for the United States.

Mr. Griswold, for claimants.

BETTS, District Judge (charging jury). This action demands the forfeiture of an importation of cigars, addressed to the claimants as consignees from the port of Havana in March last. The invoice of the goods sub-

mitted to the collector in this port was raised on appraisement here and was reported undervalued in its price, in most respects, to a large percentage, nearly to the amount of 30 per cent. The justness of the appraisement has been supported by the testimony of merchants trading in the article between that port and this who have been examined in court on this trial and very considerable evidence has also been submitted on the part of the claimants impugning that evidence by witnesses examined in court, and also in testimony taken on commission in Havana.

It is to be observed by the jury that this prosecution is authorized by express statute, and that the proceedings under it do not correspond entirely to suits between individuals. The United States have exclusive power to regulate the subject of importations from foreign countries to this, and to prohibit them entirely, or clothe their admissions with such conditions or restrictions as may be deemed expedient by congress. The commodities in question are made subject by statute to a duty of 30 per cent. ad valorem, and the importers are bound to make up a true invoice of the market value of the articles in the general market of Havana at the time of exportation, as a measure by which the government may impose and collect the legal duties upon them at their entry. When the goods were offered for entry, they were ordered by the collector to be appraised, and the authority to which they were referred for that purpose is empowered by statute to determine the foreign market value, and that decision is made conclusive for the purpose of assessing duties. It is not, however, conclusive, but only prima facie, proof of that value in this action. It amounts to the latter grade of evidence to that end, and then, by the provisions of another act of congress, the burden is cast upon the claimants to prove, on their part, that the appraisement does represent the real market value of the goods in Havana, and that the invoice is a fair and honest one in respect to that value. The jury will compare and weigh all the testimony on both sides to this point and determine whether the claimants have succeeded in establishing the justness of their invoice against the proof of the government. The evidence furnished in commissions taken abroad is to have the same effect on this inquiry, as to credibility, as if delivered in court.

If the jury find, upon the whole evidence, that the claimants have not justified the prices stated on their invoice, the further inquiry remains to be settled by the jury, whether the undervaluation was made designedly, or was the result of honest mistake or misapprehension. The goods are subject to condemnation only in case they are undercharged, with intent to evade the payment of the legal duties charged upon them. That purpose will be implied and presumed by the jury in the absence of clear and credible testimony on the part of the importers excusing the undervaluation, provided the jury judge the variation so considerable as to import an expectation by the importers that a profit or benefit might be expected to be secured to them by making the importation at the invoice price, instead of its true value in the foreign market. The question upon the motives of the importers and the true state of the foreign market are matters of fact, and are submitted to the jury exclusively for their decision.

The jury retired, and after a considerable time returned into court, saying that they were unable to agree, and, after some discussion, they were discharged.

UNITED STATES v. TWO PACKAGES OF DISTILLED SPIRITS. See Case No. 15,940.

Case No. 16,588.

UNITED STATES v. TWO STEAM BOILERS.

[Cited in U. S. v. Two Horses, Case No. 16,578. Nowhere reported; opinion not now accessible.]

Case No. 16,589.

UNITED STATES v. TWO THOUSAND BUSHELS OF WHEAT.

[Cited in U. S. v. The Francis Hatch, Case No. 15,158, and in U. S. v. Stevenson, Id. 16,396. Nowhere reported; opinion not now accessible.]

Case No. 16,589a.

UNITED STATES v. TWO THOUSAND FOUR HUNDRED AND NINETEEN SHEEPSKINS.

[2 Hask. 394.] [1]

District Court, D. Maine. April, 1880.

SMUGGLING — MIXTURE OF SMUGGLED WITH INNOCENT GOODS—FORFEITURES.

1. Merchandise subject to duty, mixed with other goods upon which the duties have been paid at an earlier place of entry, imported by vessel without invoice and consular certificate and without entry on the manifest, under the false pretence, that the duties on it have also been paid, and that it was protected as in transit by the same manifest, persisted in until the fraud is discovered, when the duties are tendered, subject to seizure and forfeiture under the revenue laws.

2. Such merchandise on board a foreign vessel at a wharf in Eastport, Maine, is imported into this country so as to become subject to our laws; and for their violation the same may be there seized.

3. Those packages only in which the goods intended to be smuggled were contained are liable to forfeiture and not the whole invoice. These are not so liable unless the court is satisfied that there was an intent to defraud by importing them; nor then, if the officers, after seizure, have distributed the goods so that it cannot be told in what packages the goods intended to be smuggled were placed.

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[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

In admiralty. Libel in rem against merchandise seized for violation of the revenue laws. Josephus M. Murchie appeared and claimed the property, and answered denying any illegal importation and any intent to defraud the revenue.

Wilber F. Lunt, U. S. Dist. Atty.

Frederick A. Pike and George F. Talbot, for claimant.

FOX, District Judge. This merchandise was seized by the collector of customs in the Passamaquoddy district at Eastport, on navigable waters on January 5, 1880, for alleged violations of the customs laws, and the present libel has been instituted that the same may be declared forfeited. Josephus M. Murchie, a trader of St. Stephens, in New Brunswick, is the claimant of all said merchandise, and in his answer denies all violation of law in the importation thereof, and all intention on his part in any way to have violated any of the provisions of the acts of congress.

It appears that, in October, 1879, Murchie purchased in the province of Nova Scotia about 2,000 sheepskins of rather inferior quality, which had been taken from sheep and lambs slaughtered in the summer, when the fleece is not as valuable as later in the season. These skins were procured by him in various places and at various prices, and were taken across the Bay of Fundy to St. John, from whence, by rail, they were transported to St. Stephens and stored in a portion of a barn, which had been finished off for an ice house, upon the premises of one Elliot Murchie, a brother and partner of Josephus M. Murchie, and there they remained from about the middle of October until the third day of January last. These skins were all dried, and were salted with salt, which had been used in pickling fish, and were easily distinguishable from fresh skins. The city of St. Stephens is on the easterly side of the St. Croix river, and is separated from Calais, in this district, by that river; the two places are united by a bridge about 500 feet long, at the westerly end of which, on the American shore, is an office of the United States customs revenue. In January last, there was not any boat running from Calais to Eastport; but the Stroud a small propeller under the British flag, ran as a mail and ferry boat from St. Stephens with freight and passengers, making the weekly trips to Eastport, and touching on one or more of these trips at St. Andrews, Deer Isle and Grand Menan, all in British territory. On the first of January, Murchie saw the customs officers at Calais, and consulted with them as to the course to be adopted by him for getting the skins to market He informed them where the skins were, and wanted them to go to St. Stephens and there take the account in order to estimate the duties; at first, the officers, as he swears, thought this might be done, but, on reflection, they concluded that skins must be brought within the United States if they were to be entered; and thereupon, it was arranged that Murchie should haul the skins over to the end of the bridge where they were to be examined and the duties ascertained by the officers. On January 2nd, Murchie procured a team and hay rack, and, with the aid of one Libby, loaded up the rack with skins which were taken over the bridge and there inspected; the shearling skins, or those which had not any wool of a commercial value, were thrown one side by the direction of the inspectors; the others were counted, weighed, and the quantity of wool upon them ascertained, and they were then reloaded and taken loose, in bulk, by Libby and Murchie, to the barn from whence they had been hauled, and were there thrown out on to the floor of the barn, and were not mixed with the skins remaining in the ice house. Five loads of skins were thus dealt with; the last load was carried back to the barn late in the afternoon, but was not removed from the rack until after dark, when the skins were thrown down with all the other skins upon the barn floor. Libby and Murchie both testify that they brought away from the ice house in the last load all the skins there were in it, and that none were left behind; and they also both swear that Murchie did not return to the ice house with the last load; but, after it had crossed over to St. Stephens, Murchie left it in charge of Libby and went to his shop, which was some distance from the ice house, and was not in sight from it. A correct account was taken by the customs officers of all the wool on the skins subject to duty, and of their number, viz., 1888; but no account was kept of the shearlings which were mixed with the others and hauled back. All the skins were loose and unbaled when brought into and when taken from Calais, and the customs officers never baled, corded, or sealed any portion of them. After Murchie returned to his shop, he engaged a couple of men to bale up the skins; a portion were baled and tied up that night, and the residue the next morning, making seventy-three bales. They reported the number of bales to Murchie, who thereupon went to the Calais custom house to enter the same and pay the duties; the officers called upon him for a consular invoice, which he had not obtained; the number of shearlings by estimate was fixed at eighty-five, and the whole number was given to him by the officers as 1973. He returned to St. Stephens to the place of business of the United States consular agent, one C. H. Clark, a trader in that place. Clark was not to be found, and Murchie informed Walcott, his clerk in the store, of his business with Clark, and thereupon Walcott filled out an invoice of the skins upon a blank, on the back of which was what purports to be the invoice declaration of Murchie for entry of the same at Calais made before Clark, and verified by his formal consular certificate, purporting that

the invoice was produced before him that day by Murchie, &c., as required by the act of congress.

This invoice, so certified by Clark, was then taken by Murchie to the customs officers, but it was not satisfactory to them, as the slats or shearling skins were not separately entered on the invoice; Murchie thereupon returned to Walcott, informed him of the requirement of the custom house officers, and the correction was made by him on the invoice by adding eighty-five slats, and reducing, to that extent, the number of wool skins, all of which is quite apparent upon the original invoice from the erasure thereon. By this invoice, Murchie, January 3d, entered at the custom house at Calais the 1888 skins and the wool thereon, paying a duty of $396.02, and the eighty-five slats, which were free of duty. On the same day a transit manifest was obtained by C. B. Eaton, the agent of the Stroud, from the Calais custom house for the transportation of various parcels of merchandise "by dray and boat to Eastport," among which appears entered seventy-three lots wool skins, of the value of $900, Josephus M. Murchie, Boston, consignee. Eaton, as owner of sheepskins, makes oath to the statements contained in the manifest, which does not state the number of skins as required by regulation of the department. The seventy-three bales were placed on board the Stroud on the evening of January 3d, which was Saturday, and they were carried thence to Eastport on the Monday following.

The doings of Walcott at the consular agency in St. Stephens were in open violation of all the provisions of the act of congress, relative to consular invoices; and the proceedings of the customs officers at Calais were not in compliance with the law and the regulation of the treasury department. These skins were not within the United States at the time of their entry at the custom house, but were then in New Brunswick; the number and quantity of the dutiable skins had been ascertained and were known to the customs officers, so that no detriment in this behalf was sustained by the revenue; but in one respect there was a manifest neglect of duty by these officers, as by the regulations of the treasury department, January 5, 1875, it was provided that, when goods are to be shipped from any port of the United States in transit through the province of New Brunswick, to another port of the United States, such goods, wares and merchandise shall, whenever practicable, be baled, corded and sealed by said customs officers at the port of departure. It is not pretended that these skins could not easily have been baled, corded and sealed before leaving Calais, and thus have complied with the regulations; and if this had been done, the opportunity could not have arisen for any fraud upon the government, as is now claimed to have been perpetrated. It is not contended that the claimant has not paid to the government the full amount of its duties to which it was entitled upon the 1,888 dry salted wool skins; but the libel alleges that these bales were opened and the small skins withdrawn and other large and valuable skins substituted; and it is also alleged that a large number of skins, some four or five hundred, were added to those which had passed the customs and upon which duties had been paid, so that the 1,973 skins had increased to 2,419 at the time of their reaching Eastport. The pretense that the smaller skins were withdrawn from the bundles and larger skins substituted finds no support in the testimony, and therefore requires no further remark. That there were only 1,973 skins, or thereabouts, examined by the officers at Calais, and the duties due thereon paid, and that 2,419 were found in the 73 bales when examined at Eastport is established beyond all question and is conceded by the claimant; and he presents the following explanation of this discrepancy. He testifies that on the 23d of December he purchased of one Eastman, who resided some 6 miles beyond the limit of St. Stephens, 400 wool skins which were large, fresh skins, at the rate of 76 cents, paying him therefor $305. The skins were then at Eastman's place, and he was to haul them to the ice house and there deliver them so soon as the condition of the roads would permit; that on Friday afternoon, Eastman hauled the skins and unloaded them as agreed, no other person being present, and they were, most of them, thrown by him into the ice house, some few being upon the barn floor, and that after Libby had unloaded that night the last load of skins which had been inspected and passed through the custom house, the persons employed by Murchie to bale up the skins, supposing they were to bale all there were there, baled up the Eastman skins with the others, and they were thus included in the 73 bales; and that the claimant was not informed that Eastman had delivered his lot of skins, or that they were included in the bundles, until Saturday afternoon about four o'clock, when Eastman came into his shop to purchase some groceries, and then notified him he had brought in the skins the day previous. Murchie says he at once went to the ice house and found all the skins had been included in the 73 bundles which had been hauled down to the Stroud; that not knowing what to do he went to the Calais custom house which was closed; that he then attempted to find the consular agent but without success, and at last concluded that he could accompany the goods to Eastport on the Stroud and pay the duties at that port.

The government contends that this explanation is wholly unworthy of credit, and that the Eastman skins, being of much greater value, were fraudulently bound up with the rest, with an intent and design to pass them into the country by the transit manifest as being a portion of those upon which the duties had been paid at Calais. During all this

time Elliot Murchie was absent in the woods.

The claimant took out a commission to obtain Eastman's testimony, which has been returned by the commissioner unexecuted, for the reason, as he states, that Eastman is so unwell that he cannot give his deposition. Evidence has been presented from another witness, that Eastman did haul the skins on Friday afternoon to the ice house, and Murchie swears most persistently that he was not aware that they had been delivered by Eastman until he was so informed by him on the afternoon of Saturday; that he never gave any directions that these skins should be included in these bundles, and had no reason to suppose they were so included, until he learned what Eastman had done; and the testimony of the men employed by Murchie to haul the skins, as well as that of Libby, who hauled them, rather tends to corroborate this statement of Murchie. It is however somewhat remarkable that Murchie, after he had learned that there were on board the Stroud 400 skins belonging to him on which he had paid no duty, was content merely to call at the custom house and the office of the consular agent, and finding no one at either place to afford him the requisite information, should take no further steps to ascertain where any of these officers could be found. Calais and St. Stephens are not so large cities that public officers can not easily be reached when one is really anxious to discover them; and the court here cannot but entertain very grave suspicions, whether the statement of the claimant is true in relation to this parcel of skins, but upon the whole matter, as the testimony of the claimant is positive and direct, the court is inclined to allow him the benefit of the uncertainty, and to find that these skins were not, by the authority of the claimant, included in the seventy-three bundles.

On Monday, Murchie went with the skins on the Stroud to Eastport; but he took with him no invoice or other document of any kind with which he might upon his arrival enter the skins at the custom house; his movements were anticipated by one King, an inspector of customs at Calais, whose suspicions had been aroused by the proceedings of Murchie with this property, and who went by land to Eastport, arriving there before the Stroud, and after an interview with the collector, orders were given that the skins should be counted on their arrival. Was it Murchie's intention to enter the four hundred skins and pay the duties thereon on his arrival at Eastport, or was it his purpose to get them by the custom house authorities under the transit manifest, if he could, as merchandise upon which the full duties had been paid, and, if not successful in this attempt, then, as a last resort, to enter and pay the duties thereon? The great importance of this point is quite apparent; and the government contends that from the conduct and statements of Murchie at Eastport, he did not intend to act in good faith and pay the duties on his parcel of skins if he could escape from so doing. As to what took place at the wharf between Murchie and the customs officers, as well as to Murchie's statements to the collector of customs at Eastport, at the custom house, there is a very great discrepancy in the testimony of the various witnesses. When the Stroud reached Eastport, the Falmouth, on her way from St. Johns to Portland, was at the wharf, and the Stroud ran alongside and made fast in a position to transfer to the Falmouth the merchandise on board, which was destined for Boston.

From the testimony, the court can draw but one conclusion, that Murchie, after he found out there were four hundred skins more in the packages than he had entered and paid duties upon at Calais, finally concluded to let the skins come forward on the Stroud, and attempt to transfer them to the Falmouth to transport them to Boston under the false claim and pretense that they were included in the transit manifest, and were not subject to duty, but that he had paid the duties thereon.

It is claimed, that the evidence shows that Murchie had procured the funds to pay these duties, informing the party from whom he obtained the money, that he wanted it for this purpose. Testimony to that effect has been produced; but this evidence is quite consistent with an intention to evade the payment of the duties if practicable, and, if not, then to be prepared for such an emergency, if duties were required. As bearing upon the purpose and intention of Murchie, it must be remembered that he was without any invoice or consular certificate of any description upon which to make an entry, although, but a day or two previous, he had learned from the officers at Calais, that such a document was a necessity, without which, an entry under ordinary circumstances, would not be permitted, and that a failure to produce the same, when entry should be demanded if finally allowed, would necessarily occasion great delay and prevent the immediate transfer of the goods as intended. Rev. St. § 3082, declares "that if any person shall fraudulently or knowingly import or bring into the United States or assist in so doing, any merchandise contrary to law, * * * such merchandise shall be forfeited, &c." In the case of U. S. v. Thirty-Nine Trunks [Case No. 15,885], 1876, Mr. Justice Strong, of the supreme court, held "that importing goods subject to duties, without an invoice and consular certificate, and without entry in the manifest, is not such an importation as the law permits to be made." In U. S. v. Jordan [Id. 15,498], Lowell, J., referring to the opinion of Strong, J., says: "The learned judge held * * * that the goods were illegally imported, in this, that the importer had not prepared himself with the invoices necessary to their entry at the custom house, and that the statute of 1866 should be construed to include a fraud connected with the entry of the goods, or an intent not to enter them."

Viewed in the light of these decisions, the

court can not but conclude that these four hundred skins have become forfeited to the United States under the provisions of this section. They were not only without the proper documents, but the claimant endeavored to impose upon the customs officers at Eastport, by the false pretense that the duties had been paid upon them at Calais, and that they were protected by the transit manifest; and he persisted in this fraud, until he found that it would not succeed and that some other course must be adopted by him to obtain his property.

It is urged in defense that, from the character of the skins and his employment, there was no importation of these skins prior to the seizure. It is urged, that she was a provincial mail boat, employed most of the time in foreign waters, touching only at Eastport, and, therefore, the goods had not been imported into the United States; that finding the customs officers at Eastport would not admit them to entry, and they being on board the Stroud, the claimant had the privilege of retaining the goods on board of her and returning them back to the provinces.

It is a sufficient reply to this view, that whatever may be the nationality of a vessel, when she arrives within the territory of this country, she must conform to our revenue laws; and if an attempt is made to violate them, the ship and cargo must abide the consequences as declared by act of congress. Her nationality or employment does not confer immunity and justify any act or attempt to disregard the laws of this country. That the Stroud, when alongside the Falmouth, was solely within the United States, is clearly beyond question; and the merchandise on board was amenable to our laws as absolutely as if she had been a domestic ship. Any other construction would render our revenue laws wholly ineffectual; for all that a provincial smuggler would have to do, would be to place his merchandise on board a British ship, and, without invoice or document of any description, in open day, arrive in one of our harbors, makes fast to the wharf, go on shore and test the market, and finally conclude to sell and land the merchandise without payment of duties, and, upon being detected in these proceedings, would then insist on the right to leave the country, taking with him the merchandise which he had failed to put on shore.

The court does not understand that the laws of the United States, as yet, have held out such strong inducements for their violation; and these four hundred unsalted skins, purchased of Emerson, are therefore adjudged and decreed forfeited to the United States, as having been by the owner knowingly and fraudulently, and in violation of law brought into this country with the actual intention by him to thereby defraud the United States. These goods being thus adjudged forfeited, it is claimed by the government, that the residue of the skins must also be condemned. It is said that the skins were all so mixed up by the claimant that it is impossible to distinguish the Emerson skins from the Nova Scotia lot; that there was such a confusion of goods that the one can not be separated from the other, and as the one lot has been condemned, and, by the act of the claimant or his agents, they have been thus intermixed, and he cannot select out those upon which the duty has been paid by him, they must all be decreed forfeited, as, in the case of a wilful confusion of one's own goods with another's, the whole must be taken to be the property of the latter party, unless his property can be satisfactorily distinguished. To what extent this rule, which is sometimes recognized in such cases, might be applicable in a case of this description, it is unnecessary for the court to consider, as the four hundred skins purchased of Emerson, and which are liable to forfeiture, are as easily to be selected from the dried skins as if they had been the skins of bullocks or any other animal.

It is also claimed that the 1,973 skins entered at Calais, upon which the proper duties were paid, are liable to forfeiture under the provisions of section 2864 of the Revised Statutes, and section 12, c. 391, Acts 1874 [18 Stat. 188]. Under each of these sections, it is requisite that the party, by a false invoice, or a false or fraudulent statement, or appliance or pretense, should enter or attempt to enter his merchandise. In the present instance, the attempt to enter was made at Eastport, but not until after the skins had been seized and were in the control of the officers. It is, also, not quite certain that any of the statements made by Murchie to the collector, at his office, constituted such a false or fraudulent practice or appliance, or false statement as would work a forfeiture under these provisions of law. According to the collector's testimony, Murchie did not claim in his conversation that he had paid the duties on the 400 skins, or even that it was his purpose so to do when he left St. Stephens. The substance of his statement was, that he had not paid the duties and wanted the privilege of doing so. The act of 1874 (section 12) should be construed in connection with section 2864; and, by section 12, the entire invoice in such cases is not forfeited, but only "the merchandise in the case or package containing the particular article or articles to which such fraud or alleged fraud relates." Under this section, therefore, only such packages of the dry skins as contained some of the Emerson skins, would be liable to forfeiture; and while the court has no doubt there were some packages which contained some of both parcels, the court can not now, by any possibility, determine which skins were thus baled together, as the bales have all been opened since the seizure, and their contents distributed, and no record taken to identify the contents of any particular package.

But, in the opinion of the court, there is a still more decisive and conclusive answer to this claim by the government. The act of

1874 (section 167) provides that unless the court is satisfied that there was the intent to defraud, there shall be no forfeiture of the goods. In the present instance, the government had received every dollar it was entitled to exact for duties upon this lot of skins, and therefore there could have been no intention to defraud in that particular. With all the assistance of the district attorney, the court has failed to meet with any statute which subjects this portion of the skins to forfeiture, for any matter, which has been shown to the court, and they are therefore adjudged not liable to condemnation for any violation of the revenue laws, and are ordered to be restored to the claimant; but, under the circumstances, the collector is entitled to a certificate of probable cause of seizure.

Decree accordingly.

Case No. 16,590.

UNITED STATES v. TWO TONS OF COAL.

[5 Blatchf. 386.] [1]

Circuit Court, E. D. New York. March 4, 1867.

INTERNAL REVENUE—SEIZURE FOR FORFEITURE—RELEASE ON BOND.

1. The question of releasing, on bond, property seized for a violation of the internal revenue laws, considered.

2. Reasons assigned for refusing the privilege of bonding, in this case.

[3. Cited in Coffey v. U. S., 6 Sup. Ct. 435, 116 U. S. 433, as one of the instances in which suits of this character have been brought originally in the circuit courts.]

This was an application for the discharge of certain property under seizure, upon giving bond for its value. The property consisted of a still, a worm, a mash-tub, and other apparatus used for distilling, which had been seized for an alleged violation of the internal revenue laws.

BENEDICT, District Judge. In ordinary revenue causes, where the detention of property until the trial will cause serious injury to the claimants, and where its release upon bail can be granted upon good security and without detriment to the public interests, the application to bond has hitherto been granted in this court almost as a matter of course. Experience throws some doubt upon the expediency of the practice in any case. But, in this case, the facts submitted cannot be considered as affording ground for the exercise of such a discretion. The reasons urged are, that the claimant is a poor man, with a large family dependent upon him; that certain persons, whose names are not given, loaned him the money to procure the still and engage in the business of distilling; and that it is necessary he should have possession of the still in order that he may not lose his time and the value of the money expended in the purchase of the apparatus. But no profit can now be derived from using such a still as this, for the tax upon the product is greater than its market value. The detention of the property in question will, therefore, entail no loss upon the claimant and, to surrender it, would subject the claimant to the temptation of defrauding the government in its use, to save himself from loss and procure support for his family. Besides, it appears that the claimant has not paid any special tax, nor has any inspector been appointed for him, and, therefore, he cannot lawfully use his still. The motion must, therefore, be denied.

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

Case No. 16,591.

UNITED STATES v. TWO TRUNKS.

[6 Ben. 218.] [1]

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

FORFEITURE — GOODS CONCEALED ON BOARD OF A VESSEL—SEIZURE BY INSPECTOR.

1. On the arrival of a steamer at New York from France, two inspectors of customs were on board after all the passengers and their baggage had been landed. From some remarks which excited suspicion, they went to a state room which was locked, and in which was the barber of the vessel. Under a berth in the room they found two trunks containing fringes, braid, &c., without any articles of personal baggage. The trunks were marked with the name of the purser of the ship, but without his authority or knowledge. They were claimed by a man who occupied the room, and who had come in the ship, giving his services as second steward for his passage, receiving no wages and not being entered on the crew list. He had no invoice of them. He had made no declaration of their contents as dutiable, and they were not entered on the manifest of the ship. The inspectors seized the trunks. A libel was filed to forfeit the trunks and their contents, alleging a seizure by the collector. It was urged in defence, that the trunks were not concealed, and that the seizure was not made by the collector: *Held*, that, under the 68th section of the act of March 2, 1799 (1 Stat. 677), goods, subject to duty, found concealed on board of a vessel, are subject to forfeiture, and all that the government is bound to show, to make out a prima facie case for forfeiture, is that the goods were subject to duty, were searched for, were found concealed, and were seized by a proper officer.

2. The contents of these trunks were found concealed.

3. Under the 2d section of the act of July 18, 1866 (14 Stat. 178), the inspectors were authorized to seize them, and the libel might be amended accordingly.

H. E. Davies, Jr., Asst. U. S. Dist. Atty.

W. Stanley, for claimant.

BLATCHFORD, District Judge. The libel of information, in this case, proceeds against certain property as having been seized by the collector of the port of New York, on the 21st of November, 1871, on board of the steamer Ville de Paris, and as being forfeited

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

to the United States for a violation of sundry sections of sundry statutes, and, among them, the 68th section of the act of March 2, 1799 (1 Stat. 677). That section provides, that every collector, or other person specially appointed by him for that purpose, shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods subject to duty are concealed, and therein to search for, seize and secure any such goods, and that all such goods on which the duties shall not have been paid or secured to be paid shall be forfeited. There is a count in the libel, alleging that the said collector, having reason to suspect that goods subject to duty were concealed in the said vessel, did, on the said day, enter the said vessel, and therein search for, seize and secure the goods named in the information, which were therein concealed, and on which the duties had not been paid, or secured to be paid, contrary to the said 68th section.

Firmin Serenne, who claims to be the owner of the goods in question, came as a passenger in the ship, with the goods. The goods were not entered on the manifest of the vessel, and were not contained in cases, but were in trunks. Serenne had previously been steward on the Lafayette, a vessel of the same line, plying between New York and Havre, in France. On this occasion he gave his services as second steward on the voyage, as compensation for his passage, receiving no wages, and not being entered on the crew list. The trunks in question were not marked with his own name, but were marked, one if not both of them, with the name and title of office, in French, of the purser of the vessel. On the day in question, after all the baggage of the passengers had been landed from the vessel, she being alongside of her wharf at pier 50, North river, two inspectors of the customs were on board of the vessel. Hearing some remarks which excited their suspicions, they obtained access to one of the state rooms, which was locked on the inside, and within which at the time was the barber of the vessel, whether with the claimant or not does not distinctly appear. The trunks in question were found under a berth in this state room, it being the state room occupied by the claimant. The claimant had no invoice of the goods in the trunks. After one of the trunks, one which had on it the name of the purser, had been discovered, an effort was made by the barber, in the absence of the officers, to erase the name of the purser. One of the inspectors seized the trunks and took them to the custom-house, with their contents. There was no wearing apparel, or articles constituting the contents of a passenger's baggage in either one of the trunks that were seized. The trunks were not marked with the purser's name by the authority or direction of the purser, and he never saw or heard of the trunks until they were seized.

The 68th section of the act necessarily implies, that goods subject to duty, found concealed on board of a vessel, may be in a condition to be subject to forfeiture, if the duties on them have not been paid or secured to be paid, even though they are seized while still on board of the vessel. Ordinarily, the duties on goods are not necessarily expected to be paid or secured to be paid while the goods remain on board of the vessel. But, where they are found concealed on board of the vessel, and the duties on them have not been paid or secured to be paid, the presumption arises, under the statute, that an intention exists to defraud the government out of the duties. The seizing and securing of the goods for trial is authorized, if, when searched for, they are found concealed. All that the government is bound to show to make out a prima facie case for forfeiture, is to show, that the goods were subject to duty, were searched for, were found concealed, and were seized by a proper officer. It is then for the claimant to show that the duties were paid or secured to be paid.

In the present case, the goods were subject to duty, were searched for, were found and were seized. It is contended by the claimant that they were not concealed. The libel of information alleges the seizure of "two trunks, containing fringe, buttons and braids," and it is contended that there was no concealment of the trunks, they being in a passenger's state room, under a berth, in a usual place for putting trunks; and that the fact, that the goods were in trunks, shows no concealment of them, inasmuch as goods are generally brought in trunks, boxes or envelopes of some kind. But, the libel proceeds against all the property seized, as well the contents of the trunks, as the trunks themselves. It cannot be regarded as a libel only against the trunks. The contents of trunks may be concealed, and yet the trunks themselves not be concealed.

On all the facts in this case, I cannot doubt that the contents of the trunks were found concealed, within the meaning of the statute. It is not shown that the duties on them were paid, or secured to be paid. The false marking of the trunks, the fact that they were not on the manifest of the vessel, the fact that they were not landed with the baggage, the fact that no declaration had been made of their contents as dutiable, the fact that no articles of personal baggage were in the trunks, and, in connection with that, the fact that the claimant had no invoice of the goods, and, in fact, all the circumstances attending the transaction, indicate a concealment of the goods, in such wise as to show an intention to avoid, if possible, the payment of duties on them, and a concealment, within the act.

It is also urged that the 68th section of the act of 1799 forfeits the concealed goods only when they have been seized by a collector, naval officer, or surveyor, or by some person specially appointed by one of them for that purpose; and that, in this case, although the libel alleges a search and seizure by the col-

lector, the evidence shows a search and seizure by an inspector of customs. But, the 2d section of the act of July 18, 1866 (14 Stat. 178), provides, that an inspector of customs may go on board of any vessel, and inspect, search, and examine the same, and any person, trunk, or envelope on board, and, if it shall appear that any breach or violation of the laws of the United States has been committed, whereby, or in consequence of which, such vessel, or the goods, or any part thereof, on board of such vessel, is or are liable to forfeiture, may make seizure of the same, or either or any part thereof. In this case the goods were liable to forfeiture, under the 68th section of the act of 1799, because, the duties on them not having been paid, or secured to be paid, they were concealed on board of the vessel, and were found so concealed. There can be no doubt, that a seizure, under the 2d section of the act of 1866, by an inspector of customs, of goods concealed on board of a vessel, under the circumstances named in the 68th section of the act of 1799, is a valid seizure.

A decree must be entered condemning the goods seized other than the trunks, under the 68th section of the act of 1799. As to the trunks, there is nothing to show that they were subject to duty. The libel may be amended, before decree, to aver truly by whom the seizure was made.

Case No. 16,592.

UNITED STATES v. TWO TRUNKS.

[10 Ben. 374.] [1]

District Court, S. D. New York. March, 1879.

JUDGMENT AGAINST STIPULATORS IN CASE OF FORFEITURE—DEFENCES BY STIPULATORS.

Certain goods having been proceeded against as smuggled, the owner appeared as claimant and gave stipulation for value in a sum agreed upon between the claimant and the district attorney. Afterwards a final decree was entered against the claimant on default. On return of the order to show cause against the stipulators why execution should not issue against them for the amount of the stipulation, *held*, that they were not entitled to a reduction of the amount of the stipulation on the ground that the claimant after the giving of the stipulation and before the delivery of the goods to her had paid the duties, and that the amount of the stipulation was for the estimated foreign value of the goods with the duty added; nor on the ground that while the goods were under seizure, and before the stipulation was given, they were injured by being carelessly handled by persons in the employ of the collector and by visitors who, by their consent, had access to them, and that the stipulation was given for a larger amount than the true value of the goods at the time it was given.

S. Tenney, Asst. U. S. Dist. Atty.

B. B. Foster, for stipulators.

CHOATE, District Judge. In this case the goods were proceeded against as smuggled goods, being landed without a permit in the personal baggage of the owner. The seizure was on the 11th of March, 1878. On the 9th of April, 1878, the claimant, with sureties, executed a stipulation for value in the sum of $3,600. The agreement as to the value of the goods for the purpose of bonding them was doubtless designed to be, and was, a substitute for the appraisement provided for in such cases by section 938 of the Revised Statutes. The stipulation is in the usual form, and its condition is that "if the stipulators undersigned shall at any time upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above named suit may proceed, and upon notice of such order or decree to Foster and Adams, Esquires, proctors for the claimant of said property, abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue." And the agreement of the stipulation is: "The parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or her sureties, execution for the above amount ($3,600) may issue against their lands, chattels and goods."

A final decree went against the claimant by default for want of an answer, July 30, 1878, for the amount of the stipulation. By the rules and practice of the court, notice of four days is, after the entry of the final decree, given to the stipulators to show cause why execution should not issue against them. On the return day of this order to show cause the stipulators appeared to show cause why execution should not issue for the amount of said decree, and made proof by affidavit, that after the giving of the stipulation and before delivery of the goods to the claimant, she paid the duties on the goods; that the agreed valuation of the goods ($3,600) for which the stipulation was given was based on an estimate of their foreign value with the duties added thereto; also, that while the goods were under seizure and before the stipulation was given, they were injured by being handled carelessly by persons in the employ of the collector and by visitors who were admitted by them to the seizure room to examine them; that the stipulation was given for a larger amount than the goods were really worth when this valuation was put upon them, that valuation making no allowance for this injury. The stipulators ask that the amount of the decree be reduced as to them by the amount of the duties paid, and by the amount of this depreciation caused by the carelessness or improper conduct of the government officers.

Assuming that the facts are as claimed by the stipulators, they are not entitled to relief in this proceeding.

As to the claim for depreciation and injury, it has been held that the stipulation which the United States is entitled to, on delivery of the

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

goods to the claimant, is a stipulation for their value, at the time and place of the seizure. Four Cases Silk Ribbons [Case No. 4,986]. And as all the alleged damage was subsequent to that date, it could not properly have been taken into account, either by appraisers appointed to appraise the goods, or by the parties in fixing the value by consent. If, then, the claimant saw fit to bond the goods instead of allowing them to be condemned, neither she nor her sureties can complain if they were bonded for more than they were actually worth at the time of the bonding. She preferred to give the bond, and there is no equity in her or their claim to be released from it to this extent. Nor does the alleged misconduct of the officers of the customs afford any ground for a claim, either directly for damages, or indirectly by way of recoupment against the United States.

As regards the duties, it is insisted that the case is within the principle of the case cited above, in which it was held that, if the goods are in warehouse, the proper valuation to be put on the goods is their full value less the duties, and it is claimed that this stipulation should have been for the value of the goods, less the duties, or that the payment of the duties may be treated as an equitable defence to the claim, so far as the stipulators are concerned, and that the court can, at this stage of the proceeding, give relief. The case differs from the case cited in this, that this claimant has, by her own act, in violation of law, put these goods into the common stock of the merchandize of the country, and I think the cases are so unlike, that that case would not be a precedent for the appraisement of goods, seized in the country at large as smuggled goods, at their value, less the unpaid duties. As is pointed out in that case, if the duties had been paid, and the goods were not in warehouse, the owner, if he bonds, must give a stipulation for the full value, and in that case would lose the goods, and the duties, too. The privilege given to the importer to put the goods in warehouse, carries with it the privilege of using the goods for exportation in a certain event, without paying any duties on them, and it was held, upon good reason, that in such a case, the real value of the goods to the owner or to any purchaser is their value in bond, that is, their value less the duty, and the rule adopted was based in part on the idea that such valuation was necessary, in order to give the owner the full benefit of the warehousing system. I see no reason for applying that rule to the case of smuggled goods. It is true that the government has a lien on the goods for the unpaid duties. But the duties are also a debt of the claimant and can be collected of her by an action, if the government chooses to prosecute therefor, and the payment of the duties on execution in such an action would not relieve the goods from forfeiture, in whole or in part.

But however this may be, there seems to be no discretion as to the amount for which judgment must be entered against the stipulators. The amount of the stipulation required by section 938 of the Revised Statutes, is determined in a mode regulated by law, and the stipulation, when given, stands in the stead and place of the goods. If cause of forfeiture is found against the goods, the court has no discretion to remit any part of it. And so it would seem there cannot be any discretion to remit any part of the stipulation. The power of remission in proper cases is given to the secretary of the treasury alone. And if by a mistake of the claimant, such as is made the basis of this application, a stipulation given by consent, instead of that the amount of which is to be determined in the manner prescribed by statute, is made larger than the strictly statutory stipulation would have been, it seems to me that the court has no power to reduce it. The very reason which induced the government to assent to it, in lieu of a stipulation under the statute, may have been that it was larger in amount than it would have been if the mode prescribed by statute had been followed, and, if it is now to be departed from, there is no way in which the amount can be fixed as required by the statute. It is too late for an appraisement now, and the court cannot make a new agreement between the parties. There is no suggestion that the stipulation was procured to be signed by the stipulators by any fraud or improper practice. The stipulation was voluntarily given, and the claimant has had the benefit of it.

For these reasons the motion to correct or reduce the stipulation must be denied.

Case No. 16,593.

UNITED STATES v. ULLMAN.

[4 Ben. 547; [1] 13 Int. Rev. Rec. 68.]

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

TARIFF ACTS—CONSTRUCTION—COMMERCIAL DESIGNATION—COPPER AND DUTCH METAL.

1. The tariff act of March 2, 1861 [12 Stat. 178], imposed a duty of 10 per cent. on "Dutch metal," and of 30 per cent. on manufactures, not otherwise provided for, of brass, copper or other metal, "or of which either of these metals, or any other metal, shall be the component material of chief value." The tariff act of February 24, 1869 [15 Stat. 274], imposed a duty of 45 per cent. on "all manufactures of copper, or of which copper shall be a component of chief value, not otherwise herein provided for." *Held*, that, under the tariff acts, brass must be taken to be a metal, as well as copper, and that, if Dutch metal was a manufacture of brass, although copper was the chief component of brass, yet Dutch metal would not be included in the act of 1869, as being a manufacture of which copper was a component of chief value.

[Cited in Arthur v. Sussfield, 96 U. S. 130.]

2. In cases of serious ambiguity in the language of a tariff act, or doubtful classification of articles, or vague or doubtful interpretation,

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the construction of the act is to be in favor of the importer.

3. It is not the province of the jury to construe the law, but to receive the construction from the court.

This was an action to recover duties alleged to be due to the United States on an importation of "Dutch metal," made by the defendant [Sigismund Ullman], and entered at the custom house at New York, by him, on the 29th of March, 1869. The value of the importation was $1,067, in gold. The collector exacted from the defendant a duty thereon of 10 per cent. ad valorem, amounting to $106.70, in gold, which was paid by him, and the goods were delivered to him. It was now claimed, that a duty of 45 per cent. ad valorem on such value should have been paid on $988 worth of the goods. This suit was brought to recover, as the proper difference, $345.80, in gold, with interest from March 29, 1869. The claim was based on the ground, that a duty of 45 per cent. ad valorem was imposed on the goods by the act of February 24, 1869 (15 Stat. 274), entitled "An act regulating the duties on imported copper and copper ores." That act provides, "that, from and after the passage of this act, in lieu of the duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected, and paid on the articles herein enumerated and provided for, imported from foreign countries, the following specified duties and rates of duty, that is to say: On all copper imported in the form of ores, three cents on each pound of fine copper contained therein; on all regulus of copper, and on all black or coarse copper, four cents on each pound of fine copper contained therein; on all old copper fit only for remanufacture, four cents per pound; on all copper in plates, bars, ingots, pigs, and in other forms not manufactured or herein enumerated, including sulphate of copper or blue vitriol, five cents per pound; on copper in rolled plates, called braziers' copper, sheets, rods, pipes, and copper bottoms, eyelets, and all manufactures of copper, or of which copper shall be a component of chief value, not otherwise herein provided for, forty-five per centum, ad valorem."

On the 7th of May, 1869, the secretary of the treasury issued a circular to the officers of the customs (9 Int. Rev. Rec. 172), in which, after reciting the said act, he said: "The question has been presented to this department, whether 'bronze powders' and 'Dutch metal' are properly liable to duty under the act in question. It is the opinion of the department that the articles named are manufactures, and it is understood that they are composed in part of copper. The principal question remaining is, whether copper is the component of chief value in such manufactures. If this be so, and the articles are not otherwise provided for in said act, they are liable to a duty of forty-five per centum, ad valorem."

On the 14th of July, 1869, the secretary of the treasury made a decision (10 Int. Rev. Rec. 26, 163), in which he said, in a letter to a firm which had imported stamped brass goods in May, 1869: "As, in all articles made of the composition usually known as brass, copper is the component of chief value, the goods imported by you were subject to" a duty of forty-five per cent. ad valorem, under the act of February 24, 1869. "The position taken by the collector is correct, in regard to the material of which brass is composed; and, as the law in question includes all articles of which copper is the component of chief value, his action in assessing said duty was correct. The fact, that brass and many other articles of which copper forms the principal part, have other distinctive names, and are never known as manufactures of copper, in the commercial world, cannot be deemed to affect the question, under the very comprehensive language of the act referred to."

On the 19th of July, 1869, the secretary of the treasury made a decision (10 Int. Rev. Rec. 25), on an appeal from a decision of the collector of the port of New York assessing duty at the rate of forty-five per cent. on certain Dutch metal and bronze powder, imported into that port in June, 1869. The secretary said: "The language of the act of February 24, 1869, is very comprehensive, and, in the opinion of this department, embraces every manufacture of which copper is the component of chief value, whether the copper be the simple metal, or in the form of an alloy, or combination of chemicals, or otherwise, with any other article or articles."

On March 29, 1869, the defendant entered at the custom-house an invoice of "Dutch metal," and the duty was, by the entry clerk, estimated at ten per cent., under the tariff act of March 2, 1861 [12 Stat. 178]. The appraiser, April 15, 1869, returned the article as "Dutch metal, at ten per centum, ad valorem." May 19, 1869, the collector directed the appraiser to reconsider his return, and "report if copper is a component part of chief value. See secretary's decision, dated May 7, 1869." Thereupon, on June 19, 1869, the appraiser reported the article as "Dutch metal, a manufacture of which copper is component of chief value, at forty-five per centum." Then the collector liquidated the entry at forty-five per cent., instead of ten per cent. The importer refused to pay the difference, and the government brought this suit therefor.

The United States gave evidence tending to show that the proportion of copper entering into Dutch metal was so great, that the rolled sheets of metal out of which it was made could not be called the brass of commerce.

The defendant gave evidence tending to show that such rolled sheets were the brass of commerce, and were an article of commerce, and, as such, were sold and used to make other things besides Dutch metal. The defendant's counsel claimed, that the United States could not recover, unless it was found

that Dutch metal was a manufacture of which copper, as known to the tariff laws, was a component of chief value; that brass was well known to tariff legislation; that the copper act of 1869 did not obliterate brass and its manufactures, or the other metals therein named and their manufactures; and that Dutch metal was not, in the tariff sense, a manufacture of copper, but a manufacture of brass, or of some other alloy. Both parties agreed, that, in the sheets of which the Dutch metal was made, copper was the component of chief value, and that, as an original ingredient, in a chemical sense, copper was the component of chief value among the components of Dutch metal.

When the testimony was closed, the defendant's counsel requested the court to instruct the jury as follows: (1) Brass is an article well known to commerce and the revenue laws, and, if the jury shall find that Dutch metal is manufactured therefrom, as a distinct article, then it is not liable to duty under the copper act of February, 1869. (2) Even if the jury shall find that the chief component material, from which the article out of which Dutch metal is subsequently made, is copper, still, if the result of the first process is a distinct article, known in commerce as brass, or as any other metal, from which the merchandise now in controversy was made, then it is not dutiable under the copper act of February, 1869, as a manufacture of copper. (3) If the jury find that the article in controversy is known in commerce as Dutch metal, then the rate of duty thereon is fixed by the tariff act of March 2, 1861, and their verdict must be for the defendant.

The district attorney requested the court to charge the jury thus: (1) That, if the jury find that Dutch metal is manufactured from a compound of copper and zinc, which compound is made for the purpose of manufacturing Dutch metal, and is made in the proportions requisite to that end, and that the manufacture is a continuous process, begun and continued with a view of producing Dutch metal, then they should find that Dutch metal is not a manufacture of brass, or one of which the component of chief value is brass. (2) That, upon the evidence in this case, it is apparent that Dutch metal is not a manufacture of brass, within the commercial sense of that term, as used in the tariff acts. (3) That the designation, "Dutch metal," if it be the name of a manufacture of which the component of chief value is copper, is, for that reason, within the act of 1869, notwithstanding it is specifically taxed in former acts. (4) That, even if the article produced, in one state of the process of manufacture, assumes a form or condition which might scientifically be called brass, yet that circumstance, if the intention was to produce Dutch metal by the completed process, does not make the article produced a manufacture of brass. (5) That the components of such an article are to be ascertained by reference to its bases, and not to intermediate accidents or incidents. (6) That the article of which Dutch metal is manufactured, which is described as "Lahn gold," by some of the witnesses, is not a "metal," within the meaning of the acts of congress. (7) That said article is an alloy, and not a metal, either in the arts or in law. (8) That, whether a metal or an alloy, if it is produced as part of the process of manufacturing Dutch metal, and for the purpose of accomplishing that manufacture, the Dutch metal produced is not to be deemed a manufacture of such alloy or metal, but of the articles used as the bases of the whole manufacture.

Noah Davis, U. S. Dist. Atty., and Henry E. Davies, Jr., Asst. U. S. Dist. Atty.

Sidney Webster, for defendant.

BLATCHFORD, District Judge (charging jury). This is an action brought by the United States against Sigismund Ullman, to recover a sum of money as due by him to the United States. Under the laws of the United States, if goods are imported upon which duties are imposed by law, and those goods, rightfully or wrongfully, by the permission of the officers of the government, or against their will, come into the possession of the individual who imports them, those duties are a personal debt against the importer, in addition to there being a lien therefor upon the goods, so long as they remain in the possession of the government. The goods now in controversy, as you have seen, passed into the possession of Mr. Ullman, with the full consent and permission of the government authorities; but the government claims, that, although he paid all the duty required of him at the time, which was 10 per cent., ad valorem, he did not pay as much as the law demanded. The government, which can suffer no prejudice by the omissions or mistakes of its officers, brings this suit; and, if it had the right, when these goods were entered at the custom-house, to exact the 45 per cent. which it now demands, it has the same right at the present time. Therefore, the question in this case is, simply, whether these goods, at the time they were entered were liable to a duty of 45 per cent., ad valorem, under the act of 1869.

This is not a case of fraud or undervaluation, and of seizure, which is a frequent shape in which revenue cases come before this court. If 45 per cent. in this case had been demanded of Mr. Ullman at the time, it might have been paid under protest, and then, if he complied with all the forms, he could have brought suit against the collector in the circuit court for this district, or in the state court, whence it would have been removed into the circuit court. But, in that case, the same rules of law would have been applicable. The collector who levied the duties would in such case be required, as the government is in this case, to show warrant of law, clear and explicit, for exacting the money as and

for duties or taxes. That principle, enforced many times by the courts, was well expressed by Mr. Justice Nelson in a case (Powers v. Barney [Case No. 11,361]), in which he said, in the circuit court for this district, that duties are never imposed upon a citizen in cases of serious ambiguity in the language of an act, or doubtful classification of articles, or vague or doubtful interpretation, and that, in all such cases, the construction must be in favor of the importer.

Now, gentlemen, it is necessary that I should give to you, and you must take from the court, as matter of law, the legal construction of the act of congress of 1869, under which this sum of money is claimed by the government. It is your duty, under your oaths, not merely to give a verdict according to the evidence, but according to the evidence under the law as explained to you by the court. It is not for you to construe the law yourselves. And I refer to this subject because a strong appeal was made to you, in summing up, by the counsel for the government, as to what construction you should put upon this law. It is not your business to put any construction whatever upon the law. That is the business of the court, and it would be as proper, and as consonant with the administration of justice, for the counsel for the defendant to appeal to you to construe this law in one way because you are in favor of a low tariff, as it is for the counsel for the government to appeal to you to construe the law in another way because you are advocates of a high tariff. That has nothing to do with this trial. Those considerations are considerations proper to arise in congress on the enactment of the law. They have no place in a court of justice; much less have they anything to do with the functions of a jury. I speak strongly, not only for the reason just stated, but also for the further reason, that this principle is a result of the wisdom of courts of justice and of judges, for years, under the Anglo-Saxon system. The rule is, that the law must be taken from the court. And why? Because, unless you do so take it, you must necessarily do wrong to one side or the other in the controversy. In this case, if the court should lay down the law to you in one way, and you should construe it in another way, the party against whom your verdict should be rendered would be utterly without remedy, because the court would have construed the law in a manner perhaps unobjectionable to such party, and yet you would have construed it in a way objectionable to him. A party can have no remedy against a wrong construction of the law by the jury; but he can against an erroneous construction thereof by the court. If the court expounds the law wrongly, then the party who considers himself aggrieved by such a construction has his clear remedy. But, of that remedy one or the other party must be deprived, if the jury do not take the law as the court gives it to them. If the court is wrong, an exception may be taken, and the case can be carried up regularly to a higher tribunal, and the error be corrected.

There is no question that the article in this case is Dutch metal, and no question that it comes within the description of what, in the statutes of the United States imposing duties, is called Dutch metal. A duty of ten per cent., ad valorem, is imposed by the 19th section of the act of March 2, 1861 (12 Stat. 187), on "Dutch and bronze metal, in leaf." The 22d section of the same act imposes a duty of thirty per cent., ad valorem, upon "manufactures, articles, vessels, and wares, not otherwise provided for, of brass, copper, gold, iron, lead, pewter, platina, silver, tin, or other metal, or of which either of these metals, or any other metal, shall be the component material of chief value." Under this 22d section, there is no doubt that Dutch metal would be liable to thirty per cent. duty, but for the fact that it is otherwise provided for in the same act, by name, as "Dutch metal," and subjected to a duty of ten per cent.

The 13th section of the act of July 14, 1862 (12 Stat. 557), imposes an additional duty of five per cent., thus raising the duty to thirty-five per cent., on "manufactures, articles, vessels, and wares, not otherwise provided for, of gold, silver, copper, brass, iron, steel, lead, pewter, tin, or other metal, or of which either of these metals, or any other metal, shall be the component material of chief value." The same remarks that I have made in regard to the act of 1861 apply to this act of 1862. Dutch metal would be liable to thirty-five per cent. duty under this act of 1862, taken in connection with the act of 1861, but for the fact that it is otherwise provided for, that is, provided for by name, as "Dutch metal," in the act of 1861.

It is to be noticed, in respect to the provisions of these two acts, that they contain the same specification of metals, except that platina is in the first act and not in the second, and steel is in the second act and not in the first. It is also to be noticed, that articles are spoken of as metals, in the provisions in both acts, which, in a scientific sense, are not called metals. Gold, silver, copper, iron, lead, platina, and tin are scientifically metals, because they are found in a native state in the earth, in the condition in which they are properly known by these several names. But brass is not found as a native metal. It is an alloy of copper and tin or copper and zinc. So, pewter is an alloy of lead and tin. So, steel is iron carbonized with a certain proportion of carbon. Thus congress has described as metals gold, silver, brass, copper, iron, steel, lead, pewter, platina, and tin, and speaks of them as "these metals," thus specifically saying that they are metals. It thus gives the name of a "metal" to brass, to pewter, and to steel. In thus saying, in these two acts, that copper is a metal and brass is a metal, the declarations are as clear and dis-

tinct as if they read thus: "We, the congress of the United States, hereby declare, that, in these statutes, we regard copper as a metal and also brass as a metal."

Then we come to the act of 1869 (15 Stat. 274), under which the present question arises. It was passed on the 24th of February, 1869, and provides, "that, from and after the passage of this act, in lieu of the duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected, and paid on the articles hereinafter enumerated and provided for, imported from foreign countries, the following specified duties and rates of duty, that is to say." It then imposes a duty of 45 per cent., ad valorem, on "all manufactures of copper, or of which copper shall be a component of chief value, not otherwise herein provided for." The words, "a component of chief value," mean the same thing as the expression used in the previous acts, "the component material of chief value;" because, an article composed of several materials can have but one of chief value, unless there happen to be two materials of equal and of the greatest value in them. Therefore, the statute must be read as if the words were, "of which copper shall be a component, and the component of chief value." This act of 1869 must be read in connection with the prior acts of 1861 and 1862, wherein congress had placed a duty of thirty-five per cent. upon copper, brass, and other metals, and had recognized brass as a metal, although it must contain copper, and although copper is necessarily the component material of chief value therein. Then congress, by the act of 1869, took out copper alone from the operation of the acts of 1861 and 1862. Congress took out no other metal. They did not take out brass. They left brass to be subject to thirty-five per cent. duty. They took out every article which "is a manufacture of copper, or of which copper shall be a component of chief value, not otherwise herein provided for." If it were not for the word "herein," we should not probably be here trying this case. If the words were merely "not otherwise provided for," that would mean, "otherwise provided for in existing acts," and we should be remitted to the act of 1861, wherein Dutch metal is dutiable at ten per cent. ad valorem. But the act says, "not otherwise herein provided for." Therefore, Dutch metal is liable to a duty of 45 per cent., not being provided for in any place in this act of 1869, unless in the 45 per cent. clause, if it is, in the sense of that act, a manufacture of which copper is the component of chief value. Under the acts of 1861, 1862, and 1869, Dutch metal is not a manufacture of which copper is the component of chief value, if it is a manufacture of which brass is the component of chief value; that is, if the copper and the zinc which enter into the composition of Dutch metal do assume, in the judgment of the jury, upon the evidence in the progress toward Dutch metal from the raw copper and the raw zinc, the condition of brass, in the sense of the brass of commerce, and as the word "brass" is used in the acts of 1861 and 1862, then Dutch metal is a manufacture of brass, and, being thus a manufacture of brass, it is not a manufacture of copper, within the meaning of the act of 1869. Therefore, it is, on the evidence in this case, for you to determine, whether, in point of fact, the government has shown to you, satisfactorily, by a preponderance of evidence, that this article is dutiable under the act of 1869.

I have said, "a manufacture of brass," but the principle is equally applicable if it be a manufacture of any other thing which can properly be called a metal. You will recollect the testimony of Mr. Ullman. He was asked what he was in the habit of ordering, if he wished to purchase the sheets made of copper and zinc to manufacture Dutch metal, and he said that he ordered number four metal or number two metal, as the case might be, according to the number of the Dutch metal which he desired to make. The principle I have laid down applies equally in case you shall find that the alloy of copper and zinc had entered into a state in which it became an article of commerce, as a metal, whether as brass or "any other metal." That is the sole question of fact for you to determine. I will recall to your attention the evidence of the witnesses on the subject. There was, in the first place, Mr. Spitzer, a government witness, who had, as custom-house examiner, something to do with this case in the custom-house, but who never saw the particular articles composing this invoice. The gentleman who saw the articles and examined them, and made a legal appraisement of them, was Mr. Sackreiter, who was not called before you as a witness. Mr. Spitzer went through a species of appraisement unknown to the laws of the United States, by appraising an article without seeing it. He had seen Dutch metal generally; but he had not seen the particular article imported in this case. Mr. Spitzer says, that his understanding of it is, that you cannot make such Dutch metal as he knows the Dutch metal imported into this country to be, with a less proportion of copper than 80 per cent. of copper to 20 per cent. of zinc; and that, if you have a less proportion of copper than 80 per cent. you cannot get the pliability, the ductility, or the capacity of being beaten out to the necessary thinness without breaking, which you must have in this article. He also says, that an article containing the proportions of 80 per cent. of copper to 20 per cent. of zinc is not the brass of commerce, in his judgment. Then he was asked to say what proportions of copper and zinc he would call the brass of commerce. He said, that, from 50 of copper and 50 of zinc to 65 of copper and 35 of zinc he would call the brass of commerce. He also states, that he has known a com-

pound to be made in the United States with the proportions of 60 per cent. of copper to 40 per cent. of zinc, and to be bought here and sold as yellow metal and as button metal.

Of the same character is the testimony of Mr. Brandeis, an exceedingly intelligent gentleman, judging from his bearing and manner of testifying, and a chemist evidently of experience and learning. He states, that the smallest proportion of copper that will answer to make Dutch metal is 73 per cent., that, if you have less copper that that, you cannot get the qualities that are necessary, the ductility, the pliability, and the capacity of being beaten thin; and that less than 73 per cent. of copper to 27 of zinc will not answer. He also states, that, in his experience, he knew of the importation of some of these rolled sheets, which one of the witnesses denominated "sheet brass," and which another witness stated was called, in German, Lahn gold—that he knew of one importation of that article into this country, which he used himself here for the purpose of making this Dutch metal leaf out of it. He also states what he considers to be the brass of commerce; that the average of the brass of commerce contains 60 per cent. of copper to 40 per cent. of zinc; and that, if you have more than 66 2-3 per cent. of copper, you do not have the brass of commerce—that you must have either 66 2-3, or less than 66 2-3, per cent., of copper.

On the part of the defendant, you have three witnesses, Mr. Ehrmann, Mr. Meier, and Mr. Ullman, all of them connected with this trade, interested in it, and all of them frankly stating that they have controversies on the subject, and, as importers of this article, are interested in getting it into the country at as low a duty as possible, and in maintaining the 10 per cent. duty for the sake of their own business. Nevertheless, they have appeared before you, and you have seen their manner of testifying, and heard their evidence, and you are to weigh that evidence, in connection with the evidence on the part of the government, and give to it all the strength and force to which you may consider it to be entitled.

Mr. Ehrmann testifies, that the rolled sheets, composed of copper and zinc, which are first hammered by steam, and then beaten further by hand, to make Dutch metal, are, in the shape in which they are purchased to be hammered by steam, bought and sold as an article of commerce; that they are sold to go to Russia, to the East Indies, and to countries where Dutch metal is not made; that they are sold in Germany, not only for the purpose of making Dutch metal, but to be used there, and that they are used there, to make the polished surfaces of knives, which you see through the tortoise-shell on the handles, and to make toys, and to make buttons, and ornaments for theatrical dresses. Mr. Ehrmann also states, that, of the various numbers of Dutch metal, which numbers are given according to the shades of color, three-fourths of the entire quantity that is made in the region of country in Bavaria where it is made, is No. 4; and the invoice in question in this suit shows, that nearly one-half of the Dutch metal involved in this case is No. 4. In regard to this No. 4, Mr. Ehrmann testifies, from his acquaintance with the trade, in buying these sheets from which to make Dutch metal, that the component parts of No. 4 are 65 per cent. of copper to 35 per cent. of zinc, or an average of 60 of copper to 40 of zinc. Now, 60 to 40, thus stated by Mr. Ehrmann to be the average in No. 4 Dutch metal, are precisely the proportions which Mr. Spitzer and Mr. Brandeis say they would understand to be the brass of commerce. Mr. Meier, another witness for the defence, states, that these rolled sheets are an article of commerce in Germany, and are used for the purpose of making Dutch metal, and also for ornamenting in theatres, and for toys. Mr. Ullman, the defendant, says, that the firm in Germany with which he is connected buys these sheets in the open market, and beats them by steam, and then sells them in that condition, and buys back the Dutch metal, which is sent out to this country. He says the sheets are an article of commerce in Germany, and that they are used to make watches, and artificial flowers, and ornamentation for theatres, as well as Dutch metal; and that, when his firm in Germany wishes to buy these sheets, it orders so much metal, of such a number. It is for you to say, on all the evidence, whether the government has satisfied you that this Dutch metal is a manufacture of which copper is a component of chief value. If the government has not satisfied you of that fact, then it cannot recover in this suit.

I believe I have thus explained every question that arises in the case, and I charge you substantially in accordance with the first two prayers submitted on the part of the defendant, and decline to charge in accordance with any of the prayers submitted on the part of the government.

The jury thereupon retired, and, after deliberation, returned a verdict for the defendant.

Case No. 16,594.

UNITED STATES v. ULRICI.

[3 Dill. 532.] [1]

Circuit Court, E. D. Missouri. 1875.

REPEAL OF PENAL STATUTES—CONSPIRACY TO DEFRAUD UNITED STATES—INDICTMENT—AVERMENT OF INTENT — REMOVAL OF DISTILLED SPIRITS — EFFACING STAMPS.

1. The sections of the Revised Statutes under which the indictments were drawn, continue in

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

force, notwithstanding a later act, prescribing a different punishment. The Revised Statutes contain a general provision modifying the common law doctrine in this respect, which is construed and applied.

[Cited in U. S. v. Van Vliet, 23 Fed. 35. Followed in U. S. v. Mathews, Id. 75. Quoted in U. S. v. Reisinger, 128 U. S. 402, 9 Sup. Ct. 101.]

[Cited in brief in Bush v. District of Columbia, 1 App. D. C. 3; McCann v. Mortgage, Bank. & Inv. Co. (N. D.) 54 N. W. 1029.]

2. Requisites of indictment against distiller for conspiracy to defraud the United States of the internal revenue tax, considered; and held not essential to state, in addition to an intent to defraud, the facts showing such intent.

[Cited in U. S. v. Simmons, 96 U. S. 364.]

[Cited in Bonneville v. State, 53 Wis. 686, 11 N. W. 427.]

3. Where the charge is of an attempt to defraud, the pleader should specify some acts which constitute the attempt.

[Cited in U. S. v. Walsh, Case No. 16,636.]

4. A count for the removal of distilled spirits from the distillery to a place other than the distillery warehouse, held sufficient.

5. Under the legislation of congress (Rev. St. § 3224), an indictment for failing to efface, etc., marks and brands at the time of emptying the cask or package, need not aver a criminal intent.

6. So as to a person having in his possession tax-paid stamps once used. In the cases last mentioned, congress has not made criminal intent an element of the offences.

7. Whether the punishment is limited to the person who actually empties the highwines, or extends as well to his employer, quære?

Two indictments were found against the defendant [Rudolph W. Ulrici], the nature of which appears in the following opinion given by the circuit justice, on demurrer, at the September term, 1875. The opinion was orally pronounced, and is reported from the shorthand notes taken at the time.

Mr. Dyer, U. S. Dist. Atty., Mr. Henderson, Mr. Eaton, and Mr. Bliss, for the United States.

John W. Noble, for defendant.

Before MILLER, Circuit Justice, and TREAT, District Judge.

MILLER, Circuit Justice. These are two indictments found against one Ulrici, and have been submitted to the court upon demurrers. I will now proceed to consider them, and to pronounce the decision of the court upon the questions which have been raised.

To facilitate the consideration of these questions, I will divide the objections into two classes: First, those urged against both indictments, and, second, those made to the several counts respectively.

1. In the first place, it is contended that the act of 1875 [18 Stat. 307], having prescribed a different punishment for the offences charged in these indictments, the sections of the Revised Statutes, under which these indictments have been drawn, are repealed, inasmuch as the later act contains no saving clause. In answer to this, I would observe that the 13th section of the Revised Statutes contains a general provision changing, as I conceive, the rule of the common law, that a statute modifying the punishment of a crime prescribed by a prior law operates as a repeal of that law. There is no doubt that that general proposition is sound. Any statute that varies the definition or the punishment of an offence abrogates the former statute; and no offences committed under it can, by a well-known principle of the law, be punished, unless the later act contains a saving clause. But, as I remarked, the Revised Statutes changed this rule of the common law. They were intended to change it, and it is only the extent of the change which is here questioned. Section 13 provides that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statue shall be treated as still remaining in force, for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Now the counsel for the defendant argues that neither the word "penalty," "forfeiture," nor "liability," is equivalent to the word "punishment," and, therefore, that the section under which these indictments are drawn is repealed, unless the penal sanction is comprehended by the term "penalty," and this, he insists, means only that which can be enforced by a civil action; or, by the term "forfeiture," which relates merely to property; or, by the term "liability," which, he says, means merely subject to a civil proceeding. But, without attempting to go into a precise technical definition of each of these words, it is my opinion that they were used by congress to include all forms of punishment for crime; and, as strong evidence of this view, I found, during the progress of the argument, and called the attention of the counsel to a section, which prescribed fine and imprisonment for two years, wherein congress used the words: "Shall be liable to a penalty of not less than one thousand dollars, * * * and to imprisonment not more than two years." Moreover, any man using common language might say, and very properly, that congress had subjected a party to a liability, and, if asked what liability, might reply, a liability to be imprisoned. This is a very general use of language, and surely it would not be understood as denoting a civil proceeding. I think, therefore, that this word "liability" is intended to cover every form of punishment to which a man subjects himself, by violating the common laws of the country. Besides, as my Brother Treat reminds me, the word "prosecution" is used in this section, and that usually denotes a criminal proceeding.

2. I will now proceed to consider the first indictment, which contains three counts. The first count is objected to on the ground as it stands, that it contains merely a naked presentation of an offence which is denounced and

made punishable as a felony without any averment of those acts which are necessary to show what the felony really was. Now, let us inquire whether it is liable to this objection. It sets out that the defendant did engage in and carry on the business of a distiller, at his distillery situated in the city of St. Louis, with intent, then and there, to defraud the United States of the tax due upon each and every gallon of one thousand proof gallons of spirits thereafter to be distilled by him. Now, what he was doing is set out with sufficient particularity. It is alleged that he was carrying on the business of distiller at a particular place and at a particular time, and, while so engaged, conceived the intent, then and there, to defraud the United States. It is contended that there should be some statement of the evidence of this intent—that some one or more of the facts which manifest this intent should be set out in the indictment; but I suggested to counsel at the time, that, if he could show where it was necessary to describe more than what the party intended to do, in a case where intent was the essence of the crime, then this might not be considered a sufficient charge, but I apprehend that no such instance can be produced. Of course, you must show that what the party intended to do was criminal, because the offence is something which the law itself says he should not do. And that seems to have been done here. It is charged that the accused intended to defraud the United States of taxes upon the whisky he himself produced; that that tax was an internal revenue tax of seventy cents imposed upon every gallon distilled by him. But, it is said that you must show how he was going to do it. Now, an intent is often very hard to prove, but when you show that it is essential to a civil or criminal proceeding, you can demonstrate it in a thousand ways. All human actions are the external evidence of intent. The conduct of a man, in its thousand various forms, goes to discover his inner thoughts. And, to say that the indictment should allege these with particularity, would be very difficult for the pleader. Are we to set all the facts out? If not, where is the limit to be fixed? The objections, therefore, to this count are overruled, and it is held to be good.

3. Little was said specially upon the third count of this indictment, and yet, upon examination, we consider that there is a want of particularity in that. It is charged that, Ulrici being engaged in the business of distilling at this place, did, while so engaged, attempt to defraud the United States of the taxes imposed by law. Here the objection is good, for this indictment says nothing about intent. I think the defendant in this cause is entitled to have it shown what he did, or how he attempted to defraud. When you say that he attempted to defraud the government, I think it is your duty to specify some acts which constitute the attempt. We therefore hold the third count to be bad.

4. I come now to consider the fourth count. It is very different from the others. As we construe it, it is a count for the removal of distilled spirits from the distillery to a place other than the distillery warehouse. The gentleman who defended this count did not so understand it. He treated it as an indictment of the defendant for having in his possession the mash, still and other apparatus, with intent to defraud. This is the offence which, it has been said, is charged in this count. But it does not stop here. It goes on to aver that the said Ulrici, then and there carrying on the business of a distiller, did remove a large quantity of distilled spirits from the place where they were manufactured, to a place other than the distillery warehouse. This we conceive to be a good indictment for the removal, but not for having the distillery apparatus in possession with intention to defraud the government.

It was strenuously urged that the charge for the removal is well stated, as also having stamps, &c., in possession with fraudulent intent, and that, therefore, two distinct offences are alleged in the same count, and, consequently, it is bad. We concur in the opinion that the allegation of the removal is sufficient, and constitutes a complete crime; but we, at the same time, consider that the first averment may be properly treated, as inducement, as descriptive of the character of the person charged. It may be that there is a different punishment prescribed for a distiller committing this offence from that provided for others; if so, it was proper to describe him, in order that he might be subjected to that particular punishment. There is certainly a distinct punishment prescribed for a store-keeper committing this crime, and, if this were an indictment against Ulrici as a store-keeper, it should certainly recite his employment as such. The count, therefore, is adjudged good for the offence of wrongfully removing distilled spirits. This disposes of this indictment.

5. The other indictment presents far more serious questions, which have caused us much more difficulty in deciding. The first count in this indictment (leaving out the formal parts, such as the venue, the date, etc.), charges that the defendant did empty and draw off, and cause to be emptied and drawn off, so many thousand gallons of distilled spirits, contained in so many barrels, which barrels bore a tax-paid stamp to denote that the tax due the United States had been paid, "and did feloniously then and there fail, at the time of emptying and causing to be emptied and drawn off, the said contents of said barrels, to efface and obliterate from each of said barrels the said stamp." &c.

The objection to this count urged by the counsel for the defence, and which, we think, had a good deal of force, is, that it is nowhere charged that the offence was committed intentionally or fraudulently; that is to say, that the failure to erase the stamps, which is the essence of the crime (for anybody has a

right to empty a barrel of highwines after the tax is paid), is not charged to have been done intentionally or fraudulently, and that, on the contrary, it might have been done by any honest purchaser of the whisky procured from the distillery, and this either carelessly, or absolutely without knowing the obligation imposed upon him by law. It certainly was truly said, that, unless there was some criminal intent, or some fraudulent purpose in the failure to erase these stamps, it was a great hardship that a man should be punished as a felon and disgraced in public estimation by imprisonment, and all for doing that, with no intent whatever to cheat or defraud or do harm to any one. The act might have been done in ignorance; it might have been done in negligence.

This section, No. 3324, is one which, in the Revised Statutes, and, I think, in some revision of the internal revenue laws prior to these, was intended to condense into one paragraph a description of offences, and a denunciation of penalties which had before been scattered in various enactments, and distributed in various parts of the revenue law. It speaks of the offence of emptying casks of distilled spirits, with stamps upon them, in two different places, and leaving out all other offences contained in the section. I will collocate what is said on this particular subject: "Every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package, bearing any mark, brand or stamp required by law, shall, at the time of emptying such cask or package, efface and obliterate said mark, stamp or brand." That is the obligation of everybody. Then comes one provision in the event that is not done. "Every such cask or package from which said mark, brand or stamp is not effaced and obliterated, as herein required, shall be forfeited to the United States, and may be seized by any officer of internal revenue wherever found." That is the penalty denounced upon the cask itself. Then there follow several other offences; and finally we come to the penalties applicable in this case: "Every person who fails to efface and obliterate said marks, stamp or brand, at the time of emptying such cask or package, * * * shall be deemed guilty of a felony, and shall be fined not less than $500, nor more than $10,000, and imprisoned not less than one year, nor more than five." Now, it is obvious, from what I have read, that the statute itself nowhere requires in express terms that the party who failed to efface or obliterate these stamps should have done it intentionally or fraudulently. The punishment is denounced against the simple failure, and such failure is declared to be a felony, and the party is subjected to the punishment appropriate to a felony.

It is very well understood, both by the courts, and by the profession, as well as every one interested in the matter, that the collection of the internal revenue tax in this country has required a system of legislation for its enforcement harsh beyond everything known to our history. And it is equally well understood that, harsh as these measures are, they have been far from successful. Notwithstanding the heavy penalties denounced against crimes which go to defraud the government of its revenue from internal taxes, and notwithstanding the minuteness and particularity in the description of these crimes, and notwithstanding all the aids which congress has given by legislation to the enforcement of the revenue laws, they have been very imperfectly executed, and that the government is cheated out of perhaps one-half of its revenue, especially that from the tax on whisky and tobacco. It is not contended that the legislature has not power to make this omission or failure a felony. It is not denied that it was within their province to adopt measures as severe as this, but it is argued that, in all cases, where an act is made a felony, that a felonious intent is essential to the commission of the crime. At common law, that may be true, but congress and the state legislatures, in defining and punishing crimes, are above the common law. They have a right to change it, and the progress of society has developed the necessity of doing it very often; so that, in fact, there is hardly an offence existing to-day in this country which is punished in the state courts as a common law crime. And none whatsoever exists now or ever did exist, punishable as such in the United States courts.

The question is, then, narrowed down to this: Did congress intend, in this provision, declaring and punishing the failure to efface these stamps, at such time, as a felony, that a criminal intent should be necessary? We see nothing in the language of the statute requiring such an intent. On the other hand, we do see very much in the whole system of legislation on internal revenue showing that congress did not make intent a necessary ingredient in the crime. In their first enactments on this subject, they ignored the intent, and, very frequently in the course of their legislation concerning it, they denounced acts as crimes where the intention to do wrong constitutes no part of the offence. If such legislation be wise, or permissible at all, it is precisely in this class under consideration, where one would suppose that congress intended to create the offence, without making the scienter essential; for this failure itself exposes the government to fraud, just as well, and just as efficiently, whether it be intentional or unintentional. An empty cask, with this live evidence upon it, that the tax upon the liquor has been paid is perhaps the most fertile opportunity to cheat the government out of its revenue. Indeed, this stamp regulation is as complete to protect the government as any that has ever been devised by human ingenuity, for an empty cask, with a stamp upon it, bears the evidence that the whisky afterwards put into it has duly paid

the tax to the government. In various ways congress has shown a lively sense of the necessity of securing the revenue against this mode of cheating, by the use of barrels which bear the evidence that any liquor with which they may be filled has paid the tax. Those stamps had been already used, and ought to have been destroyed. Congress, therefore, saw fit to subject to very heavy penalties all persons who, either through carelessness or intentional conduct, thus exposed the government to be defrauded.

But this is not all. The decision does not rest alone upon this reasoning. The section under consideration contains a description of other offences, in which the intent is made indispensable to the completion of the crime, and there is no reasoning more often referred to, or more forcible, than that, when in the same section, an element is required in one case, and is left out in another, the omission was intentional; the legislature intended it. Now, right in the middle of this section, and in this connection, congress describes an offence where the intention is made a necessary ingredient; the language is this: "And every railroad company, or other transportation company, or person, who receives or transports, or has in possession with intent to transport, or with intent to cause or procure to be transported, any such empty cask or package, or any part thereof, having thereon any brand, mark or stamp, required by law to be placed on any cask or package containing distilled spirits, shall forfeit," etc. Now, why should congress say that, as to you, who failed to efface these stamps, no intention is required; but, as to the man who has possession of these casks, such possession must be accompanied with a criminal intent. He must intend to transport them. It seems to me so clear that congress intended this distinction, that I hardly think it necessary to argue it.

So we come now to the punishment. I have given the descriptions of the offences. In one case, intent is necessary, and in the other it is not. This is the concluding language of the statute: "Every person who fails to efface and obliterate said mark, stamp or brand, at the time of emptying such cask or package, or who receives any such cask or package, or any part thereof, with the intent aforesaid, * * * shall be deemed guilty of a felony." We cannot conclude, however harsh it may seem, that congress intended that a criminal intent should be averred in a charge for failure to destroy the stamps.

Nearly the same question is raised, and the same argument applies, with equal force, as to the second count, which charges the defendant with having in his possession tax-paid stamps, once used. But I shall not go over this whole argument again. It will be perceived, on reading the statute, that no intent is necessary. "Every person who has in his possession any such stamp, so removed as aforesaid, or has in his possession any cancelled stamp, or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled spirits, shall be deemed guilty of a felony." No intent is necessary here. It is argued that any man might have in his possession these stamps, however innocent, and that seems to me the strongest argument made. But, on looking carefully at the internal revenue laws, it appears very obvious, in view of the manner in which these stamps are affixed, that no man can have possession of them without knowing their character. They are not new stamps, they are stamps that have been once used, and the officer who places them upon the casks puts marks and names and numbers upon them, which are conclusive evidence that they have been used. Congress obviously had that view of the subject, and we do not think you can import the intent into the statute as framed. Consequently it is not necessary to allege it in the indictment. This proposition extends to all the counts in this indictment, and the demurrer is overruled.

Before I close, I will call the attention of the counsel to [U. S. v. Staats] 8 How. [49 U. S.] 41. This whole question of the allegation of intent is discussed, especially when the statute denounces the intent, and makes it a part of the offence.

Judge Krum: If the court please, as this is the first time this statute has been construed in this district, I would inquire whether your honors intended that the punishment as for a felony is to be limited to the person who actually empties the highwines, without destroying the stamps, or extends to those who employ him?

MILLER, Circuit Justice. We have not felt called upon to decide that question.

Judgment accordingly.

[See Cases Nos. 14,484–14,487, 15,670.]

Case No. 16,595.

UNITED STATES v. UNGER.

[18 Int. Rev. Rec. 164.]

Circuit Court, N. D. New York. 1873.

CUSTOMS DUTIES—WITHDRAWAL FROM WAREHOUSE.

[The 10 per centum additional duty imposed by Act March 14, 1866, on goods withdrawn from the warehouse after one year from their importation, is also to be assessed upon goods never withdrawn, but sold to satisfy duties.]

SHIPMAN, District Judge. Duty is properly exacted on "abandoned" goods,—that is, on goods never withdrawn from warehouse for any purpose, but left at the disposal of the government, and permitted to be sold. The ten per centum additional duty imposed by act of March 14, 1866 [14 Stat. 8], upon goods withdrawn from warehouse after one year from date of importation, is also to be assessed upon goods never withdrawn, but sold to satisfy duties, and such amount is to be deducted from proceeds of sale in addition to the regular duties. It is clearly the intention

and meaning of the warehouse acts that the government should receive the same duties on goods abandoned and sold to satisfy duties that it would have received if the same goods had been withdrawn for consumption.

Case No. 16,596.

UNITED STATES v. UNION NAT. BANK.

[Affirming U. S. v. Union Nat. Bank, Case No. 16,597. Nowhere reported; opinion not now accessible.]

Case No. 16,597.

UNITED STATES v. UNION NAT. BANK.

[10 Ben. 408.] [1]

District Court, S. D. New York. April, 1879.[2]

MONEY PAID UNDER MISTAKE OF FACT—LACHES—UNITED STATES AS PLAINTIFF.

1. A party entitled to recover money, paid under a mistake of fact, is bound to give prompt notice of the discovery of the mistake to the party to whom the money was paid.

2. Where the party to whom money is so paid, sustains damage in the loss of his remedy over against another party, through the negligence of the party to whom he is liable in failing to give notice of the discovery of the mistake, he is thereby discharged from liability.

[Cited in U. S. v. National Park Bank of New York, 6 Fed. 854.]

3. The action being equitable, the United States suing as plaintiff in such action is bound by the same equitable rules as any other plaintiff in such an action and cannot recover, if through its failure to give notice of the discovery of the mistake the defendant has lost his remedy over.

4. In such an action by the United States, where it appeared that the assistant treasurer at New York gave notice of the discovery of the mistake, and demanded payment, but afterwards withdrew the notice and demand, *held*, that assuming that he was the proper officer to give such notice he was the proper person to withdraw it, and the defendant having relied on such withdrawal and thereby lost his remedy over was discharged from liability.

S. Tenney, Asst. U. S. Dist. Atty.

Geo. De Forest Lord, for defendant.

CHOATE, District Judge. This is a motion for a new trial for error of law in directing a verdict for the defendant. It was not attempted on the argument to sustain the action, except as an action for money paid under a mistake of fact. Assuming that all the elements of such a cause of action once existed, a question which it is unnecessary now to examine, yet I see no reason why the United States should be exempted from the general rule applicable to any other party who is entitled to maintain such an action, that they shall not, by their delay after the discovery of the mistake, lead the party liable to them into further loss, as, for instance, the loss of a remedy over against another party. This is an equitable action and the plaintiff can only recover on showing that it is equitably entitled to the money. The duty of promptly notifying the defendant on discovery of the mistake, is conceded by the plaintiff's counsel; but it is claimed that the notice from the sub-treasurer was a performance of this duty. The discovery by the United States of the alleged mistake before that notice was given cannot, I think, be denied. Assuming that the sub-treasurer was the proper person to give the notice, and demand payment of the defendant, he was also the proper party to withdraw that notice, and I think it is clear that what took place after the notice was given, was equivalent to a withdrawal of the notice, on which the bank had a right to rely, and did rely, until it lost all remedy over against Polhemus and Jackson; and after that, only, was the claim renewed by commencement of this action. I think this is a claim in respect to which laches may be imputed to the United States, and that on the ground of laches and entire want of equity in the claim on the undisputed facts, the direction of a verdict for the defendant was right. See U. S. v. Cooke [Case No. 14,855].

Motion denied.

[The judgment was affirmed in the circuit court upon a writ of error. Case unreported.]

Case No. 16,598.

UNITED STATES v. UNION PAC. R. CO. et al.

[11 Blatchf. 385; [1] 8 Am. Law Rev. 356.]

Circuit Court, D. Connecticut. Nov. 27, 1873.[2]

UNION PACIFIC RAILROAD COMPANY — SUITS BY UNITED STATES — ACT MARCH 3, 1873—CONSTITUTIONAL LAW — LAND GRANTS — RIGHTS OF SHAREHOLDERS.

1. The provisions of the 4th section of the act of March 3, 1873 (17 Stat. 509), directing a suit in equity to be instituted, in the name of the United States, against the Union Pacific Railroad Company and others, create different rules for the conduct of that suit from those by which ordinary suits are governed. Among such differences are the following: (1) Said suit may be brought in any circuit court of the United States, and all the parties may be made defendants in one suit. (2) Decrees in said suit may be entered and enforced against any one or more parties, without awaiting a final determination as to other parties. (3) The writs of subpœna issued against the defendants therein may run into any district of the United States, and be served by the marshal upon persons not residents of the district in which the suit is brought, and not found therein. (4) Such writs may be served upon representatives of deceased parties who are not residents of the district in which the suit is commenced, and whose testators were not such residents.

2. The powers and authorities given by the said act to the attorney-general are exceptional, and are limited, in their exercise, to the cases

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

[2] [Affirmed by circuit court; case unreported.]

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

[2] [Affirmed in 98 U. S. 569.]

and the matters in that act specified, viz.: (1) To a suit in favor of the United States against the Union Pacific Railroad Company, and all persons who have subscribed for or received capital stock in said road which has not been paid for in full in money. (2) To a suit against persons who may have received, as dividends or otherwise, portions of the capital stock of said road, or the avails thereof, or other property of the said road, unlawfully and contrary to equity. (3) To a suit against persons who may have received, as profits or proceeds of contracts for the construction or equipment of said road, or other contracts therewith, money or other property which ought, in equity, to belong to said corporation. (4) To recover money, bonds, &c., which ought, in equity, to be paid or accounted for to the said company or to the United States.

3. For these causes, except the last, which is not set up in the bill, there is no right of action in the United States, nor can any be given by an act of congress. Such rights of action are the property of the railroad company. In substance and in form, the proceeds of the same belong to the corporation and not to the United States, or any other creditor, and suit to recover the same must be brought in the name of the railroad company.

4. Congress cannot create damages to be recovered by the United States by suit, or cause acts to be wrongs to the United States which are, in their nature wrongs to another.

5. The United States cannot convert to itself the property of another, by its own declaration, or its own authority; nor can it maintain an action, in its own name, against A., to recover a debt which he may owe to B.

6. The gifts of lands and bonds made by the United States to the Union Pacific Railroad Company were not in the nature of a trust, but were made absolutely, without condition precedent.

[Cited in Re Pacific Ry. Com'n, 32 Fed. 266.]

7. Redress for alleged fraudulent acts on the part of the directors and managers of the Union Pacific Railroad Company, in breach of their duty to the shareholders, cannot be obtained in a suit brought by the United States, but must be obtained in a suit brought by the corporation, or, if it refuses to sue, by a shareholder.

In equity.

George H. Williams, Atty. Gen., Aaron F. Perry, Thomas A. Jenckes, and J. Hubley Ashton, for the United States.

Benjamin R. Curtis, William M. Evarts, and Sidney Bartlett, for defendants.

Before HUNT, Circuit Justice, and SHIPMAN, District Judge.

HUNT, Circuit Justice. This action was commenced during the summer of 1873, by process issuing from the district of Connecticut, and served upon defendants in other districts, who were not residents of Connecticut, nor found therein to be served with process. The Union Pacific Railroad Company and twenty-four other defendants now demur to the bill of complaint filed by the complainant. The alleged grounds of demurrer are (1) that the complainant, by its bill, has not made a case which entitles it to any discovery or relief in a court of equity, from or against the defendants; (2) that the bill is multifarious.

The proceedings taken by the complainant are based upon the act of congress of March 3, 1873 (14 Stat. 509). To understand them, or to appreciate the argument on the demurrer, it is indispensable that this act should be carefully considered. It is a portion of the act making appropriations for the expenses of the government for the year 1874, and for other purposes, and is in the words following: "Sec. 4. That the attorney-general shall cause a suit in equity to be instituted in the name of the United States against the Union Pacific Railroad Company, and against all persons who may, in their own names or through any agents, have subscribed for or received capital stock in said road, which stock has not been paid for in full in money, or who may have received, as dividends or otherwise, portions of the capital stock of said road, or the proceeds or avails thereof, or other property of said road, unlawfully and contrary to equity, or who may have received, as profits or proceeds of contracts for construction or equipment of said road, or other contracts therewith, moneys or other property which ought, in equity, to belong to said railroad corporation, or who may, under pretence of having complied with the acts to which this is an addition, have wrongfully and unlawfully received from the United States, bonds, moneys, or lands which ought, in equity, to be accounted for and paid to said railroad company or to the United States, and to compel payment for said stock, and the collection and payment of such moneys, and the restoration of such property, or its value, either to said railroad corporation or to the United States, whichever shall, in equity, be held entitled thereto. Said suit may be brought in the circuit court in any circuit, and all said parties may be made defendants in one suit. Decrees may be entered and enforced against any one or more parties defendant without awaiting the final determination of the cause against other parties. The court where said cause is pending may make such orders and decrees, and issue such process, as it shall deem necessary to bring in new parties or the representatives of parties deceased, or to carry into effect the purposes of this act. On filing the bill, writs of subpœna may be issued by said court against any parties defendant, which writ shall run into any district, and shall be served, as other like process, by the marshal of such district. The books, records, correspondence, and all other documents of the Union Pacific Railroad Company shall at all times be open to inspection by the secretary of the treasury, or such person as he may delegate for that purpose. The laws of the United States providing for proceedings in bankruptcy shall not be held to apply to said corporation. No dividend shall hereafter be made by said company but from the actual net earnings thereof; and no new stock shall be issued or mortgages or pledges made on the property or future earnings of the company without leave of congress, ex-

cept for the purpose of funding and securing debt now existing, or the renewals thereof. No director or officer of said road shall hereafter be interested, directly or indirectly, in any contract therewith except for his lawful compensation as such officer. Any director or officer who shall pay or declare, or aid in paying or declaring, any dividend or creating any mortgage or pledge, prohibited by this act, shall be punished by imprisonment not exceeding two years, and by fine not exceeding five thousand dollars. The proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel said Union Pacific Railroad Company to operate its road as required by law."

1. This act prescribes different rules for the conduct of this suit from those by which ordinary suits are governed. Omitting the questions upon the act which give rise to the demurrer, and which may be considered as of the merits of the case, I notice the following, as some of these differences: (1) The "said suit may be brought in the circuit court in any circuit, and all said parties may be made defendants in one suit." An objection that would ordinarily exist for a misjoinder of parties is cured by this provision. The objection of misjoinder of causes of action is cured by the same provision. The authority to bring a suit, and to implead various defendants, necessarily includes the right of stating the cause of action as it may exist against each of such defendants. (2) "Decrees may be entered and enforced against any one or more parties defendant, without awaiting the final determination of the cause against other parties." By the ordinary rules of chancery practice, a cause cannot be brought to a final hearing until it is ready for a hearing as to all the defendants. A final decree cannot be made against one defendant, leaving the interests of other defendants undetermined. Ordinarily, there is to be but one final decree, and in that decree all the rights and interests of all the parties, however complex or varied, are to be settled. The law we are considering prescribes a different rule, and in effect authorizes a severance of the one suit commenced into one hundred and seventy different suits, in which decrees may be entered as the court shall hold to be just, independent of the result as to any other defendant. Congress intended that the suit should be against many persons, that it should include causes of action not connected with each other, or which might be hostile to each other, against persons not charged in relation to the same transactions, and which could not, under the ordinary rules of law, be united in the same suit. (3) The most striking departure from the ordinary rules for the conduct of a suit is found in the following provision: "On filing the bill, writs of subpœna may be issued by said court against any parties defendant, which writ shall run into any district, and shall be served, as other like process, by the marshal of such district." By the judiciary act of 1789 the territory of the United States is divided into judicial districts, for which district courts are appointed; and circuit courts are organized, each circuit extending over one or more of said districts. By section 11 of that act (1 Stat. 78, 79) it is enacted, that "the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. * * * But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." The present suit was commenced and is pending in the circuit court for the district of Connecticut. By force of the statute of 1873 the writs for the commencement of the suit have been issued into ten different states. These writs have been served, in those states, upon persons not inhabitants of the district of Connecticut, in which district the suit was commenced, nor found within that district at the time of serving the writ. I do not pause here to consider the effect of this provision, as a question of jurisdiction. The defendants insist that it is unconstitutional and void, as in violation of that article of the amendments to constitution of the United States (article 5) which provides that no person shall be "deprived of life, liberty, or property without due process of law," and they move to dismiss the bill on that ground. The provision is here important, as showing the difference in the conduct and management of this suit from that obtaining ordinarily in the circuit courts of the United States. For the present purpose, its validity is assumed. (4) The process is authorized to be served upon representatives of parties deceased, and it is not required that they shall be residents of the district of Connecticut, or that their testators should have been such residents. As a general rule, the power and authority of executors, both for the purpose of suing or being sued, is restricted to the state or district in which their letters are granted. The power of the executor to bring a suit is derived from his letters testamentary alone. Thus, an executor appointed by the courts of Connecticut, under authority of the statutes of that state, cannot bring a

suit in that character in the state of New York. His authority will not be recognized in the latter state, but he must be re-appointed under its authority before he can maintain an action. The principle is the same as to actions against executors and administrators. They must be called upon to respond within the local jurisdiction by which they are appointed. Their liability, as well as their authority, is thus locally limited. They are entitled to the benefits and protection of the laws which such local jurisdictions give them. Kerr v. Moon, 9 Wheat. [22 U. S.] 565; Armstrong v. Lear, 12 Wheat. [25 U. S.] 169; Vaughan v. Northup, 15 Pet. [40 U. S.] 1. This principle is overruled in the statute we are considering. As in the case of a former variation from the established rules of law, I assume, for the present, the validity of this provision, and refer to it here as one of the several differences to be found between the condition of the present action and that of an ordinary suit in the courts of the United States.

II. The powers and authorities by this act given to the attorney-general for the conduct of this suit, which have been pointed out, are, in their nature, exceptional and limited. They are not given to the attorney-general in all cases, but only in the case of the Union Pacific Railroad Company, and to redress the alleged wrongs specified in the act of 1873. It is quite safe to say, that it is not within the general powers of the attorney-general to institute a suit in which he would be relieved from an objection of the misjoinder of the parties, or of the misjoinder of causes of action, in which he could obtain final decrees against various defendants from time to time, and as often as he might be prepared for that purpose, and in which he could cause to be executed writs to bring in defendants residing in remote districts, and who were not found in the district where the suit was commenced. Generally, he may bring and maintain suits, subject to the ordinary rules of law. In the present instance, he insists, truly, that the act of 1873 confers extraordinary powers upon him. The act is his charter. Whatever is authorized by it (on the assumptions made) he may here do. Beyond it he cannot go. It thus becomes necessary to ascertain for what alleged wrongs, or for what causes of action, the attorney-general was directed by the act of 1873 to commence a suit. If the allegations of his bill are within the authority of that act, and if such allegations afford a good cause of action, his suit is maintainable; otherwise it is not.

III. For what causes of action, and against whom, was the attorney-general thus directed to institute proceedings? The act of 1873 directed a suit in equity to be instituted, in the name of the United States (1) against the Union Pacific Railroad Company, and all persons who may, in their own names, or through any agents, have subscribed for or received capital stock in said road, which stock has not been paid for in full in money; (2) against persons who may have received, as dividends, or otherwise, portions of the capital stock of said road, or the proceeds or avails thereof, or other property of said road, unlawfully and contrary to equity; (3) against persons who may have received, as profits or proceeds of contracts for construction or equipment of said road, or other contracts therewith, moneys or other property which ought, in equity, to belong to said corporation; (4) against persons who have wrongfully and unlawfully received from the United States bonds, moneys, or lands, which ought, in equity, to be accounted for and paid to said railroad company or to the United States. For these several causes of action, and for these only, the attorney-general is authorized, in this suit, "to compel payment for said stock, and the collection and payment of such moneys, and the restoration of such property, or its value, either to said railroad corporation or to the United States, whichever shall in equity, be held entitled thereto." If either the railroad corporation or the United States is equitably entitled to such moneys, it is declared that recovery therefor may be had in this suit. The recovery of money or property, and not the regulation and management of the road, or the disposition of its estate now or hereafter, is the object and purpose of the action. For the purpose of enforcing these four specified causes of action, and for no other purpose, is the attorney-general invested with the unusual powers conferred by the act of 1873.

IV. The United States is the plaintiff in this suit, and the question arises—Is there a right of action in the United States for the causes thus specified, or can a right to recover for such cause of action be given to the United States by an act of congress? Congress may well authorize its attorney-general to institute suits to recover damages due to the United States, or to redress wrongs which are legally wrongs to the United States, but its action can scarcely create such damages, or cause acts to be wrongs to the United States which are, in their nature, wrongs to another. The United States cannot convert to itself the property of another, by its own declaration, or its own authority; nor can it maintain an action, in its own name, against A., to recover a debt which he may owe to B. Moneys recovered by the United States in such an action, like its other funds, will go into its general treasury, and form a part of its resources, to be disposed of according to law. So, if any individual has committed a breach of trust, or been guilty of fraud in discharging his duties as an agent of the Union Pacific Railroad Company, the cause of action to redress such wrong and to recover damages therefor, and the damages themselves, when recovered, belong to the corporation. The suit for such redress must be in the name of the corporation,

as plaintiff. As a general rule, and under ordinary circumstances, no other party can be such plaintiff, and an authority by congress to the attorney-general to commence such action in the name of the United States, is valueless. Congress cannot thus appropriate to itself what belongs to another. To give effect to such an act would be to deprive one of his property without due process of law. I do not doubt the power of congress over the remedy to redress alleged injuries—in other words, its power to regulate the conduct of suits, or to prescribe the form of actions. But, it cannot, under the form of regulating the remedy, impair contracts, or dispose of rights of property. It cannot itself adjudge that moneys are due to the United States, and, by such judgment, give authority for their collection.

This principle applies to all the causes of action specified in the act of 1873, except to a portion of the fourth. Thus, if any person has subscribed for capital stock, or received capital stock or shares, in the Union Pacific Railroad Company, which have not been paid for, the action to recover the money payable by the terms of the subscription must be in the name of the corporation. The contract was made with the corporation, as an existing person. The money, if due at all, is, in terms, payable to the corporation as such. In law it must be recovered by the corporation, to be applied by it to the legal necessities of the railroad company. In substance and in form the money must go through and to the corporation, and no creditor, legal or equitable, can maintain an action for its recovery. In certain cases, if the corporation refuses to do its duty, such action may be maintained by the shareholders of the corporation, the corporation being made a party defendant. There may also be a case in which a judgment creditor can maintain an action against his judgment debtor and his creditor, to collect his debt, after his legal remedies are exhausted. Such was the case of Curran v. Arkansas, 15 How. [56 U. S.] 304. That, however, is not the present case. The debt of the United States has not yet matured. Its bonds, issued to the railroad company, have not become payable, and their payment, when they mature, is secured by a specific lien upon the road and its franchises. It is not a case for a creditor's bill. Whether the interest paid by the United States upon its bonds is a presently payable claim against the company is a question which has not been argued here, and which I do not decide.

The doctrines I have laid down are sustained by numerous authorities, of which I cite the following: Robinson v. Smith, 3 Paige, 222; Attorney General v. Insurance Co., 2 Johns. Ch. 371; Carlisle v. Railway Co., 1 Macn. & G. 689; Attorney General v. Railway Co., 1 Drew. & S. 154. See the cases cited in Heath v. Railway Co. [Case No. 6,306] In Robinson v. Smith [supra] the rule is laid down by Chancellor Walworth in these words: "Generally, where there has been a waste or misapplication of the corporate funds by the officers or agents of the company, a suit to compel them to account for such waste or misapplication should be in the name of the corporation. But, as this court never permits a wrong to go unredressed merely for the sake of form, if it appeared that the directors of the corporation refused to prosecute, by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation was still under the control of those who must be made defendants in the suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation a party defendant. And, if the stockholders were so numerous as to render it impossible or very inconvenient to bring them all before the court, a part might file a bill in behalf of themselves and all others standing in the same situation." It is held in two of these cases, that, if an incorporated company acts illegally, in such manner as to endanger the public interest, it may be restrained from such action on a bill filed by the attorney-general. In many of the cases quoted in these authorities this position is doubted. But, I find no case justifying an action in the name of the sovereign, to recover money or property belonging to a corporation, illegally received by another, although obtained from the corporation by fraud or conspiracy. The power is confined to enjoining the commission of acts endangering the public interests, and does not extend to the recovery of money or property which belongs to the corporation. A suit for such recovery can only be maintained by the corporation, or, in certain exceptional cases, by one or more of its shareholders.

The cases of the contract with the Wyoming Coal & Mining Company, and the others set forth in the bill, come within the principles laid down in the cases cited. It is alleged that the Wyoming contract was made to give an unfair and unreasonable profit to the contractors, to give them a monopoly of the supply of coal for fifteen years, and that the contract was a fraudulent means of obtaining for the parties interested the advantages of the coal trade for the benefit of the individuals named, and against the interest of the railroad corporation. Again it is alleged of the Pullman Palace Car Company, that an agreement has been made, by which it obtains from the railroad company privileges and advantages which it is not for the interest of that company to give, and that the managers and stockholders of the railroad company fraudulently obtain for themselves profits which in equity belong to the railroad company. A similar statement is made in regard to the Omaha Bridge Transfer Company. Again, it is alleged that the cost of the railroad was less than one-half the sum represented by the stock and other outstanding liabilities of the company; and that much of

the stock and bonds of the company have been issued not in the interest of the company, but by the managers unlawfully to enrich themselves, and that high interest and commissions are habitually paid to the managers. The Hoxie contract is of the same general character, and is connected with the following transaction: It is alleged that the Credit Mobilier of America was an incorporation organized under the laws of Pennsylvania, with power, among other things, to contract for building railroads; that the defendants named, in pursuance of a design to control the Union Pacific road for their private benefit, and not for the purposes declared in the act of congress, obtained the control of the Credit Mobilier; and that the intention of the defendants named was to substitute the Credit Mobilier as a contractor in the place of those who had undertaken to perform the Hoxie contract. The means of accomplishing their purpose are set forth in detail, and it is alleged that large amounts of money, dividends, certificates of shares, mortgage bonds, land grants, and income bonds were issued to and received by the defendants named, on pretence of payment for building the road and telegraph line; and that the transaction was a fraudulent device of such defendants to put money in their own pockets.

The allegations of the bill represent the transactions respecting the Oakes Ames contract and the Davis contract to have been of a like design, and perfected in a like manner. It is alleged that the accounts respecting these pretended contracts yet remain unsettled, and that large balances are claimed against the railroad company. It is alleged that the stocks and bonds issued under these contracts should, in equity, be returned to the company for cancellation, or the amount thereof be paid the company in cash. In respect to Cornelius Bushnell, it is alleged that the managers permitted him to dispose of a large number of its bonds, and of other property, for which he has not accounted, and for which it refuses to compel him to account, and that the corporation sold to him certain other bonds at prices below their real value, and that he obtained a large sum of money as compensation for pretended services. All these transactions are alleged to be unlawful and illegal, and it is charged that Bushnell, and Scott, Carnigie, and Morgan, who confederated with him, are liable to the company for the amount thereof, with interest thereon.

This is the substance of the bill on this branch of the case. Upon the principles and authorities already expressed, the right of recovery for wrongs of this character is in the railroad corporation. Large amounts of money are involved, which belong to the corporation, and not to the United States; neither the damages nor the right of action belong to the United States. It is true in law, as alleged in the bill, that Bushnell, Scott, Carnigie, and Morgan are "liable to the company for the amount" claimed. The United States possesses no power to sue for and recover this debt due to the Pacific corporation, and can give none to its attorney-general.

These principles are quite consistent with the power of the United States to institute a suit to procure an adjudication that the charter of the corporation be declared forfeited, and that a receiver of its assets be appointed. The corporation coming into existence by virtue of a statute of the United States, it is quite likely that the federal courts have jurisdiction to adjudge such forfeiture, upon the proper allegations and proofs. In that event, a receiver would be appointed, representing the interests of all parties, who would administer upon the assets according to law. This remedy, however, the United States have not thought fit to pursue. They do not ask to have the corporation dissolved. They are content that it should continue in existence. They must recognize its rights as so continuing, and cannot ask that its affairs be administered as if it were dead. People v. Turnpike Co., 23 Wend. 193; Thompson v. People, 23 Wend. 537; Chesapeake & Ohio Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. 1. So, I doubt not, that, for the purpose of fixing the rates of fare upon the road, according to the power reserved in section 18 of the act of July 1, 1862 (12 Stat. 497), congress may direct an examination into the cost of building and running the road, and, in an action with appropriate allegations, may cite the corporation to a discovery upon that subject, and for that purpose. Such, however, is not the theory of the present bill. So, it is quite probable that a bill can be filed for the purpose of securing the application of the five per cent. of net earnings in payment of the interest or principal of bonds issued, as provided in section 6 of said act of July 1, 1862. A discovery may be sought, and the suit may be retained to afford relief. But it is sufficient to say that such is not the intent of the present bill; that there are no adequate prayers for such an account; and that the allegations are not framed with reference to a bill to compel the company to pay this annual fund.

These objections apply, also, to a supposed right of action to protect the mortgage security of the United States: (1) It is not a cause of action against the remaining demurrants. (2) There is no allegation that the security of the road and the ties is now imperilled. They are just as valuable, whether laid by fraud and in extravagance, as if honestly and prudently laid. (3) It is said that, some years hence, new rails and ties will be needed, and that, if future fraud and misconduct occur, the security will be imperilled. This is not a present evil. None of these causes of action are fairly within the scope of the present suit.

V. But let us look at the question of a trust to be enforced, upon the supposition that the act of 1873 was intended to authorize such trust to be set up in the present suit. The claim of the plaintiff, upon this branch of the

case, is contained in the forty-second paragraph of the bill, and is as follows: "Forty-second. The grants to said Union Pacific Railroad Company in said acts of congress approved July 1, 1862, and July 2, 1864, of the right of way through the public lands for the construction of said railroad and telegraph line, and the right, power, and authority to take, from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof, including, with said right of way to the extent of two hundred feet on each side of said railroad where it may pass over the public lands, the right to take all necessary grounds for stations, buildings, workshops, and depots, machine-shops, switches, side-tracks, and water-stations, and of every alternate section of public land designated by odd numbers, to the amount of ten alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of twenty miles on each side of said road, and of the bonds of the United States and the proceeds thereof, issued to the said company, as well as of the other corporate property, rights, privileges, and franchises bestowed upon said Union Pacific Railroad Company by said acts of congress, were grants in aid of a public work of the United States, and for a public use, and, having been accepted by said corporation, the subject of each of such grants is held in trust by said corporation to be applied to such public use, and according to the intention of such grants, and to be accounted for in such application; and the United States are entitled to have the trust so declared and carried into execution, and to have said property so applied and accounted for, and to have the misapplication of the same restrained by the injunction of this court, and the property or proceeds thereof so misapplied, restored to said corporation as such trustee, or to the United States."

Not only the lands granted and the bonds issued by congress to this road are here asserted to be the subjects of a trust which the United States are entitled to have executed, but the moneys received upon subscription to its stock made by individuals, and from all other sources, all its corporate property, in short, and its corporate rights, privileges and franchises. In the sense that all men are bound to deal honestly and act justly in the discharge of their duties, and that whoever receives benefits or advantages from the public, which are expected or intended to produce an advantage to some portion of the people of the country, assumes a trust to effect that advantage, the plaintiff's claim is true. It is not, however, accurate in a legal sense, to say of a bank incorporated for banking purposes, or of an insurance company, or of any similar institution, that it is a trustee of the government to effect the desired result, or that its property is impressed with a trust for that purpose, which may be enforced in the courts. Such corporation is chartered for private benefit as well as for public advantage, and is legally bound to administer its affairs for the public advantage only to the extent that it does not violate the provisions of its charter or the law of the land. With this limitation, such corporations are authorized to manage their own affairs for their own benefit, and such is the understanding of the government which grants a charter, and of the individuals who accept it. If, in this respect, a corporation should fail in its duty, the remedy is not by an attempt to enforce its supposed duties to the public as a trust, but to punish its illegal acts by a forfeiture of its charter.

The plaintiff's counsel base their argument of a trust upon the title of the said act of July 1, 1862, viz.: "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes." No trust is declared in this title, or in the sections of the act in which this aid is extended. In section 3 it is enacted, "that there be and is hereby granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon," every alternate section of land, &c. In section 5 it is enacted, "that, for the purposes herein mentioned, the secretary of the treasury shall, upon the certificate" specified, issue to said company bonds of the United States, and "the issue of said bonds and delivery to the company shall, ipso facto, constitute a first mortgage on the whole line of the railroad and telegraph," and, upon failure to redeem the said bonds, the road and all its rights, functions, immunities, and appurtenances, and all granted lands which may remain unsold, may be taken possession of for the use and benefit of the United States: "Provided this section shall not apply to that part of any road now constructed." Not only is no trust expressed, but the idea thereof is excluded by taking a mortgage upon the road, the telegraph, its property, franchises, and all its granted lands, remaining unsold. The government does not rely upon the security of an uncertain and undefined trust, but takes an express mortgage, where it intends to secure to itself the performance of conditions by the company. The 6th section enacts "that the grants aforesaid are made upon the condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph lines in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, &c., upon said railroad. A condition precedent is that which is requisite in order that something else shall take effect, and without the existence of which that something else does not and cannot exist. Now, that these grants were made absolutely, that is, without condition precedent, is evident from the undisputed fact that the legal title to the lands vested at once in the corporation,

without interference from the government or claim of title on its part. The same is true of the bonds issued by the government. Stanley v. Colt, 5 Wall. [72 U. S.] 142, per Curtis, arguendo, and cases cited. The condition referred to can only be a condition subsequent, which congress may enforce or omit to enforce, at its pleasure, and which does not affect the title to the property, or the existence and powers of the corporation, until it is enforced. Its enforcement would not be as of a trust, but to declare a forfeiture of the charter, and to recume possession of the lands. And again, in section 17, congress specifies the mode in which it intends to secure the completion and keeping in repair of the road and telegraph. If the corporation fails to complete the road and telegraph within a reasonable time, or permits the same to remain out of repair, congress may pass an act to insure its speedy completion or repair, and may confiscate its subsequent income, to repay the expenditures caused by its delay or neglect. The next section provides, that, to enable it to accomplish the same purposes, congress may alter, amend, or repeal the act. These affirmative guards and securities furnish strong evidence that congress did not intend to rely upon a condition or an implied trust, to secure its rights. Whatever trust, guaranty, or protection it desired was reserved in express terms. Implications are thereby excluded. Leggett v. Dubois, 5 Paige, 114; Anstice v. Brown, 6 Paige, 448. The expressions, which it is claimed established a trust, were used that the act might show on its face that the bounty of congress was bestowed for a constitutional purpose.

It is apparent to the most superficial reader of the statutes, that the great object of congress was to bestow advantages, and from time to time to increase gratuities, to a corporation which should undertake the completion of a railroad to the Pacific. Conditions, restraints, or trusts were but little thought of. Thus, by the act of 1862 (section 3), there was granted to the Union Pacific Company 5 alternate sections per mile on each side of said railroad, and within the limits of 10 miles on each side thereof, equalling 6,400 acres per mile. In 1864, by an act of congress, this land grant was doubled in amount, and the enormous gift of 12,800 acres per mile was made to the road. And again, by its charter of 1862, the government undertook to issue its own bonds to the corporation, payable in 30 years, with interest, to the extent of $16,000 per mile, whenever 40 miles of said road should be completed. which bonds were declared to be a first mortgage upon the road and its property. By the act of 1864 it was provided, first, that the corporation might issue its own bonds to the extent thus specified, and that the lien of the United States' bonds should be subordinate to that of the company's bonds; and, secondly, that the corporate bonds might be issued, as provided, whenever and as often as 20 miles of road should be completed, instead of 40, as first required. By section 11 of the first act it was enacted, that, in certain localities, the subsidy bonds of the government thus to be issued should be $32,000 per mile, and in still other localities that they should be $48,000 per mile. By the original act 15 per centum of the bonds to be delivered upon the completion of the sections of the road between certain points, and 25 per centum between certain other points, were required to be reserved until the whole of the road should be completed, and, if there was a failure to complete, should be forfeited to the United States. By the act of 1864 this reservation was abolished, and the whole amount was authorized to be delivered to the corporation.

The United States have granted lands in many instances to corporations. The 14th volume of the Statutes at Large will be found to contain five such cases (pages 210, 236, 239, 289, 292). The same general terms, with reference to the purpose of the grants and the use to be made of the road by the government, are contained in many of these acts. In 1850, congress granted land in aid of the construction of a railroad from Chicago to Mobile, in which it was enacted, that the railroad "shall be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property, or troops of the United States," and that "the United States' mail shall at all times be transported on the said railroad under the direction of the post office department, at such price as the congress may by law direct." 9 Stat. 467. Eleven similar cases, where the same language is used, are found in the two following volumes. 10 Stat. 9, 35, 156, 302; 11 Stat. 10, 16, 18–20, 22, 31. I cannot think that the government intended to reserve to itself a visitorial power over these corporations, the right to examine into their affairs, and, when not satisfactorily administered, to summon them before the courts for their regulation, or that it has done so. This railroad company is not a charitable corporation, nor were the grants for a charitable use. The grants of land and the issuing of bonds are to be considered as gifts, gratuities, voluntary contributions to aid in the construction of works which it was supposed would develop the resources of the country, advance its civilization and improvement, and upon which the mails and munitions of war could be transported. When given and accepted, the power of the donor is at an end, and the absolute ownership is in the corporations. The position of the government is that of a donor and not that of a creditor or a cestui que trust, except where such position is directly specified. Voluntary conveyance creates no presumption of a trust. 1 Hill, Trustees (4th Am. Ed.) 170, 171. The rights of the government are those which are expressly reserved, and do not arise from an implied trust.

No authority is cited to sustain the argument that such gifts or gratuities to a business corporation are in the nature of a trust, and

I have found none. The disposition of the law is against implied or constructive trusts. In Cook v Fountain, 3 Swanst. 585, the law is thus laid down by Lord Nottingham: "There is one good, general, and infallible rule that goes to both these kinds of trusts. It is such a general rule as never deceives, a general rule to which there is no exception, and it is this: The law never implies, the court never presumes, a trust, but in case of absolute necessity. The reason of this rule is sacred, for, if the court of chancery do once take the liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the lord chancellor to construe or presume any man in England out of his estate, and so at last every case in court will become casus pro amico." See, also, Sturges v. Knapp, 31 Vt. 1. The cases in which trusts by implication have been enforced are usually those in favor of third parties, the presumed objects of the donor's bounty, and not in favor of the donor himself. The presumption is much slighter in the latter case than in the former.

The bill charges a series of fraudulent acts on the part of the directors and managers of the corporation, enormous in extent and gross in character. I should have preferred to have found a mode of redressing these wrongs in the present suit, rather than to have reached the conclusion that this bill and this plaintiff cannot now and here afford it. Thus, it is said in the thirty-fifth paragraph, that the defendants, conspirators and managers of the Union Pacific Railroad Company, caused large amounts of money belonging to the corporation to be expended for unlawful purposes, upon objects not within the scope of the corporate powers of the company, to aid in procuring legislation from congress for their benefit, and in improperly influencing public officers in the discharge of their duties, and in litigation to which said corporation was not a party, or in which it had no interest, and for the private interests of the defendants hereinbefore named. Other offences equally or more heinous are specified, which must meet the condemnation of every honest man. I am of the opinion, however, that their redress must be sought through the corporation, unless they refuse to bring suit, in which case the action must be by a shareholder of the corporation.

The suggestions already made embrace all the causes of action provided for in the act of 1873, except the last, viz. the action against persons who have wrongfully and unlawfully received from the United States bonds, moneys, or lands which ought to be accounted for and paid to the United States. Where property has been wrongfully received from the United States, which ought to be accounted for and paid to them, a cause of action exists in its favor, for the recovery of such property. The allegations of the bill, however, and the conceded facts, do not cover this cause of action. The bill contains no allegation that any person wrongfully holding them has received such bonds or moneys or property from the United States. In every instance referred to in the bill the property is stated to have been delivered by the United States to the corporation, and not to "the persons" against whom the action is authorized. This cause of action is not set up in the bill, and needs no further consideration.

Judgment must be ordered for the defendants, upon the demurrer, with leave to the plaintiffs to amend their bill, if they shall be so advised.

[The case was taken on an appeal to the supreme court, where the decree of this court was affirmed, Justices Swayne and Harlan, dissenting. 98 U. S. 569.]

Case No. 16,599.

UNITED STATES ex rel. HALL et al. v. UNION PAC. R. CO.

[2 Dill. 527.] [1]

Circuit Court, D. Iowa. 1873.

MANDAMUS—PRACTICE—EFFECT OF ACT OF JUNE 1, 1872, UPON PRACTICE IN MANDAMUS PROCEEDINGS.

1. The judiciary act confers no jurisdiction on the circuit court to issue a writ of mandamus as an original proceeding; and the 5th section of the act of congress of June 1, 1872 [17 Stat. 197], does not confer original jurisdiction in mandamus proceedings.

[Cited in Jordan v. Cass Co., Case No. 7,517; People v. Colorado Cent. R. Co., 42 Fed. 640.]

2. The act of June 1, 1872, does not have the effect to make the provisions of the state statutes relating to pleadings and practice in actions of mandamus applicable to the ancillary jurisdiction of this court in mandamus proceedings, but the practice of the court remains substantially as at common law.

3. The act of congress of March 3, 1873 [17 Stat. 509], confers original jurisdiction on the proper circuit court of the United States of cases of mandamus to compel the Union Pacific Railroad Company to operate its road according to law.

[Cited in Hall v. Union Pac. R. Co., Case No. 5,950; U. S. v. Union Pac. R. Co., Id. 16,600.]

A petition, or information, under oath, is filed in this court by Samuel E. Hall and John W. Morse, who describe themselves as citizens of the United States and of the state of Iowa, making the Union Pacific Railroad Company defendant or respondent. It sets out the acts of congress relating to the Union Pacific Railroad, and alleges that the eastern terminus of the road is within the corporate limits of the city of Council Bluffs, in the state of Iowa, and on the eastern side of the Missouri river; that the said railroad company neglects and refuses to operate its road from its eastern terminus at Council Bluffs as one continuous line, but on the contrary, operates its road

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

from Omaha, in Nebraska, although the railroad company owns a bridge across the Missouri river between these two cities; that the company runs and operates the portion of its road over the bridge as a distinct and independent line, under the name of "The Omaha Bridge Transfer," thereby "causing great expense and delay to shippers and passengers, and great damage and inconvenience to the public at large, and especially to your petitioners, who are merchants doing business at Council Bluffs, and who constantly are obliged to ship and receive goods transported over said road." It is not essential to refer to the petition more at length. Its purpose sufficiently appears by the prayer, which is as follows: "Wherefore your petitioners pray, that a writ of mandamus may issue from this honorable court directed to the said Union Pacific Railroad Company, its officers and agents, strictly enjoining and commanding them henceforth to operate the whole of their said road, from Council Bluffs westward, and including that portion of their said road between Council Bluffs and Omaha, and constructed over and across the said bridge as one continuous line for all purposes of communication, travel, and transportation; and especially commanding them to start their regular freight and passenger trains westward bound from said Council Bluffs, to run their eastward-bound trains of both descriptions through and over said bridge, to Council Bluffs, and to run and operate said trains to and from said Council Bluffs under one uniform time schedule and freight and passenger tariff with the remainder of said road, and to wholly desist and refrain from operating said road as an independent and separate line, and from causing or requiring freight or passengers bound westward or eastward to be transferred as aforesaid at said Omaha; and otherwise commanding said defendants as to the court shall seem just and agreeable to law and required by the circumstances of the case."

A notice directed to the defendant was served upon its general agent at Council Bluffs, stating that an application would be made to the court this term for a peremptory writ of mandamus, as prayed.

Putnam & Rogers, Sapp, Lyman, & Hanna, and A. V. Larimer, for petitioners.

J. M. Woolworth and A. J. Poppleton, contra.

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

DILLON, Circuit Judge. By act of congress approved March 3, 1873 (17 Stat. 509), it is provided that the "proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel said Union Pacific Railroad Company to operate its road as required by law." It is under this act that the present proceeding is instituted.

There has been no appearance by the defendant in the court, but on the day fixed in the notice as the one on which the petitioners would apply for a writ of mandamus, counsel in the interest of the defendant have asked leave to suggest for the consideration of the court the question whether, assuming the proceeding to be regular and one which is authorized, and the court to have jurisdiction in the matter, the court can, prior to the final determination of the controversy, award a writ of mandamus. This suggestion is based upon the statute of the state (Code 1873, p. 573) relating to "actions of mandamus," and the effect claimed for the 5th section of the act of congress of June 1, 1872 (17 Stat. 197). By the statute of the state, proceedings by mandamus are assimilated to regular actions at law, both in respect to pleadings and procedure. The alternative writ is abolished, and an order of mandamus, which is a substitute for the peremptory writ, issues only after trial, and the right to such order has been adjudged to the plaintiff. The 5th section of the act of congress of June 1, 1872, above mentioned, enacts "That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The act of congress first above mentioned gives to the "proper circuit court * * * jurisdiction to hear and determine all cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law." It will be assumed that this is a proper court to take cognizance of the proceeding here commenced, and the question which meets us and which must be determined before any further steps can be taken, is, whether the proceedings shall be conducted in conformity to the state statutes relating to mandamus, or according to the practice at common law. If according to the latter, then in due course an alternative writ issues, which stands in the place of a petition or declaration, to which, if served, return must be made, and the rights of the parties thereon determined in the usual manner; but if according to the state statute, then no writ can be awarded until the right to it is established by the final judgment of the court.

The question as to the effect of the act of June 1, 1872, upon the practice in mandamus proceedings in this court, is one of interest, and we proceed to consider it. Under the judiciary act, which prescribes the jurisdiction of this court, it is settled that it cannot issue the writ of mandamus at all in the exercise of original jurisdiction, that the power to

issue this writ is confined exclusively to cases where the jurisdiction already exists, and that jurisdiction cannot be acquired by means of this writ. Bath Co. v. Amey, 13 Wall. [80 U. S.] 244; Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166, 197. Now the 5th section of the act of June 1, 1872, regulating pleadings and procedure cannot have the effect to confer on this court jurisdiction in mandamus cases; the jurisdiction must otherwise exist by virtue of the judiciary act or some other act of congress, and then the court may issue the writ when necessary to the exercise of such jurisdiction and agreeable to the principles and usages of law. Judiciary Act, § 14; Bath Co. v. Amey, supra.

The provisions of the state statute which contemplates that there shall be original process and regular pleadings, and a final determination or judgment before the writ or order is awarded, are in the main wholly inapplicable to the ancillary jurisdiction of this court in mandamus proceedings. So that in general, the practice in this court in mandamus proceedings is not affected by the act of June 1, 1872, but remains as before. And by its terms, that act refers to causes of a common law nature (Judiciary Act, § 11), and by the express decision of the supreme court, mandamus proceedings are not included in the section of the judiciary act which prescribes the jurisdiction of this court. Bath Co. v. Amey, supra, and cases there cited. The general practice of the court in mandamus proceedings being regulated by the principles and usages of law, and not by the state legislation, is there anything in the nature of this case which should make it an exception?

It is true that the act of 1873 gives the proper circuit court original jurisdiction of this particular case of mandamus, but as it is not one of the cases which fall within the jurisdiction of this court in common law actions as conferred by the judiciary act, and is not one of those to which the act of June 1, 1872, was intended to refer, and so does not fall within it; and as the duty sought to be enforced arises wholly under acts of congress, and can be in no way influenced by state legislation, it is our opinion that this proceeding should be made to conform to the practice at common law as liberalized and modified in more recent times by legislation and judicial decisions.

A motion for a rule upon the Union Pacific Railroad Company to appear and show cause why an alternative writ should not be granted, or for an alternative writ to be granted without the rule, is the proper step next to be taken by the relators.

The motion for the alternative writ is now under advisement by the court on the question, whether the petitioners may be relators, and as to jurisdiction of the court over the respondent. [See Cases Nos. 5,950, 16,600, 16,601; also, 91 U. S. 343.] Construction of act of July 1, 1872, see Schwabacker v. Reilly [Case No. 12,501]; Bronson v. Keokuk [Id. 1,928].

Case No. 16,600.

UNITED STATES ex rel. HALL et al. v. UNION PAC. R. CO.

[3 Dill. 524;[1] 1 Cent. Law J. 566.]

Circuit Court, D. Iowa. 1875.

FEDERAL COURT — JURISDICTION — UNION PACIFIC RAILROAD COMPANY — SERVICE OF PROCESS.

The circuit court of the United States for the district of Iowa, under the acts of congress relating to the Union Pacific Railroad Company, has jurisdiction in mandamus to compel that company to operate its road as required by law, if any part of the road is in the district of Iowa; and under the act of June 20, 1874 [18 Stat. 111], service of process may be made upon the president or general superintendent of the company, found in the district of Iowa.

[Cited in City of St. Louis v. St. Louis Gaslight Co., 70 Mo. 115.]

[This was a petition by Hall and others for a writ of mandamus against the Union Pacific Railroad Company to compel it to operate its road according to law. For a prior proceeding, see Case No. 16,599.]

The alternative writ of mandamus awarded at the last term [Id. 5,950] was served upon the president and general superintendent of the company at Council Bluffs, in this district. The marshal's return on alternative writ of mandamus is as follows: "This writ came into my hands on the 10th day of June, A. D. 1874, and on the same day I served the same on Sidney Dillon, president of the within named defendant, the Union Pacific Railroad Company, at the transfer grounds of said company, in the city of Council Bluffs, county of Pottawattamie, Iowa, by delivering to him a true copy thereof, and offering to read to him the within writ, which he then and there waived, and on the same day I served the within writ on S. H. H. Clark, general superintendent of the within named defendant, the Union Pacific Railroad Company, by delivering to him a true copy thereof, and offering to read the original, which he then and there waived; all done at the transfer grounds of said Union Pacific Railroad Company, in the city of Council Bluffs, Pottawattamie county, Iowa." The company made a special appearance, and excepted to the sufficiency of this service, and moved to quash the same.

In support of the motion, the following affidavit was filed:

"A. J. Poppleton, being duly sworn, says, that for several years last past, he has been, and now is, the attorney of the Union Pacific Railroad Company, defendant in this action. That said corporation is created by, and organized under, a law of the United States; that, by a certain joint resolution of congress, passed and approved April 10th, 1869, the stockholders of said company were authorized to establish their general office at such place as they might select at a meeting to be held in the city of Boston, April 22,

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1869; that at such meeting, said city of Boston was by said stockholders selected, and its general office established in said city, where it has ever since remained. That in said city, in the state of Massachusetts, all the meetings of its board of directors are held, and its books and records kept, and that all its officers are residents of said city, except its president, who resides in the state of New York; that it has no other office or place where its legislative corporate power is exercised; that its managing office, where the power and authority of its managing agents, to wit: Superintendent, auditor, cashier, general freight and ticket agents, are exercised and wielded, is in the city of Omaha and state of Nebraska, and it has no general managing office elsewhere; that the alleged service of the writ in this action was made on Sidney Dillon, president of said company, while casually traveling through the district of Iowa, he being at the same time a resident of the city and state of New York, and that defendant has and owns no railroad situated in the state of Iowa, except such portion of the iron track laid over and across its Missouri river bridge and the approaches thereto as are east of the boundary line between the states of Iowa and Nebraska. That said S. H. H. Clark, general superintendent, upon whom said alleged service was also made, resides, and has his office at Omaha, Nebraska, and that neither the said Dillon, president, nor Clark, superintendent, resides or has an office in the state of Iowa. A. J. Poppleton.

"Subscribed and sworn to by A. J. Poppleton, before me October 13th, 1874. George B. Corkhill, Clerk."

John N. Rogers, for relators.

J. M. Woolworth and A. J. Poppleton, for the railroad company.

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

DILLON, Circuit Judge, on overruling these exceptions, and orally delivering the judgment of the court, in substance said: This is a proceeding instituted by certain persons residing in Council Bluffs, in this state, who claim that they are aggrieved by reason of an alleged failure of the Union Pacific Railroad Company to operate its road according to law. The 15th section of the act of 1864 [13 Stat. 362], which was an act amending the original charter of this company—giving it additional subsidies and additional grants of land—by means of which in reality the road was subsequently constructed, provided that it should be the duty of the company to operate its road, so far as the government and the public were concerned, as one continuous line. In this case it is alleged that the company refuse to operate their road as a continuous line; that in fact they operate it as one continuous line as far only as the city of Omaha, and there break its continuity by the agency of a distinct and separate transfer from that point to the Iowa side. This is the complaint which the relators make, and which they allege to be in violation of the terms of the charter of the company and its duty to the public. U. S. v. Union Pac. Ry. Co. [Case No. 16,599].

In 1873, congress passed an act [17 Stat. 509] in these words: "The proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel the said Union Pacific Railroad Company to operate its road as required by law." This was an act which was indispensable in order to give the federal court original jurisdiction in mandamus, and was passed for that purpose. U. S. v. Union Pac. Ry. Co. [supra]. This proceeding heretofore came before us on two questions. The one was "whether private persons could move for the writ; that is, could institute the proceeding to compel the road to perform its public duty, or whether the proceeding must not be instituted by the attorney general." We have decided at the last term, that the writ was well moved; that if private persons could show that they were interested in the operation of the road, they had a right to come into court under this act and call the company to account for failing to perform its public duty, to their injury, and thereupon awarded the alternative writ. On the other question, whether the circuit court of the district of Iowa was the "proper circuit court" before which to bring this proceeding, we gave no opinion. The act of June, 1874, makes an addition to the 15th section of the act of July, 1864, and provides that there shall be added to it the following words: "Any officer or agent of the company who is authorized to construct the aforesaid road, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph lines under his control or which he is engaged in operating, for purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line, and without discrimination of any kind, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined and imprisoned." This act makes it the personal duty of the officers of the road to operate it as one continuous line. Now, if it can be shown that the president of the road is not operating it as a continuous line, within the meaning of this act of congress, then he is guilty and may be punished, and we do not think for the violation of the act in this respect he can be protected by any resolution of the board of directors. The law says: "You shall operate this road as one continuous line," and enjoins this duty upon the officers of the road. In the next sentence the phraseology changes: In case of failure or refusal of the Union Pacific Railroad, or either of said branches, to com-

ply with the requirements of this act and the act to which this is amendatory, an action against them may be brought in the district or circuit court of the United States, in the territory, district or circuit in which the road or any portion of it may be situated, for damages on acount of such failure or refusal. The action must be brought in the court of some district in which some portion of the road of the defendants is situated.

Now in this proceeding it is alleged that a portion of the road which this company refuses to operate as one continuous line, is situated within the geographical limits of the state of Iowa. On this motion we must take this to be true. The act of 1874 provides, that if process in any suit is served upon any agent of the defendant found within the territory, district, or circuit in which such suit may be brought, such service shall be held by the court to be good and sufficient. In this case the alternative writ of mandamus was served upon the president and the general superintendent of the company at Council Bluffs, in this state, and the question is, whether this is a sufficient service to give this court jurisdiction, assuming that some portion of the road of the defendant is in this district, and assuming that the road is not operated as required by law. It is of course to be regretted that the phraseology of the act is not so clear as to admit of no controversy; and yet, when we consider that it is our duty to carry out the intention of congress, so far as we can learn it, it does not seems to us that it admits of very much doubt that this is, upon the assumptions above mentioned, a proper circuit court. The writ of mandamus may go to the corporation, to the corporate body, and command it to perform its duty (granting that any part of the road is in this district), and if the writ, thus commanding this duty, is served upon the chief officer of the corporation, its president, or upon any officer who may be indicted and criminally punished, if he fails to do his duty in this respect, then it seems to us the court has jurisdiction over the company and its officers, by mandamus, to compel the performance of this duty. This writ may. perhaps, run also, under the act of 1874, to the president of the company: "You are hereby commanded to operate the road as one continuous line." Under this act, this is a duty which he can and should perform. He can be criminally punished if he does not perform it, and it is no protection to him that the board of directors has ordered him to do something else. The writ of mandamus may be served upon him, and he is obliged to respond to it, whether it be regarded as a proceeding against him as an officer, or whether it be regarded as against the corporation. The argument is this: The act of 1874 enjoins the duty to operate the road as one continuous line, upon the officers engaged in operating the road; if they refuse to do so they are made indictable. The duty to be performed by them is one which rests upon the officers as well as the corporation; otherwise congress would not have made it criminal for the officers to refuse to discharge it. It is their duty to obey the law; if they fail they may be proceeded against criminally, and the public duty may be enforced by mandamus, and this writ may be directed to the corporation and served as required by the act of June 20, 1874, or perhaps to the president or officers who are made subject to indictment under that act, and served upon them if found within the district. Whether any portion of the road of the company is within this district, and whether the transfer between Omaha and Council Bluffs, by means of the "Omaha Bridge Transfer," which is the subject of the relators' complaint, is in violation of the duty of the company or its officers, as enjoined by law, are questions which are not passed upon on the present motion. And again, considering that the original charter of the company, as well as the act of March 3, 1873, provided no mode of service, and that the act of 1874 was designed to enforce the duty enjoined by the 15th section of the act of 1864, all these acts are to be construed as in pari materia, and thus regarded, any proceeding or suit to enforce the duty enjoined by the 15th section, may be instituted in the proper court, and the proper court, as prescribed by the act of 1874, is one in the district in which some part of the company's road is situated, and in any such proceeding or suit, the process may be served upon the company's agents found in the district, and in this proceeding by mandamus, our judgment is, that service of the writ upon the president or any officer whose duty it is to see that the road is operated as required by law, is sufficient. Exceptions to service of alternative writ overruled. Exceptions overruled.

[NOTE. A motion was then entered for a peremptory mandamus, which was ordered to issue. Case No. 16,601. The cause was then taken to the supreme court on a writ of error, where the judgment of this court was affirmed, Mr. Justice Bradley dissenting. 91 U. S. 343.]

Case No. 16,601.

UNITED STATES ex rel. HALL et al. v. UNION PAC. R. CO.

[4 Dill. 479;[1] 9 West. Jur. 356; 7 Chi. Leg. News, 282.]

Circuit Court, D. Iowa. May Term, 1875.[2]

EASTERN TERMINUS OF THE UNION PACIFIC RAILROAD COMPANY—POWER OF COMPANY TO BRIDGE THE MISSOURI RIVER — MANDAMUS TO COMPEL THE COMPANY TO OPERATE ITS WHOLE LINE.

1. The charter of the Union Pacific Railroad Company (12 Stat. 489, § 12) required its Iowa

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

[2] [Affirmed in 91 U. S. 343.]

branch to be constructed westward from a point on the western boundary of the state of Iowa, to be fixed by the president of the United States. *Held*, on a consideration of various provisions of the charter, that the eastern terminus of said branch was on the Iowa shore of the Missouri river, and not on the Nebraska shore, nor at a point "on the middle of the main channel" of the river, although that was the legal western boundary of the state of Iowa.

2. The right to erect a bridge across the Missouri river to the eastern terminus of the Iowa branch on the Iowa shore, was given to the Pacific Railroad Company by implication in the original charter of the company, and was expressly conferred by the ninth section of the amended charter of the company, of July 2, 1864 (13 Stat. 356). The powers given and the duties imposed by those acts in respect to bridges, were recognized, increased, and regulated, but not repealed, by the special act of February 24, 1871, entitled "An act to authorize the Union Pacific Railroad Company to issue its bonds to construct a bridge across the Missouri river at Omaha, Nebraska, and Council Bluffs, Iowa" (16 Stat. 430).

3. This last named act, construed in connection with the other legislation of congress, was held not to change the eastern terminus of the Iowa branch of the Union Pacific Railroad Company from the Iowa shore of the Missouri river, nor to disconnect the bridge from the road of the company, so as to relieve the company from the duty imposed by its charter and other acts of congress, to operate its whole railroad as "one continuous line."

4. A peremptory mandamus to compel the Union Pacific Railroad Company to operate its road over the bridge in the same general manner that it operates the other portions of road was granted, and the device of a separate transfer over the bridge by local trains held to be in violation of the duty of the company to the public.

5. Amendments in form and in substance may be allowed in mandamus proceedings, in any stage thereof where justice will be thereby promoted; in this case the alternative writ was amended, by leave of court, by striking out part of its mandate, and the peremptory writ, instead of being denied because the alternative writ was too broad, was ordered to be issued in conformity to the alternative writ as amended.

[Cited in U. S. v. Johnson Co., Case No. 15,489.]

On motion for a peremptory writ of mandamus. This is a proceeding by mandamus, to compel the Union Pacific Railroad Company to operate its road as a continuous line, by running its regular through trains to and from the Iowa shore of the Missouri river, at a point within the limits of Council Bluffs, in the state of Iowa, and which point the relators claim to be the eastern terminus of the road. On the other hand, the company insist that the eastern terminus, that is, the legal as well as actual terminus of the company's road proper, is on the western shore of the Missouri river, at a point within the corporate limits of the city of Omaha, in the state of Nebraska. Between the Iowa shore and the Nebraska shore the company has constructed a railway bridge, the eastern end of which and the approaches thereto are within the city of Council Bluffs, while the western end and the approaches thereto are within the limits of the city of Omaha. The western end of this bridge is near the passenger depot of the company in Omaha, and the rails of the company's road are extended or prolonged over the bridge, so that the company could, if it desired, run its regular trains each way, without change, over the bridge. The bridge is located about two miles south of the point in section 10, township 15, range 13, known as the initial point of the actual construction, but the road between that point and the machine shops of the company in Omaha has been taken up and abandoned. The company, instead of running its regular trains to and from the Iowa side of the river, stops them at and starts them westward from Omaha, and it crosses passengers and freights over the bridge by means of separate and distinct trains, called "transfer trains," under the management of a "Bridge Transfer Company," an organization of its own employés, charging therefor special rates, viz., fifty cents for each passenger, and ten dollars for each car, and keeping a separate account of the earnings of the bridge. Through passengers and freights, each way, cross the bridge by the agency of this transfer company. Passengers from any of the Iowa roads terminating in Council Bluffs, or at or near the eastern end of the respondent's said bridge, intending to go west by the respondent's road, instead of getting directly on the regular train of the respondent, are required to get on a local or transfer train, and, on arriving at Omaha, to change to the regular train of the company, which is made up and operated from the company's depot in that place. And a like change is necessary to be made by passengers on the respondent's road arriving at Omaha from the west and going east. The present proceeding is instituted by the relators under the act of congress of March 3, 1873 (17 Stat. 509, § 4, last clause), which provides that "the proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel said Union Pacific Railroad Company to operate its road as required by law."

The relators claim, under the various provisions of the acts of congress applicable to the respondent, that it is bound to operate its regular through trains over the bridge to and from the Iowa side, and that operating the bridge in the manner stated, through the agency of the transfer company, is in violation of the acts of congress. Indeed, the relators claim that the bridge is, in fact, an integral part of the railroad of the company, and must be operated as such, and that the company has no legal right to exact or charge special rates or tolls for freights or passengers carried thereon. The alternative writ of mandamus (upon which, and the return and answer thereto, relators now move for a peremptory writ), commanded "the Union Pacific Railroad Company to operate the whole of its railroad from Council Bluffs westward,

including that portion of its road between Council Bluffs and Omaha, and constructed over and across the said bridge, as one continuous line, for all purposes of communication, trade, and transportation; and especially to start its regular through freight and passenger trains westward-bound from Council Bluffs, and to run its eastward-bound trains of both descriptions through and over the said bridge to Council Bluffs, and to operate its said trains to and from Council Bluffs under one uniform time schedule and freight and passenger tariff with the remainder of its said road, and to wholly desist and refrain from operating said last mentioned portion of said road as an independent and separate line, and from causing or requiring freight or passengers, bound westward or eastward, to be transferred as aforesaid at Omaha," or that the company appear, to show cause to the contrary. The company has appeared, and for cause shows substantially the facts herein stated.

The Union Pacific Railroad Company was chartered by congress July 1, 1862 (12 Stat. 489). The 1st, 7th, 8th, 9th, 12th, 13th, 14th, and 17th sections—and particularly the 12th and 14th—bear upon the present controversy. The act provided for a main trunk line to run westward from a point on the 100th meridian, at which point it was to connect with branch roads converging there; the northern one having its eastern terminus at Sioux City, Iowa; the southern, at the mouth of the Kansas river, on the south side thereof; and the central (the one here in question), "from a point (section 14) on the western boundary of the state of Iowa, to be fixed by the president of the United States." On the 17th day of November, 1863, President Lincoln, by an executive order, fixed "so much of the western boundary of the state of Iowa as lies between the north and south boundaries of the United States township within which the city of Omaha is situate, as the point from which said line of railroad shall be constructed." But this point is indefinite north and south, as the township was six miles in length, and on March 7, 1864, the same president, "on the application of the company," did "designate and establish such first above named point on the western boundary of the state of Iowa, east of and opposite to the east line of section 10, township 15, range 13, in the territory of Nebraska." The legal western boundary of the state of Iowa is "the middle of the channel of the Missouri river." 9 Stat. 52. On the 2d of July, 1864 (13 Stat. 356), the charter of the company was materially amended, by giving to the company increased aid in lands and bonds, and by several specific provisions. The original charter contained no express provisions as to bridges. The amended charter (section 9) on the subject was as follows: "That, to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri river, and other rivers which its road may pass in its course, and authority is hereby given said corporation to construct bridges over said Missouri river and all other rivers, for the convenience of said road: provided, that any bridge or bridges it may construct over the Missouri river, or any other navigable stream on the line of said road, shall be constructed with suitable and proper draws, etc., and shall be built, kept, and maintained at the expense of said company, in such manner as not to impair the usefulness of said rivers for navigation." The company commenced in 1869 the construction of the bridge here in question at the point where it now is, but before it was completed, congress passed an act, approved February 24, 1871, having a material bearing upon the present controversy. 16 Stat. 430. This enactment is as follows: "An act to authorize the Union Pacific Railroad Company to issue bonds and construct a bridge across the Missouri river at Omaha, Nebraska, and Council Bluffs, Iowa. Be it enacted by the senate and house of representatives of the United States of America, in congress assembled: That, for the purpose of more perfect connection of any railroads that are, or shall be, constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and is hereby, authorized to issue bonds and secure the same by mortgage on the bridge and approaches, as it may deem needful, to construct and maintain its bridge over said river, and tracks and depots required to perfect the same, as now authorized by law of congress; and said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges for the use of the same; and for the use and protection of said bridge and property, the Union Pacific Railroad Company shall be empowered, governed, and limited by the provisions of the act entitled 'An act to authorize the construction of certain bridges, and to establish them as post roads,' approved July 25, 1866, so far as the same is applicable thereto: And provided, that nothing in this act shall be so constructed as to change the terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligations as established by existing laws: Provided, also, that congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half millions of dollars: Provided, that if said bridge shall be constructed as a draw-bridge, the same shall be constructed with spans not less than two hundred feet in length in the

clear, on each side of the central or pivot pier of the draw."

Under the authority thus conferred to mortgage the bridge, the company, April 1, 1871, mortgaged the same, and its tolls and income, to secure bonds to the amount of $2,500,000 in gold, which bonds are now outstanding. But before the said bridge was commenced, viz., November 1, 1865, the company, under authority given by the 10th section of the act of July 2, 1864, had mortgaged to trustees "all and singular the railroad and telegraph of said company heretofore constructed or hereafter to be constructed on a point on the western boundary of the state of Iowa, heretofore fixed by the president of the United States, to-wit, at the city of Omaha," etc., with all lands, rights of way, easements, depot buildings, and franchises for building and operating the said road, etc., etc., to secure the first mortgage bonds, of which $27,000,000 are alleged to be outstanding, and the government has a subordinate lien for many millions of dollars to secure the repayment of the bonds it issued to the company. The 12th section of the original charter of the company contained, inter alia, this provision: "The whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line." The 15th section of the amended charter of 1864 contained the provision: The several companies, for the purposes of communication, travel, and transportation, so far as the public and the government are concerned, shall operate and use said roads as one continuous line, and in such operation and use to afford and secure each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road and business of any or either of said companies, or adverse to the road or business of either of the others. As late as the 20th day of June, 1874, by an act entitled "An act making additions to the 15th section of the act approved July 2, 1864" (the amendatory act of 1864 above referred to, 1873–74, 18 Stat. 111), the said 15th section is amended by the addition thereto of the following: "And any officer or agent of the companies authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph under his control, or which he is engaged in operating for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line, or shall refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time or transportation, without any discrimination of any kind in favor of, or adverse to, the road or business of any or either of said companies, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding $1,000, and may be imprisoned not less than six months." Further provisions are made for suit by the party aggrieved (prescribing the courts in which suit may be brought, and the mode of service therein), "in case of failure or refusal of the Union Pacific Railroad Company, or either of said branches, to comply with the requirements of this act, and the acts to which this act is amendatory." On other questions this proceeding has already been several times before the court. [Case No. 16,599] and Hall v. Union Pac. R. Co. [Id. 5,950]. A return has been made to the alternative writ, and an answer thereto been filed, and the case is now before the court on the motion of the relators for a peremptory mandamus.

John N. Rogers, for relators.

J. M. Woolworth and A. J. Poppleton, for the railroad company.

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

DILLON, Circuit Judge. In a controversy which has excited intense local feeling, and one involving such large interests, and to which so much attention has been drawn on the part of the public and of congress, and which has been so fully argued at the bar, the court would be justified in stating with more than usual fullness the grounds of its judgment, but as its determination is not final, and as it is understood that the unsuccessful party, whichever it may be, will carry the order here made for revision to the supreme court, it is not our purpose to discuss the case with that degree of elaboration we should otherwise do, and which its intrinsic importance would well warrant.

We now proceed to notice the material questions involved in the application for the peremptory writ. If the road which the respondent is bound to operate, has its terminus on the western shore of the Missouri river, as its counsel have contended—in other words, if, under the acts of congress applicable to the respondent, it was not authorized to build the road it is required to operate, to the Iowa shore of the river—it may be conceded that the result would be that the relators would not be entitled to the writ they seek. What point, therefore, does the charter of the company fix as the commencement of what is therein termed the "Iowa Branch?" This question is answered by the following language in the act of 1862: "The said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the state of Iowa, to be fixed by the president of the United States." In the executive orders of November 17, 1863, and March 4, 1864, President Lincoln did not undertake to change this provision, but carefully conformed to it. Accordingly, those orders named "the western boundary of the state of Iowa" as "the point

from which the company should construct their branch road to the 100th meridian." Indisputably, then, the commencement point of the Iowa branch is on "the western boundary of the state of Iowa." This precise language as descriptive of "the point of commencement," is twice used in the section (14) which provides for the building of the branch, and prescribes its commencement, course, and termination. Indeed, counsel for the company do not deny, in argument, that the commencement point of the road, as prescribed by the terms of the charter, is upon the western boundary of Iowa, but they raise a question as to what is the western boundary of that state, and deny that this language means the eastern shore of the river. The argument of the company's counsel on the subject can best be presented in his own language. He says: "The western boundary of the state of Iowa is in the middle of the Missouri river. 9 Stat. 52. The road is to be constructed, then, from a point, to be fixed by the president, in the middle of the main channel of the river. But it is said that is impracticable, and you must put your initial point on the Iowa shore, or a part of the authorized road cannot be built. But there is this rule, that a grant of this kind is to be strictly construed. You cannot go beyond the limits fixed, and if you cannot go to the limits fixed, you must go as near them as you can, always keeping within them. If it is impracticable to begin the road in the middle of the river, you must begin on the Nebraska shore."

If it be granted that congress, by the use of the words "point on the western boundary of the state of Iowa as descriptive of the 'point of commencement' of the 'Iowa Branch,'" meant to refer to the legal boundary of the state as declared in 1846 (9 Stat. 52), the views of counsel would be sound. And if there is nothing to show that congress meant some other than the legal boundary, there would be a strong presumption that the legal boundary was the one here intended. There is, however, in various provisions of the charter of the company, evidence of a very satisfactory character that congress, in the language under consideration, referred to the boundary of the state on the river rather than on the ideal line in the middle of its channel. It had no question of territorial jurisdiction before it, and hence its attention was, probably, not drawn to the act of 1846, fixing the legal boundary. Congress, in the charters of the Union Pacific Company, as respects all of the branches, decisively meant to secure a close and immediate connection with the Iowa and Missouri railroads—leaving no hiatus or break in the line. What reason is there, then, for supposing that the central Iowa branch was intended to be exceptional in this respect? The Iowa lines of railway had not then been completed to the Missouri river, and hence could not be mentioned by name, but it is not readily to be supposed that congress, in granting the powers and furnishing the means to construct a great national highway, intended to make no provision for crossing a broad and swift stream like the Missouri, known to be at the western end of the Iowa roads, whose completion so as to connect with the Union Pacific road was then contemplated and relied on. Therefore, when the original charter of the company authorized and required it to construct its railway from a point on the western boundary of the state of Iowa, it authorized its construction from the Iowa shore, and if a bridge was necessary to meet the requirement, then the power to build the bridge was given. Inhabitants of Springfield v. Connecticut River R. Co., 4 Cush. 63; City of Clinton v. Cedar Rapids & M. R. Co., 24 Iowa, 455, 479; People v. Rensselaer & S. R. Co., 15 Wend. 113, 130. Indeed, it might well be urged that not only was authority conferred to build the bridge, but that the duty was imposed to build it as a part of its "line of railroad" necessary to reach the prescribed point of commencement. The company did not need, so far as relates to bridges, the power given to it by the 9th section of the amended charter (1864), "to establish ferries across the Missouri river, and other rivers which its road may pass in its course," and "to construct bridges over said Missouri river, and all other rivers, for the convenience of its road," and "to enable it to make convenient and necessary connections with other roads." A bridge built under authority of the acts of 1862 or 1864, would be part of the road of the company; or, in the language of the original charter (section 14), part of its "line of railroad constructed from a point on the western boundary of the state of Iowa;" just as a bridge in a highway has often been held to be part of the highway itself. Dill. Mun. Corp. § 579. If there was doubt as to the right of the company to pass beyond the middle of the river, and go to the Iowa shore, under the original charter of 1862, that doubt is set at rest by the aforementioned 9th section of the amended charter of 1864, which, in terms, authorizes the company to construct a bridge over the Missouri river, which presupposes that the eastern end of it shall rest upon the Iowa shore; and this is done, so congress declares, "to enable the Union Pacific Railway to make convenient and necessary connections with other roads." The bridge was to be built by the Union Pacific Railroad Company. No provision was made for a bridge company, or for stock or capital for bridge purposes, and if the structure had been built under authority thus conferred, and no other, there could be no doubt that it would have been a part of the road of the company in such a sense that the company would have been bound to operate it, as much as it was bound to operate any other part of its line.

It appears, from the return to the alternative writ, that the company, under the authority thus given, and not otherwise, commenced the construction of the bridge here in question in 1869. It is proved to be a

difficult and expensive undertaking, and in 1871 the structure was far from being completed. On the 24th day of February, of that year, congress passed "An act to authorize the Union Pacific Railway Company to issue its bonds to construct a bridge across the Missouri river at Omaha, Nebraska, and Council Bluffs, Iowa." 16 Stat. 430. This enactment is supposed by the defendant to have a controlling effect on the present controversy; and it undoubtedly has an important bearing upon it. It is given in full in the statement of the case. It authorizes the Union Pacific Railroad Company "to make a mortgage on the bridge and approaches and appurtenances," and to issue bonds not to exceed $2,500,000, to be secured by such mortgage.

Notwithstanding the rule of law that authority to levy and collect tolls must be plainly conferred, and the able argument of the relators' counsel on this point, it is clear to our minds that congress gave, by this act, to the company the right to "levy and collect tolls and charges for the use of the bridge," reserving, in the second proviso, the "power at all times to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinafter provided for." It is manifest, from this language, that tolls and charges, other than those for local travel, were contemplated as being within the competency of the company to levy and collect for the use of the bridge. Besides, the chief value of the bridge as a security would be the tolls, and the authority to make a mortgage for $2,500,000 on the mere bridge structure and approaches, without the right to levy tolls, and pledge the same to the lender, would, doubtless, have proved a barren power, since it would be quite imposible to negotiate such a security. It is evident, from the tenor of the bridge mortgage, that all the parties to that instrument thus understood the act of 1871. The act contains, also, the important provision that it shall not "change the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under the existing laws, nor release said company from its obligations under existing laws." It also contains a clause adopting, as far as applicable to the bridge in question, the provisions of the bridge act of July 25, 1866 (14 Stat. 244). The act also contains a clause authorizing the bridge to be "so constructed as to provide for the passage of ordinary vehicles," but the privilege was not used, and so need not be considered. The bridge act of 1871, it is to be observed, does not profess to repeal the previous authority, express or implied, on the part of the company to bridge the Missouri river, but only to confer additional powers and make additional provisions. All the provisions of the several acts are to be read together; and thus viewed the respondent would have, inter alia, the following rights and powers in respect to the bridge in question: (1) To build it under the original and amended charter as part of its road, and from a point on the Iowa shore. (2) Under the act of 1871 it was so far disconnected from the road as to authorize it to be separately mortgaged as a bridge, and this act empowered the company to levy and collect tolls and charges for the use of the same as a bridge, or compensation for the use of it, by other railroads constructed to the Missouri river at or near Council Bluffs and Omaha, congress reserving the power to regulate the bridge and the rates for transportation of freight and passengers over the same. But it was expressly provided that this act should not change the then existing eastern terminus of the company's road, nor release the company from its obligations under existing laws. By this last provision it was doubtless intended to declare that the eastern terminus of the road should remain where it had before been established, and then existed, namely, on the Iowa shore, and the existing obligations of the company springing from that fact should remain in full force. One of these obligations is that while the bridge mortgage remains unforeclosed, and the bridge is in possession of the company, the company must operate it as part of its road, which it has never ceased to to be, although it may, under the act of 1871, charge special rates for its use, subject to the control of congress. Three several times, first in the act of 1862 (section 12), then in the act of 1864 (section 15), and lastly, as late as June 20, 1874, has congress required the respondent "to operate and use its road for all purposes of communication, travel, and transportation, so far as the public and government are concerned," as one continuous line. This last act even goes so far as to make it criminal on the part of the controlling officers or agents of the companies, or either of the companies, to refuse thus to operate the roads or either of them—thus demonstrating that congress intended that each road, singly, as well as all the roads constituting part of the system of Pacific roads contemplated by the acts of 1862 and 1864, should be operated without breaks or unnecessary delay, as a continuous line, without favor or discrimination towards either persons or localities.

If we are right in the position that the eastern terminus of the road of the respondent is on the Iowa shore, then, inasmuch as the bridge act of 1871, upon which the respondent so strongly relies, declares that such terminus remains unchanged, notwithstanding that act, the conclusion necessarily follows that the respondent must operate its trains over the bridge under its control as part of a continuous line of road, and operate them over its entire line of road from terminus to terminus. Such a duty has been enforced by a mandamus without such specific legislation as congress has provided in

this behalf by the act of March 3, 1873 (17 Stat. 509, § 4, last clause), which, in terms, gives "to the proper circuit court of the United States jurisdiction to hear and determine all cases of mandamus, to compel the Union Pacific Railroad Company to operate its road as required by law." State v. Hartford & N. H. R. Co., 29 Conn. 538; Rex v. Severn & W. Ry. Co., 2 Barn. & Ald. 646. Suppose the respondent should habitually stop its regular trains two miles west of Omaha and refuse to run them eastward of that point, or only run "transfer trains," is there any doubt, under the legislation of congress, that it could be compelled to operate and run its regular trains into that city? And so in the case before us, if the bridge on which its track is extended is to be considered as part of its road, within the meaning of the acts of congress requiring it to operate its whole line without any break in its continuity. In this view the transfer device of the company, putting passengers and shippers of freight to unnecessary delay, inconvenience and expense, is in violation of the duty which the company owes to the public. If made by the company with third persons, without legislative authority, it would be ultra vires. It is none the less objectionable that it is made by its own employés.

A point is made by the respondent against the writ on the ground that the bridge structure is not opposite section 10, as fixed by the president, but some two miles down the river. In point of fact, after getting bonds and lands by reason of that location, the company has abandoned the track through section 10, and instead of crossing the river opposite that section, has constructed its road so as to connect with the present bridge. If this change in the location of the bridge from section 10 was authorized as an implied effect of the act of 1871, applied to the subject matter, the objection under consideration fails. Originally, under the order of President Lincoln, the bridge should have been constructed so as to reach the Iowa shore east of and opposite section 10. Instead of this, the company commenced a bridge at the site of the present bridge, two miles south. Congress, in 1871, authorized that bridge to be completed and mortgaged, thereby legalizing the change, and doubtless relieving the company of the duty of bridging the stream opposite section 10. And, therefore, when congress also said that the act of 1871, in relation to the bridge, should not "change the eastern terminus of the road from the place where it is now fixed under the existing laws," it did not mean that the company should still be under an obligation to build a bridge opposite section 10, but that the Iowa shore should, notwithstanding the bridge act, remain the eastern terminus of the road, and the company's obligation in this regard should continue. But if the change in the location of the bridge was not authorized by the act of 1871, still the company ought to be estopped to say we have reached our eastern terminus at the wrong place, and hence cannot be compelled to operate the whole length of our actual line of road.

Again, it is suggested by the respondent's counsel that this view, if sound, necessarily has the effect to subordinate the bridge mortgage for $2,500,000, which was intended to be a first lien upon the bridge as well as its tolls, to the prior mortgage of the company upon its entire line of road.

These respective mortgagees are not before us, and their rights cannot be touched by anything here decided. We content ourselves, therefore, with the remark that, observing the terms of the two instruments, we do not see that the result suggested necessarily follows from the positions we have attempted to maintain. It were premature at this time to anticipate that there will be a sale under the bridge mortgage, and to consider the rights of the purchaser, of the company, of the public, or of the government after that event.

Two technical points are made by the respondent. The first is that no demand is averred. Under the circumstances of this case, this objection, being made at the hearing on the merits, and the duty being a public one, which the respondent has all the time denied to exist, comes too late. The object of a demand is to give the option to do or refuse that which is demanded, and it is evident that a demand by the relators would not have obviated the necessity for this proceeding to determine the contested question of public right and duty here involved. Dill. Mun. Corp. § 696. The other point is more substantial, and, indeed, fatal, to the application in its present form for the peremptory writ, unless the objection can be avoided by amendment. The proceedings by mandamus at common law are characterized by unreasonable strictness; and an established rule of practice in the queen's bench is that the mandate of the peremptory writ cannot be moulded by the court after hearing upon the return of the alternative writ, but the peremptory writ must be denied altogether unless the sphere of its mandate is exactly coincident to the mandate of the alternative writ. Queen v. East & West India Docks & B. J. Ry. Co., 2 El. & Bl. 466; 3 Adol. & E. 534; 14 Adol. & E. (N. S.) 59.

If the propositions heretofore advanced are correct, the mandate of the alternative writ was too broad in that it commanded the defendant to operate the bridge under a uniform tariff of freights and fares with the residue of the road.

We hold that the defendant may, under the act of 1874, exact special tolls and charges for the use of its bridge. Anticipating that this might be the view of the court, the relators' counsel have, in that event, asked leave to amend by striking out of the mandate of the alternative writ the words, "and freight and passenger tariff," and that the peremptory

writ issue so as to conform to the alternative writ as thus amended. Undoubtedly this amendment ought to be allowed. In this country, and at this day, the writ of mandamus has lost its prerogative character, and the proceedings are governed by the same liberal rules which obtain in ordinary legal remedies. According to Chief Justice Taney, "the right to the writ, and the power to issue it, have ceased to depend on any prerogative powers, and it is now regarded as an ordinary process in the case to which it is applicable. It is a writ to which every one is entitled, when it is the appropriate process for asserting the right he claims." Kentucky v. Dennison, 24 How. [65 U. S.] 66. In our judgment, the true rule is to allow, on proper terms, amendments in proceedings by mandamus at all times, both as to form and substance, in the interests of justice. In England, 9 Anne, c. 20, § 7, extended the statutes of jeofails "to all writs of mandamus, and all the proceedings thereon." Speaking of the power to allow amendments, Mr. Justice Strong, delivering the judgment of the supreme court of Pennsylvania, remarks: "Formerly, when the doctrine of amendments remained as at common law, the court would not allow the writ of mandamus to be amended after return filed; but, as is said (Tapp. Mand. p. 334), the strict rule of the common law has been, of late years, altogether departed from, the principle as to amendment being that it shall be allowed in all cases, when such a course will promote justice." Com. v. Select & Common Councils of City of Pittsburgh, 34 Pa. St. 499, 515. And such is unquestionably the American practice. Dill. Mun. Corp. §§ 699, 701, and cases cited; High, Extr. Rem. 519. And the allowance of such amendments is within the spirit, if not, indeed, within the terms, of the liberal provisions as to amendments in the 32d section of the judiciary act. The power there given to allow amendment is broad, extending to "any defect," and should not, ordinarily, be confined to defects of form, and should be liberally viewed, and the power given liberally exercised to promote justice.

Guided by these considerations, why should the relators be denied the power to amend to conform to the views of the court, and compelled to commence anew. The defendant, it is to be supposed, has and feels no other interest in this controversy than to have its public duty authoritatively settled, and this can be as well done in this proceeding by allowing the amendment, as by forcing the relators to retrace all their steps, by commencing de novo.

Let an order be entered allowing the proposed amendment to the alternative writ, and thereupon directing the peremptory writ to issue, conformed to the alternative writ as amended. Ordered accordingly.

The judgment in this case was affirmed by the supreme court at the October term, 1875 (91 U. S. 343).

Case No. 16,602.

UNITED STATES v. UNITED STATES EXP. CO.

[5 Biss. 91.] [1]

Circuit Court, N. D. Illinois. June, 1869.

VIOLATION OF POSTAL LAWS — EXPRESS COMPANY CARRYING UNSTAMPED LETTER OF ADVICE.

1. It is not a violation of the post office laws for an express company to carry with a money letter or package, an unstamped letter of advice concerning said money.

2. It was the intention of congress, in the act of March 3, 1845 [5 Stat. 732], to permit an unstamped letter of advice relating merely to the article shipped to be transmitted with such article.

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

DRUMMOND, District Judge. This case is submitted to the court on an agreed statement of facts to the following effect: That the defendant is an express company, and common carrier of money between Chicago and Springfield, Illinois, over the Chicago, Alton & St. Louis Railway, a United States mail route; that the packages of the express company are transported in a car under their exclusive control; that the express company does not carry letters unless in a government stamped envelope, except as money packages received for transportation, and letters enclosed therewith relating thereto. On the first day of May, 1868, the express company, in the usual course of its business, received, at Chicago, a package in a letter envelope unstamped, containing a sum of money and a letter relating thereto, addressed to the consignee in Springfield, Illinois, receiving the usual rate of pay for transmitting such a sum of money. The company carried the package to its destination, over and upon the route aforesaid, in a car such as has been described, and delivered the same to the consignee. It is claimed, under this statement of facts, that the defendant violated the laws of the United States concerning the conveyance of letters from place to place between which the mail is regularly transported under the authority of the postoffice department. The question is whether the act set forth in the agreed statement of facts comes within any of the laws upon that subject.

We understand that it is claimed to be a violation of the 9th section of the act of March 3, 1845 (5 Stat. 732, 735), which declares that it shall be unlawful for any person or persons to establish any private express for the conveyance of letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips, of any letters or packages or other matter properly transmittible in the United States mail, except newspapers, pamphlets, magazines, and periodicals. If this section stood alone

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

there might be some question whether the words "in any manner to cause to be conveyed * * * any letters or other matter properly transmittible in the United States mail," did not cover the case as stated; but the 10th section of the same law declares "that it shall not be lawful for any stage coach, railroad car, steamboat, packet, boat, or other vehicle or vessel, nor any of the owners, managers, servants, or crews of either, which regularly perform trips at stated periods on a post route, or between two or more cities, towns, or other places, from one to the other, over which the United States mail is regularly conveyed * * * to transport or convey, otherwise than in the mail, any letter or letters * * * except such as may have relation to some part of the cargo of such steamboat, packet, boat, * * * or to some article at the same time conveyed by the same stage-coach, railroad car, or other vehicle."

The question is whether this case is not fairly within the exceptions contained in the 10th section. We think it is. The letter which was transmitted by the express company was in an envelope containing money, and related to the money, and we think that it was the intention of congress in framing this 10th section to allow a letter to be sent accompanying any article of property, provided it related merely to the article of property or money sent, and did not concern any other subject. In other words, it was the intention of congress to permit a party who transmitted any article of property or money, by an express company or otherwise, to send at the same time and by the same mode of conveyance, although it might be between cities where there was a post route, and where the United States mail was carried, a letter of advice, merely relating to the money or property thus sent. The main object of the 9th section seems to have been to prevent the establishment of express or other companies to come in competition with the transmission of the mail under the authority of the government, although it was clearly intended also to prevent the transmission or conveyance of letters by such conveyances except in connection with any article of property sent.

These provisions of the post-office law being in derogation of common right, must be construed strictly, and in the absence of clear and explicit language forbidding the carriage of a letter, under the circumstances indicated, we must hold that the right to do so is not interfered with.

The 8th section of the act of August 31, 1852 (10 Stat. 141), has been referred to. The object of that section was to authorize the postmaster-general to provide suitable letter envelopes, with proper water-marks and other guards against counterfeits, which were to be sold to any person at their cost, and which when used by enclosing a letter in such government envelope thus stamped, might be transmitted by express companies or by any one between places where there was a post route, and where the United States mail was carried, provided the envelope was duly sealed or closed in such a way that the letter could not be taken from the envelope without tearing or destroying it. This law simply declared that when letters were within these government envelopes they might be carried in any quantity by express companies, so that when they reached their destination and were received by the person to whom they were addressed, they were defaced in such a way that they could not be again used. The government thus reaped all the advantage of their regular transmission through the mail, and the defacement of the stamps by the post-office officials. Without this provision it is apparent, that, the express companies would not have this authority, and the agreed case declares that the defendants have never carried letters in any other way than is thus provided, or as accompanying and relating to some article of property or money sent.

The instructions given by the post-office department of 1866, are entirely consistent with the view which we have expressed of the law.

Case No. 16,603.

UNITED STATES v. UNITED STATES TEL. CO.

[2 Ben. 362; [1] 1 Am. Law T. Rep. U. S. Cts. 69; 7 Int. Rev. Rec. 141.]

District Court. S. D. New York. April, 1868.

DUTY ON TELEGRAPH CABLE—ENUMERATED ARTICLES.

1. Telegraph cable, composed of iron-wire and gutta-percha, iron being the material of chief value, is embraced in the words of the twenty-second section of the tariff act of March 2, 1861 (12 Stat. 192), and the thirteenth section of the act of July 14, 1862 (12 Stat. 557), as a manufacture, not otherwise provided for, of which iron is the component material of chief value.

[Distinguished in Cohen v. Phelps, Case No. 2,964.]

2. It is, therefore, not embraced within the provision of the twentieth section of the act of August 30, 1842 (5 Stat. 565), which provides, that, on non-enumerated articles, manufactured from different materials, the highest duty shall be assessed which is chargeable upon any of their component parts.

3. Such telegraph cable, therefore, was held to be chargeable with thirty-five per cent. duty, notwithstanding the fact that gutta-percha was chargeable with forty per cent.

B. K. Phelps, Asst. U. S. Dist. Atty.

G. P. Lowrey, for defendant.

BLATCHFORD, District Judge. This is an action to recover $542.30, with interest from January 17, 1865, alleged to be due to the United States, for duties on a quantity of telegraphic cable imported into the United States by the defendants. The article is composed of iron-wire and gutta-percha,

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

and, in its manufactured state, iron is its component material of chief value. On the entry of the article, a duty of thirty-five per cent., ad valorem, was imposed, and paid upon it, under section twenty-two of the act of March 2, 1861 (12 Stat. 192), which imposes a duty of thirty per cent. on "manufactures, articles, vessels, and wares not otherwise provided for, of brass, copper, gold, iron, lead, pewter, platina, silver, tin, or other metal, or of which either of these metals, or any other metal, shall be the component material of chief value," and under section thirteen of the act of July 14, 1862 (12 Stat. 557), which, in addition to the duties theretofore imposed by law, imposes a duty of five per cent., ad valorem, on "manufactures, articles, vessels, and wares not otherwise provided for, of gold, silver, copper, brass, iron, steel, lead, pewter, tin, or other metal, or of which either of these metals, or any other metal, shall be the component material of chief value." The words, "otherwise provided for," mean otherwise provided for among enumerated articles, by being classed under a description contained in an enumeration of articles. Morlot v. Lawrence [Case No. 9,815]. The article in question here is not included in any enumeration of articles in any tariff act existing at the time it was imported, except in such enumerations in the acts of March 2, 1861, and July 14, 1862. It would, therefore, seem, as iron is its component material of chief value, to be liable to a duty of thirty-five per cent., ad valorem, and no more. But the United States claim that it is liable to a duty of forty per cent., ad valorem, on the ground that the twentieth section of the act of August 30, 1842 (5 Stat. 565), provides, that, on all nonenumerated articles "manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable," and that, by the thirteenth section of the act of June 30, 1864 (13 Stat. 214), a duty of forty per cent., ad valorem, is imposed on "gutta-percha manufactured." This suit is brought to recover the difference between the thirty-five per cent. paid and the forty per cent., and, at the trial, a verdict was taken for the plaintiffs, subject to the opinion of the court.

It is claimed, on the part of the United States, that, as there is not in the tariff acts any duty imposed on telegraphic cable, by that name, or by any commercial designation applicable to the thing itself, it is, therefore, a nonenumerated article, and, as such, liable to the duty of forty per cent. claimed. This view would be sound, and the article would be liable to a duty of forty per cent., if it were a nonenumerated article. But it is not a nonenumerated article, and, therefore, the twentieth section of the act of 1842 has no application to it. That section applies only where an article has not been otherwise provided for—that is, is not classed under a description contained in an enumeration of articles. Lottimer v. Lawrence [Case No. 8,521]. The article in question here is described in the twenty-second section of the act of 1861, and the thirteenth section of the act of 1862, and is classed under the description contained in the enumeration of articles in those sections, as an article of which iron is the component material of chief value. In U. S. v. Clarke [Case No. 14,813], bombazine was not named in the tariff act of 1824. It was a fabric composed of wool and silk. The act imposed a duty of thirty per cent. on all manufactures of which wool was a component part (except worsted stuff goods and blankets); a duty of twenty-five per cent. on all manufactures of which silk was a component material, coming from beyond the Cape of Good Hope; a duty of twenty per cent. on all other manufactures of which silk was a component material; and a duty of fifteen per cent. on nonenumerated articles. The court held, that, under the act, bombazine was not a nonenumerated article, but that it was doubly enumerated. Yet, the only enumeration of it was by speaking of it as an article of which wool was "a component part," or of which silk was "a component material." So, here, the telegraphic cable is enumerated, by speaking of it as an article of which iron is "the component material of chief value."

In the case of Morlot v. Lawrence [supra], which is relied upon by the plaintiffs to sustain their claim to recover in this case, the article under consideration—linen lustres, &c., composed of linen and cotton—was not enumerated. It did not fall within any of the articles specially described in any tariff act. It was, therefore, a nonenumerated article, and, as such, the twentieth section of the act of 1842 applied to it.

There must be a judgment for the defendant.

Case No. 16,604.

UNITED STATES v. VACA.

[Hoff. Dec. 22.]

District Court, N. D. California. Feb. 11, 1861.

CALIFORNIA LAND CLAIMS — SURVEY AFTER CONFIRMATION—FAILURE TO FILE MANDATE FROM SUPREME COURT.

[The survey of a claim, made by the surveyor general after the final confirmation of the claim by the supreme court, on which a patent has issued, is not invalid because the mandate issued by such court, directing further proceedings to be had in the district court, was not filed in the latter.]

[This was a claim by Juan Manuel Vaca and Juan Felipe Peña for Los Putos. 10 square leagues in Solano county, granted January 27, 1843, by Manuel Micheltorena to said Vaca and Peña. The claim was filed February 20, 1852, rejected by the commission November 15, 1853, and confirmed by the district court July 5, 1855, and the decree was

affirmed by the United States supreme court. 18 How. (59 U. S.) 557.]

HOFFMAN, District Judge. The claim in this case having been finally confirmed by the supreme court, the usual mandate directing that such further proceedings be had in this court as, according to right and justice, ought to be had, was issued. This mandate was not filed in this court, or presented to it by the attorneys for the claimant, but it was exhibited to the surveyor general, as evidence that the claim was finally confirmed, and in order that a survey and location should be made. The claim was accordingly surveyed and located by that officer, and, the survey having been finally approved by the executive authority at Washington, a patent for the land was issued. A duplicate or copy of the mandate has since been procured by certain parties, who allege the survey to be erroneous, and the same had been filed in this court. A motion is now made that an order be entered directing further proceedings to be had in obedience to it. It is not denied that the object of this motion is to obtain the order of this court that a new survey be made, and that the survey, when so made, may be brought into this court under the provisions of the act of 1860 [12 Stat. 33].

It would, undoubtedly, have been more regular to have filed the mandate in this court, and entered the usual order directing further proceedings to be had. Those further proceedings would have been the survey and location of the land. But, in strictness, the action of the surveyor general in the case would have been rather a compliance with the express requirements of the statute than with any order of this court. From the moment when, by the final decree of the supreme court, the claim was confirmed, it became the surveyor's duty to cause all the claims thus "finally confirmed to be accurately surveyed," and, upon such, a patent could lawfully issue. It is true that if, in the course of this proceeding, questions of a judicial nature arose as to the boundaries or location, the district court had authority to settle them. But this was when a proper case was submitted to it before the patent issued. Such is the express language of the supreme court in the case of Castro v. Hendricks, 23 How. [64 U. S.] 442.

The "further proceedings" to which alone the mandate could refer are the proceedings as to survey and location, which the court might have taken if any questions had arisen, and a "proper case" presented before the patent issued. But when the interposition of this court has not been asked, when the claim has been finally confirmed by the decree of the supreme court, and a survey made and patent issued, I can discover no authority in this court to set aside that patent, reform the survey, and direct an amended patent to issue.

In the case above cited, the supreme court say: "But it was not the expectation of this court that the surveyor general should make returns to the district court in every case, nor did they imply that the validity of a survey depended on the recognition of that court, or its incorporation into a decree of that court." It is evident, therefore, that the absence of any "recognition" by this court of the survey in the case at bar has no effect to impair its validity, or that of the patent issued in pursuance of it.

It is urged, however, that the court is empowered and required by the act of 1860 to order this survey to be returned to it. It will be perceived that the interposition of the court in this form is claimed on a ground inconsistent with that on which it is asked to enter an order for further proceedings, i. e. for a survey; for, in the last case, the application is based on the supposition that no legal survey has yet been made, and that none can be, or should have been, made, until after the filing of the mandate and order of this court directing further proceedings to be had. The former application proceeds on the idea that a regular survey has been made, which, by the terms of the act of 1860, is subjected to the supervision of this court.

As already intimated, I am unable to perceive any reason for treating the survey and patent as absolutely null and void merely because the mandate was not filed in this court. And if the survey was properly made, and a patent has issued in pursuance of it, the act of 1860 gives this court no authority to interpose. The primary object of that act was to subject surveys and locations thereafter to be made to the supervision of the district court, and to define and regulate, as its title recites, the jurisdiction already vested in the court, as was decided in the case of U. S. v. Fossatt [unreported]. But that jurisdiction was expressly declared in that case to exist over the cause only "until patent issued," and there could have been no intention on the part of congress to authorize the court to re-examine and set aside all surveys which had already been made, and on which patents had issued. That the act was chiefly intended to be prospective in its operation further appears from the fact that a special provision was inserted in the sixth section, subjecting all cases in which proceedings were then pending in the district courts to the operation of the act, except that no publication was to be made of the survey. But a case where no objection to the survey had been made, and where a patent had issued, could in no sense be said to be pending, or embraced within the provisions of either the first or the sixth sections.

On the whole, I am of opinion that this court has no jurisdiction to direct a new survey to be made, or to inquire into and set aside or reform the survey that has been made in this case.

Case No. 16,605.

UNITED STATES v. VALLEJO.

[Hoff. Dec. 51.]

District Court, N. D. California. Jan. 25, 1862.

CALIFORNIA LAND GRANTS—DECREES OF CONFIRMATION—RES JUDICATA—SURVEYS.

[After a decree confirming a grant according to described boundaries, and the dismissal of an appeal therefrom, the court has no authority, in determining questions relating to the survey, to assume the invalidity of the original grant.]

HOFFMAN, District Judge. In the decree of confirmation in this case, the land is described as the place called "Petaluma," containing 15 square leagues, and bounded as follows, viz.: "On the south by the estero of Olompali (Petaluma creek), north and east by the river Sonoma, Agua Caliente, and Giulicos, and on the west by the hills of the Roblar de la Miseria." The title of the claimant, Mariano G. Vallejo, was founded in three different grants. The first dated June 21, 1834, was for the land known by the name of "Petaluma," bounded by the mission of San Francisco Solano, the place of Santa Rosa, and the estero de Olompali, of the extent of four square leagues. On the 22d October, 1843, Vallejo petitioned Gov. Micheltorena for a new grant of the tract, alleging that his previous title papers, as well as the expediente, had been lost. In this petition he represents that the land was of the extent of ten square leagues, as shown by the map, &c. It is not explained whether, in thus stating the extent of the tract referred to, Vallejo deceived the governor, and procured from him a grant of 10 leagues, under the idea that that was the quantity already granted to him by the titles which had been lost, or whether he meant to ask, and the governor to give, an addition to the previous grant. It seems, however, that the grant issued for the "place called 'Petaluma,' bounded on the south by the estero of Olompali, on the north and east by the river of Sonoma, Agua Caliente, and Giulicos, and on the west by the hills of the Roblar de la Miseria, it being of the extent of 10 square leagues." The third title exhibited by the claimant was a grant dated June 22, 1844, for the surplus or sobrante of five leagues, found to exist "in the place of Petaluma, marked out and recognized from the river of Sonoma, to the estero of Olompali and Posas Cautua." The second condition provides "that the land of which mention is made shall not pass the boundaries which have up to this time been recognized as those of Petaluma, mentioned in the respective title of said rancho, in which they are described in a distinct and positive manner." The authenticity and validity of all these grants was recognized and affirmed by the decision of the board and the decree of this court, and the claim was confirmed to 15 leagues of land, bounded as has been stated. The appeal to the supreme court having been dismissed by the United States, the decree of this court has become final, and cannot now be disturbed.

It is alleged that the sobrante, or five-league grant, is a forgery. But that question is no longer open for discussion. It is also objected that all the grants are for the place called "Petaluma," and the true eastern boundary of that tract is not the river Sonoma, but a range of hills to the west of it, which separates the two valleys of Petaluma and Sonoma. But in answer to this objection it is enough to say that the ten-league grant expressly mentions the boundaries of Petaluma to be, on the south, the estero de Olompali, and on the north and east the river of Sonoma, Agua Caliente, and Giulicos. The five-league or sobrante grant also speaks of the "place of Petaluma, marked out and recognized from the river of Sonoma to the estero of Olompali and Posas Cautua." And the second condition expressly refers to the "boundaries of the Petaluma as mentioned in the title to the rancho, in which they are described in a distinct and positive manner."

Assuming these grants to be genuine, there can be no doubt that the eastern boundary of Petaluma was the river of Sonoma. The decree of confirmation expressly states the boundaries in the language of the ten-league grant, and I am at a loss to perceive how, in the present proceeding, I can adopt any other boundaries than those mentioned in the decree.

The reference in the decree to the title papers and evidence will not aid us in this case, as in some others, to correct any accidental error of the decree in the designation of boundaries, for the same description must be adopted, unless we assume the grants to be fraudulent; an hypothesis which, after final confirmation, cannot be entertained. The extent of land within the exterior boundaries marked in the decree has been found to exceed 15 leagues, the quantity confirmed. That quantity has accordingly been surveyed to the claimant within his exterior boundaries, at his election. I am not aware that any objection is taken to the manner in which this right has been exercised. The survey is therefore approved.

Case No. 16,606.

UNITED STATES v. VALLEJO.

[Hoff. Op. 53; Hoff. Dec. 3.]

District Court, N. D. California. July 5, 1859.[1]

MEXICAN LAND GRANTS — CONFIRMATION — EVIDENCE—JURISDICTION OF COURT.

[1. Claim confirmed, notwithstanding a failure to produce the original grant; its loss being accounted for by the fact that the grantee was killed during the war, and it appearing that the archival evidence was complete and regular in all respects, and that the grantee was in possession from a date long prior to the grant.]

[1] [Affirmed by the supreme court in 1 Black, (66 U. S.) 283.]

[2. The court has no jurisdiction, in a proceeding to confirm a grant, to inquire into any questions of private right between the heirs or devisees of the grantee and the present claimants. The decree of confirmation must be made to the claimant, or to the legal representatives of the deceased grantee, whoever they may be, and without prejudice to the rights of any one who may be lawfully entitled under him.]

[Claim of Mariano G. Vallejo to the Pina ranch, in Sonoma county.]

HOFFMAN, District Judge. This case has been submitted without argument, the district attorney not disputing the genuineness or validity of the claim. The original grant is not produced. Its nonproduction, however, is not a ground for suspicion, for the grantee was killed during the war, and, after searching, the grant could not be found. The expediente is found in the archives, duly numbered as its date required, and the grant is noted with its approximate number, the names of the grantee, and of the land granted, in Jimenio's index. A certificate of confirmation by the departmental assembly is also attached to the expediente, dated October 8, 1845, and, on reference to the journal of that body, the reference to the committee on vacant lands, the report of that committee, and the resolution of approval are found duly recorded. The signatures to all the documents in the expediente are proved to be genuine, and all the preliminary proceedings and the issuance of the grant appear to have been strictly regular. The occupation of the tract by Pena, the grantee, from a date long anterior to that on which the grant was approved by the assembly, is also shown. The proofs of the validity of this claim are thus far as full and as reliable as could be offered in support of any grant made by the former government of this country. There can be no doubt but that it should be confirmed. The contents of the lost grant are proved, not only by parol testimony, but by the concession and the approval of the departmental assembly. The claim has been presented by M. G. Vallejo. The conveyance from Pena to him appears to have been made before the grant was obtained by the former.

This court has no jurisdiction to inquire, in the present proceeding, into any questions of private right between the heirs or devisees of the grantee and the present claimant. The decree of confirmation must, therefore, be made to M. G. Vallejo, claimant, or to the legal representatives of the deceased grantee, whoever they may be, and without prejudice to the rights of any one who may be lawfully entitled under him.

[On appeal to the supreme court, this decree was affirmed. 1 Black (66 U. S.) 283.]

UNITED STATES (VALLEJO v.). See Cases Nos. 16,818 and 16,819.

UNITED STATES (VALLIERE v.). See Case No. 16,822.

Case No. 16,607.

UNITED STATES v. VAN FOSSEN et al.

[1 Dill. 406.] [1]

Circuit Court, D. Kansas. 1871.

RECOGNIZANCE—EFFECT OF SUBSEQUENT IMPRISONMENT OF PRINCIPAL COGNIZOR BY STATE AUTHORITY—DEATH.

1. It is no defence to sureties on a recognizance given to the United States in a criminal case, that their principal, after entering into the recognizance, and before the time fixed for his appearance in the United States court, went beyond the jurisdiction of the district, into another state, and there committed an offence against its laws, or was there arrested for a prior offence against its laws, in punishment for which he was, at the time the recognizance was declared forfeited, in actual confinement in the penitentiary of such state.

[Cited in Taylor v. Taintor, 16 Wall. (83 U. S.) 370–372; In re James, 18 Fed. 857; U. S. v. McGlashen, 66 Fed. 538.]

[Followed in State v. Horn, 70 Mo. 467.]

2. Whether, in such case, the sureties would have been exonerated had the subsequent arrest and confinement been by the United States —quere?

[Cited in Re James, 18 Fed. 857.]

3. Death of the principal, after default and forfeiture of his recognizance, does not exonerate his sureties.

[Cited in U. S. v. McGlashen, 66 Fed. 538.]

[4. Cited in U. S. v. Wells, Case No. 16,665, to the point that no process from a federal court can reach a prisoner in the prior custody of a state court.]

William S. Dunn at the October term, 1868, of the United States district court for the district of Kansas, was indicted for robbing the United States mail, and was duly arrested therefor by the marshal of the district on the 4th of April, 1870. On the 4th day of May, 1870, Dunn, as principal, and the present defendants, as his sureties, executed to the United States a recognizance in the penal sum of $2,500, in the usual form, conditioned that the said Dunn should "appear in his own proper person, before the district court of the United States for the district of Kansas, at its next term, to be held at, etc., on the 10th day of October, 1870, and not depart therefrom without leave, etc., then this bond to be null and void, otherwise to remain in full force and effect." Pursuant to the practice of the court, this action is brought upon the recognizance; and it is alleged in the petition that Dunn failed to appear at the term specified; that the sureties, though duly called, and required to produce him according to the tenor of the condition of the bond, failed to do so, and that thereupon the same was duly forfeited. The sureties in the recognizance, for answer, plead in substance: "That, after they entered into it, Dunn, the principal, went beyond the jurisdiction of the United States court, into the state of Missouri; that on the 10th day of June, 1870, he committed, in Marion county, in that

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

state, the crime of grand larceny, for which he was duly indicted and convicted by the circuit court of Marion county, and sentenced for the term of six years to hard labor in the penitentiary of the state of Missouri, to which he was taken by the authorities of the state, to undergo his imprisonment; that he was, pursuant to said sentence, in the custody of the warden of the prison when such recognizance was forfeited: wherefore, said Dunn could not appear in his own proper person before the United States district court, as required by the recognizance; and the sureties, without any fault on their part, are thereby prevented from producing the said Dunn to answer the indictment therein pending against him." To this answer, the district attorney demurs, on the ground that the facts therein pleaded do not discharge the defendants from liability.

A. H. Horton, U. S. Dist. Atty.

W. C. Webb and McComas & McKeagan, for defendants (sureties).

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

DILLON, Circuit Judge. Examination and reflection have confirmed my first impression that the facts pleaded in defence do not, in law, exonerate the defendants from liability on the recognizance. The recognizance is a contract between the cognizors and the government of the United States, that, if the latter would release the principal recognizor from custody, the former would undertake that he should personally appear at the specified time and place, to answer the indictment. The condition of the recognizance was broken by his failure to appear; and the parties to it became absolute debtors to the United States for the amount of the penalty (People v. Anable, 7 Hill, 33), and must be held liable to pay the same, unless they can show some matter legally sufficient to excuse this failure.

"It is a general principle of the law," says Nelson, C. J., "that where the performance of the condition of a bond or recognizance becomes impossible by the act of God, or of the law, or of the obligee, the default is excused." People v. Bartlett, 3 Hill, 570, and authorities cited, approved and followed; Caldwell v. Com., 14 Grat. 698; and see, also, Way v. Wright, 5 Metc. (Mass.) 380; State v. Allen, 2 Humph. 258; Brown v. People, 26 Ill. 32; People v. Manning, 8 Cow. 297. The principal cognizor was not prevented by sickness or death, or any act of God, from keeping the condition of the bond; and hence we have only to consider whether the defendants are excused of the forfeiture by the act of the law, or by the act of the obligee. The obligee in the recognizance is the United States, whose criminal laws the principal obligor was indicted for violating. It is not alleged in the answer that the United States subsequently arrested and imprisoned him, but that this was done by the state of Missouri, a stranger to the recognizance. If it were shown that the United States had, by a subsequent arrest and conviction in another district, for another offence against it, prevented the performance of the condition, the question would be more complicated and difficult of solution; and one respecting which the cases in the state courts seem to differ. Brown v. People, 26 Ill. 32; Devine v. State, 5 Sneed, 623; Alguire v. Com., 3 B. Mon. 349; Ingram v. State, 27 Ala. 17, 20. Compare People v. Bartlett, 3 Hill, 570; Caldwell v. Com., 14 Grat. 698.

The United States and the state of Missouri are wholly distinct parties, and the action of the state authorities cannot be imputed to the government of the United States as an obstruction or interruption by it to the performance of the condition of the recognizance. It is therefore plain that there is no act of the obligee which excuses the default of the principal obligor. Hence, the defence pleaded must rest upon the proposition that the performance was excused by the act of the law. This makes it necessary to consider what is an act of the law, in the sense of the rule. "There is a diversity," says Brian, C. J., "where a condition becomes impossible by the act of God, as death, and where by a third person (or stranger), and where by the obligor, and where by the obligee; the first and last are sufficient excuses of forfeiture, but the second is not; for in such case, the obligor has undertaken that he can rule and govern the stranger, and in the third case, it is his own act." Vin. Abr. tit. "Condition," G. c., pl. 19, quoted by Nelson, C. J., in People v. Bartlett, supra.

A distinction is, in my opinion, to be observed between the act of the law, proper, and the act of the obligor, which exposes him to the action and control of the law. The facts pleaded by the sureties show that their principal was prevented from appearing, not by an act of the law, properly viewed, but by reason of his own voluntary act, which rendered him amenable to the criminal laws of another jurisdiction. There would be no one so bold as to claim that the principal should be allowed to set up, as a defence to this recognizance, that he had thus been prevented from appearing; and the sureties are so far bound up with their principal, that they must show that he had a sufficient excuse for not keeping the condition of the bond.

The case stands thus: The United States had the actual custody of the principal, to answer an indictment which had already been preferred against him. Upon the recognizance being taken, the principal was delivered into what Blackstone calls the "friendly custody" of his sureties, instead of being committed to prison. 4 Bl. Comm. 301. They thenceforth became invested with full authority over his person. They are his jailors. They may take him at any time or

place; in the state, or beyond it. They are aptly said to have the principal always upon the string, and they may pull it when they please, to surrender him in their own discharge. 6 Mod. 231. If they do not exercise their power to prevent his going beyond the jurisdiction, and he does so, with or without their consent, and commits an offence, and is sentenced to prison for it, this cannot be accepted by the state in whose tribunals the recognizance was taken, as a defence thereto. Upon considerations such as these, it was adjudged by the supreme court of Tennessee to be no defence to sureties, that, after the recognizance was entered into, and before the forfeiture was taken, the principal was arrested in another state for an offence committed there, and, by reason of such imprisonment, disabled or prevented from keeping the conditions of the recognizance. Devine v. State, 5 Sneed, 623.

This case, in principle, is like the case at bar, and may be distinguished from those where, as in Caldwell v. Com., 14 Grat. 698, and People v. Bartlett, 3 Hill, 570, the subsequent imprisonment is by the authority of the same state which is seeking to enforce the recognizance, and where it is held that the sureties were discharged by the act of the obligee. But this is a point on which, as before observed, the cases are conflicting, and as to which we need not express any opinion. Brown v. People, 26 Ill. 32; Alguire v. Com., 3 B. Mon. 349; Ingram v. State, 27 Ala. 17; Gingrich v. People, 34 Ill. 448; U. S. v. French [Case No. 15,165]; State v. Scott, 20 Iowa, 63; People v. Cushney, 44 Barb. 118; Winninger v. State, 23 Ind. 228; State v. Allen, 2 Humph. 258.

Other considerations arising out of the peculiar relations of the state and general government, tend to vindicate the correctness of the view that the defence must be held insufficient. The general government and the several states have their separate criminal codes. If a person is in the actual custody of the United States for a violation of its laws, no state can by habeas corpus, or any other process, take such person from the custody of the federal tribunal or officer. So, on the other hand, a person in custody under the process or authority of a state, is, by express enactment, beyond the reach of the federal courts or judges. Judiciary act, § 14; Act March 2, 1833, § 7; 4 Stat. 634; Ex parte Dorr, 3 How. [44 U. S.] 103, 105; U. S. v. French [supra]; Ex parte Forbes [Case No. 4,921]. When the state of Missouri arrested Dunn for an offence against its laws, there was no power in the United States government to take him from the custody of the state, and subject him to trial and punishment for his prior violation of the laws of the United States. Not only so, but the principle would be the same if Dunn had remained in Kansas, and had been in the custody of that state for an offence against its laws—he would be beyond the reach or process of the federal courts, though sitting in the same district.

In the exercise of their respective systems of criminal jurisprudence, neither the state nor the United States could admit the sufficiency of such a defence as is here pleaded. In this case, Dunn was indicted for an offence against the general government, of a highly penal nature. It is punished much more severely than the offence for which he was subsequently convicted in Missouri; and if the defence here insisted on were to prevail, a defendant guilty of a grave offence, would be allowed the opportunity of evading or postponing punishment therefor, by giving bail (who incur no liability) and then committing, against another jurisdiction, a lesser offence, and submitting himself to its actual custody. Neither a state nor a federal court can be expected to recognize as law, a principle which is attended with such consequences, and which not only defeats justice, but has a tendency to encourage the commission of crime. If cases of hardship upon sureties arise, their appeal must be to the executive department, which has the power to relieve them.

Demurrer sustained.

Upon the foregoing decision being made, the sureties filed an amended answer, alleging the same facts as before, except that it is stated that the larceny for which Dunn was convicted, in Missouri, was committed prior to the date of the recognizance or bond in suit. It is also alleged that, on the 10th day of March, 1871 (which was after the forfeiture), said Dunn died in the penitentiary of the state of Missouri.

THE COURT (present, MILLER and DILLON, JJ.) sustained a demurrer to the amended answer, observing that the amendment as to the date at which the offence in Missouri was committed, did not change the legal obligations of the sureties as declared in the foregoing opinion, and that the law is settled, that the death of the principal, after default and forfeiture, does not exonerate his sureties.

Judgment accordingly.

NOTE. Since the foregoing decision was made, the reporter has met a note of the case of Taintor v. Taylor, 36 Conn. 242, in which a prisoner gave bond, with sureties, for his appearance at the next term of a court in Connecticut; but, before the term, was arrested in New York, upon a requisition from Maine, for a crime previously committed in the latter state, and was actually in prison therein at the time his recognizance required his appearance in the court in Connecticut; and it was adjudged that these facts constituted no defence to a suit on the bond.

UNITED STATES (VAN NESS v.). See Case No. 16,868.

Case No. 16,608.

UNITED STATES v. VANRANST.

[3 Wash. C. C. 146.] [1]

Circuit Court, D. Pennsylvania. April Term, 1812.

CRIMINAL LAW—CASTING AWAY OF VESSEL—CIRCUMSTANTIAL EVIDENCE.

1. Indictment against the defendant, as mate of the Lucy, he not being owner, for casting away and destroying the vessel, on the high seas, the Lucy being the property of Augustus Masol, a citizen of the United States.

2. In any case, more particularly in one which is capital, the circumstances relied upon, to establish the guilt of the accused, ought to be strong, so as to leave no doubt of the fact; and they should be consistent with themselves, each circumstance tending to establish the guilt of the accused.

3. What amounts to a casting away, was decided in the case of U. S. v. Johns [Case No. 15,481], in this court.

4. This case is within the provisions of the first section of the act of congress passed March 26, 1804 [2 Stat. 290].

Indictment against the prisoner, as mate of the Lucy, he not being owner, for casting away and destroying that vessel on the high seas, the said vessel being the property of Aug. Masol, a citizen of the United States. The evidence, though circumstantial, was very strong against the defendant; and it also appeared, from the testimony, that the plan for destroying the vessel, was laid before she sailed, by the owner himself. There was every reason to believe, that the cargo, belonging to the owner, was nothing more than billets of wood and straw, packed in about thirty boxes and trunks. It appeared, by the evidence, though not in the indictment, that the vessel and cargo were insured, and that there was a part of the cargo shipped by some person in Boston on freight, consisting of furniture. At the time the captain, mate, and crew, were taken from the Lucy by a vessel which met them at sea, the Lucy was filling rapidly, and was entirely water-logged, but she had not gone down when she was last seen. It was contended—(1) That the evidence of the defendant's guilt was merely circumstantial, and by no means strong enough to warrant his conviction. (2) That the evidence of the destruction of the vessel was insufficient, as she might afterwards have been picked up at sea and saved. (3) That the case is not within the act of congress, since the vessel was destroyed by the orders of the owner, who could not himself have committed an offence by destroying his own vessel, unless in a case coming under the second section; and of course, a person doing the same thing under his orders, could not be in a different situation. A man burning his own house, is not guilty of arson. 2 East, P. C. 1024.

WASHINGTON, Circuit Justice (charging jury). In any case, more particularly in one that is capital, the circumstances relied upon to establish the guilt of the accused, ought to be strong, so as to leave no doubt of the fact; and they should be consistent with themselves, each circumstance tending to establish the guilt of the party. It is for the jury to say, whether the circumstances in this case, have satisfied them that the prisoner was concerned in boring a hole into the bottom of this vessel, or in letting in the water, so as to render it necessary to abandon her.

2. As to what amounts to a casting away, within the meaning of the law, the point was decided by this court, after great deliberation, in the case of U. S. v. Johns [Case No. 15,481]. The present appears to be a strong case, within the definition of the terms as given in that case. The Lucy was left on the high seas completely water-logged, beyond the power of the vessel, into which the captain and crew were taken, to save her; without any other vessel in sight, and filling with such rapidity, as to render her loss almost certain, and the chance of her being saved by ordinary means, altogether hopeless. Besides which, she has never been heard of, so far as the evidence in this cause has gone, since the time when she was abandoned; now more than nine months.

3. As to this point, the court is of opinion, that the case of the defendant is within the first section of the law, if, in point of fact, he was concerned in the destruction of this vessel. The defendant is a person, not an owner, who (if he committed the act) wilfully cast away a vessel unto which he belonged, being the property of a citizen of the United States. But did he do it corruptly? If no person but the owner was interested in the property, it was not; because the owner might destroy his own property himself, or cause it to be done, without committing an offence against this, or any other law. But in this case, there were insurers on vessel and cargo, and a cargo on board, belonging in part to other persons than the owner. It was corruptly done as to those persons. Had the owner, in this case, done it, he would have been guilty under the second section; only, that in that case, the indictment must have stated that it was done to the prejudice of the underwriter on the vessel, or of a merchant that had loaded goods in the vessel. But this is not necessary under the first section, if it come out in the evidence.

The jury found a verdict of not guilty.

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

Case No. 16,609.

UNITED STATES v. VANSICKLE.

[2 McLean, 219.] [1]

Circuit Court, D. Michigan. Oct. Term, 1840.

IMPEACHMENT OF WITNESSES — BAD CHARACTER — WHAT MAY BE SHOWN.

1. To discredit a witness it is not competent to prove general bad character, disconnected with his veracity.

[Cited in U. S. v. Dickinson, Case No. 14,958; Teese v. Huntingdon, 23 How. (64 U. S.) 12.]

[Cited in brief in Bishop v. Wheeler, 46 Vt. 412; Fletcher v. State, 49 Ind. 132, 133; Hamilton v. People, 29 Mich. 187; Hillis v. Wylie, 26 Ohio St. 577.]

2. The proper inquiry is, what is the general character of the witness, where he resides, for truth.

[Cited in Teese v. Huntingdon, 23 How. (64 U. S.) 12.]

[Cited in Frye v. Bank of Illinois, 11 Ill. 379; Holbert v. State, 9 Tex. App. 219; Kennedy v. Upshaw, 66 Tex. 453, 1 S. W. 312.]

3. And the witness, under examination, may be asked, from your knowledge of his general character, would you believe him under oath.

[Cited in Teese v. Huntingdon, 23 How. (64 U. S.) 12.]

[Cited in Holbert v. State, 9 Tex. App. 219.]

4. Particular facts, of a criminal nature, cannot be proved to discredit the witness. The inquiry must be general.

The District Attorney, for the United States.

Mr. Bates, for defendant.

McLEAN, Circuit Justice. The defendant [William Vansickle] was indicted for knowingly and corruptly obstructing the marshal, in the service of a subpœna, on a witness, in certain criminal cases, in which he, with others, was defendant, under the twenty second section of the act of congress of the 30th April, 1790 [1 Stat. 117]. The plea of not guilty was entered, and a jury were called and sworn to try the issue. Remember Lummis, a witness, stated that the defendant took her from place to place while the marshal or his deputy was in pursuit of her to summon her as a witness. That the defendant had frequent interviews and conversations with her, whilst she was kept out of the way, and that he proposed to give her a tract of land if she would avoid the process; and he represented to her that if the process were served she would be taken to Detroit and confined in jail, unless she could give bail for her appearance. By this means the process was eluded for some weeks, until the witness became dissatisfied and resolved to appear, and communicated such intention to those who found means to aid her determination. Other witnesses, called by the prosecuting attorney, in many important particulars, corroborated the statements of this witness. The witnesses on the part of the defendant were sworn and examined, chiefly with the view to discredit Remember Lummis, the principal witness for the prosecution. And a question was made as to the form and substance of the questions to be propounded to the impeaching witnesses. On the part of the defendant it was contended, that they had a right to examine into her general character and standing in society; and, particularly, whether she was not a lewd woman in general estimation. On the other side it was insisted, that the questions must be limited to the general character of the person impeached as to truth and veracity; and whether the witness, from his knowledge of her character, would believe her under oath.

It is singular that there should be great contrariety in the decisions on this question, which is of almost daily occurrence in the administration of justice. All the authorities agree that the inquiry must be general, whether it relate to veracity or to character in a more enlarged sense. A witness is compelled to appear and testify, and it would be most unjust to permit specific facts to be proved against him, of which he has had no notice, and which materially affect his reputation. Every individual is supposed to be able, at all times, to establish or defend his general character; which is nothing more than the prevailing opinion of the community where he resides. For this charge being made in a general form, may be met and refuted in the same manner. The regular mode of examining into general character, says Phillips on Evidence (vol. 1, 1839 Ed., 292), is to inquire of the witnesses whether they have the means of knowing the former witnesses' general character, and whether, from such knowledge, they would believe him on his oath. In answer to such evidence against character, the other party may cross-examine those witnesses, as to their means of knowledge and the grounds of their opinion. In the case of Hume v. Scott, 3 A. K. Marsh. 260, the proper question was held to be, "what is the general moral character of the witness?" and, in their opinion, the court say that the jury may draw unfavorable inferences as to the truth of the witness, from his general turpitude. In the case of People v. Herrick, 13 Johns. 84, the reasoning of the court would seem rather to sustain the above position. They say the conviction of an infamous crime, as petit larceny, would as much destroy the credibility of a witness as if it related to his truth. State v. Boswell, 2 Dev. 209. You may prove the witness to be of bad moral character. The question need not be restricted as to his veracity. The same effect is the case in 1 Hill, 251, 258, 259. And in the case of Fulton Bank v. Benedict, 1 Hall. 558, the court say—to inquire only as to general character for truth seems too narrow. But the weight of authority limits the inquiry to the veracity of the witness impeached; and it seems the question as to general character is too vague.

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

The witness cannot advert to particular facts, or to his personal knowledge, of the character of the individual impeached, but to his general reputation for truth. This reputation is general character. To form a general character as to truth it is not necessary that the individual should have sworn falsely, or, indeed, that he should ever have been examined as a witness. The public opinion is by no means limited to this, as to a man's veracity. It is formed by combining the elements of his character; and it is this result of the public mind which is to impeach the witness. A man who is notoriously immoral, who is believed to be dishonest, and who is addicted to misrepresentation, can never have a good character for truth. And as it regards defects of character, that community has yet to be discovered which does not feel, at least, as strong an interest in the investigation of a man's faults as his virtues. The character of every man is known in the community where he resides. His acts, whether good or bad, have been scrutinized, and, in most instances, if not in all, an opinion has been formed as to his veracity. It is this opinion which is evidence, and not the particular circumstances which led to the formation of such an opinion. In behalf of the witness these circumstances may be inquired into to show, that they originated in the controversy then pending, or that an erroneous impression had been made on the public mind.

It is said in some of the cases cited, that the inquiry as to the veracity of the witness is too limited; and that the inquiry should be as to character generally. That if the answer shall be—the witness sustains a bad character, the question may then be asked, in behalf of the witness, whether the character spoken of is in regard to his veracity. But if general character, without limitation, is the object of inquiry, why suffer it to be thus qualified? If the question as to the veracity of the witness be proper, in support of the witness, to explain or do away the effect of general bad character, does it not show that it is the question, and the only question, which should, at first, have been propounded. This is incontrovertible, unless bad character in the abstract, and without reference to truth, be proper evidence. Now what shall constitute bad character? Shall the witness be questioned on this point? And if he be, may he say that the witness impeached is generally believed to be a common prostitute. That this was proper was decided in the case of Com. v. Murphy, 14 Mass. 387. This, however, was overruled in the case of Com. v. Moore, 3 Pick. 194. In the case of Evans v. Smith, 5 T. B. Mon. 365, 366, unchaste character was held admissible to impeach a witness. But this decision is believed to be against the whole current of authorities, English and American. We do not mean to say that the chasteness of the witness may not become a proper question on an indictment for a rape, or in a case which may be supposed; but that it is not a proper question, under ordinary circumstances, to discredit a witness. If such a question be proper, shall it be limited to the character of a female? Must it not as well apply to the other sex? Again, the question is asked, what shall constitute general bad character. In some communities a Mason or an anti-Mason, an abolitionist or anti-abolitionist, a man who plays cards or engages in horse racing, may be esteemed, as the opinions of the majority in the neighborhood may preponderate, to have an immoral or bad character. Shall this opinion then, of bad character, so indeterminately formed, be evidence on which to destroy the credit of a witness. If this opinion be evidence, it is so without showing the basis on which it rests. For, as has been shown, it is unnecessary, if it be not improper, in the first instance, to prove how this opinion has been formed. Is it evidence in the broadest sense, without explanation or restriction? That it is evidence so far as bad character has, in the public opinion, affected the veracity of the witness, is admitted. But is it evidence independently of this?

The witness must be impeached, not by proving particular facts, for these he is not supposed to be prepared to meet, but by showing his general character in the public estimation. Facts are not to be proved from which the jury may infer a bad character, but it is the inference, drawn by the public, which is evidence. An inference already drawn and embodied in the public opinion, and which, as a fact, is susceptible of proof. Now what is the fact thus to be proved? Is it as to the bad character of the witness generally, or his bad character as to veracity. The object of the examination would seem to be a sufficient answer to this inquiry. It is to shake and overthrow the credit of the witness. Now this is effectually done by showing that in the neighborhood in which he lives, and where his character is best known, he is not considered worthy of credit. Shall a public opinion which does not reach his credibility, be proved as a fact from which the jury may infer a want of credibility? This would be an inference from public opinion which had not been drawn by the public. And would it not be a most dangerous species of evidence? It would be a conclusion inferred, not from original facts, but from an opinion formed on those facts by the public. It would be an inference on an inference. This would be a new rule, not yet incorporated, it is believed, into the law of evidence. Ancient boundaries may be proved by reputation. But is this done by proving the existence of any facts, in public opinion, short of the boundaries. Marriage is often proved by reputation. The fact of living together as man and wife, and being so recognized by each other and the public, is received as evidence of marriage. But this is a legitimate inference arising from the facts proved. Living together and recognition are not established as a matter of reputation, but

as facts, distinct from public opinion. And from these facts a jury may infer, as well as the public, that the parties were married. And the same rule applies as to proof of pedigree by reputation.

If it were competent to prove that the impeached witness was a common prostitute, had been guilty of stealing, or of any other infamous crime, the inference that she is unworthy of credit might be legitimate. But these things, if true, cannot be established either by proof of the facts, or that they are believed to be true in public opinion. The inquiry, it is insisted, must be general as to character, and if that, in the public estimation, be bad, however it may have been formed, and without the least reference to the veracity of the witness, it is evidence to shake and overthrow that veracity. As the rule now stands, we think, a witness can only be impeached, under this head, by proof of general character as it regards his veracity. The impeaching witness may be asked if he is acquainted with the general character of the impeached witness. If he answer in the affirmative, he should then be asked whether, as it regards his veracity, it be good or bad; and if bad, whether, from his knowledge of the prevailing opinion of the public, he would believe the witness under oath.

Witnesses were examined under the rule here laid down to impeach and to sustain Remember Lummis. The jury found the defendant guilty, and he was sentenced accordingly.

Case No. 16,610.

UNITED STATES v. VAN SLYKE.

[8 Biss. 227.] [1]

Circuit Court, W. D. Wisconsin. June, 1878.

INTERNAL REVENUE—WHISKEY TAX—MEANING OF "PROPRIETOR"—INTEREST OF DEFENDANT—CROOKED WHISKEY.

1. In section 3251, Rev. St., by which it is provided that every proprietor of any still shall be liable for taxes on the distilled spirits produced therefrom, the word "proprietor" is used in the sense of an owner, who, whether in personal possession or not, has the exclusive right to, and the control over, the premises.

2. A lessee is a proprietor, but the lessor is not.

3. Under the same section, in order to hold the defendant liable as being interested in the use of the still, a direct interest in the business must be shown. His interest as a lessor, or as a creditor who expected to collect his claims if the business proved successful, is not sufficient.

4. Knowledge by defendant that illicit spirits were being manufactured on the premises, does not render him liable for the tax.

This action was brought to recover the sum of twenty-two thousand and five hundred dollars, alleged to be due the government from the defendant [N. B. Van Slyke] for taxes upon illicit spirits manutactured at the Middleton distillery, near Madison, Wis., between September 3, 1873, and April 24, 1874. The complaint alleges that the defendant was the owner and proprietor of the distillery and distillery premises at the time of the manufacture of the spirits, and interested in the profits of such manufacture with one Alexander L. Rogers and Charles H. Bunker, who had the immediate control and management of the business. The defendant admitted that he held the title in fee to the premises, but denied that he was the proprietor or interested in any way in the manufacture of the liquors. The evidence was, that prior to 1873 the premises were owned by one Jacob Lentz, and that Lentz, and subsequently Lentz & Rogers, carried on the business; that the defendant, as president of the First National Bank of Madison, advanced money to Lentz & Rogers, and discounted their paper to a large amount to enable them to carry on this and other branches of business, and that defendant, to secure these advances, took a mortgage from Lentz on the distillery premises, which was foreclosed, and the premises bid in by the defendant. After this the distillery was idle for some months, until on the 11th of August, 1873, the defendant let the real estate to Rogers, who entered again into the manufacture of spirits, Rogers obtaining a license from the government to carry on the business until May 1, 1874, and defendant, as owner of the premises, gave his consent as required by law that the premises be used for that purpose, and stipulated that the lien of the United States for taxes and penalties should have priority of his rights, and that in case of forfeiture of the premises the title should vest in the United States. From September, 1873, until April 24, 1874, Rogers, in connection with one Charles H. Bunker, whom he took in as a secret partner, manufactured a large quantity of illicit wines and spirits, which they took to Madison, where they were rectified under the immediate management of Bunker, without the payment of the taxes. On April 24, 1874, the distillery and distillery apparatus were seized by the officers of the government, and they, as well as the real estate, forfeited to the United States. During all this time the defendant, as president of the bank, continued to advance money to Rogers and to discount his paper, to enable him to carry on the business, in the hope of getting back, as he alleges, some of the amount previously advanced to Rogers and to Lentz & Rogers. The attorney for the government claimed that such money was advanced as partner in the business and as proprietor of the distillery; and claimed, also, that if the evidence did not establish this fact, and that the defendant was interested in the profits of the manufacture, that he was still liable for the taxes as proprietor of the premises under section 3251, Rev. St., which provides as follows: "Every proprietor or possessor of, and every

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

person in any manner interested in the use of any still, * * * shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom."

J. C. McKenna, for the United States.

J. C. Sloan and Wm. F. Vilas, for defendant.

BUNN, District Judge (charging jury). The law makes every proprietor or possessor of, and every person in any manner interested in the use of any still, distillery or distilling apparatus, liable for the taxes imposed by law on the distilled spirits produced therefrom. The government, who is the plaintiff in the case, alleges that the defendant, during the time in question, was the owner and proprietor of the still and had an interest as partner, or otherwise, in its use. The defendant admits, and the evidence shows, that he was the owner of the premises on which the distillery was situated, but he denies that he was the proprietor in the sense in which that word is used in the statute, and denies that he had any interest in the use of the still. And this constitutes the issue which the jury are to try. The issue is simple, and all I desire is to call your attention to it, and to state the law applicable to the case without restating the evidence which is fresh in your minds and has been fully and ably discussed by counsel on both sides.

First, then, was the defendant the proprietor of the distillery from August 11, 1873, to May 1, 1874, during the time when it is charged the spirits were manufactured on which the taxes have not been paid? The evidence shows that he was the owner of the distillery premises and had let them out by written lease to one Alexander L. Rogers, who was in possession of and running the still. I think the word "proprietor" is used in the statute in the sense of an owner, who, whether in personal possession or not, has the exclusive right to, and the control over, the premises. A person in possession of premises as lessee under a lease for years, has himself, as against the general owner and all the world, the right to the exclusive possession, control and management of the same during the continuance of the lease, and is for all such purposes as much the proprietor of the premises, for the time being, as though he held the legal title in fee. And I think it was never the intention of the law to make the general owner of premises so leased, and not himself having any right to the possession, control or management of the premises or business carried on, and having no interest in the distillery business except to receive his stipulated rent, liable for the payment of the taxes imposed by the government on the spirits distilled. I think, on the contrary, the purpose of the law is to make every person, whether possessor or proprietor, who has any control of the business, and every person having an interest in the use of the still, whether possessor, owner, partner, or otherwise, liable for the payment of taxes so imposed. So, I think, if you should find the facts to be that Rogers or Rogers and Bunker, during the time in question, had the exclusive possession of the distillery under the lease from the defendant, and the exclusive control and management thereof, and that defendant had no other interest than to get the rent, or to obtain payment of the indebtedness due from Rogers, or Lentz & Rogers, to the bank on account of the then present or previous deal, the fact of his being the owner of the real estate and letting it to Rogers, would not render him liable to the payment of the taxes imposed on the highwines produced at the distillery. And in that case you will next inquire and determine from the evidence whether the defendant was in any manner interested in the use of the distillery during that time; for if he was, then he should pay the taxes. But I think there is no doubt that the interest, to make defendant liable, should be a direct interest in the business, and not merely an indirect interest in the success of the business as belonging to other persons. If the business was in fact his, or he was interested as a secret partner, or otherwise in the profits, then he will be liable for the taxes on the products of the still. But if the business belonged to Rogers, or Rogers & Bunker, and they alone were entitled to the proceeds, and the defendant was only interested in having them succeed because their success would the better enable Rogers or Bunker to pay moneys advanced by the bank of which defendant was president and stockholder, to Rogers, or to Lentz & Rogers, or to Bunker, for the purpose of paying taxes on the highwines, or to carry on the business, then I think the defendant would not be liable. Nor is the fact of his having bought cattle to be fed at the still, sufficient of itself to show such an interest in the distillery business as would make him liable for the taxes; but of course the evidence upon that subject should be considered by the jury in connection with the rest of the testimony in considering and determining what the true character of the whole transaction was, and whether or not defendant had in fact an interest in the profits of the distillery business. That question the jury are to determine fairly from a full and comprehensive view of the whole case, and from the weight of the testimony taken as a whole. What do you believe? What is the conviction produced in your minds by the evidence? You are the sole judges of the weight to be given to the testimony of the several witnesses, and upon the testimony, taken in connection with the contracts, papers, and record evidence in the case and all of the circumstances, you

are to determine the fact. The written contracts introduced in evidence do not, upon their face, show any such interest on the part of the defendant as would render him responsible for the taxes. But it is insisted by the government attorney, and his evidence is intended to show, that these contracts do not represent fairly the real transaction, but on the contrary, were not made in good faith, and were intended rather as a cloak to cover the real transaction according to which it is alleged the defendant had a direct and substantial interest in the profits and products of the distillery business. As the lease and contracts are fair on their face, and do not, of themselves, show any such interest on the part of the defendant, the burden is on the government to satisfy you by a preponderance in the weight of testimony that these papers and agreements do not represent truly the whole case, and that the defendant, notwithstanding, had a real interest in the business. And this question is fairly presented by the evidence, and must be submitted for your careful consideration and determination.

The business of rectifying is distinct in the law from the business of distilling, and has no necessary connection with it, and if you shall believe from the evidence that defendant had an interest either alone or with Bunker in the business of rectifying, that of itself would not render him responsible for taxes on the highwines used in that business, though he may have known that the taxes on the wines received from the distillery had not been paid. But it would be necessary to go further and show that he had an interest in the distillery business itself. But this, of course, should not prevent a full consideration by the jury, of the circumstances attending the defendant's relations with Bunker in respect to the rectifying business, and the real nature of the transaction between them, as bearing upon the main question at issue in the case—to-wit: whether or not defendant was in any manner interested in the use of the still. For in determining that question, as before said, it will be your duty to consider all the evidence and circumstances in the case. Again, the jury will understand that the defendant's liability to the payment of the tax, turns upon the question of his being a proprietor or possessor of the still, or interested in the use of the still, and not upon the question of his knowledge or want of knowledge, as to how the distillery was being run, whether "straight" or "crooked." So that the fact of defendant's having notice that illicit wines were being made by Rogers at the distillery would not make him liable for the tax, if all the interest he had in the success of the business was to collect the debt due the bank for rent and for moneys advanced. But his knowledge, if he had such knowledge, that the distillery was being run contrary to law and that the taxes were not being paid, and his conduct in relation thereto, are all to be considered as part of the evidence in this case, and it is for you to say how far they bear upon the question of his interest in the distillery business.

Nor would the fact, if such were the fact, that Bunker after he went into the rectifying business, formed a secret partnership with Rogers in the distillery business, unknown to defendant, though you may believe that defendant was interested in the rectifying business alone or with Bunker, render the defendant liable for the taxes on the spirits distilled at the distillery.

Verdict for defendant.

Motion for new trial heard before DRUMMOND, Circuit Judge, and BUNN, District Judge, and overruled.

Case No. 16,611.

UNITED STATES v. VANZANDT.

[2 Cranch, C. C. 338.] [1]

Circuit Court, District of Columbia. Oct. Term, 1822.[2]

REGIMENTAL PAYMASTERS—ACTION ON BOND—CERTIFIED ACCOUNT AS EVIDENCE—LIABILITY OF SURETIES.

1. A copy of a regimental paymaster's account, as settled by the accounting officers of the treasury, certified according to the act of the 3d of March, 1817 [3 Stat. 366], "to provide for the prompt settlement of accounts," is competent evidence to the jury of the balance due from the paymaster to the United States.

[Followed in U. S. v. Griffith, Case No. 15,263.]

2. A copy of a paymaster's bond, certified according to the "act to provide more effectually for the settlement of accounts between the United States and receivers of public money," is competent evidence.

3. If a regimental paymaster neglects or fails to make any report to the paymaster-general once in two months, showing the disposition of the funds previously transmitted, with estimates for the next payment of the regiment, and so neglects or fails for more than six months after receiving the funds, and is not recalled for such default and neglect, but additional funds are placed in his hands, notwithstanding his known neglects and defaults, the sureties in his official bond are not chargeable for his failure to account for such additional funds.

Debt upon the official bond of John Hall, a regimental paymaster. The defendant [Nicholas B. Van Zandt] and one David Ott were his sureties. The condition was "that, whereas the said John Hall is appointed paymaster of the Rifle Regiment in the army of the United States aforesaid; now if the said John Hall shall well and truly execute and faithfully discharge, according to law and instructions received by him from proper authority, his duties as paymaster, aforesaid, and he, his heirs, executors, or administrators

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

[2] [Reversed in 11 Wheat. (24 U. S.) 184.]

shall regularly account, when thereto required, for all moneys received by him, from time to time, as paymaster, aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the United States for that purpose, and moreover pay into their treasury such balance as on a final settlement of the said John Hall's accounts, shall be found justly due from him to the said United States, then this obligation shall be null," &c. The alleged breach of the condition of the bond was, in not paying into the treasury the sum of $29,266.06, a balance of an account settled and certified by the accounting officers of the treasury department.

Mr. Swann, the attorney of the United States, offered in evidence, a copy of the bond, certified by the register, and authenticated under the seal of the treasury department, according to the act of the 3d of March, 1797 (1 Stat. 512), "to provide more effectually for the settlement of accounts between the United States and receivers of public money." And a copy of the account of the paymaster as adjusted by the accounting officers of the treasury, and certified by the second auditor, according to the act of the 3d of March, 1817 (3 Stat. 366), "to provide for the prompt settlement of public accounts."

Mr. Jones, for defendant, objected to these documents thus certified, and contended: (1) That the sureties are not bound by these treasury settlements, especially such a naked certificate of a balance of $29,266. The act of 3d of March, 1797, is applicable only to "receivers of public money." Such is its title, and the first section shows that it is confined to those who are entitled to commissions upon their disbursements. The second section corroborates this construction, and speaks of delinquency. This is not a suit against a delinquent. The defendant is only collaterally bound; he is not a receiver of public money, and has no knowledge of the accounts of the paymaster. The account, if evidence at all, is only evidence against the principal, not against the surety. (2) That this is not "a transcript from the books and proceedings of the treasury." It is only the transcript of a particular act done on a particular day. It is not a transcript of the whole of the proceedings of the treasury in relation to the account of the paymaster, it is only a certificate that a balance of $29,266 was struck on a certain day. It is an account against the late paymaster. It was made up after he was out of office, and the first item is, "to balance on settlement this day." The settlement does not appear.

Mr. Swann, contrà. The same law which applies to the principal, applies to the surety. Evidence against Hall, is evidence against his sureties. The suit might have been brought against them jointly. The first section of the act applies to receivers of public money who are entitled to commissions, but the other sections are not so limited. The second section is in general terms, "in every case of delinquency," a transcript from the books of the treasury is evidence. So by the same act, in any case, an execution may run into any state.

THE COURT (MORSELL, Circuit Judge, contrà) admitted the bond and account thus certified, to be read to the jury as evidence of the amount due from Hall to the United States. The attorney for the United States further gave in evidence, a statement of the charges against the paymaster, on the books of the paymaster-general's office, and the transmission of accounts, vouchers, and estimates by him to that office, and also gave evidence to prove that the statement was correctly made from the books of the paymaster-general, and also sundry original letters from the said Hall, to the paymaster-general; and the original entries in the books of the second auditor, showing that several settlements of his accounts were made at sundry times by the second auditor. He also gave evidence that the moneys advanced to the said Hall, were to have been disbursed by him in the Western country, namely, at St. Louis, in Missouri; to all which evidence the counsel for the defendant objected that it was not competent or admissible to charge this defendant in this action.

But THE COURT (MORSELL, Circuit Judge, contrà) overruled the objection, and permitted the evidence to be given to the jury. Whereupon the counsel for the defendant prayed the court to instruct the jury, that if from the said evidence they should believe that the said Hall had neglected and failed to make any report or reports to the paymaster-general once in two months, showing the disposition of the funds, previously transmitted, with estimates for the next payment of the regiment, and had also neglected and failed either to transmit such estimates, or to render his vouchers to the paymaster-general for settlement, more than six months after receiving funds, and was not recalled for such default and neglect; but additional funds were placed in his hands, notwithstanding his known defaults and neglects in the instances aforesaid, then the defendant in this action is not chargeable for any failure of the said Hall to account for such additional funds, so placed in his hands, after his said defaults and neglects in respect of funds previously received, were known as aforesaid. By the 4th section of the act of April 24, 1816, c. 69 (3 Stat. 297), "for organizing the general staff," &c. (pamphlet, p. 72), it is enacted: "That it shall be the duty of the regimental and battalion paymasters to pay all the regular troops; and to insure punctuality and responsibility, correct reports shall be made to the paymaster-general, once in two months, showing the disposition of the funds previously transmitted, with accurate estimates for the next payment of such regiment, garrison, or department, as may have been assigned to each; and whenever a paymaster shall fail to transmit such estimate, or neglect to render his vouchers to the paymaster-general for settlement of his accounts, more

than six months after receiving funds, he shall be recalled, and another appointed in his place."

Mr. Jones and Mr. Key, for defendant. The act of congress is peremptory, that if the paymaster fails to report for six months, he shall be recalled. If the government fails to recall him, his sureties are discharged from all further liability. The government did not rely on his bond only, but on his frequent accounting. The sureties knew this and relied upon the government's discharging its duty in removing a delinquent paymaster. It was part of their security, and entered into their contract. It stands upon the same principle as the case of a creditor giving further time to his debtor without the consent of the surety. Nisbet v. Smith, 2 Brown, Ch. 579; Rees v. Berrington, 2 Ves. Jr. 540; and in Law v. East India Co., 4 Ves. 824, the master of the rolls says: "Where any act has been done by the obligee that may injure the surety, the court is very glad to lay hold of it, in favor of the surety." So a sale at any other place than that which is required by the agreement, releases the surety. Ludlow v. Simond, 2 Caines, Cas. 49, 57. Equity will not bind a surety who is not bound at law. The bond is supposed to be made in reference to the act of congress. Negglect of a superior officer to remove a loan officer in New York, upon his default, discharged the surety. People v. Jansen, 7 Johns. 332.

Mr. Swann, contrà. The act of 1816, was only directory to the executive officers. It left a discretion with the president. So long as Hall continued to be paymaster de facto, his sureties were liable. He was constitutionally appointed by the president, who alone had the power of removal. He held his office at the will of the president, and that will could not be controlled by congress. The president was to decide whether the paymaster had complied with the terms of the act of congress, or not, and to remove him, or not, at his discretion. He continues in office until removed by the president, and until so removed his sureties are liable by the express condition of their bond. The New York cases have gone further in discharging sureties than we have here or in Virginia. The case in 2 Caines, Cas., supra, was decided upon the ground that the sale was not made according to the agreement of the parties. The case of People v. Jansen was decided upon the ground of fraud on the part of the supervisors, and fraudulent concealment of the default of the loan officers.

THE COURT (THRUSTON, Circuit Judge, doubting) gave the instruction as prayed by the defendant's counsel, principally upon the authority of the case of People v. Jansen, 7 Johns. 332.

NOTE. This decision was reversed by the supreme court of the United States (11 Wheat. [24 U. S.] 184), upon the authority of the case of U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720, which was not decided until the 17th of March, 1824, seventeen months after the decision of this court in this case.

Case No. 16,612.

UNITED STATES v. VAPORISOR.

[The case reported under above title in 7 Int. Rev. Rec. 205, is the same as Case No. 10,537.]

Case No. 16,613.

UNITED STATES v. VEITCH.

[1 Cranch, C. C. 81.] [1]

Circuit Court, District of Columbia. April Term, 1802.

MISDEMEANORS—INDICTMENT—PROCESS.

A capias is the proper process upon an indictment for misdemeanor, found after service of a summons to show cause why an indictment or information should not be filed.

Indictment for retailing spirituous liquors. The first process was a summons to show cause why an information or an indictment should not be filed. Upon this summons the defendant [Peter Veitch] did not appear, and his default was recorded. The indictment was found at July term, 1801, and a capias issued returnable to October term, 1801.

Mr. Simms, for defendant, contended that a capias was not the legal process.

THE COURT stopped him from arguing the point, saying it had been decided several times in this court, and a general direction had been given to the attorney for the United States to issue a capias upon every indictment found after a summons had issued and been served to show cause why an indictment or information should not be filed; being of opinion that a capias was the proper process. Laws Va., Rev. Code, p. 106, § 28.

Case No. 16,614.

UNITED STATES v. VEITCH.

[1 Cranch, C. C. 115.] [1]

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

HOMICIDE—DYING DECLARATIONS.

On an indictment for murder, the declarations of the deceased, in extremis, and when sensible of approaching death, may be given in evidence as to facts, but not as opinions.

Indictment [against Alexander Veitch] for manslaughter of Richard Walker, on the 25th of February, 1803, by a stroke on the back of the neck, with a carpenter's iron square. He languished till the 5th of March following, and then died. The declarations of the deceased were offered in evidence on the part of the United States, and admitted by the court, being made in extremis.

Mr. Mason, for the United States, cited Drummond's Case (anno 1784), Leach, Crown Cas. 337 (case 165); Woodcock's Case, Id. 500 (case 231).

Mr. C. Lee, for the prisoner, contended that the rule was limited to the case of extremity

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

—in extremis; it must be the declaration of a dying man who is sensible of his situation.

The witness, Mr. Jamieson, stated that the declarations were made two days before the deceased became speechless and insensible, and three days before his death; that he was sensible of great danger of approaching death. Upon this testimony and considering the cases cited, THE COURT nem. con. admitted the declarations to be given in evidence, as to facts stated by the deceased but not as to his opinion of Veitch's motives, or malice.

Case No. 16,615.

UNITED STATES v. VENABLE.

[1 Cranch, C. C. 416.] [1]

Circuit Court, District of Columbia. July Term, 1807.

PASSING COUNTERFEIT MONEY.

The delivery of counterfeit money to a person to be passed off generally, for the benefit of the prisoner is not a passing "in payment," within the act of assembly of Virginia of December 19, 1792.

Indictment [against Joseph Venable] for passing counterfeited coin, contrary to Act Va. Dec. 19, 1792, p. 249, whereby the passing of such coin, "in payment," is punishable with death.

THE COURT, at the prayer of the prisoner's counsel, Mr. Swann, instructed the jury that if they should be satisfied, by the evidence, that the prisoner, knowing it to be counterfeit, passed the money to Brooke, with intent that Brooke should pass it away generally, for their joint benefit, or even for the sole benefit of the prisoner, it was not a passing in payment, within the meaning of the act of assembly, unless they should also be satisfied that the prisoner had given Brooke express orders to pay some certain debt due from the prisoner with that money, and the debt had been so paid; in which case, perhaps, there may be doubt. But if the prisoner passed the false money knowingly to Brooke, in payment for good money, it was a passing in payment within the meaning of the act.

DUCKETT, Circuit Judge, absent. Verdict, not guilty.

[See Case No. 16,616.]

Case No. 16,616.

UNITED STATES v. VENABLE.

UNITED STATES v. BROOKE.

[1 Cranch, C. C. 417.] [1]

Circuit Court, District of Columbia. July Term, 1807.

PASSING COUNTERFEIT MONEY—ACQUITTAL—BOND FOR GOOD BEHAVIOR.

After acquittal upon a charge of passing counterfeit money, "in payment," the court will not order the prisoners to give security for their good behavior, although it should appear in evidence that they had uttered false money, as true.

Mr. Jones, attorney for the United States, moved the court, that the prisoners [Venable and Brooke], who had been acquitted of passing counterfeit money, "in payment," under the act of Virginia of December 19, 1792, should be ordered to give security for their good behavior, it having appeared in evidence that they had uttered counterfeit money, but not "in payment."

Motion overruled. DUCKETT, Circuit Judge, absent.

[See Case No. 16,615.]

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

Case No. 16,617.

UNITED STATES v. The VENUS.

[See Case No. 16,914.]

Case No. 16,618.

UNITED STATES v. VERMILYE et al.

[10 Blatchf. 280; [1] 6 Am. Law T. Rep. 78.]

Circuit Court, S. D. New York. Dec. 27, 1872. [2]

NEGOTIABLE INSTRUMENTS—UNITED STATES "SEVEN-THIRTY NOTES"—RESTRICTION OF NEGOTIABILITY—BAILMENT—RIGHTS OF CARRIER.

1. An obligation of the United States, commonly called a "seven-thirty note," issued under the act of March 3, 1865 (13 Stat. 468), payable to the order of , and not having the name of any person filled into such blank space, is in the same condition as if payable to bearer, and is, therefore, negotiable by delivery.

2. The writing of anything on the back of such note, while such blank is not filled up with the name of a payee, does not amount to an endorsement on, or of, such note, in the sense of that word, in the law merchant, so as to restrict the negotiability of the note, or to make it non-negotiable by delivery merely.

3. A person who purchases such a note after its maturity, and after the time for its conversion into bonds has passed, takes nothing but the actual right and title of his vendor.

4. Such a note is not money, but is only evidence of the indebtedness of the United States for money borrowed.

5. A carrier of such a note, for hire, has such a special property in it, that, if it be stolen from him, and be found in the possession of a person who took it after maturity, and who shows no better title to it than the title of the thief, the carrier may recover it from such person, by action.

6. The carrier, on paying the value of the note to his bailor, becomes the equitable assignee of the title of the bailor to the note.

[This was a bill of interpleader filed by the United States against Washington R. Vermilye and others, composing the firm of Vermilye & Co., and the Adams Express Company.]

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

[2] [Affirmed in 21 Wall. (88 U. S.) 138.]

Clarence A. Seward and Charles M. Da Costa, for the express company.
John E. Burrill, for Vermilye & Co.

BLATCHFORD, District Judge. The bill in this case sets forth, that the defendants Vermilye & Co. claim to own five of the obligations of the United States, known as "seven-thirty notes," for $1,000 each, issued June 15th, 1865, and three of such notes, for $100 each, issued July 15th, 1865; that such eight notes were sent by Vermilye & Co. to the plaintiffs, for payment or redemption, Vermilye & Co. claiming that they purchased said notes in good faith and for a valuable consideration, without notice or suspicion that the seller was not the owner thereof; that the defendant the Adams Express Company likewise claims to be the owner of all of said notes, and that the same were stolen from it about May 22d, 1868, and that it never parted with the title to the same; that each of such claimants has notified the plaintiffs not to pay or deliver the notes to the other; that the plaintiffs have always been willing to deliver the notes, and to pay the moneys secured thereby, to the person lawfully entitled to receive the same; that they offer to deliver the same into this court; and that they do not collude with either claimant, and have not brought this suit at the request of either or both, and have not been indemnified by either or both. The prayer of the bill is, that the defendants may interplead and settle their rights to the notes, and to the money secured thereby, and that the plaintiffs may be at liberty to deliver the notes to this court, and that the defendants may be enjoined from commencing any suit against the plaintiffs, touching the premises, and that the plaintiffs, upon the payment into court of such amount, and procuring the defendants to interplead, may be discharged of all liability to the defendants in the premises.

The answer of Vermilye & Co. avers their ownership of the notes, and denies that the Adams Express Company has any interest in, or title to, them. It avers, that the notes were purchased and received by them in the ordinary course of business, at their banking house in the city of New York; that, at the time of said purchase, they paid therefor the full value of the notes in said city; that they so purchased and paid for the same in good faith, and without any knowledge or notice that the parties from whom the same were purchased were not the owners thereof and lawfully entitled to the same, and in the full belief that said persons were such owners and so entitled; that they forwarded the notes to the secretary of the treasury, at Washington, for redemption and payment, the notes having then become due, and for no other purpose; that it was the duty of the plaintiffs to have redeemed and paid the notes to them, or to have returned them to them; and that they demanded a return of them from the plaintiffs, before the commencement of this suit. The answer asks that the court will adjudge that Vermilye & Co. are the owners of the notes, and entitled to recover and receive the same, or the amount due thereon.

The answer of the Adams Express Company denies the ownership of Vermilye & Co., and that they purchased the notes in good faith, and for a valuable consideration, without notice or suspicion that the seller was not the owner thereof. It sets up ownership in the company, and avers that the company is a carrier and forwarder of money packages for hire; that it was so, in May, 1868, between New Albany, in Indiana, and the city of New York; that, on the 19th of May, 1868, the First National Bank, at New Albany, Indiana, owned one of the $1,000 notes; that, on that day, and at that place, its cashier endorsed said note as follows: "Pay secretary of the treasury, for redemption. W. Mann, Cas.," or, "Pay secretary of the treasury, for conversion. W. Mann, Cas.;" that the note, so endorsed, was placed and secured in an envelope, which was addressed to the secretary of the treasury of the United States, at Washington; that, on the same day, the package containing the note was delivered to the company, for transportation by it to its address; that, while the package was in the possession of the company, as carrier, it was feloniously, and with force and arms, taken from the possession of the company, by some unknown persons, not through any negligence of the company; that the note subsequently appeared in circulation, but not bearing, with legible distinctness, such endorsement, but yet bearing traces of it sufficiently legible to indicate to any one conversant with such notes, that its negotiability had been restricted by an endorsement which had been attempted to be obliterated; that the fact of such attempted obliteration was and is plainly perceptible on the note, and was the cause of the refusal of the secretary of the treasury, in the first instance, to redeem or convert it; and that the company has fully paid the bank for the note, and is entitled to its possession, and to be paid the amount due on it. The answer prays for a decree to that effect. It also sets up, that, on the 21st of May, 1868, the First National Bank of Clarksville, Tennessee, was the owner, in its own right, or as depositary, of the other seven notes; that those notes, endorsed by its cashier, or their owners, were securely enveloped and addressed to B. Seaman, Cashier, New York, and the package was delivered to the company, for transportation to New York; that such package was feloniously taken from the custody of the company, at the same time, and under the same circumstances, with the package from New Albany; that the endorsements on the notes were attempted to be obliterated in the same manner, and to the same extent, and no more, as in the case of the note from New Albany, and they

came to Vermilye & Co. in the same manner as that note; and that the company has fully paid the Clarksville Bank for the notes, and is entitled to their possession, and to the amount due thereon. It prays for a decree to that effect. It also avers, that Vermilye & Co., prior to receiving the notes, were notified by the company of the fact of such larceny, and were furnished by it with the numbers of the notes, and of the series thereof, and were fully notified thereby, and also by the appearance of the notes, that the same had lost their negotiable character, and were tainted, in their title thereto, in the hands of those who passed them to Vermilye & Co.; and that, if Vermilye & Co. parted with value for the notes, they did so in violation of the notices given to them by the company, of its property in the notes, and without the exercise of ordinary care and scrutiny, and with full knowledge, from the appearance of the notes, that they had been tampered with.

This case was brought to hearing, on the pleadings, in July, 1870, and a decree was then made, to the effect, that the bill is properly filed; that the defendants do interplead and settle the matters in controversy herein between themselves; that, in the meantime, and until the further order of the court, the notes in controversy be deposited with the clerk of this court; that the costs of the United States be paid by the party in whose favor judgment final shall be entered herein; and that the consideration of all questions of costs as between the defendants, and all other questions and directions, be reserved until the trial of the matters in controversy between the defendants.

The notes in question were all of them issued under the authority of the act of March 3, 1865 (13 Stat. 468). They all of them bear on their faces the words: "Act of March 3d, 1865." The New Albany note, one for $1,000, and the four Clarksville notes for $1,000 each, bear date June 15th, 1865. The other three Clarksville notes, for $100 each, bear date July 15th, 1865. The $1,000 notes read, on their faces, in this way, in engraving: "Interest twenty cents per day. Three years after date, the United States promise to pay to the order of one thousand dollars, with interest, at $7^{3}/_{10}$ per cent., payable semi-annually, in lawful money. Washington, June 15th, 1865. Treasury Department. Act of March 3d, 1865." They also bear the signatures, on their faces, of the register of the treasury and of the treasurer of the United States. On the face of each are the words, in engraving: "5 coupons attached. Last 6 months' interest payable with note. Prior instalments payable only on presentation of coupons therefor;" also, the words, in engraving: "The government reserves the right of paying, in coin, the interest on this note, at the rate of six per cent. per annum." On the back of each note are the words, in engraving: "Pay to bearer," in a panel, with a blank space underneath, in the panel, in which words could be written. On the back of each note are, also, the words, in engraving: "At maturity, convertible, at the option of the holder, into bonds redeemable, at the pleasure of the government, at any time after five years, and payable twenty years from June 15th, 1868, with interest at six per cent. per annum, payable semi-annually, in coin." The $100 notes differ from the $1,000 notes, only in having the words "two cents," instead of "twenty cents," the words "one hundred" instead of "one thousand," and the words "July 15th," instead of "June 15th."

The fact of the larceny of the notes from the possession of the express company and their ownership by the banks, as set up, is fully proved. They were stolen during the night of the 22d of May, 1868, out of a railroad car, the iron safe, in which they were, being taken away, with its contents, after the messenger in charge of it had been knocked senseless by the robbers. On the 29th of May, 1868, a printed handbill, advising of the stealing of the New Albany note, as a United States 7-30 note for $1,000, second series, act of March 3, 1865, and giving its number, was delivered to a person behind the counter of Vermilye & Co., in their office in New York. This handbill cautioned all persons against receiving or negotiating the note, and stated that the express company claimed the right to recover its possession, and that it was endorsed, "Pay secretary of the treasury for redemption. W. Mann, Cashier." The handbill purported to be issued by the president of the express company, and was dated New York, May 28th, 1868. On the 5th of June, 1868, another printed handbill, dated Cincinnati, May 28th, 1868, advising of the stealing of the New Albany note, as a United States 7-30 note for $1,000, second series, issued under the act of March 3, 1865, and endorsed as before mentioned, and giving its number, and of the four $1,000 Clarksville notes, as United States 7-30 bonds, of $1,000 each, June 15th, and giving their numbers and letters, and of the three $100 Clarksville notes, as United States 7-30 bonds, of $100 each, dated July 15th, 1865, and giving their numbers and letters, was delivered to a person behind the counter of Vermilye & Co., in their office in New York. This handbill purported to be issued by officers of the express company, and contained a like caution and statement as before mentioned, in regard to the notes specified in it.

On the 22d of June, 1868, the treasury department issued a circular limiting the time for the conversion of the seven-thirty notes into bonds, but not extending the time during which the notes not presented for conversion would draw interest, beyond the date of their maturity. The time for the conversion of the notes maturing June 15th, 1868, was extended to and including July 15th, 1868, and the time for the conversion of the notes maturing July 15th, 1868, was extended to and including August 1st, 1868. The bonds to be issued in exchange for the notes were to bear inter-

est from July 1st, 1868, and the interest on the notes surrendered in exchange was to be calculated accordingly.

In July, 1868, the Adams Express Company filed in the treasury department a caveat, consisting of the before named handbill dated Cincinnati, May 28th, 1868. It was delivered to the department, with a letter from the office of the company at New York, dated July 20th, 1868, to its agent at Washington, which letter requested the agent to have the notes mentioned in the handbill, caveated at the department. They were caveated, by entering, in a book in the department, under proper heads, the fact that they were seven-thirties, and their dates of issue, numbers, and amounts, with the fact that they were "stopped," and the name of the company as the person filing the caveat.

In June and July, 1868, the company paid to the two banks, respectively, the entire value of the stolen notes. The notes, when stolen, and when they came into the possession of Vermilye & Co., did not have the name of any person filled into the blank spaces on their faces, after the words, "order of." The New Albany note had, when stolen, written across its back, one or the other of the two forms of words set forth in the answer of the company in that behalf. There is no satisfactory evidence that any thing was written on the back of any of the Clarksville notes.

On the 9th of April, 1869, Vermilye & Co. purchased, at their office, from Suydam & Nason, a reputable firm, members of the New York Stock Exchange, the New Albany note and the four $1,000 Clarksville notes, paying therefor a sum calculated at the rate of 99½ per cent. on the principal, with the addition of the six months' unpaid interest on such principal. On the 12th of April, 1869, Vermilye & Co. made a like purchase, from the same firm, for a like price, of the other three Clarksville notes.

On the 14th of April, 1869, Vermilye & Co. presented the eight notes at the treasury department for redemption. They were not redeemed. In reply, the department informed Vermilye & Co. that the notes were all of them claimed by the Adams Express Company, and, further, in regard to the five $1,000 notes, that their general appearance warranted the belief "that the payee's name had been extracted from the face of the notes."

It is in evidence, that it was usual for seven-thirty notes to be bought and sold in the market after their maturity, and after, by such maturity, interest had ceased to be payable on them; and that the notes in question were purchased by Vermilye & Co. in the usual mode in which such transactions were conducted. No mala fides can be imputed to Vermilye & Co. in respect of the purchases, except such as may grow out of the facts that they purchased the notes so long after their maturity, that the handbills referred to were delivered to them, and that the notes, some or all, bore appearances which, as to some of the notes, attracted the notice of the officers of the treasury department, on their finding that the notes were notes which had been caveated on their books.

There is no evidence as to what was visible on the faces or backs of the notes, when they were received by Vermilye & Co., or by the treasury department, in respect to written matter partially obliterated, except the remark, in the letter of the department, of April 14th, 1869, to Vermilye & Co., in regard to the five $1,000 notes, that "the general appearance of the notes warrants the belief that the payee's name has been extracted from the face of the notes." As it is not shown or claimed, that the name of any payee was ever inserted in the blank on the face of any of the notes, this remark has no meaning. In the absence of the insertion of any names in such blanks, the notes were all of them in the same condition as if payable to bearer, and were, therefore, negotiable by delivery; and the writing of anything on the backs of the notes, while the blanks after the words "order of" were not filled up with the names of payees, did not amount to an "endorsement" on, or of, the notes, in the sense of that word, in the law merchant, so as to restrict the negotiability of the notes, or to make them non-negotiable by delivery merely. Wookey v. Pole, 4 Barn. & Ald. 1; White v. Vermont & M. R. Co., 21 How. [62 U. S.] 575; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Murray v. Lardner, 2 Wall. [69 U. S.] 110; Sanders v. Bacon, 8 Johns. 485; Tappan v. Ely, 15 Wend. 362. And these doctrines apply to these notes issued by the United States, in like manner as if they were the notes or bonds of a corporation or of an individual. Texas v. White, 7 Wall. [74 U. S.] 700; Texas v. Hardenberg, 10 Wall. [77 U. S.] 68. But, while Vermilye & Co., if they purchased these notes in good faith, before their maturity, without notice of any defect of title in the sellers, might be protected, and be held to have acquired the title to the notes, yet a very different question is presented, when it appears, as it does, that the notes were all of them purchased after their maturity. When they were so purchased, the time for their conversion into bonds had long passed. They were then merely overdue obligations, payable in lawful money. A person who takes a bill or note, which, on the face of it, is overdue, cannot claim the privileges which belong to a bona fide holder without notice; and, if he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it, and takes nothing but the actual right and title of his vendor. Andrews v. Pond, 13 Pet. [38 U. S.] 65, 79; Goodman v. Simonds, 20 How. [61 U. S.] 343, 365, 366; Texas v. White, 7 Wall. [74 U. S.] 700, 735; Texas v. Hardenberg, 10 Wall. [77 U. S.] 68, 90. The last two cases cited show that these

doctrines apply to securities issued by the United States. In Texas v. White [supra], the court say, that the known usage of the United States to pay all bonds as soon as the right of payment accrues, requires the application of the rule respecting overdue obligations to bonds of the United States which have become redeemable. The right to convert into bonds the seven-thirty notes which matured June 15th, 1868, expired July 15th, 1868, and the right to convert into bonds the notes which matured July 15th, 1868, expired August 1st, 1868. The notes, therefore, after those dates, remained, in the hands of any holder of them, good only for the principal secured by them, and for unpaid interest up to the date of their maturity, as expressed on their face. The holder of them was losing interest on his money by holding them. He could use them only for what their value was, principal and interest, at their maturity. They were thus, in fact, less valuable to their holder than an ordinary promissory note of a solvent maker would have been, after its maturity. This condition of these notes is shown by the fact that Vermilye paid for them one-half of one per cent. less than their principal, with the addition of the unpaid interest up to maturity. The fact that they continued to be bought and sold after their maturity, and after interest had ceased on them, did not make them any the less overdue obligations, or relieve them from the operation of the rules of law in regard to such obligations. Vermilye & Co. still took the risk of the title of the vendor. There may have been many reasons, in respect to particular notes, why they passed in the market after maturity, and why the interest on the money represented by them was being lost to the holder. It does not necessarily follow that all of such notes had been stolen, so as to establish such usage as a usage to deal in stolen notes after maturity, even if such usage could be of any force. We have no evidence of the extent of the dealing in such notes after maturity, as compared with the entire amount of the notes issued. With the known usage of the government to pay its obligations at maturity, and the loss of interest, and the rejection of the privilege of conversion, all of which facts were apparent to Vermilye & Co. by inspection of the notes, there is every reason for holding them to the rule, that they took nothing but the actual right and title of their vendor. That was nothing but the title of the thief. No principle applicable to the protection of those who deal in negotiable securities before their maturity, requires that these notes, in the position they occupied after their maturity, should be regarded as other than overdue obligations. Mr. Trowbridge, one of the defendants, who negotiated the purchase of the notes in question, testifies, that, when he bought them, he knew they were past due. They had been past due from nine to ten months. In connection with this fact, it is not inapt to remark, that, whatever may be said in regard to holding a party bound by such notice as was given to Vermilye & Co., in this case, in respect to dealing in government securities such as these notes, before their maturity, it is not at all unreasonable to regard such notice given June 5th, 1868, in respect to securities which would become, and which became, due, some June 15th, 1868, and the rest July 15th, 1868, as a good notice in respect to dealing in the particular securities named in the notice, after they became overdue.

There is no force in the suggestion, that the notes in question were a part of the currency of the country, and were money, in the same sense as bank notes. They were issued under the act of March 3, 1865 (13 Stat. 468), and so state on their faces. The 3d section of that act expressly provides, that nothing contained in that act shall be "construed as authorizing the issuing of legal tender notes in any form," although a previous part of the 3d section had provided that all the provisions of the act of June 30, 1864 (13 Stat. 218), which were applicable to the obligations to be issued under the act of 1865, should apply to them. The reason for this evidently was, that the 2d section of the act of 1864 provided, that certain seven-thirty notes, authorized by it, and to be made payable, principal and interest, in lawful money, at maturity, not exceeding three years from date, should be a legal tender to the same extent as United States notes, for their face value, excluding interest; and it was intended that the seven-thirty notes to be issued under the act of 1865 should not be a legal tender. The first section of the act of 1865 shows that the seven-thirty notes issued under that act were only evidences of the indebtedness of the United States for money borrowed by it.

It is objected, on the part of Vermilye & Co., that the express company has no title to, or interest in, the notes, other than that which arises from its having paid the amounts of the notes to the banks, and that there is no evidence of any transfer to the company of the titles of the banks, or of any other person, to the notes. The company had these notes in its possession, as a carrier for hire. In virtue of that relation, it had such a special property in them, that it could maintain an action to recover them, against the thief. If so, no good reason is perceived why it could not also maintain an action to recover them against Vermilye & Co., if they were found in the hands of Vermilye & Co., after having been taken by the latter under the circumstances shown in this case. This being so, the company ought to be allowed to rely on such special property, as against Vermilye & Co., when it is shown that Vermilye & Co. have no better title than the thief who stole the notes from the company. The company was clearly liable to the bailors for the

loss of the notes; and, when it is shown, in addition to such special property of the company, that it has paid the value of the notes to the bailors, in discharge of such liability, it must be held, that, in equity, there has been an assignment to the company of all the title of the bailors to the notes. The facts proved are sufficient to establish the right of the company, as against Vermilye & Co., to receive payment of the notes from the United States, and to protect the United States in paying the notes to the company.

There must be a decree in favor of the express company.

[The case was taken on appeal to the supreme court, where the decree of the circuit court was affirmed. 21 Wall. (88 U. S.) 138.]

Case No. 16,618a.

UNITED STATES v. The VERMONT.

[MS.]

District Court, D. Connecticut.[1]

SHIPPING — SALE OF LICENSED COASTING VESSEL TO FOREIGNER—FORFEITURE.

[The sale of a licensed schooner to a British subject, followed by an order to the master to make delivery to him, and the presentation of a request for clearance by the captain, which recites the sale, and is signed and sealed by the British consul, though the delivery is not yet actually made, is a "transfer," within the meaning of Act Feb. 18, 1793 (1 Stat. 305), for licensing coasting vessels, which provides that any licensed vessel transferred to a person not a citizen of, and resident within, the United States shall not be forfeited.]

This was a libel in rem by the United States against the schooner Vermont for violation of the act of February 18, 1793, for licensing vessels in the coasting trade.

SHIPMAN, District Judge. This libel of information is founded on section 32 of the act of congress, approved February 18, 1793, which provides, among other things, "that if any licensed ship or vessel shall be transferred in whole or in part, to any person who is not at the time of such transfer, a citizen of and resident within the United States, * * * every such ship or vessel, with her tackle, apparel and furniture, and the cargo found on board of her, shall be forfeited." The present proceeding is instituted by the United States for the condemnation of the schooner Vermont, her tackle, apparel, and furniture. There is no claim on the part of the government that she had any cargo on board at the time of the alleged transfer or at the time of her seizure. The vessel was seized on the 14th of August, 1861, in the Thames river, within the admiralty jurisdiction of this court, by Edward Prentiss, Esq., collector of the port of New London. Since the filing of the libel, Gilbert Potter, Jr., filed his claim, alleging that he is the owner, and for answer denies the allegations of the libel. The facts, as they appear in the proof, are briefly these: This schooner appears to have been formerly owned by Edward Kidder and Wm. H. Willand of Wilmington, N. C., and was registered at that port. On the 4th of May, 1861, Kidder and Willand sold her to Gilbert Potter, Jr., of New York. The bill of sale was presented for record at the New York customhouse on the 31st day of July, 1861, the old register canceled, and a new enrollment and license issued to Potter; he having taken the usual oath that he was sole owner. From the facts proved, it is clear that, soon after the 31st of July, and before the seizure, the Vermont was sold by Potter to N. R. Clements, of Yarmouth, in the province of Nova Scotia, but it is claimed by the vendor that she was never delivered, and that no "transfer", within the meaning of the act of 1793, took place. It appears that Henry Fargo was, at the time of the sale, and for many months previous had been, master of the Vermont, and he swears that Potter sold her to Clements, and that he was to paint her, and deliver to the latter at Halifax. He also says that he received a letter from Clements, directing him to have her painted. This letter was received by him some time before the seizure, while he was at Norwich, in this state, where he had taken the vessel. The letter also directed Fargo to have her name changed to the "Annie," and stated that a British flag would be procured for her. A few days after Capt. Fargo presented the paper marked "C" at the customhouse at New London, and requested a clearance of the vessel. This paper recites the fact of the sale to Clements, a British subject, the change of the name of the vessel, and is signed by the British consul for Massachusetts and Rhode Island. It is dated the 6th of August, 1861, and has the consular seal attached. It appears that Capt. Fargo acted as the agent both of Potter and Clements, and, in the absence of any explanation from either of them, it is fair to presume that he acted with the knowledge and consent of both, and that they both consented to the presentation of the consular paper, which treated the sale as complete and unconditional.

I think it entirely immaterial whether there was a formal delivery of the vessel to Clements in person or not. I think that enough appears, in view of the silence of Clements and Potter, to warrant the inference that the vessel was regarded by both as the property of the former, and that the title and control of the vessel had passed to him. But, upon the settled principles of law, the title of a specific chattel passes without delivery, certainly as between the parties to the contract, where the sale is unconditional.

A decree of condemnation of the vessel, her tackle, apparel, and furniture, must therefore be entered.

[1] [Date not given.]

Case No. 16,619.

UNITED STATES v. VICKERY.

[1 Har. & J. 427.]

Circuit Court, D. Maryland. May Term, 1803.

INDICTMENT—SURPLUSAGE—SLAVE TRADE—STATUTORY PUNISHMENT—FINE AND IMPRISONMENT.

1. A failure to prove an unnecessary averment in an indictment will not vitiate it.

2. Where the indictment charged that the prisoner was employed in transporting slaves from Martinique to Cumana, and the evidence produced was that he transported the slaves from Nevis to Cumana, *held*, that the indictment, being in the words of the statute, is sufficient without any averment of the place, which was unnecessary and mere surplusage, and that proof of the transportation from Nevis supported the indictment.

3. Where a statute directs a fine and imprisonment to be imposed for an offence, the court are bound to inflict both, if the party is found guilty.

This was a criminal prosecution under the act of congress passed the 10th of May, 1800 [2 Stat. 70], which subjects all persons voluntarily serving on board any vessel of the United States, which is employed in transporting slaves from one foreign place to another, to fine and imprisonment. The indictment stated that Vickery voluntarily served on board a certain schooner belonging to a citizen of the United States, as master, which schooner was employed in transporting nine negro slaves from one foreign place to another, to wit, from the island of Martinique, in the West Indies, to Cumana in South America. The evidence produced on the trial proved the voluntary serving on board the said schooner, which was employed in transporting nine negro slaves from Nevis to Cumana, and not from Martinique.

Mr. Purviance, for the prisoner, supported by Mr. Harper, moved the court to direct the jury, that the proof offered did not support the indictment. The indictment charges the transportation from Martinique, and the proof is of a transportation from Nevis. Although the indictment might have been good without averment, as it is in the very words of the statute, yet it has become material by being stated in the indictment, and must be proved as laid. In a declaration in a civil suit, it frequently happens that an averment, which was not necessary for the validity of the declaration, yet, when laid, must be made out in proof, and the rule of law is much more strict in requiring the allegata et probata to correspond in criminal than in civil cases. The most dangerous consequence might flow from a contrary opinion. The prisoner, if found guilty in this case under the present indictment, with the present proof, might be indicted over again for the transportation from Nevis, and would be precluded from pleading the conviction in this case, for he would not be permitted to shew any parol proof that the offence, as charged in the latter indictment, to wit, the transportation from Nevis, was the same offence of which he was found guilty on the former indictment, to wit, the transportation from Martinique. This would be to contradict the record, and they therefore hoped the court would direct the jury according to their prayer.

Mr. Hollingsworth, attorney of the United States for the Maryland district, contended that the averment was unnecessary, and merely surplusage, and therefore it could not be necessary to prove it. The indictment alleges the transportation exactly in the words of the statute, to wit, "the transportation from one foreign place to another," and this would be sufficient, without averring any place; and surely an unnecessary and useless averment shall not become an essential part to be made out in proof. For these reasons, he expected the court would refuse the direction which was prayed by the counsel for the prisoner.

WINCHESTER, District Judge. The indictment, being in the words of the statute, is sufficient, without any averment of the place, which is unnecessary and mere surplusage. A failure to prove an unnecessary averment cannot vitiate an indictment which was good without the averment. It would be no contradiction of the record, on an indictment for a transportation from Nevis, to prove that it is the same offence as the transportation from Martinique charged in the present indictment, for that is surplusage, and the transportation from one foreign place to another, which is the substantial part of the indictment, would not be contradicted. The court are of opinion that the proof of a transportation from Nevis supports the present indictment.

The proof being unequivocal as to the transportation from Nevis to Cumana, the jury found a verdict of guilty without retiring. The court were satisfied, from all the circumstances of the case, that the prisoner was ignorant that he was committing a violation of any law, and therefore fined him only $10, and imprisoned him 24 hours. The court were disposed only to have imposed the fine, but, upon looking at the law, they were of opinion that they were obliged to inflict both.

Case No. 16,620.

UNITED STATES v. The VICTORIA PEREZ.

[8 Ben. 109.] [1]

District Court, E. D. New York. May, 1875.

FRAUDULENT REGISTER — A VESSEL WRECKED AT SEA IS NOT "A VESSEL WRECKED IN THE UNITED STATES"—ACT DEC. 23, 1852 (REV. ST. U. S. § 4136); ACT JULY 18, 1866 (ID. § 4189) — EVIDENCE.

1. A Swedish vessel, abandoned at sea, was picked up by a steamer and towed into New

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

York, where she was libelled for salvage and sold. Her purchaser, G., put repairs on her to the amount of three-fourths of her value when repaired, and thereafter procured from the secretary of the treasury an American register for her as being "a vessel wrecked in the United States," under the act of December 23, 1852 (Rev. St. U. S. § 4136 [10 Stat. 149]). Subsequently a libel was filed against her on behalf of the United States to forfeit her under the 24th section of the act of July 18, 1866 (Rev. St. U. S. § 4189 [14 Stat. 184]), as not being entitled to the register, such register being obtained or used knowingly and fraudulently. *Held*, that the construction put on the act of 1852 by the treasury department, and long acquiesced in, should not now be set aside unless convincing reason be given against such a construction.

2. No such reason appeared.

3. The vessel was not "a vessel wrecked in the United States," and was not entitled to the register which was obtained for her.

4. The fact that the register was obtained on a false representation of the circumstances attending the wreck of the vessel, made by the agent of G., and supported by a forged protest, was evidence that the register was fraudulently obtained.

5. The production of the forged protest and other papers from the files of the New York custom house, with proof that they were the only documents on file there in connection with the issuing of the register, and the fact that G., the owner, when examined as a witness in the cause and shown the papers in question, did not intimate that they were not the papers used in obtaining the register, was sufficient evidence that they were the papers presented to the secretary of the treasury, and on which the register was obtained.

George W. Hoxie, Asst. U. S. Dist. Atty.

J. H. Choate, for claimants.

BENEDICT, District Judge. This is a proceeding to forfeit the brig Victoria Perez under the act of July 18, 1866 (Rev. St. U. S. § 4189). To warrant a decree of forfeiture under section 24 of the act of 1866, it must appear that the vessel was not entitled to the benefit of the register, obtained or used for her, and that such register was obtained or used knowingly and fraudulently.

The first question of this case, therefore, is whether the brig Victoria Perez is entitled to the benefit of an American register. The facts bearing upon this question are that the vessel was a Swedish vessel called the "Teya," and that, while on a voyage to Europe from New York, she met with a disaster, and was abandoned at sea. She was afterwards picked up at sea by the steamship Australia and brought into the port of New York. She thus returned to the waters of the United States, a wreck in charge of salvors. After her arrival in New York, she was purchased and repaired by John H. Gardiner, a citizen of the United States. The repairs put upon her equalled three-fourths of the cost of the vessel when so repaired; and by virtue of the act of December 23, 1852 (Rev. St. U. S. § 4136), she became entitled to the benefit of an American register, provided she comes within the designation of "a vessel wrecked in the United States."

It has been contended, not without force, that a vessel abandoned at sea and by salvors brought directly from sea into a port of the United States as a wreck is "a vessel wrecked in the United States," within the meaning of the act of 1852. But this act has been understood to require that the vessel be actually wrecked within the waters of the United States. Such at least has long been the construction put upon it by the department of the treasury, and this construction appears in the treasury regulations. A construction of such an act which has been adopted by the department required to administer the law, and has been long acquiesced in, and which finds support in the language of the statute as well as in the object of the navigation laws of the United States, should not at this late day be set aside, unless convincing reason be given against such a construction. No such reasons appear to me and I therefore hold that this vessel, having been wrecked at sea and then brought into the United States, was not a vessel wrecked in the United States and consequently was not entitled to the benefit of an American register.

It remains to determine whether the American register obtained for this vessel was knowingly and fraudulently obtained. It is clear that fraud was practiced in obtaining the register, for it was obtained upon a false representation of the circumstances attending the wreck of the vessel, made to meet the requirements that she should be shown to have been wrecked within the waters of the United States; and this representation was supported by a fictitious and forged protest, plainly gotten up for the purpose of misleading the secretary of the treasury. The false representation was made by an agent of Gardiner, who then owned the vessel, and a copy of the forged protest, accompanied with original papers signed by Gardiner, formed part of the evidence offered in support of the application. No fact is proved which could afford justification for the statement or the belief that the vessel was wrecked within the waters of the United States, and it is manifest that Gardiner had reason to know the fact to be otherwise. I find no difficulty, therefore, in charging Gardiner, the owner of the vessel, with knowledge of the fraud which was practiced upon the secretary of the treasury.

A question has been made as to the sufficiency of the evidence that the American register was issued upon the forged protest and other documents produced in court, inasmuch as there is no proof that these documents were the documents presented to the secretary of the treasury in support of the application for an American register, except the fact that they are the only documents on file in the New York custom house in connection with the issuing of this register, and that they form the record there of the action of the collector in the premises. But Gardiner,

the owner of the vessel, upon whose application the American register was granted, was upon the stand as a witness. These documents were before him as the documents constituting his application; and he did not intimate, even, that they were not the papers presented by his agent, with his knowledge, in support of his application for the register in question. The silence of the owner under such circumstances is equivalent to an admission that these papers produced before him are the documents which formed his application, and upon which he obtained the register which was issued.

A decree must therefore be entered, condemning the vessel, with costs.

Case No. 16,621.

UNITED STATES v. VIGOL.[1]

[2 Dall. 346; Wharton St. Tr. 175.]

Circuit Court, D. Pennsylvania. May 22, 1795.

TREASON—WHAT CONSTITUTES—DEFENCE OF DURESS.

[1. To go with a large party in arms, marshaled and arrayed, to the houses of officers of the excise, and there commit acts of violence and devastation, with the avowed object of suppressing such offices, and compelling the resignation of the officers, for the purpose of nullifying an act of congress, is treason, under the constitution and laws of the United States.]

[2. The putting in fear which the law will recognize as sufficient duress to excuse the perpetration of a criminal act must proceed from an immediate and actual danger threatening the very life of the person accused. The apprehension of loss of property by waste or fire, or even an apprehension of a slight or remote injury to the person, is not sufficient.]

Indictment for high treason, in levying war against the United States. The prisoner was one of the most active of the insurgents in the western counties of Pennsylvania, and had accompanied the armed party, who attacked the house of the excise officer (Reigan) in Westmoreland, with guns, drums, &c., insisted upon his surrendering his official papers, and extorted an oath from him, that he would never act again in the execution of the excise law. The same party then proceeded to the house of Wells, the excise officer in Fayette county, swearing that the excise law should never be carried into effect, and that they would destroy Wells and his house. On their arrival, Wells had fled and concealed himself; whereupon they ransacked the house; burned it, with all its contents, including the public books and papers; and afterwards discovering Wells, seized, imprisoned, and compelled him to swear, that he would no longer act as excise officer. Witnesses were, likewise, examined to establish that the general combination and scope of the insurrection, were to prevent the execution of the excise law by force; and in the course of the evidence, the duress of the marshal of the district, the assembling at Couche's, the burning of General Neville's house, &c., were prominent features.

As no question of law arose upon the trial, but the case rested entirely on a proof of the overt acts by two witnesses, M. Levy and Lewis, for the defendant, and the attorney of the district agreed, without argument, to submit to the decision of the jury, under the charge of the court, which was delivered to the following effect:

PATERSON, Circuit Justice. The first point for consideration is the evidence which has been given to establish the case stated in the indictment; the second point turns upon the criminal intention of the party; and from these points,—the evidence and intention,—the law arises.

With respect to the evidence, the current runs one way. It harmonizes in all its parts. It proves that the prisoner was a member of the party who went to Reigan's house, and, afterwards, to the house of Wells, in arms, marshalled and arrayed; and who, at each place, committed acts of violence and devastation.

With respect to the intention, likewise, there is not, unhappily, the slightest possibility of doubt. To suppress the office of excise in the Fourth survey of this state, and particularly, in the present instance, to compel the resignation of Wells, the excise officer, so as to render null and void, in effect, an act of congress, constituted the apparent,—the avowed,—object of the insurrection, and of the outrages which the prisoner assisted to commit. Combining these facts and this design, the crime of high treason is consummate in the contemplation of the constitution and law of the United States.

The counsel for the prisoner have endeavored, in the course of a faithful discharge of their duty, to extract from the witnesses some testimony which might justify a defence upon the ground of duress and terror. But in this they have failed, for the whole scene exhibits a disgraceful unanimity; and, with regard to the prisoner, he can only be distinguished for a guilty pre-eminence in zeal and activity. It may not, however, be useless on this occasion to observe that the fear which the law recognizes as an excuse for the perpetration of an offence must proceed from an immediate and actual danger, threatening the very life of the party. The apprehension of any loss of property, by waste or fire, or even an apprehension of a slight or remote injury to the person, furnish no excuse. If, indeed, such circumstances could avail, it would be in the power of every crafty leader of tumults

[1] [This was one of the trials arising out of the so-called "Whiskey Insurrection," occurring in Western Pennsylvania in the year 1794. For a full account of the proceedings of the disaffected parties, see U. S. v. Insurgents, Case No. 15,443.]

and rebellion to indemnify his followers by uttering previous menaces; an avenue would be forever open for the escape of unsuccessful guilt, and the whole fabric of society must, inevitably, be laid prostrate.

A technical objection has, also, been suggested in favor of the prisoner. It is said that the offence is not proved to have been committed on the day, nor the number of the insurgent party to be so great, as the indictment states. But both these exceptions, even if well founded in fact, are immaterial in point of law. The crime is proved, and laid to have been committed, before the charge was presented; and whether it was committed by one hundred or five hundred cannot alter the guilt of the defendant. If, however, the jury entertain any doubt upon the matter, they may find it specially.

Verdict, guilty.

NOTE. The court, having waited about an hour for the jury ('till half past 10 o'clock at night), adjourned 'till 11 o'clock the next morning. Just after the adjournment took place, the jury requested to see Foster's Crown Law and the acts of congress, which, by consent, were accordingly sent to them. I am told, that they remained together 'till between 3 and 4 o'clock in the morning, when they wrote, signed, and sealed up their verdict, and adjourned. On the next morning (the 23d of May, 1795) they appeared at the bar, and, being called over, offered the written verdict, sealed up, to the clerk. But the court said that the paper could not be received. The foreman then pronounced the verdict viva voce, and again offered the written verdict, but the court repeated: "We cannot open or receive it." Nothing was said publicly of the jury's having adjourned. The defendant was eventually pardoned.

Case No. 16,622.

UNITED STATES v. VILLATO.

[Whart. St. Tr. 185; 2 Dall. 370.]

Circuit Court, D. Pennsylvania. April, 1797.

NATURALIZATION UNDER STATE LAWS—REPEAL OF STATUTE—TREASON AGAINST UNITED STATES.

[1. The Pennsylvania act of 1789, providing for the naturalization of foreigners, was repealed by implication on the adoption of the new state constitution, which contains provisions in relation to resident foreigners inconsistent with that act; and, as the new constitution makes no provision on the subject, an attempted naturalization under the state laws is void, irrespective of the question whether the naturalization laws of the United States do not operate to exclude all state jurisdiction.]

[Distinguished in Passenger Cases, 7 How. (48 U. S.) 556. Cited in U. S. v. Rhodes, Case No. 16,151.]

[2. Therefore a Spanish subject who took the oath under the Pennsylvania statute after the adoption of the state constitution, and afterwards engaged on board a French privateer in the capture of an American vessel, was not guilty of treason against the United States.]

The defendant had been committed by the district judge, on a charge of high treason against the United States, and on the return to a habeas corpus, issued under the act of Pennsylvania (Vol. 2, Dall. Ed., p. 241), it appeared, that he had entered on board of a French privateer "in parts out of the territory of the United States, and that, having so entered, he aided in capturing an American vessel."

But it was objected by Mr. Dallas and Mr. Duponceau, for the prisoner, that he was not liable to a charge of high treason, because he was by birth a Spaniard, and had never become a naturalized citizen of the United States. They contended, therefore, that he ought to be discharged from the prosecution; independent of any inquiry, whether the offence could be deemed high treason, even in a citizen.

The facts were these:—Francis Villato was born within the dominions of the king of Spain; he came from New Orleans to Philadelphia in the beginning of the year 1793, and on the 11th of May following, he took and subscribed before the mayor of the city, the oath specified in the third section of the act of assembly, passed on the 13th of March, 1789. Vol. 2 (Dall. Ed.) p. 676. He afterwards went to the West Indies, entered on board a French privateer, and acted as prize-master of the American brig John of New York, which the privateer had taken, while he was on board, and procured to be libelled and condemned at Cape Francois. Under these circumstances, the argument entirely turned upon the question, whether the prisoner had become a citizen of the United States, in consequence of the oath taken and subscribed by him on the 11th of May, 1793.

For the affirmative of the proposition, Mr. Lee, the attorney general of the United States, and Mr. Morgan, contended, that the act of Pennsylvania was in force in the year 1793; that it was not affected by the establishment of the new state constitution, nor repealed by any subsequent law; that the power of naturalization granted to the federal government was concurrent with, and not exclusive of, the state jurisdiction upon the subject; that the first naturalization act of congress, passed in the year 1790 [1 Stat. 103], furnished a new rule, but contained no repealing or negative words to impair the operation of the pre-existing state laws; and that although at this time there was no other than the federal rule for naturalizing a foreigner, yet this was the direct effect of positive negative words, in the act of congress passed in the year 1795. Vol. 3 (Swift's Ed.) p. 163 [1 Stat. 414]; Collet v. Collet [Case No. 3,001].

Mr. Dallas, in reply. It is conceded, that if the prisoner is not a naturalized citizen of the United States, he must be discharged. It is unnecessary to inquire, whether the federal power of naturalization is concurrent or exclusive; since it will be sufficiently shown, that even if the power is concurrent, the state had ceased to exercise it before the year 1793; and, consequently, the prisoner could not have become a citizen of the United States under any law of Pennsylvania. Be-

fore congress had exercised the power of naturalization given by the federal constitution, the then existing state constitution had declared, that "every foreigner of good character, who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land or other real estate; and, after one year's residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this state, except that he shall not be capable of being elected a representative until after two years' residence." Vol. 1 (Dall. Ed.) p. 60, in appendix. While the test laws were in force, no particular form of qualification was prescribed for the purpose of naturalization, different from the oath, or affirmation, of allegiance and abjuration, exacted from every inhabitant of the state; but when the test laws were repealed, and before congress had legislated upon the subject, a special provision became necessary; and the proviso in the act of the year 1789 (Vol. 2, Dall. Ed., p. 677) was expressly introduced to preserve and effectuate the 42d section of the constitution, with which it is in language and meaning inseparably connected. The next change in the business of naturalization was the act of congress, passed in the year 1790. This act, it is true, does not contain a repeal of the state law, nor any negation of a state power to naturalize; but the arguments ab inconvenienti are strong against a concurrent authority; and, if not on the question of power, at least on the principle of expediency, the state convention, who afterwards formed our existing constitution, have evidently avoided a collision of jurisdiction, by omitting to prescribe any state mode of naturalization, and leaving the subject implicitly to the rules which congress had previously prescribed. A citizen of the United States, adopted under the act of congress, is a citizen of each and every state; and the convention of Pennsylvania could conceive no means of establishing uniformity (the very object contemplated by the federal constitution) if each state in a distinct and different mode, might likewise convert the character of an alien into that of a citizen of the United States. The state constitution is, therefore, silent; and it only remains to be shown, that the law passed in the year 1789, was virtually repealed by the ratification of that constitution; which provides, indeed, that all the pre-existing laws, not inconsistent with itself, shall continue in force. Schedule (section 1). But the act of 1789 was not only entirely dependent on the existence of the old constitution, which was abrogated; but is in many essential points inconsistent with the new constitution. Thus, it is to be remarked, that the part of the act of assembly on which the controversy turns, is not a substantive and original section, but a mere declaratory proviso, that the legislature did not intend to do, what it was out of their power to have done, that is, to alter the 42d section of the constitution by a mere repeal of the test laws. The proviso proceeds in the following words: "Every such foreigner as in the said section mentioned, who shall come to settle in this state, shall, after one year's residence therein, be entitled to the full enjoyment of the rights and privileges therein specified," upon taking and subscribing the oath, or affirmation, &c. When the whole constitution was destroyed, none of its parts could survive; and when, therefore, the 42d section was annulled, the description of foreigners which it contained, and the rights and privileges which it specified, could no longer furnish a foundation, on which the act of assembly could stand, and it inevitably shared the fate of every baseless superstructure. But is it possible to render the act consistent with the existing constitution? A slight comparison will yield a satisfactory answer. The act declares, that a foreigner, having taken the oath, or affirmation of allegiance, and resided here one year, shall be entitled to all the rights and privileges specified in the 42d section of the old constitution; that is, he may acquire, hold and transfer real estate, and enjoy all the rights of a natural born subject of this state, except the right of being elected a representative, which he cannot enjoy for two years. Now, the existing constitution will not allow any man to be even an elector, who has not resided here two years; and besides requiring a longer period of residence than two years, to entitle a citizen to be elected a representative, a senator, or governor, it superadds the qualification, that he shall be of a certain age, before he can be chosen for those offices respectively. If, then, the act of assembly is in force, an alien naturalized under it, having the rights of the old, is in a situation preferable to a natural born citizen under the accumulative restraints of the new constitution. But a contrary construction has been given whenever the point was directly presented for consideration, which was not the case in Collet v. Collet [supra] by the legislature, by our courts, and by the bar.

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

PETERS, District Judge. At the time of committing the defendant, some doubts arose in my mind; which, on account of the importance of the subject, I thought it more proper to submit to a solemn discussion, than hastily to decide at my chambers. I take the earliest opportunity, however, to acknowledge, that I am now convinced the commitment was erroneous. The act of assembly is obviously inconsistent with the existing constitution of the state; and, therefore, cannot be saved by the general provision of the schedule annexed to it. On that ground only my opinion is formed; but it is sufficient to authorize a declaration, that the pro-

ceeding before the mayor was, ipso facto, void; that the prisoner is not a citizen of the United States; and that, consequently, he must be released from the charge of high treason.

IREDELL, Circuit Justice. I am of the same opinion. Difficulties, it is true, have been suggested on points not necessary to a decision on the present occasion; and, certainly, if the question had not previously occurred, I should be disposed to think, that the power of naturalization operated exclusively, as soon as it was exercised by congress. But the circumstances of the case now before the court, render it unnecessary to inquire into the relative jurisdictions of the state and federal governments. The only act of naturalization suggested, depends upon the existence, or non-existence, of a law of Pennsylvania; and it is plain, that upon the abolition of the old constitution of the state, the law became inconsistent with the provisions of the new constitution, and, of course, ceased to exist, long before the supposed act of naturalization was performed.

The prisoner must, therefore, be discharged.

Case No. 16,623.

UNITED STATES v. VINSENT.

[5 Cranch, C. C. 38.] [1]

Circuit Court, District of Columbia. Nov. Term, 1836.

SLAVERY—CERTIFICATE OF FREEDOM.

A certificate of freedom is not such a "pass" as is contemplated by the 19th section of the Maryland act of 1796 (chapter 67).

Indictment for giving a pass to one of Mr. Custiss's slaves, "being a paper writing, purporting to be a certificate from the president of the board of aldermen, and acting mayor of the city of New York, under seal of the mayoralty of said city of New York, that the bearer thereof, Alexander Vinsent, was a free person."

THE COURT (nem. con.) was of opinion that the paper was not such a "pass" as is contemplated by the 19th section of the Maryland statute, upon which the indictment was founded.

Case No. 16,624.

UNITED STATES v. VINTON.

[2 Sumn. 299.] [2]

Circuit Court, D. Maine. May Term, 1836.

ARMY—BREVET RANK—RETROACTIVE COMMISSION—PAY AND EMOLUMENTS.

1. The defendant, being a lieutenant in the army of the United States, was commissioned June 30th, 1834, as a captain by brevet, to take rank from September 30th, 1829. *Held*, that the commission took effect retroactively, and that the defendant was entitled to receive the pay of a captain by brevet, for services rendered as captain, after the date last above mentioned.

2. Where a brevet commission in the army of the United States is conferred upon a party, to take rank from a prior date, the pay and emoluments of the rank conferred follow as an incident from this date, whenever the party has rendered services according to that rank.

Assumpsit on an account annexed and for money had and received. The cause came on to be heard upon an agreed statement of facts, which was as follows: This is an action of assumpsit, brought by the United States against Captain [John R.] Vinton, and at his request, to test the validity of his claim to certain brevet pay, to recover two hundred and four dollars, which sum was drawn by him from the paymaster, but disallowed at the treasury; and the parties agree to the following statement of facts: The defendant was commissioned first lieutenant in the United States army, on the 30th of September, 1819, and served under the said commission until the 30th of June, 1834, when he was commissioned a captain by brevet, to take rank from the 30th of September, 1829. During the periods for which he claims the additional, or brevet pay of ten dollars per month, viz. from the 16th of September, 1830, to the 31st of August, 1831; from the 1st of October, 1831, to the 21st of February, 1832; and from February 26th to July 4th, 1832, he had a captain's command. The question for the court is: Did this brevet commission, made and conferred on the 30th of June, 1834, to take rank from the 30th of September, 1829, authorize the defendant to receive brevet pay for services performed in 1830–'31 and '32. If the defendant was, by said brevet, so authorized, then the plaintiffs are to take nothing by their writ; otherwise the defendant is to be defaulted, and judgment rendered for the plaintiffs for the sum demanded, and costs.

Mr. Anderson, U. S. Dist. Atty., argued as follows: By act of congress of July 6, 1812, c. 37, § 4 [2 Stat. 784], the president is authorized to confer brevet rank on such officers of the army as shall distinguish themselves by gallant actions, or meritorious conduct, or who shall have served ten years in any one grade: provided, that nothing herein contained shall be so construed as to entitle officers so brevetted to any additional pay or emoluments, except when commanding separate posts, districts, or detachments, when they shall be entitled to, and receive the same pay and emoluments which officers of the same grades are now, or hereafter may be allowed by law. By act of April 16, 1818, c. 64 [3 Stat. 427], "officers of the army, who have brevet commissions, shall be entitled to and receive the pay and emoluments of their brevet rank when on duty, and having a command according to their brevet rank, and at no other time." By act of March 16, 1802, c. 9, § 20 [2 Stat. 136],

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

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

"every officer and soldier shall take and subscribe the oath to bear true allegiance" to the country, &c., which oath is required of every soldier on his enlistment, and of every officer on his accepting his appointment. As every promotion is a new appointment (Marbury v. Madison, 1 Cranch [5 U. S.] 16), the defendant could not act officially under his brevet commission until he had taken and subscribed the oath required by law. The defendant's commission was made and completed on the 30th of June, 1834, to take rank from the 30th of September, 1829; subsequent, of course, to which time he took and subscribed the oath by law required, to authorize him to act under or by virtue of the said commission. The services for which the defendant received pay, rendered, as he maintains, under this brevet commission, were performed between the 16th of September, 1830, and the 4th of July, 1832, two years before this brevet commission was made. Can it be maintained, that the defendant acted under and by virtue of this commission, two years before such commission was in existence? He could not perform the service both under his old commission of lieutenant and under his brevet commission of captain at one and the same time. He acted under one or the other of these commissions. If he performed the service under his old commission, he is, clearly, not entitled to pay for this service under the brevet or new commission. A new commission to do the same thing, determines the old commission. Jacob's Law Dict. tit. "Commission." When did this new commission determine the old commission? When, as regards pay and emoluments, the defendant accepted it, and took and subscribed the oath necessary to qualify him to act under the new commission and not before. Then, as the defendant was not qualified to act under this brevet commission; for it was not made or conferred until long after the services in question were performed, he did not perform them by virtue of any power or authority derived from this commission, and cannot claim the increased pay given by this commission for like services. But even if acceptance and the taking the oath of allegiance should not be deemed indispensable; yet the brevet commission could not determine the old commission, until such brevet commission was completed by the signature of the president, and this was two years after the services were performed.

In Marbury v. Madison, it is said, "the applicant has a right to the office or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record." In the case of Marbury, the officer was nominated, confirmed, and his commission made and completed; yet he could not act in his official capacity, until he received his commission or a copy of it, and was duly qualified under such commission or copy, by taking the qualifying oath. Had Marbury assumed to act as a magistrate before he had obtained his commission, or a copy of it, and before he had taken the requisite qualifying oath, would such acts have become legal and valid, by his subsequent possession of the commission and a subsequent qualification to act under it? Could Marbury have enforced the payment of fees for such assumed official acts, by the production of a commission bearing date before, but under which he was not qualified to act, until after the services were performed? If not, how can the defendant claim this money, when even his commission was not made until long after the performance of the service for which he received the money? The act of congress contemplates services to be performed, and not services already rendered. "Officers who have brevet commissions, shall be entitled to receive the pay and emoluments of their brevet rank, when on duty and having a command, according to their brevet rank, and at no other time;" but should the construction contended for by the defendant prevail, so as to cover past services, he will receive pay for "time other" than when he held such brevet commission. By the act of 1812 (chapter 137, § 4), the president is authorized to confer brevet rank; and by the act of 1818 (chapter 59, § 2), "no brevet commission shall hereafter be conferred without the advice and consent of the senate." As it is not imperative on the president to nominate, or on the senate to confirm, this brevet might have been delayed twenty years, and then defendant might have been brevetted a colonel, to take rank ten years prior to the date of his commission. Could the defendant, under such circumstances, go back with his account, and charge pay and emoluments as a colonel for such periods as he, as a lieutenant in fact, might have been left in command of a separate post? Brevet rank is not conferred on officers of the navy; but, to reward gallant deeds, commissions are often conferred, to take rank from an anterior day. Suppose a lieutenant had taken command of the ship, his captain being sick or disabled, and for his gallant conduct in action he should subsequently be made a captain, to take rank on the day of the action in which he distinguished himself, could he go back, and draw pay and prize money as a captain? By article 75 of the rules and articles for the government of the army (Act 1806, c. 20 [2 Stat. 368]), "no officer shall be tried but by general court-martial, nor by officers of inferior rank, if it can be avoided." Suppose the officers composing a court-martial, to try a colonel, were all of inferior rank, while a court might, without difficulty or delay, have been organized, composed of officers of the rank of the accused, as required by law; and the accused should object to a confirmation of the sentence of such court, for this reason; but before a decision was made upon the objection to the confirmation of the sentence, the officers objected to, on account of

their inferior rank, should receive commissions of colonels, to take rank prior to the organization of said court-martial, would these subsequent commissions cure the defect? If not, then can a subsequent commission give a right to increased pay for past acts, when it cannot confer the increased power to do those acts, or rather to make those acts valid. The case of Captain Bache, of the army, was in all respects like the one under consideration. The attorney general, to whom that case was submitted, in his official opinion, given on the 5th of January, 1835, says: "To come within the law of 1812, the officer must have been brevetted; and to be included in that of 1818, he must have a brevet commission. Captain Bache's rank having been carried back to a date prior to the period for which he now asks brevet pay, he would seem to have an equitable claim for the difference charged by him, but his only remedy is by application to congress." By the act of 1812 (chapter 37), officers, who have served ten years in one grade, may be brevetted. The only object and intent of conferring rank anterior to the date of the commission is, evidently to decide the officer's relative place and command among his brother officers, and to fix the beginning of another ten years, when he may, by the act, receive another brevet; otherwise a commission would have said to take pay as well as rank from an anterior day. Congress evidently intended, by the act of 1818, by requiring the consent of the senate to these appointments, to guard not only against too great an increase of these commissions, but also against increase of pay under them, by expressly refusing pay, except when the command was according to the rank. The words of the act are too plain and unambiguous to admit of a doubt as to the intention of congress, and it is contended that the United States must prevail, unless by construction the defendant shall be made to have held this brevet commission two years before it was made, and when in truth and in fact he held no such commission.

Vinton, pro se, argued as follows: The question seems principally to turn upon the single point, whether the validity of any commission takes origin from its date, or from some other period. The attorney general of the United States is of opinion, that in the case of a brevet commission, and with regard to the pay and emoluments pertaining to it, this period is "when it is conferred." But the law is simply declaratory of the privileges and restrictions of brevet rank. The phrase, "officers who have brevet commissions," seems to be only another mode of saying, officers with brevet rank; captains by brevet, or majors by brevet, &c. &c.; and could not have been meant to imply, that in order to ensure to an officer the emoluments of his brevet rank, he must necessarily have the parchment commission in his pocket. There is nothing, in a fair reading of the law, however certain passages may be emphasized, which places brevet commissions on any ground distinct from other commissions, with respect to the date and origin of the immunities conferred by them.

The decision of the attorney general is unprecedented. Repugnant as it is to the feelings of the defendant to appear as a controvertist with his government, yet it cannot be surprising, that he should appeal from a judgment at variance with all former decisions, opinions and usages, which have prevailed, both in the army and in the departments at Washington, in similar cases. The rule has hitherto been, invariably, that all the immunities of a commission have their initial virtue from its date. The immunity of rank is explicitly declared to obtain from its date upon the face of the instrument, and if it were usual to discuss the matter of pay in such a document, it can scarcely be doubted, that it would be made to correspond. The time of a commission being "conferred," or issued has always been considered as a matter of little or no importance. By confirming an appointment with an anterior date, it is a virtual acknowledgment, that it ought to have been conferred at that date. Commissions of all kinds must necessarily be dated back. No one can be nominated, confirmed, and have his commission executed, on the day it falls due. Every advantage of the back date has therefore always been conceded. Whenever in the ordinary course of service, an officer is promoted to an advanced grade, he draws the difference of pay, on the first official announcement of the promotion, though the confirmation of it could not take place until a subsequent period. Some thirty brevet second-lieutenants are annually appointed in July, who are not confirmed until the ensuing session of congress; yet they receive the pay of their brevet rank for the intervening time, although, in the view of the attorney general, they are not then "brevetted," and have not a "brevet commission." In every instance, of civil or diplomatic appointment, the same usage is believed to prevail.

In the view of right and justice, even the attorney general admits, that the defendant has an "equitable claim." The law evidently intended to confer additional emolument for additional service rendered. It is not denied, that its requisitions, in this respect, were fulfilled. The law guarantees brevet promotion, after ten years faithful service in one grade. It is not denied, that this probation was accomplished. The commission was, therefore, executed and delivered, conferring rank from a date strictly conforming to the period when it became due. The senate, for purposes of their own, deferred action on its confirmation, but not, it is presumed, with any design to deprive it of its immunities. On the contrary, by dating it back, they virtually acknowledged and sanctioned the period at which it should have been conferred, and from which all its immunities should date. If any wrong ensue from the delay, the government

cannot justly take advantage of that wrong to the prejudice of the citizen.

It may be fairly concluded, then, that unless the law has expressly declared, that the emoluments due under a brevet commission are to be allowed only from the time of its confirmation by the senate, or its promulgation by the executive; unless brevet commissions are in this manner to be explicitly excepted from the general and prevailing rule in regard to other commissions, all the immunities pertaining to them should be coeval. The law has made no such express exception. Consequently the pay drawn by the defendant as brevet captain, "having a command according to his brevet rank," was due to him under the statute, and should be allowed at the treasury.

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

STORY, Circuit Justice. The defendant, Captain Vinton, appears, by the statement of facts, to have been commissioned as a lieutenant in the army on the 30th of September, 1819; and he served under that commission until the 30th of June, 1834, when he was commissioned by the president, by and with the advice and consent of the senate, as a captain by brevet, to take rank from the 30th of September, 1829, the time when his ten years' service expired. He claims, and has received, the additional pay of ten dollars per month, as captain by brevet, for different periods of time between September, 1830, and July, 1832, during which periods he had the command of a captain by brevet. The United States insist, that this additional pay has been received and retained against law. And the question now is, whether Captain Vinton has rightfully received it, and can rightfully retain it, according to the existing laws on this subject. The act of July 6, 1812 (chapter 37), provides that the president shall be authorized "to confer brevet rank on such officers of the army as shall distinguish themselves by gallant actions, or meritorious conduct, or who shall have served ten years in any one grade." The act of April 16, 1818 (chapter 64), provides "that the officers of the army, who have brevet commissions, shall be entitled to and receive the pay and emoluments of their brevet rank, when on duty, and having a command according to their brevet rank; and at no other time." It is plain that the additional pay and emoluments of brevet rank cannot be claimed, until the party has received his brevet commission, and is properly qualified to act under it. And if there were nothing more in the present case, there would be no room for doubt or controversy. But the true question here is, not whether the party must have a brevet commission (for Captain Vinton has that); but whether his commission takes effect only from its actual date; or, by relation back, takes effect at and from the 30th day of September, 1829, from the terms in the commission, that he is thereby "to take rank from the 30th of September, 1829." If it is to take effect from this last period as to rank, it is difficult to perceive, why the pay and emoluments of the rank do not follow the rank itself, according to the provisions of the act of 1818 (chapter 64).

It has not been denied, and, indeed, it is tacitly admitted by the argument, that the president, by the advice and consent of the senate, has authority to confer brevet rank from a period antecedent to the actual appointment and commission. That point, therefore, is fairly out of the case; and, indeed, we must admit, that Captain Vinton was regularly and honorably entitled to the rank from such antecedent period, since it was actually conferred upon him by the proper authority.

It appears to me, that the commission does not take effect solely from and after its date; but in this instance retroactively, it has effect from and relation to the 30th of September, 1829. I hold this to be the natural, nay, the necessary construction of the words of the commission. Unless this construction is given to the instrument, we in fact strike out of it the words, "to take rank from the 20th of September, 1829," a liberty, which no court of justice can be justified in assuming. If the words, then, are to have any meaning, they confer on Captain Vinton the brevet rank of captain from that time. If they confer on him that rank from that time, then they confer on him also the pay and emoluments of that rank, when he is on duty, and has a command according to that rank, from and after that time. It seems to me, that the pay and emoluments are necessarily attached to the rank; and that if the rank existed from September, 1829, and the duty and command also existed, then the pay and emoluments followed of course. It is admitted, that, in equity, he ought to receive the pay and emoluments; and I think, he is equally so entitled at law, upon the plain intent of the commission, and of the act of congress regulating the pay and emoluments.

The whole argument, on behalf of the United States, rests upon the ground, that the commission can operate only from and after its date, to confer brevet rank and pay in futuro. But the very terms of the commission contradict that, as to rank; and if so, where is the ground for a distinction between the rank, and the pay and emoluments? The act of congress states none. The commission states none. I confess myself unable to find any. If we construe the commission as a commission creating Captain Vinton a captain by brevet from the 30th of September, 1829, the whole difficulty in the case vanishes. If we adopt any different construction, we reject the words of the instrument, or we deny them any meaning. They become, vox et præterea nihil.

Having said thus much, the subject is, with me, exhausted. My judgment is, that the United States ought to take nothing by their suit, and that judgment ought to be entered for the defendant.

The district judge concurs in this opinion; and therefore let judgment be entered accordingly.

Case No. 16,625.

UNITED STATES v. The VIRGIN.

[1 Pet. C. C. 7.] [1]

Circuit Court, D. New Jersey. April Term, 1806.

CUSTOMS DUTIES—VIOLATION OF COLLECTION ACT—FORFEITURE OF VESSEL—DEFECTIVE PROCEEDINGS—AIDER BY VERDICT.

1. Construction of the 27th, 28th, and 50th sections of the law of the United States, entitled "Act to regulate the collection of duties on impost and tonnage" [1 Stat. 648, 665].

[Cited in Walsh v. U. S., Case No. 17,116; U. S. v. Twenty Cases of Matches, Id. 16,559.]

2. The prohibitions of this law do not extend to a case, where merchandise has been taken out of a vessel, more than four leagues from the coast.

3. What defects in proceedings are cured by verdict. If a proper case is laid in the declaration or libel, but not described with precision, the court after verdict will presume that the want of precision was supplied by the evidence: aliter, if no ground at all is laid.

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

A libel or information was filed against the Virgin, for receiving from the Hunter, a vessel bound from a foreign port to the United States, and before her arrival at her port of discharge, and before she was legally authorised to unlade the same, a certain quantity of rum, with intent to defraud the revenue. [See Case No. 15,428.] The owners of the Virgin put in their claim, and denied generally all the facts stated in the libel. The jury found the facts in favour of the United States, upon which, sentence of condemnation was passed by the district court. [Case unreported.]

Messrs. Williamson and Ogden made the following objections to the decree: First. That the libel stated that the seizure was made by J. Heard, now collector of the port of Perth Amboy, but it does not state that he was collector at the time of the seizure; and that the seizure could by law be made by no other person than one legally authorised to make it. 3 [Bior. & D. Laws] 136 [1 Stat. 627]. That the seizure is the whole foundation of the proceedings in error, and that if this was improperly made no condemnation should take place. Second. That the libel does not state that the Hunter was within four leagues of the coast, and no offence can be committed under the 27th and 28th sections of the act of congress, unless she was within the jurisdiction of some district of the United States, or within four leagues of the coast, and the only section which subjects the vessel to forfeiture, for receiving goods unlawfully unloaded, is the 28th section. They laid down the general principle, that in actions founded on a statute, the plaintiff must aver every thing and bring his case within the statute. 1 Com. Dig. 321; 5 Com Dig. 369. The same rule prevails in proceedings in the exchequer, which this is in the nature of (Hob. 213); so also in the admiralty (Bunb. 177, 273; Parker, 278). And the cases cited show that a verdict will not cure the defect. Third. That the libel does not negative the exception in the 27th section, "that the vessel was in distress," and the rule is that if the exception be part of the enacting clause, it is part of the description of the offence and must be negatived; but if it be a provision for the benefit of a person, it need not be negatived, but must be taken advantage of by the other party. 1 Ld. Raym. 119; 1 Term R. 141; 6 Term R. 559; 7 Term R. 27.

The district attorney, Mr. M'Ilvaine, for the United States, contended, that these objections were cured by the verdict, and cited 5 Com. Dig. 60, 61; 4 Burrows, 2020; 1 Strange, 212; 2 Ld. Raym. 1212. That the stating of the offence to be against law, is a sufficient averment to let in an intendment that every thing was proved necessary to warrant the verdict.

In answer to this last argument, it was contended by the counsel for the appellants, that this is merely an inference of law from which a fact cannot be intended, whereas inferences of facts must be from some facts stated. 1 Doug. 679

WASHINGTON, Circuit Justice. The jury have found the facts stated in the libel to be true, but where is the offence? If the rum was taken out before the arrival of the Hunter, within four leagues of the coast, the act is not prohibited by law. The place where the offence was committed is an essential part of it; if committed in any other place it is perfectly innocent. A conviction for burglary might as well be sustained, without laying the offence to have been perpetrated in the night time, as here, without stating in the libel or information, the place where the offence was committed.

It is said that the verdict will cure the defect. But a verdict cannot convert an innocent act into a criminal one. The plaintiff is not bound to prove more than he lays in his declaration, and therefore we must presume the case stated in it to have been proved and no other. If a proper case be laid, but not with sufficient precision, and the defendant will not at a proper time take advantage of the defect; the court after verdict will presume that the want of precision, was supported at the time, by evidence, because as a proper ground for such evidence was laid it would have been proper; not so if no ground at all is laid. It has been properly observed at the bar, that if this defect can be cured by intendment, it will be difficult to imagine a case where a judgment can be arrested.

The decree of the district court reversed.

NOTE. In The Harmony [Case No. 6,081], Mr. Justice Story decided (May, 1812) that under the 50th section of the act of March 2, 1799, c. 128 [1 Story's Laws, 617; 1 Stat. 665, c. 22], if foreign goods exceeding 400 dolls. in value, are unladen without a permit, &c., the vessel from which they are unladen, is forfeited; although they were not actually brought in such

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

vessel from a foreign port, but had been transhipped into her on the homeward voyage. The 27th and 28th sections of the law, the court were inclined to consider applicable to transhipment, within four leagues of the coast, or within some district of the United States, before the arrival of the vessel at a port of delivery.

UNITED STATES (VIRGINIA & MARYLAND STEAM NAV. CO. v.). See Case No. 16,973.

Case No. 16,626.

UNITED STATES v. VIRGINIA BONDS.

[9 Pittsb. Leg. J. 377.]

District Court, N. D. New York. May 31, 1862.

CONFISCATION ACT OF 1861.

[The confiscation act of July 13, 1861 (12 Stat. 255), did not embrace choses in action, such as bonds, stocks, etc., or money.]

This was a seizure of $70,000 worth of Southern bonds, the property of Mr. Guthrie, stopping at the Fifth Avenue Hotel. The jury, by direction of the court, rendered a verdict restoring the property to the claimant, the judge (SMALLEY, District Judge) charging that the confiscation act of July 13, 1861 [12 Stat. 255] under which the [sixty-one] bonds were seized, was a revenue act, and covered only goods, chattels, wares, and merchandise, or such property as was properly cognizable under the revenue act; that it did not embrace choses in action, such as bonds, stocks, &c., nor any money.

Case No. 16,627.

UNITED STATES v. VOLZ.

[14 Blatchf. 15.] [1]

Circuit Court, S. D. New York. Nov. 8, 1876.

PERJURY—OATH BEFORE UNITED STATES COMMISSIONER—QUALIFICATION AS BAIL—AUTHORITY OF COMMISSIONER TO TAKE BAIL—FUGITIVE AWAITING WARRANT OF REMOVAL.

1. On a complaint before O., a United States commissioner in New York, against S., for having committed an offence against the United States, cognizable by the courts of the District of Columbia, S. was committed by O. to await the issuing by the district judge of a warrant for his removal for trial to such district. Before such warrant was issued, V. went before O., to justify as bail for S., and made oath before him to a deposition concerning his property, which was signed by him and entitled in the proceeding against S. Afterwards S. was released by the district judge on bail, on a bail bond signed by V. It did not appear that the deposition of V. was exhibited to the district judge, or that any further steps were taken before O. after the deposition was made. V., having been indicted for, and convicted of, perjury, in making, in such deposition, statements of material matter, which he did not believe to be true, moved for a new trial, on the ground that the deposition was not made in a case "in which a law of the United States authorizes an oath to be administered," within section 5392 of the Revised Statutes. *Held*, that the motion must be denied.

[Cited in U. S. v. Brawner, 7 Fed. 88; U. S. v. Rogers, 23 Fed. 661.]

2. Up to the time of the issuing of a removal warrant, a commissioner under whose commitment a prisoner is held, has jurisdiction to entertain an application for his release on bail, and to administer an oath to a person who tenders himself for justification as good bail for such prisoner.

[This was an indictment against John Volz for perjury. Heard on a motion for a new trial.]

Benjamin B. Foster, Asst. U. S. Dist. Atty.

Thomas Stewart, for defendant.

BENEDICT, District Judge. The prisoner was charged with having committed perjury in a certain written deposition made by him before John A. Osborn, a United States commissioner. Having been convicted, he now moves for a new trial, upon the ground that the facts do not make out the crime of perjury, as defined by section 5392, Rev. St. U. S. The facts are as follows: A complaint was made before John A. Osborn, a United States commissioner, against one Thomas P. Somerville, charging him with the crime of conspiracy. Upon such complaint the commissioner issued his warrant to apprehend Somerville, who, by virtue thereof, was thereafter apprehended and brought before the commissioner, and, an examination being waived, and it appearing that the offence charged was cognizable by the courts of the District of Columbia, Somerville was committed by the commissioner to the custody of the marshal, to await the issuing by the district judge of a warrant for his removal to the district where the trial was to be had. Thereafter, and before any removal warrant was issued by the district judge, and while Somerville was in the custody of the marshal, by virtue of the commitment of the commissioner, the accused presented himself before the commissioner, to justify as bail for Somerville, and thereupon made oath to a deposition concerning his property, with the object of showing his sufficiency as such surety. This deposition was in writing, signed by the accused, and entitled United States v. Thomas P. Somerville. As the jury have found, it contained statements of material matter, which the deponent did not believe to be true. Thereafter, Somerville made application to Judge Blatchford to be released by him upon bail, to appear for trial in the District of Columbia, and tendered to Judge Blatchford a bail bond executed by the accused as his bail. This bond was accepted by Judge Blatchford, and Somerville thereupon was released upon such bail. It does not appear that the deposition made by the accused before Commissioner Osborn was exhibited to Judge Blatchford, or that any further steps were taken before Commissioner Osborn after the making of the deposition under consideration. Upon these facts the question arises, whether the deposition made by the prisoner

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

before Commissioner Osborn was made in a case "in which a law of the United States authorizes an oath to be administered," within the meaning of section 5392.

I am of the opinion that it must be held to have been so made. Plainly, the word "case," as used in the statute, is not to be confined to suits or proceedings strictly in court. There are many instances where the laws of the United States authorize an oath to be administered, when no suit or criminal proceeding has been commenced. But, in the present instance, a criminal proceeding had been instituted before a commissioner, in which a prisoner had been arrested who was entitled to give bail, and in which a surety could lawfully justify under oath, as being good bail for such prisoner. It can make no difference, as to the validity of such an oath, whether the person making it be accepted or rejected as bail, nor is the oath rendered invalid by the fact that the proceeding before the commissioner stops with the justification of the bail. The deposition in question was made in such proceeding, and was left with the commissioner. It became then a part of that proceeding, and afforded foundation for a demand by Somerville to be released by the commissioner upon tendering the bond executed by such surety, whenever it might be deemed desirable to make such tender and demand.

It has been contended, in behalf of the defendant, that, at the time this oath was administered, the commissioner had no power to release Somerville on bail, and, consequently, no power to take the justification of a surety, because the offence appeared to have been committed in another district, and Somerville stood committed to await the action of the district judge in regard to his removal to such district for trial. It is claimed that the power of the commissioner terminated with the issuing of the commitment. I do not so understand the law. The power to take bail exists in every case where a party has been arrested for any crime or offence against the United States, and it is in all cases to be taken for trial before such court of the United States as by law has cognizance of the offence. This power never ceases with the issuing of a commitment. The requirement of the statute (section 1015) is, that "bail shall be admitted upon all arrests in criminal cases, where the offence is not punishable by death;" and, in such cases, it may be taken by any of the persons authorized by section 1014 to arrest and imprison offenders. There is no provision that the right to give bail is to cease with the issuing of a removal warrant, and certainly the right must exist so long as no such warrant is issued. Until the removal warrant is issued, the prisoner is held in arrest under the commitment of the commissioner, and to that officer application may be made to be released from arrest, on giving bail for trial before such court of the United States as the commissioner shall determine to have cognizance of the offence as proved before him. What power the commissioner may have after the district judge shall have issued his warrant directing the prisoner to be removed to another district for trial, it is unnecessary now to consider. But it seems plain, that, up to the time of the issuing of a removal warrant, the commissioner under whose commitment the prisoner is held has jurisdiction to entertain an application for his release on bail, and, by necessary consequence, jurisdiction to administer an oath to one tendering himself for justification as good bail for such prisoner. I am, therefore, of the opinion, that the offence of perjury, as defined by the statute, was committed by the accused, when, in a proceeding taken before Commissioner Osborn, to justify himself against the exceptions of the district attorney to his sufficiency as bail for Somerville, a prisoner at that time in custody under the commitment of Commissioner Osborn, and entitled to be released by such commissioner upon giving good bail, he made a deposition containing material statements touching his property, which he did not believe to be true.

The motion is denied.

Case No. 16,628.

UNITED STATES v. VOSS.

[1 Cranch, C. C. 101.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

INTOXICATING LIQUORS—ILLEGAL SALES—INFORMER AS WITNESS.

1. Upon an indictment for retailing spirituous liquors, the informer is not entitled to half of the penalty, and is a competent witness.

2. The selling by the servant is the selling by the master.

[Cited in U. S. v. Paxton, Case No. 16,013; U. S. v. Shuck, Id. 16,285.]

Indictment for retailing spirituous liquors. The defendant objected to the witness because, being the informer, he is entitled to half the penalty under the act of congress concerning the District of Columbia.

Mr. Mason, for the United States. It does not appear that he is the informer, and by the laws of Maryland on which this indictment is founded, no part of the penalty accrued to the informer.

THE COURT overruled the objection.

Mr. Hewitt, for defendant, prayed the court to instruct the jury that the selling by the young man, was not the selling by his master; the master not being answerable criminally for his acts.

Instruction refused. THE COURT referred to the case of U. S. v. Paxton [Case No. 16,013], at December term, 1801, and U. S. v. Shuck [Id. 16,285], at January term, 1802.

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

Case No. 16,629.

UNITED STATES V. WADE et al.

[2 Cranch, C. C. 680.] [1]

Circuit Court, District of Columbia. May Term, 1826.

JOINT INDICTMENT—COMPETENCY OF WITNESS.

If two be indicted jointly for assault and battery, the wife of one of them cannot be a witness for the other, although they sever in their pleas.

The defendants [Judson Wade and David Young] were indicted jointly for assault and battery upon Joseph Fagan, and severally pleaded not guilty.

Mr. Key, for defendants, offered to examine the wife of the defendant Young as a witness for the other defendant, Wade.

But THE COURT (nem. con.) refused; and said, if Young himself could not be a witness, his wife could not; and cited the case of Rex v. Frederick, 2 Strange, 1095.

Verdict guilty.

Key & Frost, for defendant Wade, moved for a new trial, because the court had rejected the testimony of Young's wife; and contended that if the defendants had been tried separately, as they had a right to be, her testimony would have been competent in behalf of Wade, and that, having pleaded separately, there was the same reason for admitting it, as to Wade, as if they had been tried separately.

But THE COURT refused the new trial. See Com. v. Easland, 1 Mass. 15, and 5 Esp. 107.

Case No. 16,630.

UNITED STATES v. WAGNER.

[1 Cranch, C. C. 314.] [1]

Circuit Court, District of Columbia. June Term, 1806.

LARCENY—STEALING FENCE-RAILS.

It is not felony to steal rails fixed into posts inserted in the ground, if the severance of the rails from the posts and the taking and carrying away were one continued act.

Indictment [against Caspar Wagner] for stealing three fence-rails, the property of some person or persons to the jury unknown.

Mr. Law, for the prisoner, contended that the fence was part of the freehold, and therefore the defendant was only guilty of a trespass.

PER CURIAM. If the jury should be satisfied, from the evidence, that the rails were fixed in the posts for the purpose of making a fence, and the posts were fixed in the ground, and that the prisoner severed them from the posts and took them away at the same time as one continued act, the prisoner was not guilty of felony but only of a simple trespass.

Verdict, not guilty.

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

UNITED STATES (WAIGHT v.). See Case No. 17,042.

Case No. 16,631.

UNITED STATES v. WAITZ.

[3 Sawy. 473; 2 Law & Eq. Rep. 42; 8 Chi. Leg. News, 313.] [1]

District Court, D. Nevada. June 20, 1876.

EXTORTION DEFINED—REGISTER OF LAND OFFICE.

1. Extortion is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due him, or more than is due, or before it is due.

2. The register of a land office cannot lawfully act as attorney for any applicant for a patent for mineral land, whose application is filed, and the proceedings on which are to be conducted before him, and in his office.

3. If a register undertakes to act as attorney for an applicant in procuring a patent, and receive from him a gross sum, and this sum is taken as well for the execution of his official duties as doing some other things relating to procuring the patent, and no specified portion of it is taken as compensation for the one or the other, and the sum so taken is in excess of the fees allowed him by law, such taking of the money is extortion

The defendant [Adolphus] Waitz, was indicted for extortion while register of the land office. On the trial, the evidence tended to prove that Waitz had taken from one Ellen Grandona, an applicant for a mineral patent, the sum of $200, as a fee for obtaining a patent for her; that Waitz had at one time been admitted to the bar as an attorney at law; that he took this money from Mrs. Grandona partly as an attorney fee for conducting the proceedings to obtain the patent before himself, and partly for fees as register; that no particular portion of the money was taken either as register or attorney fee, but the work which he claimed to do as attorney and his official duties as register were all mixed and indiscriminately joined together, and a gross sum of money taken for the whole.

C. S. Varian, U. S. Atty.

C. E. De Long, for defendant.

HILLYER, District Judge (charging jury). Section 5481 of the Revised Statutes provides that "every officer of the United States who is guilty of extortion, under color of his office, shall be punished by fine," etc. Extortion is thus defined: It is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or the taking of any money or thing of value, by color of his office, in excess of what is due him, or before it is due

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 2 Law & Eq. Rep. 42, contains only a partial report.]

to him. The fees of the register of the land office are prescribed by law, and it is a general rule that no public officer may lawfully take any other fees or rewards for doing anything relating to his office than such fees as some statute in force gives him.

The statute law of the United States allows the following compensation to registers: First, a salary of $500 a year; second, a commission of one per centum on all moneys received at the receiver's office of his land district; third, a fee of five dollars for filing and acting upon each application for mineral lands; fourth, a fee of twenty-two and a half cents per hundred words for writing done in the land office in establishing claims for mineral land. Their compensation for one year, including salary, commissions and fees shall not exceed $3,000. It is further enacted that upon satisfactory proof that a register has charged or received fees or other rewards not authorized by law he shall forthwith be removed from office. He is also required to administer all oaths required by law or the instructions of his department, connected with the entry and sale of public lands without charging, or receiving directly or indirectly any fee therefor.

From all these provisions of the law it is plain that the compensation of a register of the land office is definitely fixed by the statutes of the United States, and that it is not lawful for him to charge or receive any other fees or rewards, directly or indirectly, for doing anything relating to his office of register. It is the aim of the law-maker in fixing the fees of a public officer to give him what will be sufficient pay for doing the duties required of him. It will rarely or never happen that everything which it is the duty of the officer to do is set down in the fee bill. But a salary, or commission, or fee is given him which will make the office sufficiently remunerative, in the judgment of the legislators. For those items for which a fee is fixed, the officer must take the sum given and the applicant must pay it and be content. Those duties for which no fee is set down in the law must still be performed by the officer without charge, or rather are regarded as covered by the salary, the commissions or fees given for other matters. Irwin v. Com., 1 Serg. & R. 504.

In the next place it will be advisable to ascertain as clearly as may be what the duties of a register are in reference to these applications for mineral lands, and then having a knowledge of his duties and his lawful fees, you will be able, I trust, without difficulty, to come to a right decision upon the main question in this case, viz., whether money was taken by the defendant from the prosecutrix for the execution of his official duty, when either no fee was due for the service, or when a less one was due than he took. By section 2478, Rev. St. U. S., the commissioner of the general land office, under the direction of the secretary of the interior, is authorized to enforce and carry into execution, by appropriate regulation, this statute in relation to mineral lands. He has made these regulations and I will now call your attention to some of them. (The judge here read from the instructions of the commissioner of the general land office in relation to the survey and entry of lode and placer claims.) From these instructions you will see that the duties of register extend over and have relation to everything that is done from filing the application until the papers are sent to Washington with his and the receiver's opinion on them. It is true he is not bound to draw up the paper called an application, but if he does he can lawfully charge but fifteen cents a folio of one hundred words for writing it. So as to other affidavits in land cases.

[As I have already stated, for doing anything pertaining to his official duties, he must take such fee as the statute gives him. If the statute gives him none, he must still do the duty, and take no fee, as in the case of applicants in land cases.] [2]

It is not denied that the defendant took a larger sum of money from Mrs. Grandona than he was entitled to as register, but his plea is that the money was taken as an attorney's fee, not as a register's fee. This plea of the defendant has received much consideration on my part, and the result is, that I consider it perfectly clear, and so charge you, that the defendant, while register, could not lawfully act as attorney for any applicant for a patent whose application was filed, and the proceedings on which were to be conducted before him and in his office. Many of the duties of the register are of a judicial character, and require the exercise of his impartial judgment. He should see that no fraudulent claim is enforced against the government. He has to pass upon the regularity of all the proceedings, and how can he do this impartially if he is the paid attorney of either party before him? But if this thing might lawfully be done, a more serious evil would result from the power it would give the officer to obtain money from those who were compelled to come to him as register. The compensation of the register is fixed by law, as well as his duties; citizens are compelled to go to him to make an application for a patent, and hence it is of great importance that his fees should be fixed with precision, so that he may have no excuse for taking excessive fees or imposing upon the ignorant. For this reason the legislature have fixed the fees of the register, so that each citizen may know what he has to pay. But the register cannot lawfully engage himself to an applicant to do all that may be necessary to get a patent, and charge a gross sum for his services, covering his legal fees and those he is not en-

[2] [From 8 Chi. Leg. News, 313.]

titled to as register. And the reason is, that in so doing he puts himself on unfair ground toward the applicant. Some of the services he is bound to apply to the register for, because no one else can do them, hence to allow him to take a sum in excess of his legal fees under the name of attorney's fee would be in effect the placing of every applicant for a patent in the power of the register.

Upon this branch of the case, I give you the following instruction: If you believe from the evidence that Mrs. Grandona paid the defendant two hundred dollars, or other sum, for getting her patent, and that this sum was paid defendant as well for the execution of his official duties as doing some other things relating to the getting of the patent, and that there was no specified portion of it taken as compensation or fee for the one or the other, and that the sum taken was in excess of his legal fees, then the taking of the money was extortion.

NOTE [from 8 Chi. Leg. News, 313]. The jury could not agree, and were discharged. They stood six for acquittal, and six for conviction.

Case No. 16,632.

UNITED STATES v. WALKER.

[1 Cranch, C. C. 402.] [1]

Circuit Court, District of Columbia. June Term, 1807.

LARCENY.

Stealing wood, in collusion with the owner's slave, is larceny.

Indictment [of Edward Walker] for stealing wood. The evidence was that the wood was delivered to the prisoner (or rather suffered to be taken) by the owner's servant, a slave.

THE COURT (DUCKETT, Circuit Judge, absent) directed the jury that if they should be satisfied that there was a collusion between the servant and the prisoner, with intent to commit a theft, the fact of the delivery does not alter the case, but it is still a felony.

Case No. 16,633.

UNITED STATES v. WALKINSHAW.

[Cal. Law J. & Lit. Rev. 126.]

District Court, N. D. California. 1863.

MEXICAN LAND GRANT—DETERMINATION OF BOUNDARIES—ORDER OF GOVERNOR.

[The order of the governor directing the title to issue to the petitioner is not controlling in the determination of boundaries when it appears that on the following day a decree of concession was made, accurately defining the rights of the petitioner, and the formal title was issued and accepted by him, declaring its boundaries with unmistakable precision.]

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

[This was a claim by Robert Walkinshaw for Posolmi, including El Posito de las Animas, in Santa Clara county, granted February 15, 1844, by Juan B. Alvarado and Manuel Micheltorena to Lope Yñigo. The claim was filed March 23, 1852, and confirmed by the commission November 20, 1855, and the appeal was dismissed February 16, 1857.]

HOFFMAN, District Judge. The land confirmed in this case is a tract called "Posolmi," which, by order of Governor Micheltorena, had been excepted out of a larger tract previously granted to Francisco Estrada. It appears from the expediente that, on the 10th June, 1843, Yñigo, an emancipated Indian, of Santa Clara, presented a petition to the governor, setting forth that there had been granted to him the land known as "Posita de las Animas," or "Ojo de Caballo," according to the map which he presented, and that he had been in possession of the same since 1839. He further alleged that his papers had been delivered to one Ignacia Alvisu, by whom they had been retained; that, after repeatedly demanding his papers from Alvisu, without success, he had applied a second time to the government, which again gave him documents to establish his ownership to the land; that Alvisu took these documents under pretense of acquainting himself with their contents, but had never returned them; that, in the meantime, Estrada had obtained a grant for the "Pastoria," without excepting his (Yñigo's) land. He, therefore, prayed that reports might be required from the mission of Santa Clara, where some documents must exist relative to his title and that of Estrada. On the first of October following Yñigo renewed his petition, claiming the land in dispute, "of which he had been in peaceable possession," as he averred, repeating his charges against Alvisu, and complaining that Estrada was attempting to dispossess him. On this petition, the minister of Santa Clara made a voluminous report, in which the statements of Yñigo are sustained and his rights recognized. On the 14th of February the governor made a decree as follows: "Let the title be issued to Yñigo, recognizing, in absolute and perpetual ownership, his imprescriptible right to the occupation of himself and predecessors, from the 'aguage,' or running water, contiguous to his house, as far as the land where his house is situated and his small sowing ground worked." On the following day, February 15th, 1844, the governor made the usual decree of concession, declaring the native Indian of Santa Clara owner of the tract of land named "Posolmi," "bounded by the sausal on the south, by the estero on the north, by his house, and by the spring (ojo de agua) named 'Posita de las Animas.'" On the same day the formal title was issued. It describes the land as bounded "by the Posita de las Animas, and including that spring—the other boundaries being as far as

where there is now built a house of wood—and from this point to the estero towards the north, and to the sausal on the south. Colindante con la Posita de las Animas quedando este inclusiveal serreno: tiendo los demas linderos hasta donde aclualmente fabricada una casa de madera y desde este punta hasta el estero por la parte del norte y hasta el sausal por la parte del sur." The fourth condition describes the land as that which is designated on the respective diseño. On the same day the governor made an endorsement upon the expediente of Estrada as follows: "By decree of the departmental government of the Californias, it was this day resolved that to the Indian of Santa Clara named 'Yñigo' should be extended the concession for the land which he occupies, the boundaries being from his house as far as the first spring named 'Las Animas,' inclusive, and from the sausal to the estero, and for due proof thereof it is noted on this title." The rights of Yñigo having thus been recognized and defined, the governor, on the 23d of February made an order on his second petition of October 1, 1843, as follows: "As there has been issued by this government to the interested party a title to the land in dispute, giving to him the part which is believed to be just, or, more properly speaking, declaring his prior rights, as appears by decrees on the expediente of Yñigo and of Estrada, let these originals be returned to the party," etc.

From these documents it is apparent that the rights of Yñigo to a certain tract were recognized as prior and superior to those of Estrada, and that they were intended to be secured to him in the most formal and solemn manner. But it is also plain that his pretensions were not admitted to their full extent. This is evident from the last order of the governor, on the petition of October 1, 1843, in which he states that there has already been issued to the party interested a title for the land in dispute, "giving him that part which is believed to be just." But it is still more manifest from an inspection of the diseño. On this document the boundaries as delineated by Yñigo embraced a tract extending a considerable distance to the west of the posita, and across the road to the south of the sausal. On the margin is a note stating the dimensions of the tract to be one and a quarter leagues in length, by three-quarters of a league in breadth. Within the exterior limits thus asked for by Yñigo, lines are drawn, evidently intended to indicate the tract actually conceded. These lines are on the two sides drawn north and south, passing by the posita and the house, respectively, while the northern boundary is evidently the estero, and the southern a line drawn at some distance north of the road from one of the side lines to the other. The note of the grant made on its date by Jimeno in the Toma de Razon also proves that the grant was not intended to embrace the whole league, poco mas ó menos, solicited. For it states that there was issued to Yñigo a title for Posolmi, in extension one-half of a square league, a little more or less.

It is contended on the part of the claimants that the order of the governor of February 14th, directing the title to issue, is the controlling document in the case, and should govern in the determination of boundaries. It may be admitted that if no further proceedings had been had—if by negligence or accident the formal title had not been issued in obedience to the governor's order, or if it had been lost and its contents could not be proved, the formal recognition by the governor of the rights of the Indian, contained in this order, would have been sufficient, if followed by a continuous occupation and possession under a notorious and undisputed claim of ownership, to create an equity which the United States would be bound to respect.

But in this case not only the decree of concession is made on the following day and in obedience to the governor's order, in which the rights of the petitioner are accurately defined, but the formal title is issued and accepted by him, declaring his boundaries with unmistakable precision. It is to these documents and to the endorsements on the Estrada expediente that the governor in his order on the petition of October 1, refers, as "declaring the prior rights" of Yñigo. If, then, there were any contradiction between the description of the land contained in the order for the title and that embodied in the decree of concession, the formal title, and the endorsement on the Estrada expediente, it is plain that these last should control. But in truth there is no such contradiction. The order describes the land as extending from the "aguage near his house," (admitted to be the posita) to "where his house is situated and his small sowing field worked"—this last evidently referring to the house of wood on the eastern side of the tract. The order thus determines only the width of the tract; while the length is not defined. On referring to the diseño we find two houses represented,—one on the west, near the spring, and on the western boundary, and the other on the eastern boundary. The decree of concession mentions the same boundaries, and adds to them the sausal for a southern, and the estero for a northern, boundary. Its language is: "Bounded by the sausal on the south, by the estero on the north, and by the spring called 'La Posita.'" There can be no doubt that these last were intended to be the eastern and western limits of the tract. They precisely correspond with the indications of the diseño and with the language of the preliminary order. The formal title is not less explicit. It describes the land as bounded by and including the posita; "the other boundaries being as far as where

there is now built a house of wood, and from this point to the estero on the north, and to the sausal on the south."

The fourth condition states the land to be that marked on the diseño; where, as has been so often mentioned, the same boundaries are indicated. These boundaries are again repeated in the endorsement on the Estrada expediente, though not in the same order. They are described as "from his house as far as the first spring, named 'Las Animas,' inclusive, and from the sausal to the estero." These descriptions indicate the tract granted to Yñigo so plainly that it is surprising that any doubt could have been entertained on the subject. They are the spring on the west, the house on the east, both inclusive, the estero on the north, and the sausal on the south. The positions and identity of the spring and the house are not disputed. It only remains, therefore, to ascertain the position of the "sausal," or willow thicket, which with the bay on the north will enclose the whole tract.

An attempt, however, is made to extend the limits of the tract not only far to the eastward of the house and the boundary line drawn on the diseño from the Camino Real, by the house, to the bay, but even beyond, as it would seem, the extreme eastern limits of the whole tract represented on the diseño. This claim is founded on the attempted identification of a lone oak tree, situated about two miles to the east of the house, with a tree marked "Yuque Laka," represented on the diseño as standing to the north of the house, and near the bay. The testimony by which it is sought to establish that the lone tree in question was known at the time of the grant as the "Yuque Laka" is, even if considered independently of the map, inconclusive and unsatisfactory. But the map shows that whether the lone tree of the claimants was or was not known as Yuque Laka, it could not have been the Yuque Laka of the diseño. The diseño, though rude, is much more accurate than usual. The two roads, the "Camino Real" and the "Camino del Desecho," are laid down upon it with considerable correctness. The road running from the former of these to Yñigo's house is also represented, and the courses of all of them, as shown by the compass marks on the diseño, very nearly conform to their actual magnetic courses as shown on the topographical map of Lyman. The road from the Camino Real to the house is evidently adopted as a boundary—and the line is produced in the same direction to the bay, so as to complete the eastern boundary of the tract. The general direction of the line is nearly due north, and to the right of it, and at a very inconsiderable distance from it and from the bay, a tree marked "Yuque Laka" is represented on the diseño. This tree thus stands nearly due north from the house, and close to a north and south line run from the junction of the road to the house with the Camino Real to the bay. But the lone tree of the claimant stands far out in the plain, and in a direction from the house to the south of east. If adopted as a boundary, the width of the tract will be more than doubled, while the eastern boundary will be a line drawn from the tree to the bay, two miles to the east of a line drawn from the house to the bay, as called for by the explicit language of the grant.

In all the documents connected with this title, from the first order for its issuance down to the grant itself, the spring on one side and the house on the other are mentioned as the limits of the grant. The boundaries marked on the diseño are in exact conformity with these calls, and the side lines are drawn north and south, passing close to, and so as to include, those objects.

I am unable to perceive on what grounds I can ignore these explicit calls and unmistakable indications, and assign for the eastern boundary of the tract a line drawn parallel to the line from the house to the bay, two miles to the east of it.

It is further contended that the "sausal" called for in the grant is a sausal to the south-east of the house, and near to the present residence of the intervenor, Murphy. Indeed, it would seem from the testimony of some of the witnesses that the grant is considered to extend from the lone tree westwardly along the sausal, thence southwardly to the upper road, or Camino del Desecho, thence up an arroyo to the spring, and thence to the bay. But these boundaries neither conform to those originally solicited by Yñigo, or to those actually assigned him by the governor. The lone tree to the eastward is not represented on the map, even if it were possible to give it its true position without enlarging the diseño towards the east. The western boundary, as asked for by Yñigo, is a north and a south line, drawn, not along the arroyo and thence to the spring, but at a considerable distance to the west of both, leaving the spring in about the middle of the tract. The southern boundary is the upper road, and the eastern boundary is a curved line running from the upper road, crossing the lower road, and, after making a bend to the eastward, running in a general northerly direction to the bay, passing some distance to the east of the house. But the boundaries adopted by the governor "for the part believed to be just" are, as we have seen, the spring on the west, the house on the east, and the sausal on the south. Neither the upper or lower road is mentioned as a southern boundary, but a line is drawn across the tract from the western to the eastern boundaries, evidently intended to indicate the southern limit of the land conceded. This line is to the north of, and

nearly parallel with, the lower road. That the sausal south-east of Yñigo's house, and near Murphy's, is not the sausal referred to in the grant, is I think, very plainly shown by the diseño. The sausal near Murphy's is represented on the map, but is outside of even the limits originally solicited by Yñigo. The eastern boundary, as asked for by him, is a line commencing at the Camino del Desecho, or upper road, at a point a little eastward of the brook which crosses it, running thence northerly to the lower road, thence, for a short distance, nearly parallel with the lower road, until it reaches a sausal, where it curves to the north, and, excluding the sausal, continues in a northerly direction to the bay. On comparing this delineation with the topographical map of Lyman, the course of the boundary is at once and unmistakably discerned. The point on the upper road, near the brook from which it starts, its direction thence northerly, towards the house of Yñigo, until it reaches the lower road, its deflection thence to the east, and the sausal near which it runs, where it resumes its northerly direction, can all be identified with great certainty. That sausal is the one now claimed as the southern boundary of the grant. But if it be, as cannot, I think, be doubted, the sausal represented on the diseño as lying to the eastward of the eastern boundary line asked for by Yñigo, it evidently cannot be the sausal intended to be the southern boundary of the smaller tract to which the governor saw fit to restrict the applicant. But, extending nearly the whole distance from the western to the eastern boundary lines, and a little to the south of a line drawn from the house to the spring, is a sausal either now existing or traceable by the stumps of the trees, which, it appears to me, must have been the sausal referred to in the grant. A line drawn along it, from east to west, does not very considerably depart, at least in its position relative to the lower road, from the transverse boundary line of the diseño, and this line affords a natural and convenient boundary for the tract delineated on the diseño, i. e., a rectangular piece of ground, bounded on the sides by north and south lines drawn next the spring and the house, respectively, and on the north by the bay. This line has been adopted by the surveyor general after careful examination of the ground, aided by testimony of witnesses.

I confess myself unable to see how, if the calls of the grant and the indications of the diseño are to be respected, any other southern boundary can be adopted, while the explicit calls for the spring and the house as the western and eastern limits, and the unmistakable delineation of the boundaries on the map fix the other lines with great precision. In the face of indications so clear, oral testimony as to the boundaries claimed by Yñigo, or by his son, or described by the mission priest, or admitted by Castro, the successor in interest of Estrada, or as to situation of some of Yñigo's sown fields, becomes unimportant. For, even if we could repose entire faith in the accuracy of memory and integrity of the witnesses, it would be insufficient to justify us in departing from the express calls of the grant and the manifest indications of the diseño. My opinion, therefore, is that the official survey should be approved.

Case No. 16,634.

UNITED STATES v. WALLER.

[1 Sawy. 701.] [1]

Circuit Court, D. California. Aug. 26, 1871.

INFORMATION FOR MISDEMEANORS.

Misdemeanors may be prosecuted in the national courts by information.

[Cited in U. S. v. Ebert, Case No. 15,019; U. S. v. Maxwell, Id. 15,750. Followed in U. S. v. Ronzone, Id. 16,192. Cited in U. S. v. Block, Id. 14,609; U. S. v. Reilley, 20 Fed. 46; Ex parte Wilson, 114 U. S. 425, 5 Sup. Ct. 939.]

An indictment against the defendant [John Waller] for an "offense not capital, or otherwise infamous," having been quashed, and there being urgent reasons for a speedy trial, and no grand jury in session at the time, the district attorney filed an information, alleging the offense charged. The defendant moved to quash the information, on the ground that the offense, although a misdemeanor, could only be prosecuted by indictment.

L. D. Latimer, U. S. Dist. Atty.

Milton Andros, for defendant.

FIELD, Circuit Justice. We are of the opinion that an information may be filed by the district attorney, in behalf of the United States, in the national courts, for misdemeanors committed against the laws of the United States. The motion to quash the information in this case is, therefore, denied.

Case No. 16,635.

UNITED STATES v. WALSH.

[1 Deady, 281; [2] 1 Abb. U. S. 66; 1 Am. Law T. Rep. U. S. Cts. 45; 6 Int. Rev. Rec. 212.]

District Court, D. Oregon. July 23, 1867.

ARREST IN CIVIL CASES — FRAUD — IMPRISONMENT FOR DEBT — CONSTITUTIONAL LAW — VIOLATION OF INTERNAL REVENUE LAWS—ACTION FOR PENALTY.

1. The court has not judicial knowledge whether there are matches known to the arts and commerce other than those called "lucifer" or "friction," and therefore not subject to duty.

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

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

2. Where the cause of action and arrest are identical, a verified complaint is a sufficient affidavit upon which to allow an order of arrest.

[Cited in Hanson v. Fowle, Case No. 6,041; Neff v. Pennoyer, Id. 10,083; U. S. v. Griswold, Id. 15,266; McDonald v. Cooper, 32 Fed. 751.]

3. The conditions and restrictions imposed by state law upon the allowance of imprisonment for debt, subsequent to the act of January 14, 1841 (5 Stat. 410), are not adopted by such act; and, therefore, not in force in the United States courts, unless adopted as a rule thereof.

4. The clause in the constitution of the state of Oregon (article 1, § 19), prohibiting "imprisonment for debt, except in cases of fraud," construed not to apply to an action for a tort or penalty, but only to cases of debt arising upon contract, express or implied.

[Quoted in Norman v. Manciette, Case No. 10,300; Hanson v. Fowle, Id. 6,041. Cited in Re Sanborn, 52 Fed. 585.]

[Cited in Kennedy v. People, 122 Ill. 653, 13 N. E. 213; Ex parte Bergman (Nev.) 4 Pac. 216.]

5. A manufacturer of matches who disposes of the same without stamping them, as required by law, thereby commits a fraud upon the United States, and in an action by the latter to recover a penalty for such violation, the defendant may be arrested as in an action for a debt incurred by fraud.

This was an action brought to recover sixteen penalties of $50 each of the defendant [J. F. Walsh] for making, preparing and selling lucifer matches, without stamping the same, contrary to the internal revenue act of July 13, 1866 (14 Stat. 144). The action was commenced by filing the complaint on May 23, 1867, and on the same day an order for the arrest of the defendant was allowed. On May 27, the defendant was arrested and gave bail in the sum of $800, and on July 10, his attorney filed a motion to vacate the order. The motion was made and argued as the cause was called for trial, but the trial proceeded and the decision of the motion was reserved for consideration. On the trial the plaintiff had a verdict for $800.

A. C. Gibbs, for plaintiff.

W. W. Page, for defendant.

DEADY, District Judge. The grounds of the motion to vacate the order of arrest in this case are: (1) Because the order was improperly made. (2) Because the affidavit was insufficient. (3) Because there is no undertaking for the writ. The complaint is verified by the oath of the informer, S. P. Reed, and charges that the defendant, on April 22, 1867, did manufacture and sell eight packages of friction matches, without stamping the same, or either of them, as required by the statutes of the United States; and, also, that on May 1, 1867, did in like manner manufacture and sell eight other packages of friction matches. At the time of allowing the order of arrest there was also filed the separate affidavit of the informer, containing substantially the same facts as the complaint, except that the articles therein alleged to have been manufactured and sold, were described simply as matches, without being designated as either lucifer or friction matches. Section 9, of the internal revenue act, of July 13, 1866 (14 Stat. 144), requires that lucifer or friction matches shall be stamped as prescribed in schedule C, and imposes "a penalty of fifty dollars for every omission to affix such stamp."

Counsel for the defendant maintains, that this affidavit is insufficient to authorize the order of arrest, because it does not specifically allege that the matches manufactured and sold by the defendant without stamps, were either lucifer or friction matches. The only kind of matches subject to stamp duty under the internal revenue act, is by that act designated or called "lucifer" or "friction" matches. Whether there are any other kinds of matches known to the arts or commerce, which are not subject to such duty, is a question of fact, of which I cannot take judicial knowledge. Ought I, in the absence of proof pro or con, to presume that there are other kinds of matches, not subject to duty, and that therefore the act stated in the affidavit, may or may not be cause of arrest? I incline to think not. But admitting for the purpose of the argument that the affidavit is insufficient for want of certainty of this particular, it cannot affect this motion. Where the cause of action is sufficiently set forth in the complaint, and the cause of action and arrest are identical, there is no necessity for an additional or separate affidavit to authorize the order for an arrest. In this case, the cause of action and arrest are identical, and the statement of the facts in the complaint is sufficient for either purpose. The order allowing the arrest of the defendant may be made when it appears by affidavit, that a sufficient cause of action and arrest exists. Code Or. p. 165. Upon the same principle, an execution is allowed against the body, without affidavit or other proof than the record, when it appears from the record that the cause of action, on account of which the judgment was given, was also a cause of arrest. Id. p. 210. The statute only requires that the facts necessary to authorize the order of arrest shall appear by affidavit. If the complaint shows a cause of action and no more—as that the defendant is indebted to the plaintiff for money loaned—then it would be necessary to show by affidavit in addition to the complaint, that a cause of arrest exists also—as that the defendant obtained the loan by fraud. The statute should not be so construed as to require the plaintiff to do a useless act to obtain the order. A verified complaint is in this respect an affidavit. It is a statement of facts, verified by the oath of the party making it. If it appears from such a complaint that there exists against the defendant both a cause of action and arrest, enough is shown to justify the order of arrest.

The objection that no undertaking was given for the writ, to indemnify the defendant, will be next considered. The subject of arrest and imprisonment in civil actions in the

courts of the United States, is regulated by the acts of congress, of February 28, 1839, and January 14, 1841 (5 Stat. 321, 410), the latter being declaratory of the former. The first of these acts substantially provides that no person shall be imprisoned for debt on process issuing out of the courts of the United States, in any state where by the laws of such state imprisonment for debt has been abolished, and that where imprisonment for debt was allowed upon conditions and restrictions, it should be allowed in like manner in the United States courts. This act was not prospective, and therefore did not adopt the future legislation of the states. It was also held not to apply to actions in which the United States was plaintiff. On this latter account the act of January 14, 1841, was passed, which declared that the act of February 28, 1839, should be construed to abolish imprisonment for debt in the United States courts, in all cases where, by the laws of the state, imprisonment for debt has been or shall hereafter be abolished. The act is prospective in its terms, so far as future laws of the state abolishing imprisonment for debt are concerned. Whether congress has the power to adopt prospectively state legislation on any given subject, I do not propose to discuss. The power has been seriously questioned, and upon apparently good grounds. In re Freeman [Case No. 5,083]. But the act of 1841, is silent concerning the future laws of the states imposing restrictions and conditions upon the allowance of imprisonment for debt. It does not purport to adopt them. The law of this state regulating arrest in civil actions, requires as a condition precedent to an arrest, that the plaintiff shall give an undertaking to pay the defendant "all costs that may be adjudged to him and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking." Code Or. pp. 165, 166. This is a condition or restriction imposed upon the allowance of an order of arrest, and is not adopted by the acts of congress. The adoption of this law by a rule of court, might make it of force as a rule of court between private suitors, and even this is questionable. But the United States as plaintiff in an action, could not be bound by such a law unless enacted or adopted by congress. This court could not by rule require the United States to give security for costs, or damages. The United States never pays costs to the adverse party, and it would not be bound by any undertaking entered into on its behalf to pay any one, unless authorized by act of congress.

The objection that the order was improperly allowed, raises the question, whether the United States is entitled to arrest a defendant in an action for a penalty, in this state. The constitution of this state (article 1, § 19) enacts: "There shall be no imprisonment for debt, except in case of fraud or absconding debtors." Code Or. p. 99. The laws of this state provide, among other causes, that the defendant may be arrested on a civil "action for a fine or penalty." Id. p. 164.

Counsel for the defendant maintains that this act of the legislative assembly, is in this particular repugnant to the constitution of the state, and therefore void. No decision of the supreme court is cited in support of this position, and none is known to have been made. The word "debt" is of very general use, and has many shades of meaning. Looking to the origin and progress of the change in public opinion, which finally led to the abolition of imprisonment for debt, it is reasonable to presume, that this provision in the state constitution, was intended to prevent the useless and often cruel imprisonment of persons, who having honestly become indebted to another, are unable to pay as they undertook and promised. In this view of the matter the clause in question should be construed as if it read: "There shall be no imprisonment for debt arising upon contract express or implied, except," etc. Such is substantially the language employed in the legislative acts of most of the states, abolishing imprisonment for debt; and there can be but little doubt that this was the end which the framers of the constitution had in view, as well as the popular understanding of the clause, when the instrument was adopted at the polls.

General or abstract declarations in bills of rights, are necessarily brief and comprehensive in their terms. When applied to the details of the varied affairs of life, they must be construed with reference to the causes which produced them and the end sought to be obtained. A person who willfully injures another in person, property, or character, is liable therefor in damages. In some sense he may be called the debtor of the party injured, and the sum due for the injury a debt. But he is in fact a wrong doer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment, because he is pecuniarily unable to pay what he promised to. For instance, a person who wrongfully beats his neighbor, kills his ox, or girdles his fruit trees ought not to be considered in the same category as an unfortunate debtor. He ought to be liable to arrest in action for damages by the party injured. Deny him this remedy, and in the majority of such cases it would amount to a denial of justice, and a deliberate repudiation and disregard of the injunction contained in section 10 of the same article—"every man shall have remedy by due course of law for injury done him in person, property or reputation." It may be admitted that a penalty given by statute is technically a debt. It does not, however, arise upon contract, but by operation of law. It is imposed as a quasi punishment for the violation of law or the neglect or refusal to perform some duty to the public or individuals enjoined by law. Penalties are imposed in furtherance of some public policy, and as a means of securing obe-

dience to law. Persons who incur them are either in morals or law, wrong-doers, and not simply unfortunate debtors unable to perform their pecuniary obligations. I do not think the constitutional provision prohibiting imprisonment for debt was intended to apply to or include such cases. From these premises it follows of course that the act of the assembly allowing the arrest of the defendant in an action for a penalty, is not in conflict with the constitution, and therefore valid and binding. But admitting, for the sake of the argument, that these penalties are a debt within the meaning of the clause prohibiting imprisonment for debt, do they not come within the exception—"except in case of fraud." The internal revenue act required the defendant to affix a certain amount of stamps upon all the matches manufactured by him before selling the same or removing them for consumption or sale. As a means of enforcing or securing the payment of this tax, the act also imposed a penalty of fifty dollars upon the defendant for every omission to affix such stamp. The payment of this tax was a duty imposed upon the defendant by law. When he sold these sixteen packages of matches without affixing the stamps to them, he acted fraudulently. Thereby he cheated and defrauded the United States, the plaintiff in this action. These penalties were incurred by this fraudulent act, and if they can be considered a debt within the meaning of said section 10, it is such a debt as falls exactly within the exception—being to all intents and purposes "a case of fraud," both in morals and law. Of course, in this respect there can be no distinction between cheating or defrauding the government of the United States and an individual.

The order for the arrest was properly allowed, and the motion of defendant must be denied.

Case No. 16,636.

UNITED STATES v. WALSH.

[5 Dill. 58.] [1]

Circuit Court, E. D. Missouri. 1878.

CONSPIRACY TO DEFRAUD THE UNITED STATES — REVISED STATUTES, SECTION 5440, CONSTRUED — REQUISITES OF INDICTMENT.

1. The Revised Statutes (section 5440), in respect of the crime of conspiracy to defraud the United States, change, in material respects, the offence of conspiracy as it existed at common law, and every ingredient of the offence must be clearly alleged.

[Cited in U. S. v. De Quilfeldt, 5 Fed. 279; U. S. v. Milner, 36 Fed. 891; U. S. v. Cassidy, 67 Fed. 705; Bannon v. U. S., 156 U. S. 464, 15 Sup. Ct. 469.]

[Cited in Com. v. Ward, 92 Ky. 161, 17 S. W. 283.]

2. An indictment charging an alleged conspiracy to defraud the United States to consist in "certifying that certain false and fraudulent accounts and vouchers for materials furnished for use in the construction of the United States custom-house and post-office in the city of St. Louis, and for labor performed on the said building, were true and correct," is bad for uncertainty.

On motion by the defendant [Thomas Walsh] to quash the second count in the indictment, the first count having been abandoned by the government. The second count is as follows: "And the jurors aforesaid, on their oaths aforesaid, do further present that, on the said 30th day of November, in the year of our Lord 1874, the said Thomas Walsh, being then and there superintendent of the construction of the new St. Louis custom-house and post-office, then in process of erection in the city of St. Louis, within said district, and the said William K. Patrick, being then and there assistant superintendent of construction of said building then in process of erection as aforesaid, did, at said district, conspire, combine, confederate, and agree together, and with certain other persons to said jurors unknown, to defraud the United States out of a large sum of money, to-wit, the sum of $50,000, by certifying, he, the said Thomas Walsh, as superintendent as aforesaid, and he, the said William K. Patrick, as assistant superintendent as aforesaid, that certain false and fraudulent accounts and vouchers for materials furnished for use in the construction of said new custom-house and post-office, and for labor performed on said building, were true and correct; that afterwards, to-wit, on the 1st day of December, in the year aforesaid, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said Thomas Walsh, of said district, as superintendent as aforesaid, did present to one John F. Long, then and there disbursing agent for the said new custom-house and post-office, then in process of erection in said city of St. Louis, within said district, certain written and printed papers, then and there purporting to be true and correct pay-rolls of mechanics and laborers employed on the said custom-house and post-office during the month of November, in the year of our Lord 1874, which said purported pay-rolls were then and there vouchers for the payment to be made by him, the said John F. Long, as disbursing agent as aforesaid, to certain persons to said jurors unknown, of a large sum of money then and there belonging to the United States, to-wit, $21,862.02, contrary to the form of the statute of the United States, in such case made and provided, and against their peace and dignity." The indictment is founded upon section 5440 of the Revised Statutes of the United States, which is as follows: "If two or more persons conspire either to commit any offence against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not

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

more than $10,000, and to imprisonment not more than two years." The question for consideration is, whether the second count of the indictment is sufficiently precise, specific, and certain in its statement of the offence to sustain a judgment on a verdict of guilty, if such a verdict should be found.

W. H. Bliss, U. S. Dist. Atty.

D. P. Dyer, David Wagner, and William Patrick, for defendant.

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

DILLON, Circuit Judge. We have examined all the cases cited in the arguments of the respective counsel, and many others, and we have considered the propositions they have advanced, and now proceed to announce, without much elaboration, the conclusions we have reached. At common law the offence of conspiracy was complete whenever the unlawful concert and agreement was entered into and concluded, although nothing was done in pursuance thereto, or to carry it into effect. The gist of the offence was the unlawful agreement. The offence of conspiracy at common law being complete without an overt act, it was one of the few cases in which the law undertook to punish criminally an unexecuted intent or purpose to commit a crime. But such is the settled doctrine of the common law, and hence, in an indictment for conspiracy at common law, it is not necessary to allege any overt act, or to prove it, if it is alleged.

It is a settled doctrine in our jurisprudence that there are no common law offences against the government of the United States. An act or an omission, to be criminally punished in the federal courts, must be declared to be an offence by an act of congress. It follows that the act of congress must constitute the sole basis of the offence of conspiracy, and the section (Rev. St. § 5440) on which this indictment is founded, changes, in material respects, the offence of conspiracy as it existed at common law. This section not only makes the unlawful agreement to do the prohibited act essential to a completed offence, but also "that one or more of the parties to such conspiracy shall do some act to effect the object thereof." These considerations are important in determining the weight due to the English cases on the subject of the particularity and certainty necessary in indictments for conspiracy. The English courts have sustained indictments for conspiracy which were framed in the most general manner, and without alleging any overt acts. Rex v. Gill, 2 Barn. & Ald. 204. This laxity and departure from principle have been regretted in the more recent cases in that country, and have been sought to be remedied by giving to the defendant, where the count is general and the charge indefinite, the right to call for a "bill of particulars." Examples of this may be found in Reg. v. Stapylton, 8 Cox, Cr. Cas. 69; Rex v. Hamilton, 7 Car. & P. 448, and some other cases. We have no such anomalous practice in this country, and the settled doctrine of the American courts is, that an indictment for conspiracy, like all other indictments, "must inform the defendant of the nature and cause of the accusation" (Const. U. S. 6th Amend.), and must set forth the offence with clearness and certainty. "Every ingredient of which the offence is composed must be accurately and clearly alleged." U. S. v. Cook, 17 Wall. [84 U. S.] 174. And in the recent case of U. S. v. Cruikshank, 92 U. S. 542, 557, these principles were applied by the supreme court of the United States to the case of an indictment for conspiracy. The judgment of court in the case last cited was that the indictment was bad for vagueness and generality, and because it lacked the certainty and precision required by the established rules of criminal pleading. In delivering the opinion of the court, the chief justice said: "The accused has, therefore, the right to have a specification of the charge against him, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment." And the supreme court cites and approves the decisions in New Hampshire (State v. Parker, 43 N. H. 83); Vermont (State v. Keach, 40 Vt. 118); Michigan (Alderman v. People, 4 Mich. 414); and Maine (State v. Roberts, 34 Me. 320), which reject the authority and soundness of the English decisions sustaining the sufficiency of vague and general counts in indictments for conspiracy. Among the cases cited by the supreme court of the United States was that of State v. Parker, 43 N. H. 83, in which the requisites of an indictment for conspiracy and the course of decisions in England are considered with care and ability. After commenting on the English decisions, Chief Justice Bell says: "We are constrained to regard these decisions which are not authorities here, as of very little weight, because the reasons assigned for the leading case, on which all the others depend (if reasons they can be called), are weak and unsound, and none better have been suggested in any of those that followed, because it appears by Lord Denman's opinion in Reg. v. Kenrick, 5 Adol. & E. (N. S.) 49, that eminent judges have regretted the decisions as dangerous to the accused, because the courts have found themselves compelled to supply the defects of such indictments by bills of particulars, which is conclusive that, in the opinion of such judges, the indictments did not state the crime or offence so 'fully and plainly, substantially and formally' (Bill of Rights, N. H. § 15), that a party ought not to be put upon his trial until its defects were supplied. We infer from the repeated instances in which the courts have been called to reaffirm these decisions, that the judgment of the bar revolts at them as unsound, and we draw the same inference from the fact that, out of the decisions we have found since 1819, no less than four are

in conflict with the cases we have here cited. These are: Rex v. Richardson, 1 Moody & R. 402, in 1834; Rex v. Fowle, 4 Car. & P. 592, in 1831; Rex v. Biers, 1 Adol. & E. 327, in 1834; and Reg. v. Peck, 9 Adol. & E. 686, in 1839. The same question has arisen in the courts of Massachusetts, Maine, New York, and Michigan, and has been decided with reference to the English decisions, as we think, more in accordance with the general principles of the law."

The views of the supreme court of Vermont in the case of State v. Keach, 40 Vt. 113, cited by the supreme court of the United States, and of the supreme court of Massachusetts (Com. v. Hunt, 4 Metc. (Mass.) 111; Com. v. Eastman, 1 Cush. 189; Com. v. Shedd, 7 Cush. 514), and of the supreme court of Pennsylvania (Hartmann v. Com., 5 Pa. St. 60), are to the same effect, and equally pointed and decisive. See, also, Archb. Cr. Pl. & Ev. (6th Am. Ed.) 620, and cases cited.

The principles laid down by the supreme court of the United States in the case of U. S. v. Cruikshank, supra, cover every question which arises as to the sufficiency of the second count of the indictment now under consideration. Let us turn to this count and see what it alleges against the defendants: (Here the court read this count, as is above set out.) This count is divisible into two parts: first, the conspiracy portion; second, the portion which charges what is termed the "overt act" —i. e., "the act done" by the defendants "to effect the object of the conspiracy." The conspiracy to defraud the United States is alleged to consist in "certifying that certain false and fraudulent accounts and vouchers for material furnished for use in the construction of the said custom-house and post-office, and for labor performed on said building, were true and correct." What can be more general and indefinite than this? It is not alleged that the conspiracy was to certify falsely all accounts and vouchers for material and labor for the building, but to certify "that certain false accounts and vouchers for material and labor were true and correct." This is all. But what accounts and what vouchers, is not alleged. How does this advise the defendant so as to enable him to make his defence; what accounts or what vouchers are to be impeached? How can the court know, if a trial is gone into under this indictment, whether the accounts and vouchers offered in evidence by the government are the same ones in respect to which the grand jury found the bill of indictment. Lambert v. People, 9 Cow. 578. If the defendants are convicted or acquitted on an indictment so general and uncertain, how can they plead the judgment in bar of another prosecution? How does it appear that the accounts and vouchers were such as that an intent to defraud the United States can be predicated of them? No dates, sums, amounts, persons, or materials are mentioned, and it does not appear that this could not be done, for the allegation is that the conspiracy related to "certain false and fraudulent accounts." We agree with the supreme court of Pennsylvania, in the case cited, that "precision in the description of the offence is of the last importance to the innocent," and hence the importance of the decision of the United States supreme court in the Cruikshank Case, which settles the law for all the courts of the United States.

This indictment does not advise the defendants what they will have to meet, and they cannot tell from it which of the multitudinous vouchers and accounts they have certified will be relied on by the government to establish the charge.

This is an indictment for conspiracy to defraud the United States, and the American decisions are uniform to the point that the means by which the fraud is to be effected must be described in some part of the indictment with certainty. U. S. v. Ulrici [Case No. 16,594]; State v. Parker, supra; State v. Keach, supra; Com. v. Hunt, supra; State v. Roberts, supra. Nor is the uncertainty in the present indictment helped out by the averments with respect to the overt act. It is charged in this behalf that the defendants presented to the disbursing agent of the United States certain written and printed papers, purporting to be true and correct pay-rolls of mechanics and laborers on the building for the month of November, 1874, which were vouchers for the payment of the sum of $21,862.02. But it is not alleged that these pay-rolls were false or not true, and much less that the defendants knew them to be so. The averments in respect to the overt act do not show any criminal offence in connection with those pay-rolls, and, hence, we say that they cannot, in any view, aid the defects in the conspiracy portion of the count. Reg. v. Rex, 7 Adol. & E. (N. S.) 782.

We have gone into this matter thus fully, so that the counsel for the government should be advised of the views of the court to guide his further action.

I am authorized to state that TREAT, District Judge, fully concurs in these views.

Judgment accordingly.

UNITED STATES (WALSH v.). See Case No. 17,116.

Case No. 16,637.

UNITED STATES v. WANGEREIN.

[See Case No. 17,141.]

Case No. 16,638.

UNITED STATES v. WANN et al.

[3 McLean, 179.] [1]

Circuit Court, D. Illinois. June, 1843.

RECEIVER OF PUBLIC MONEYS—LIABILITY OF SURETIES.

1. The sureties of a receiver of public monies are responsible for any neglect of the receiver which appertains to the duties of his office.

2. But, the government cannot pay an extravagant sum, for the performance of the labor neglected by the receiver, and charge his sureties with such sum.

3. The government in such a case is entitled to recover what shall be a reasonable compensation for the labor performed.

[This was an action by the United States against Wann and Bennett to recover money.]

Mr. Butterfield, U. S. Dist. Atty.

Breese & Campbell, for defendants.

McLEAN, Circuit Justice. This action is brought against the defendants as sureties of Evans, late receiver of public monies. The receiver neglected to bring up his books, and his successor was required to perform that duty, for which he received from the government three thousand dollars. And the plaintiffs claim the above sum from the sureties of the receiver, he being dead. The court instructed the jury that the defendants were responsible for the faithful performance of his duties by the late receiver. But that the sum paid by the government for bringing up the books is not to govern them in their verdict, unless they shall think it was a reasonable compensation for the labor performed. It is no more in the power of the government than of an individual, to charge an extravagant sum for neglected duty, by paying such sum to a person who did the work. The plaintiffs are entitled to recover, what the jury shall think will be a reasonable compensation for making the necessary entries in the books of the late receiver, which he, in his life time, had neglected to make. The jury found verdict in pursuance of this instruction, &c. Judgment.

Case No. 16,639.

UNITED STATES v. WARD.

[Woolw. 17; McCahon, 199; 1 Kan. 601.] [2]

Circuit Court, D. Kansas. May Term, 1863.

FEDERAL JURISDICTION OF MURDER—JURISDICTION OVER INDIAN RESERVATIONS IN KANSAS.

1. Congress is competent to legislate in respect of murder only where the crime is connected with some subject matter, or was committed in some place, which brings it within the exclusive jurisdiction of the federal government.

2. The act of June 30, 1834 (4 Stat. 729), confers upon the federal courts jurisdiction of offences against the laws of the United States, committed on Indian reservations in Kansas, unless subsequent legislation has withdrawn the locality from that jurisdiction.

[Cited in U. S. v. Stahl, Case No. 16,373; U. S. v. Sa-coo-da-cot, Id. 16,212; U. S. v. Bridleman, 7 Fed. 896.]

3. The act admitting the state into the Union withdraws all such territory from the federal jurisdiction, with an exception therein stated.

[Cited in U. S. v. Yellow Sun, Case No. 16,780; U. S. v. Sa-coo-da-cot, Id. 16,212; U. S. v. Downing, Id. 14,991; U. S. v. Bridleman, 7 Fed. 896; U. S. v. McBratney, 104 U. S. 623.]

[Cited in County of Cherry v. Thacher, 32 Neb. 350, 49 N. W. 352; State v. McKenney (Nev.) 2 Pac. 172.]

4. The exception, mentioned in the act, of territory thus withdrawn from the federal jurisdiction, is territory of Indians having treaties with the United States, which provide, that without their consent, such territory shall not be subjected to state jurisdiction.

[Cited in U. S. v. Yellow Sun, Case No. 16,780; Ex parte Forbes, Id. 4,921; U. S. v. Downing, Id. 14,991; U. S. v. Martin, 14 Fed. 823; U. S. v. Partello, 48 Fed. 673; Langford v. Monteith, 102 U. S. 146.]

5. The converse is inferable, that Indian territory, not protected by such treaty, is brought within and subjected to state jurisdiction.

[Cited in U. S. v. Partello, 48 Fed. 673.]

This was an indictment for murder. The defendant was a white man, and the person killed was also a white man. The homicide was committed on the reservation of the Kansas tribe of Indians, and in the county of Lyons. This reservation was provided by a treaty with the tribe, and was occupied by it. It was a small tract, nine miles in width, by fourteen in length. It lay in three counties of the state—namely, Waubunee, Morris, and Lyons; which counties were organized, and the courts of the state, with general civil and criminal jurisdiction, were held in each. To the indictment there was a plea to the jurisdiction, by which the defendant insisted that the offence charged against him was not committed within the exclusive jurisdiction of the United States, and that the courts of the state of Kansas could alone take cognizance of it. To this plea there was a demurrer. The question was, whether the reservation of the Kansas Indians was within the sole and exclusive jurisdiction of the United States. In determining this question, the court examined the following provisions of law: The act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved June 30, 1834 (4 Stat. 729), in its 1st section provides: "That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state, to which the Indian title

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

[2] [Reported by James M. Woolworth, Esq., and here reprinted by permission. McCahon, 199, and 1 Kan 601, contain only partial reports.]

has been extinguished, for the purposes of this act, be taken and deemed to be the Indian country;" and in its 25th section it provides: "That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country, provided the same shall not extend to crimes committed by one Indian against the person or property of another Indian." The act entitled "An act for the admission of Kansas into the Union," approved January 29, 1861 (12 Stat. 126), provides in its 1st section: "That the state of Kansas shall be, and is hereby declared to be, one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever;" * * * "provided that nothing contained in the said constitution (of the state) respecting the boundary of said state, shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the state of Kansas, until said tribe shall signify their assent to the president of the United States, to be included within said state."

MILLER, Circuit Justice. The circumstances, much enlarged upon at the bar, that the reservation is but a small tract of country, that emigration has filled up the adjoining lands, that the state has included the locus in quo within an organized county, and by its courts of justice, and its people, by their customs and intercourse, have assumed new and close relations to this tribe of Indians, afford no assistance in determining the question before us. The argument drawn from these circumstances assumes that the state has authority to legislate over these lands; and that is the very point in question. Or, if it be conceded that at one time the sole and exclusive jurisdiction was in the United States, the contention of the counsel for the defendant is based on the assumption that circumstances—the changed condition of affairs—has withdrawn that jurisdiction from the federal and conferred it upon the state government: the statement of which position shows its fallacy. We must recur to the provisions of law as written in the statute books and the treaties, for an answer to the question before us. Worcester v. Georgia, 6 Pet. [31 U. S.] 515; U. S. v. Cisna [Case No. 14,795]. The authority of congress to provide for the punishment of crime is limited to such subjects and circumstances as are peculiar to the federal government. That government may coin money, and therefore congress may provide for the punishment of counterfeiting the national coin. It may establish post-offices and post-roads, and may punish robbing its mails; but it cannot punish counterfeiting the issues of state banks, nor robbing express companies. It may punish murder, when it is committed under certain circumstances or in certain places, as when the murdered person is its officer, and at the time of the assault was in the discharge of his official duties, and the killing was in resistance to him therein; or when the homicide was committed in some place over which the national government had sole and exclusive jurisdiction, as, for instance, over forts, arsenals, &c.

Jurisdiction is claimed here to punish this homicide, because it was committed on an Indian reservation. That circumstance alone is not sufficient to give us jurisdiction. There is no act of congress giving the federal courts jurisdiction of every murder committed on any Indian reservation. We have jurisdiction only when such reservation is "within the sole and exclusive jurisdiction of the United States." The act of June 30, 1834, provides, that the section of country in which this reservation is situated shall be Indian country, and that the laws of the United States for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force therein. This provision brings the reservation within our jurisdiction. If it remained unchanged or unqualified, it would conclude the question. It is insisted that the provisions of the act organizing the territory, and the act admitting the state into the Union, withdraw the locality from the force and effect of the act. It is unnecessary to consider the former of these enactments, as all that can be claimed under it, may be found in the latter. The first clause of this act provides that the state shall be admitted into the Union, "on an equal footing with the original states, in all respects whatever." Congress does not possess the power to withdraw from any one of the original states, without its consent, the authority to try and punish a man for murder, even in the smallest portion of its territory. It cannot be said of the new state of Kansas, that she stands upon "an equal footing with the original states in all respects whatever," if congress can take from her courts, and vest in us, jurisdiction to try a man for murder committed within the state;—if congress can, without her consent, exclude her from the right and the power to enforce the laws which she has made, for the protection of the lives, persons, and property of her citizens, on every portion of her soil. This power to enforce her criminal laws throughout her boundaries, which is un-

qualified and exclusive, and is to be possessed, enjoyed, and exercised by the new state alone, and not concurrently with the federal government, is a necessary incident to her equality with the original states. It follows, then, unless the clause above cited in the act admitting Kansas into the Union is qualified by some other provision, it operates as a repeal of the act of 1830, so far as that state is concerned, and we are without jurisdiction.

But there were, at the time of the passage of the act of admission, tribes of Indians within the boundaries of the new state, as described therein, with which the United States had treaties; and in these treaties the government stipulated that their lands should never be brought within the bounds, nor subjected to the jurisdiction, of any state. Among other such tribes, we may mention the Shawnees. A treaty had been made with this tribe, giving and assuring to it certain lands; and by the 10th article it was provided, that "the United States guarantee that said lands shall never be within the bounds of any state or territory, nor subject to the laws thereof. 7 Stat. 355, 357. It is evident that the congress which passed the act of admission apprehended the principle above expressed, and foresaw the predicament in which the United States would be placed, if it admitted the state without any provision for such Indians, and for the lands of such Indians, as had treaties containing such a guarantee. It was foreseen that when once Kansas was admitted into the Union upon an equal footing with the original states in all respects whatever, the general government could not protect these obligations. Accordingly a proviso was annexed to the clause declaring Kansas in the Union. By this proviso, all territory was excepted out of, and was not to be included within, the state, which belonged to a tribe having such a treaty. So that, recurring to the case of the Shawnees, their reservation was not in the state. It was within the outside boundaries of the state, as described in its constitution, and yet was without the state, without its jurisdiction, and without its territory. And the converse of this proposition is inferable; that is, that congress intended to, and did, concede to the new state, and it acquired and holds irrevocably, except as it sees fit to surrender the same, full right and authority to legislate, to enforce her laws, and to exercise plenary jurisdiction, over all such parts of her territory as were not covered by such treaties. Or rather, to express the matter more exactly, all territory which was not covered by such treaties was included within the state, within its jurisdiction and within its territory; and this irrevocably, unqualifiedly, and exclusively.

It remains now to inquire whether the reservation here in question is within the proviso; whether the Kansas tribe of Indians, upon whose reservation this homicide was committed, had such a treaty with the United States, as the Shawnees have been shown to have had, in which it was guaranteed to them by the United States that their reservation should not be brought within any state, nor subjected to its laws. If it had a treaty with such a clause, then the reservation was not in the state, and is subject to federal jurisdiction. On the other hand, if it had not a treaty with such a clause, then the reservation was within the state, and is subject to the state jurisdiction. This question is to be determined by an examination of the treaty with this tribe, in order to see whether or not it contains such a clause. The last treaty with the tribe was made in 1859, and ratified in 1860. (12 Stat. 1111), and is before us. We have carefully examined it, and find that it does not contain the guarantee mentioned. It is conceded by the counsel for the government, that none exists in any former treaty with this tribe. It therefore results that the state of Kansas has jurisdiction to try and punish the defendant for the offence set forth in this indictment: it follows that we have not jurisdiction. The case of U. S. v. Bailey [Case No. 14,495], although decided before the act of 1834 was passed, and therefore not directly in point, is, in its reasoning, strongly corroborative of the views which we have taken. No other case decided by a federal court, bearing on the case before us, has been brought to our attention.

The demurrer to the plea must be sustained, and the case dismissed for want of jurisdiction. Demurrer sustained and bill dismissed.

See The Kansas Indians, 5 Wall. [72 U. S.] 737; and The New York Indians, Id. 761.

Case No. 16,640.

UNITED STATES v. WARDWELL et al.

[5 Mason, 82.] [1]

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

PURSER IN NAVY—OFFICIAL BOND—APPLICATION OF PAYMENTS — PAYMENTS BY ADMINISTRATOR OF INSOLVENT ESTATE — DEBTS DUE UNITED STATES.

1. The act of 1817, c. 197 [3 Story's Laws 1622; 3 Stat. 350, c. 24], respecting the bonds of persons in the navy, having required, that every person then in service &c. shall, instead of the bond required by a former act, enter into a new bond with sureties, conditioned for the faithful performance of his duties &c., the sureties on the old bond are discharged from all responsibility for monies received by any person &c., after he has given the new bond, the latter being, by the act, a substitute for the former.

[Cited in Spencer v. Houghton, 68 Cal. 86, 8 Pac. 679.]

2. In case of payments by a debtor to a creditor, the debtor has a right to direct the appli-

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

cation of them, and if he does not, the creditor may apply them as he pleases.

[Cited in Caldwell v. Wentworth, 14 N. H. 437.]

3. In cases of payments to the treasury department, the officers of that department have not a right to make any application of such payments against the will of the debtor, or of his administrator.

4. In case of payments made by an administrator of an insolvent estate, all such payments must be deemed to be made on general account, and pro rata towards the extinguishment of all the debts due to the creditor.

5. The United States having a priority by law in such cases, does not change the rule. The duty of the administrator is the same.

6. In cases of running accounts, where debits and credits are made at different times, the payments are to be deemed as made towards items antecedently due, in the order of time in which they stand in the account.

[Cited in Gass v. Stinson, Case No. 5,262; U. S. v. Bradbury, Id. 14,635; Schuelenburg v. Martin, 2 Fed. 750.]

[Cited in Conduitt v. Ryan, 3 Ind. App. 9, 29 N. E. 163; Smith v. Loyd, 11 Leigh, 512; Chapman v. Com., 25 Grat. 744; Morgan v. Tarbell, 28 Vt. 503; Norris v. Beaty, 6 W. Va. 482.]

7. The case of the United States furnishes no exception to this rule in cases of running accounts. All payments are deemed to be made on general account.

[Cited in State v. Sooy, 39 N. J. Law, 549.]

This was a bill in equity brought under the following circumstances: Benjamin F. Bourne, on the 14th of April, 1814, was appointed a purser in the navy of the United States, and gave a bond to the United States, with Abel Jones and Stephen Price, as sureties, in the penalty of $10,000, for the faithful performance of the duties of his office, in the usual form. On the 30th of April, 1817, Bourne gave another bond to the United States, with Stephen Price, C. A. Dale, and George Johnson, as sureties, in the penalty of $25,000 for the like purpose, pursuant to the act of congress, of the 1st of March, 1817, c. 24 [3 Stat. 350]. Bourne continued in office until his death, on the 10th of November. 1823. During this period, large sums of money were advanced to him as purser, to be expended for the use of the United States. On the 5th of October, 1826, the accounts of Bourne, for receipts and disbursements, were adjusted at the treasury department. The balance found due to the United States on the 30th of April, 1817, was $7,560.86; and a further balance was found due up to the 10th of November, 1823, of $31,556.88; in the whole amounting to $39,-117.74. On the 14th of November, 1823, John Howe, one of the defendants, was appointed administrator on Bourne's estate; and on the 22d of September, 1826, he paid to the district attorney, for the use of the United States, on account of money due to the United States, from the estate, the sum of $4,-968.42. Howe, at the time of payment, claimed the right to apply the same in part payment of the said balance of $7,560.86, and the district attorney claimed for the United States the right to apply the same in part payment of either of the balances aforesaid, at the election of the proper officers of the treasury department; and it was agreed between them, that the payment should be made, without prejudice to the right of either party to apply the same to either of the balances aforesaid, at their election. The money so paid, had been in fact applied by the officers of the treasury, in part payment of the said balance of $31,556.88. No farther monies have been paid by the administrator of Bourne, for want of assets.

The bill, after stating the preceding facts, alleges, that Price is without the jurisdiction of the court; that Dale and Johnson are insolvent; that Abel Jones died in September, 1815, leaving a large real and personal estate; that Julia B. Jones, his widow, John Wardwell, and the said Howe are administrators upon his estate, (and are made defendants to the bill,) and have possessed themselves of personal estate to a large amount, to wit, $21,255.19; that Julia S. Jones (also a defendant) is the daughter and sole heir at law of Abel Jones, and has by descent from her father real estate to the value of $30,000, which ought to be applied to the payment of the debts so due to the United States. The bill, therefore, prays for discovery and relief in the premises. The administrators of Jones, in their answer, deny knowledge of the particular balances due from Bourne to the United States; and admit the receipt of assets of Jones, to the amount of $27,778.25, and payment of the same in the course of administration. They assert that on the 18th of December, 1817, Bourne's accounts were settled at the treasury, and that a balance of $8,697.48, found due from him to the United States, was charged in a new account against him, to be expended by him for the use of the United States; and that it was so expended. They insist, that the act of congress of 1st March, 1817, from the time of the execution of the second bond, had the effect of superceding and annulling the first bond; that not knowing of any balance due to the United States, they, on the 1st of May, 1817, settled their administration account on Jones's estate, in the probate office, and paid the balance in their hands to the widow of Jones, who was also guardian of his daughter Julia. They allege, that no suit was commenced against them, as administrators, by the United States, within three years after their appointment, and rely on the statute of limitations of Rhode Island as a bar to the suit. Howe, as administrator of Bourne, denies any further assets; and asserts, that the payment to the district attorney was without prejudice to his right to make application thereof, so far as he was entitled by law to do, denying that he ever assented to, or authorized the application so made by the treasury department, and insisting on his right to apply the same towards the discharge of the first

bond. He also asserts the utter insolvency of Bourne's estate. The defendants farther allege, that Bourne, in his lifetime, after the adjustment of his accounts, on the 18th of December, 1817, paid for the United States large sums of money, greatly exceeding the sum of $8,697.48, in payment of the same balance found due to the United States; which sums the United States ought to apply to the discharge of the same. They farther allege, that the estate of Jones is not responsible by reason of the neglect of the officers of the government to settle Bourne's accounts, and to give due notice thereof to Jones, and by their giving him new credits &c. The usual replication was filed.

R. W. Greene, for the United States.
Howe & Searle, for defendants.

STORY, Circuit Justice. There is no controversy as to the facts in this case; and the whole resolves itself into mere questions of law. I pass over all the grounds insisted upon by way of laches on the part of the officers of the government, for the decisions of the supreme court have fully settled them.

The first ground insisted on by way of defence is, that the act of 1817, c. 197 [3 Story's Laws, 1622; 3 Stat. 350, c. 24], is a complete discharge of the first bond as to all sums received after the second bond was executed. The statute provides, "that every person now in service, or who may hereafter be appointed, shall, instead of the bond required by the act, to which this is a supplement, enter into a bond with two or more sufficient sureties, in the penalty of $25,000 conditioned for the faithful discharge of all his duties as purser in the navy of the United States, which sureties shall be approved," &c. My opinion is, that the argument is well founded. The new bond is to be given instead of, that is, in the place or room of, the old bond, and not in addition to the latter. It is a complete substitute for, and not a supplementary security to, the former. To construe the act otherwise, would be a plain departure from the meaning of the terms, and, as I think, also from its true object and intent. From the time the second bond was given, I am therefore of opinion, that the first bond was functus officio, as to future responsibilities for future advances. Then as to the payment made to the district attorney by the administrator of Bourne. Generally speaking, the debtor has a right to make the application of payments, as he chooses; if he omits so to do, the creditor, having different debts, may make the application to which he pleases. If neither party makes any application, the law will adjust it by its own notions of the equity and justice of the particular case. It is plain, that the officers of the treasury department had no power to make an absolute application of the present payment by the administrator, to the liquidation of the last balance, unless the law justifies it upon general principles. If either party had a right to direct the application, it was the administrator of Bourne; and if applied according to his direction, it goes to the reduction of the first balance. But I doubt, exceedingly, whether an administrator is subrogated in this respect to all the rights, which the debtor himself would have, if living. Especially do I doubt it, in case the estate is insolvent. When a debtor here dies insolvent, all his estate is distributable among his creditors, pro ratâ, with the exception of certain privileged creditors having priorities, such as the United States, the state, and creditors for charges of the last sickness, and of the funeral of the party. In such cases of administration, it seems to me, that all the demands of each creditor form one consolidated debt, and that the payments made, are to be pro ratâ upon the whole, to be applied in the same way towards the discharge of the whole. The administrator has no right, at the instance, or for the benefit, of third persons, to direct the payment to be applied on account of any particular debt. He is bound to pay, on all debts, a pro ratâ sum. If this be so as to ordinary creditors, the circumstance, that the United States have a priority, does not change the duty imposed by law; for if the assets are not sufficient to pay all the debts due to the United States, the same reason applies, that is, that the payment shall be pro ratâ on all. The administrator acts, not for himself, nor for sureties, nor upon personal preferences, but as a trustee for the benefit of all the creditors pari passu. And I think the law requires him in the execution of the trust, to distribute the burthen and the benefits equally among all the creditors, without preferences, and without prejudice to the rights of any sureties. Upon these principles, my opinion is, that the sum paid by the administrator ought to be applied, as of right, to both balances, discharging each pro ratâ, in the portion which the respective amounts bear to the whole sum paid. Perris v. Roberts, 1 Vern. 34, proceeded on principles which afford a just analogy.

But another ground of defence supercedes, or rather, renders the former unimportant. It appears, that the accounts of the treasury have run on, from time to time, ever since his first appointment, charging him with advances made, and crediting him with disbursements. Balances have been struck from time to time; and the balances have been again carried forward to the debit side of the new accounts. It is, therefore, the common case of a running account, where there are various debits and credits on each side, and the question is, in such a posture of things, where there has been no specific application made of any payments, by either party, to any specific items, how the payments thus passed into general account are to be deemed, in point of law, to have been applied. My opinion is,

that they are to be considered as applied in discharge of the items antecedently due, in the order of time in which they stand in the account. This is the natural, and, as I think, the legal result of carrying the credits into general account. The doctrine of Clayton's Case, 1 Mer. 572, 604, 608, is directly in point, and stands upon irresistible reasoning. It is confirmed, if confirmation were necesary, by Bodenham v. Purchas, 2 Barn. & Ald. 39, Simson v. Cooke, 1 Bing. 452, and Simson v. Ingham, 2 Barn. & C. 65. The case of U. S. v. January, 7 Cranch [11 U. S.] 572, has been supposed to justify a different doctrine. It appears to me, that such is not the true explanation of that case.[2] It turned wholly upon its own particular circumstances, and the charge of the circuit court, which, with reference to the facts, the supreme court thought erroneous. The questions then were, (1) whether the supervisor had any right to make a special application of any prior payments, made on general account, and if he had, then, (2) whether the promise of the supervisor to make a particular application of the payments, after they had been passed into general account, was, per se, an application of such payments, unless followed by some positive act of appropriation. The supreme court decided both points against the defendant; and overruled the contrary decision of the circuit court. The case of U. S.

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[2] NOTE BY JUDGE STORY.

United States vs. January & Patterson.

(Supreme Court of the United States, February Term, 1813.)

This case, as reported in 7 Cranch [11 U. S.] 572, is inaccurately given, as to the facts apparent on the record; and I therefore transcribe them from the bill of exceptions, upon which alone the opinion of the supreme court proceeded. It was an action on a bond of the 25th of August, 1797, and the pleadings were as stated in 7 Cranch [11 U. S.]. The suit was commenced on the 20th of November, 1804. At the trial, the attorney for the United States gave in evidence an account of the United States against Arthur, taken from the books in the supervisor's office, containing the debits and credits of Arthur. The debits, beginning on the 30th of September, 1797, and extending to the 30th of June, 1802, amounted to $30,584.99½. The credits, beginning on the 30th of June, 1798, and ending on 30th of June, 1802, amounted to $14,403.84, leaving a balance due to the United States of $16,181.15½. There was a deduction afterwards made of an erroneous allowance of commissions, of $970.86; and subsequent allowances of credits received between March, 1804, and July, 1805, of $573.77½. So that the ultimate balance, stated as due to the United States on that account, was $16,578.23½. There was also given in evidence, a separate account drawn off from the supervisor's books, containing the debits and credits of Arthur from the time of his appointment, until he executed a second bond to the United States with Patterson alone, as his security (on the 23d of March, 1799, which was sued, and is the case reported in 7 Cranch [11 U. S.] 575). This account presented on the debit side $9,034.13½, and after deducting the credits, $2,554.23, left a balance due to the United States, of $6,479.90½. The second bond aforesaid was also read in evidence, and also an account drawn off by the supervisor from his general account, as the debits and credits against the said Arthur, after the date of the said bond. In this account the debits up to the 15th of November, 1803, were $21,550.86, and the balance due, after deducting the credits, was $9,701.24.

The defendants then offered in evidence, the deposition of James Hughes, taken on the 11th of May, 1811, which was objected to as improper evidence, but the objection was overruled by the court. It was as follows: "This deponent says, he did, as attorney for Thomas January, apply to Major Morrison, supervisor in Lexington, at his office, some years ago, the precise time he cannot now recollect, but he is confident it must have been before the judgment entered in the Kentucky district court, in the suit, United States against Arthur & Patterson (i. e. on the second bond), in order to obtain information from the said Morrison respecting the said January's responsibility and danger of being made liable, as a security in a bond for John Arthur as collector of excise, bearing date, as appears from the bond, the 25th day of August, 1797. This deponent believes he was requested by January to bring a suit against the said Morrison to compel him either to give up the bond, or give the said January a receipt or discharge against it; and that this deponent wished to understand from the said Morrison, what was the said January's situation before he took any such measure, or whether such measure was necessary. The said Morrison informed the deponent, that John Arthur had paid a sufficient sum to discharge that bond; and that what he had paid should be so applied. This answer was reported to the said January, with which he appeared satisfied; and this deponent was himself of opinion he was safe." Signed J. Hughes.

The objections stated to the admission of the deposition on the record were, (1) because the said deposition did not go to prove, that the said Arthur had discharged the condition of the bond in suit; (2) because it only went to prove a promise on the part of the supervisor to appropriate the payments, and not an actual appropriation; (3) because it did not appear, that Arthur had given any directions to the supervisor, how to apply his payments, or that the supervisor had ever made his election to appropriate them differently from the account current; (4) because the said Arthur & Patterson were not present and assenting to the arrangement promised to be made by the supervisor; (5) because it was an attempt by bare parol to impeach the words (accounts?) of the supervisor; (6) because the words (accounts?) of the supervisor were the best and only evidence of the application made by the supervisor, and ought not to be impeached or contradicted by a promise of the supervisor to do an act out of the line of his duty, and contrary thereto. But the court overruled the objections, and the deposition was permitted to go to the jury as evidence, for the purpose of showing that the bond was paid and discharged.

The attorney for the United States then introduced Morrison (the supervisor) as a witness, who deposed, "that he had a recollection of James Hughes, calling upon him as the attorney of January, and conversing with him about the bond now sued upon. But that he did not believe, that he had ever told said Hughes, that he would appropriate the payments to the discharge of the bonds upon which the suit is brought. That the payments, which had been made by Arthur, if applied to the bond now sued upon, would discharge it: but that he had never made any other appropriation, as he recollected, than that stated in the accounts above alluded to; although he might have said, and he believed he had frequently told the defendant, January, and others, that the whole of January's bond would be paid off, if the payments that were made by

v. Nicoll, 12 Wheat. [25 U. S.] 505, in which U. S. v. January [supra] is recognized, turned upon entirely distinct considerations.

Arthur were appropriated to the discharge of that bond exclusively; and that he had himself entertained an opinion, that the payments that were made by Arthur, ought to be applied to the payment of the first bond, until that was paid off. But that he had determined to enter the credits as they were made upon the account current, which he had done, and leave it to the law and the court to fix appropriations, when difficulties should arise. That Arthur never gave him any directions about the appropriation of his credits at the time, or before, he became entitled to them, nor until after a suit was brought against him and Patterson upon the last (second) bond; and that then he gave him directions in writing to appropriate certain credits and payments exclusively to the credit of Patterson; but that he refused to do so, leaving it to the court to make the appropriation."

The defendants then called one "James Coleman, formerly a clerk in the supervisor's office, who deposed, that the defendant, January, several times called at the office on the subject of his bond, expressed his uneasiness about its remaining out, and his desire to get it up. That the supervisor assured him, that Arthur had paid enough to discharge that bond, and that he might make himself easy; but refused to give up the bond, because he thought such bonds ought to remain as vouchers in his office." The record then proceeds: "This being the whole of the testimony delivered on both sides, the attorney for the United States moved the court to instruct the jury, that the election and promise of the supervisor to James Hughes, stated in his deposition, unless the said promise was fulfilled by some act of appropriation of the payments, by the supervisor, was not of itself an appropriation of the payments. But the court overruled the motion of the attorney, and, on motion of the defendants, instructed the jury, that if they believed that the supervisor had made the election and promise, as stated in the deposition of James Hughes, that it was a declaration of his election, how the payments made by Arthur should be applied; and that whether a formal entry in the books, of their appropriation, corresponding with that election, were made or not, was immaterial, and that the jury ought to consider the appropriation as made." To which opinion an exception was taken.

Such is the record; and upon this posture of the case several observations arise to explain the opinion of the court: (1) The cause was submitted without argument; and therefore no points could arise before the court, except such as were apparent on the record. (2) Now upon the record the only points were, first, the admissibility of Hughes's deposition; and, second, the instruction of the court with reference to that deposition. (3) No point was made as to the effect of payments and credits made on general account in an account current between the parties. But the whole cause seems to have proceeded upon the assumption, that but for the special election and promise of the supervisor, the payments made and credited upon general account would not have extinguished the antecedent items of debt, so as to have discharged the first bond on which January was surety. The point not having been made, could not intentionally have been decided by the supreme court. (4) There was no evidence, that in the slightest degree tended to show that Arthur, at or before the time when the payments or credits were made by the supervisor in his books, directed any special appropriation of them; or that he did not intend that they should be placed to general account. On the contrary, Morrison expressly swore, that no such directions had ever been given until long afterwards, and after the suit was brought on the first bond. And Hughes's testimony, which applies to a period long after all the payments were made, and passed in the account current on general account, only goes to show, that the supervisor at that time elected and promised, that the payments and credits should be applied to the discharge of the antecedent debt; not that he had already so applied them. But the point did arise, whether, when no special appropriation had been made by either party at the time of the payments, but they had been passed to general account, without objection, on the account current, a public officer could, by his subsequent election or promise, change or alter the appropriation from the general account already made, to a special account. Some of the objections taken to the admissibility of Hughes's deposition relate to this point.

If the opinion of the court is examined with reference to the facts above stated, and the points made on the record, it will at once be seen, that there was no decision made on the point often supposed to have been ruled in this case, viz. that payments made on general account do not (as in common cases) go to extinguish antecedent items of debt according to the order of time, when the account is with a public officer of the United States. The judge, who delivered the opinion of the court, after referring to the rule of law, that the debtor may, if he pleases, at the time direct the application of payments, and if he does not, the creditor may direct it; and if neither does, the law will make the application, proceeded to state, that the majority of the court were of opinion, "that the rule adopted in ordinary cases is not applicable to a case circumstanced as this is, where the receiver is a public officer not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where sureties under distinct obligations are interested."

If I understand this declaration correctly, it must, with reference to the facts in the case, mean, that where payments have been indiscriminately made, and carried to general account with officers of the United States, the debtor has no right subsequently to direct or alter, the appropriation so made, to any other account or purpose. Neither has the officer acting for the United States a right to assent to or to make such subsequent appropriation. He has no authority to change, on behalf of the United States, the state of any payment as it is first applied on general account. It is then added: "It will be generally admitted, that moneys arising due and collected, subsequently to the execution of the second bond, cannot be applied to the first bond, without manifest injury to the surety on the second bond, and vice versa." I understand this to be no more than an argument from inconvenience; and not an assertion, that all moneys collected subsequently to the second bond are, if passed to general account, to be applied, not to the discharge of the first, but of the second bond. It is then added: "Justice between the different sureties can only be done by reference to the collector's books; and the evidence, which they contain may be supported by parol testimony, if any in possession of the parties interested."

I understand from this declaration, that the books of the collector are to furnish the evidence as to the debits and credits, whether on general account, or on special account or appropriation; and that parol evidence is admissible to support that evidence; but not to contradict it. At least the latter position, if not stated nor implied, is not disaffirmed. The decision was, "that the circuit court erred in the opinion given." That is, that the circuit court erred in

There the United States were supposed to have a right, like any other creditor, to apply payments, made by the debtor, to any ac-

count, where the debtor himself had made no application.

I have had occasion to consider this point in the case of Postmaster General v. Furber, (Me.) 1827, and to the opinion there given I deliberately adhere.[3]

My judgment is, that, as the credits carried into the general account of Bourne, for disbursements since the second bond was given, far exceed those due by him to the United States, the parties to the first bond are discharged from any responsibility thereon. The bill must therefore be dismissed. Bill dismissed accordingly.

Case No. 16,641.

UNITED STATES v. WARE.

[2 Cranch, C. C. 477.] [1]

Circuit Court, District of Columbia, May Term, 1824.

JURORS—CHALLENGES IN CAPITAL CASES—QUAKERS.

It is good cause of challenge, in a capital case, that the juror is a Quaker, and has conscientious scruples as to the lawfulness of taking away human life for any offence.

Betsey Ware, a free colored woman, was indicted for burglary in the dwelling house of E. J. Lee, Esq. Two of the jurors, W. Stabler and George S. Hough, when called to be affirmed, stated in open court that they were of the Society of Friends, and had scruples of conscience in regard to the lawfulness of capital punishment; and did not, in their conscience, think it lawful to take the life of a human being.

Mr. Hewitt, for the prisoner, objected that the jurors could not challenge themselves.

Mr. Taylor, for the United States (in the absence of the district attorney) then challenged them for cause, alleging that they did not stand indifferent.

THE COURT said it was a good cause of challenge, and the jurors were set aside.

Case No. 16,642.

UNITED STATES v. WARNER.

[4 Cranch, C. C. 342.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

CRIMINAL LAW — EVIDENCE OF BAD CHARACTER.

Upon an indictment for keeping a disorderly house, and for keeping a bawdy house, the United States cannot give evidence of the general character of the defendant.

The indictment [against Eliza Warner] had two counts: (1) For keeping a bawdy house. (2) For keeping a disorderly house.

Mr. Dunlop, for the United States, offered evidence of the general character of the defendant.

Mr. Z. C. Lee, for defendant, objected, and relied on the decision of this court in U. S. v. Jourdine [Case No. 15,499], at the September special court, 1833.

Mr. Dunlop, contra, cited 1 Hawk. P. C. c. 74.

THE COURT (MORSELL, Circuit Judge, contra) refused to permit the evidence to be given.

Verdict, not guilty.

Case No. 16,643.

UNITED STATES v. WARNER et al.

[4 McLean, 463; [2] 6 West. Law J. 255.]

Circuit Court, D. Ohio. Nov., 1848.

CONSTRUCTION OF STATUTES—NEGLIGENT NAVIGATION OF STEAMBOAT—MANSLAUGHTER—INDICTMENT—EVIDENCE—DUTY OF CAPTAIN.

1. In the construction of statutes, it is a rule of universal application, that effect must be given to the words used by the legislature, when there is no uncertainty or ambiguity in their meaning.

[Cited in Cross v. Seeberger, 30 Fed. 428.]

[Cited in brief in Cutler v. Currier, 54 Me. 88; Brackett v. Ridlon, Id. 430. Cited in Corsey v. Territory (N. M.) 32 Pac. 506; Buffham v. City of Racine, 26 Wis. 453.]

2. Congress having expressly provided in section 12, Act July 7, 1838 [5 Stat. 306], that any act of "misconduct, negligence, or inattention" on the part of those concerned in the steamboat navigation, producing death as a result, shall be deemed manslaughter, it is not necessary to aver, in an indictment framed upon it, or to prove on trial, a malicious intent in the persons charged—such intent not being made a necessary ingredient of the offense.

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instructing the jury, that if they believed, that the supervisor had made the election and promise, as stated in Hughes's deposition, it was a declaration of his election, how the payments of Arthur should be applied, and that whether a formal entry was accordingly made of such appropriation or not, in his books, the jury ought to consider such appropriation as made.

Now this opinion of the circuit court embraces two points: (1) That the supervisor had a right after such payments upon general account, to make a special application of them to the first bond; (2) that his promise to Hughes was an election to make such special application, and amounted without any further act done to an actual application according to his promise. The decision of the supreme court negatives both propositions, and goes no farther. The language of the judge must be construed with reference to them. There is no record of the form of the judgment of reversal, or mandate in this case. In U. S. v. Nicoll, 12 Wheat. [25 U. S.] 505, 511, this case of U. S. v. January, 7 Cranch [11 U. S.] 572, was referred to by the court in its opinion, as in point to show, that as to credits after a second bond given, it was at the election of the government to apply them to either account. This is doubtless true, where the debtor makes no other application at the time of the payments or credits. But if the government carry them to general account, it is presumed, that it was not intended to say, that they could afterwards be altered to a special account, by the government, so as to affect sureties.

[3] [In truth the same point was substantially decided by the supreme court in the case of U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720, and further discussion of it would seem to be unnecessary.]

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

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

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

3. The essence of the crime, under the section referred to, consists in the fact of there being "misconduct, negligence, or inattention" in such degree, and of such a character. as to have produced the result set forth in the indictment, irrespective of the intention of the persons charged.

4. In an indictment under said section, charging neglect of duty on the part of steamboat officers, whereby the boat came into collision with a schooner, and the former was sunk, and lives destroyed; if it appear that the accident was the result of misconduct, or unskillfulness of the persons in charge of the schooner, or that the collision was from any other cause, unavoidable, the defendants ought not to be convicted.

5. Under the second count of the indictment, to justify a verdict of guilty, the jury must be satisfied that the persons whose lives are averred to have been destroyed, came to their death by drowning, as a result of collision.

6. If the jury are satisfied, that the individuals whose lives were lost, having been apprized that they would be safe by remaining on the upper deck of the steamboat, and that in fact, those who remained there, were saved; under the influence of excessive alarm, unnecessarily and indiscreetly left the boat, when sinking, on floats or rafts, and were drowned; the loss of their lives is not so connected with, and a necessary result of collision, as that the defendants can be held responsible for such loss of life.

7. But, if the persons drowned conducted with ordinary prudence and discretion. in the circumstances in which they were placed, their deaths may be viewed as directly resulting from the collision, and the averment of the indictment in that respect, is supported.

[Cited in Denman v. State, 15 Neb. 141, 17 N. W. 348.]

8. It was the duty of the captain, with reasonable promptitude, to ascertain the extent of the injury to the boat, and upon the discovery being made that she would go down, without necessary loss of time to order the boat to be run ashore; and if, from indecision, or neglect, he failed in these duties, and the death of the passengers, or others, resulted from such delay, he is responsible for such result.

The defendants, viz. [Henry R.] Warner, as captain, [Cyrenius H.] Wishue as first mate, [Raymo] Demond as second mate, and [John] Kirby as wheelsman of the steamboat Chesapeake, then navigating Lake Erie, were jointly indicted for manslaughter, under the 12th section of the act of congress of the 7th of July, 1838, entitled, "An act to provide for the better security of the lives of passengers, on board of vessels propelled in whole or in part by steam." 5 Stat. 304. This section is in these words: "That every captain, engineer, pilot or other persons, employed on board of any steamboat, or vessel, propelled in whole, or in part, by steam, by whose misconduct, negligence or inattention, to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof, before any circuit court of the United States, shall be sentenced to confinement, at hard labor, for a period not more than ten years."

The indictment contains five counts, of which the following is a condensed statement: (1) Charges the defendants, in their respective capacities, with general misconduct, negligence, inattention, whereby the collision took place, the boat was sunk, and the lives of several persons destroyed. (2) Charges that it was the duty of the defendants to keep a lookout, and so to steer or navigate the boat, as to avoid collision, and that in their respective capacities, they neglected these duties, whereby the collision took place, the boat sunk, and the lives of Eli Cone, William N. Yerke, and David Folsom, were destroyed by drowning. (3) Charges, that it was the duty of the captain and mate, to keep a lookout, and to give orders to the wheelsman so to steer as to avoid collision, etc.; and that the captain and the mate neglected these duties, and the wheelsman neglected to steer, etc., whereby collision took place and lives were lost. (4) Contains substantially the same averments as the preceding, with the addition, that it was the duty of the defendants after the collision, to make an immediate examination of the injury; and that they neglected this duty, etc., whereby the boat sunk, and the lives of certain persons were lost. (5) Charges, that after collision, the defendants neglected their duties in the following particulars: First. In not causing an immediate examination to ascertain the extent of the injury to the boat. Second. In neglecting to close the ash-hole. Third. In neglecting to run the boat ashore, at the nearest and most convenient point without delay; whereby the boat sunk and lives were lost.

A motion for leave to the defendants to sever in their trial, and a motion to quash some of the counts of the indictment were overruled.

[2] [Before the jury were called, the counsel for the defence moved the court for leave to the defendants to sever in their trials, stating it as his object, in asking for a severance, to use the defendants as witnesses for each other. But THE COURT refused to grant this leave, as against public policy, and not sanctioned by usage or authority. U. S. v. Gibert [Case No. 15,204]; U. S. v. Wilson [Id. 16,730]. The counsel then moved to quash the indictment, for reasons substantially as follows: (1) That the first count is defective, in not specifying any act of misconduct, negligence, or inattention. (2) That the first, third, fourth, and fifth counts are defective, in not stating the manner of the deaths of those whose lives are alleged to have been lost. (3) That the specific acts of misconduct, negligence, or inattention are not set forth with sufficient certainty in any of the counts. (4) That there is no allegation that the defendants were charged with joint duties, and, as their duties were necessarily distinct, involving no community of guilt in their violation, they cannot be jointly indicted; and that, if liable, they must be sever-

[2] [From 6 West. Law J. 255.]

ally indicted, and each charged with such a violation of duty as is sufficient to produce the result alleged as the consequence of such violation.

[Swayne & Beecher, for defendants, cited, in support of the motion, Archb. Cr. Pl. 38; 5 Term R. 622; 1 Chit. Cr. Law, 220, 257; 1 Strange, 623; 2 Hawk. P. C. 89; 2 Mo. 530; 1 Denio, 232.

[T. W. Bartley, U. S. Dist. Atty., in opposition, cited Archb. Cr. Pl. 54; U. S. v. Lancaster [Case No. 15,556].

[THE COURT overruled the motion to quash; stating that, as all the grounds urged could be brought up hereafter on a motion to arrest judgment, if the result of the trial should render it expedient, it was not necessary now to go fully into their consideration. The court intimated, however, that the first count was defective on account of its vagueness and generality; and, also, that those counts were objectionable which did not describe the mode by which the persons alleged to have lost their lives came to their death; but, this latter objection not applying to the second count, and that count being in other respects good, the indictment ought not to be quashed. The court also held that there was no foundation for the position that the defendants were improperly joined in the indictment.] [2]

The jury were then sworn to try the defendants Warner, Wishue and Demond. The defendant Kirby was not put on his trial, and as to him, the district attorney subsequently entered a nolle prosequi. (As it would occupy too much space to set forth separately and in detail, the testimony of the numerous witnesses sworn on the part of the prosecution, it is proposed to give, in brief an outline of their statements, which with the references to the evidence, contained in the charge of the court, as applicable to the different allegations in the indictment, will present a satisfactory view of all the material facts of the case.) In the afternoon of the 9th of June, 1847, the steamboat Chesapeake, with the defendants on board, in the several capacities before stated, left Buffalo, destined for Cleveland. Between 11 and 12 o'clock, in the night of that day, being about six miles from shore, and nearly opposite the harbor of Conneaut, the captain and first mate having retired to their berths, and the defendant Demond, as the second mate, being the officer on watch, and the defendant Kirby, at the wheel, the boat came in contact with the schooner John Porter, Captain Thomas, master, bound for Buffalo, striking her at nearly right angles, about midship, on her starboard side, and causing her to sink in from five to ten minutes after the collision; her crew being saved from immediate death by their transfer to the steamboat. It was very soon ascertained that a hole had been made on the larboard side of the bow of the boat, and that water was rapidly coming in. The pumps were immediately set to work, all hands ordered to bail, and attempts made to stop the leak; and the boat was put toward shore, heading for the light at Conneaut harbor, but the water gained so fast, that when within one and a half or two miles from shore, the fires were extinguished, and the engine ceased to work; and, in an hour and a half from the stopping of the engine, the boat sunk, in thirty-six feet water. There were about sixty cabin passengers on board, who with the steerage passengers, officers and crew, made the whole number between eighty and ninety. As the boat went down, the hurricane or upper deck broke, and became detached from the boat. This deck had been made fast by ropes to the mast of the boat, and remained stationary over the place where the boat sunk. The captain had given notice to those on board, that this deck was the place of safety, and advised all to get on it. Some fifty or sixty persons took refuge upon it, and were all saved; and there was room enough for twenty-five or thirty more. The persons on this deck were taken from it about daylight, by the steamboat General Harrison. The night was not dark, the sky being clear and the stars visible. There was some mist, or fog, near the surface of the lake; the wind was off shore, and nearly from the point S. S. W. There was but one yawl attached to the boat, which was sent ashore with thirteen or fourteen persons in her, who were all saved. Some of the passengers, and a part of the crew of the boat, prepared floats or rafts, made of doors, tables, etc., on which as the boat sunk, they launched into the lake; and, of those who betook themselves to those means of safety, a Mrs. Howk, and four others, viz., Messrs. Vandoren, Cone, Yerke, and Folsom, lost their lives.

The counsel for the defense, after the district attorney had closed his opening argument, declined addressing the jury, and moved the court to instruct them to the following effect: (1) As all crime consists in intention, the defendants are not guilty, unless they knowingly and willfully neglected their duty. (2) As the law does not require infallibility, the defendants are not responsible for errors in judgment, in the performance of their duties. (3) That greater strictness in proof is required in criminal than in civil cases, and the defendants, in order to be holden liable, must be brought within the statute in every particular. (4) That if the loss of life was not the necessary consequence of the sinking of the boat, but resulted from imprudence in leaving the wreck contrary to the captain's advice, he can not be convicted. (5) That if the collision was occasioned by want of proper lights on the schooner, the defendants ought not to be convicted.

[2] [From 6 West. Law J. 255.]

LEAVITT, District Judge, charged the jury substantially as follows: Before I call the attention of the jury to the testimony, as it applies to the allegations of the indictment, it becomes my duty to notice the propositions submitted by the counsel for the defense, on which the instruction of the court is requested. The section of the act of congress on which this indictment is framed declares, that officers and others, employed on any steamboat, by whose "misconduct, negligence, or inattention, the life or lives of any person or persons on board," shall be destroyed, shall be deemed guilty of manslaughter. It is believed, this is the first prosecution which has been instituted under this law, and that no construction has been given to it, in reference to the points now presented, by any of the courts of the Union. It is a rule of universal application in the construction of statutes, that courts must be governed by the words used to express the intention of the legislature, when they are free from all uncertainty or ambiguity. And this rule leads the mind to the conclusion, that it was the design of the lawmaking power, in the adoption of the section under consideration, to create an offense, and annex a punishment to it, on principles variant from those which apply to crimes at common law, or to those generally created by statutory enactment. At common law, and usually in statutory crimes, the intention with which the act is done, charged as criminal, constitutes the element of the crime. But, in the section now brought to the notice of the court, the legislature seem studiously to have avoided the use of any terms, or words, making the intention of the party an ingredient of the offense. It is declared, in words so plain as to admit of no doubt, that any act of "misconduct, negligence or inattention," on the part of any one concerned in steamboat navigation, producing as a result, the loss of life, shall incur the guilt and the penalty of the crime of manslaughter. If it had been intended that these consequences should follow, in cases only where there was evidence of a positive, malicious intent, the words used would doubtless have been such as to have made that intention clear. And, in that case, the offense defined and punished by the statute, would have been the same as manslaughter, as recognized at common law, and the statutes of all the states of the Union. But, it is most obvious, from the language of this section, that congress intended to go beyond this, and to provide punishment for acts to which the common law did not affix guilt or annex a penalty. I am, therefore, led to the conclusion, that it will be the duty of the jury, if satisfied the material allegations of the indictment are sustained by the evidence, to return a verdict of guilty. There can be no doubt, that it was the intention of congress to create an offense by this statute, the essence of which consists in "misconduct, negligence, or inattention" in such degree, and of such character, as to have resulted in the loss of human life. This is a subject matter, clearly within the jurisdiction of congress; and having provided, that certain acts of delinquency, attended with a certain result, shall subject the party to a penalty, irrespective of motive or intention, there is no reason why, in a proper case, the law should not be enforced. [It is no uncommon or extraordinary exercise of power for a legislature to provide, in cases where the interests of the public demand it, that acts involving no moral turpitude in the abstract should be visited with a penalty].[3] If it were true, as insisted by the counsel for the defense, that this view of the law gives to it a character of harshness and severity, which must render it odious to the community, and a reproach to a humane government, it would afford no reason why courts and juries should refuse to carry it into effect. Until repealed by the power which enacted it, it must have the force of law. But the statute under consideration is not liable to this objection. It is true, it declares, that certain facts being established, the parties implicated shall be deemed guilty of manslaughter; but it vests in the courts an ample discretion in regard to the punishment to be inflicted, which, properly exercised, will effectually guard against undue severity. The penalty consequent on a conviction may be imprisonment for ten years; but if the circumstances are such as to call on the court for lenity, the punishment may be merely nominal—not extending beyond a few hours' or a few days' imprisonment. And it may be here remarked, that this great latitude of discretion, vested in the courts by the statute, by which it becomes their duty to graduate the punishment according to the facts of the case, even to the extent of making it merely nominal, is conclusive to prove, that congress, in this enactment, did not contemplate the commission of the crime of manslaughter in its heinousness and guilt, as defined by the common law. If such had been the view of that body, it would not have been left in the discretion of the court, in case of a conviction, to assess a merely nominal punishment. For, according to the common law sense of the crime of manslaughter, it is impossible to conceive of any case in which the exercise of such a discretion would be either justifiable or necessary to the extent contemplated by the statute.

It may not be improper here to remark, that the title of the act of congress, and the circumstances leading to its passage, are significant of the purposes of its enactment, and throw light upon its true construction. It is entitled, "An act to provide

[3] [From 6 West. Law J. 255.]

for the better security of the lives of passengers on board of vessels, propelled in whole or in part by steam." It is a matter of public notoriety, and constitutes a part of the history of the times, that within a short period anterior to the date of this statute, numerous steamboat disasters had occurred in our country, attended with a melancholy loss of human life, under circumstances justifying the conclusion that there was gross negligence, yet without the possibility of proving, either positively or inferentially, a malicious intent. Such was the fearful magnitude of the evil, that public feeling demanded such national legislation on the subject as would be effective in preventing the recurrence of those calamities. The stern legislative provision under consideration, was the result of this state of things. Its design was to enforce the greatest possible vigilance and caution on the part of those concerned in steamboat navigation. The utility of the law has been satisfactorily tested by its salutary results. It has greatly elevated the business of steamboat navigation, by introducing in all its departments, men of higher moral characters, and superior practical qualifications for their duties. As a consequence, the instances of reckless disregard of human life, and accidents resulting from improper hazards, are much less frequent, while the public confidence in the safety of steamboat traveling is greatly increased.

It will be for the jury to say, whether the result charged in the indictment, namely, the deaths of the individuals named, is justly imputable to the "misconduct, negligence, or inattention" of the defendants, or any of them. If the collision happened from the improper and unskillful navigation of the schooner, or any other cause, rendering it an unavoidable occurrence, the defendants are entitled to a verdict of acquittal, in so far as they are charged with misconduct or omission of duty in connection with the collision.

There are some other points presented in the instructions asked for, which will be noticed by the court in the consideration of the evidence, as applicable to the indictment. To this evidence, I propose very briefly to direct the attention of the jury.

It will be proper to remark here, that the case presents itself in two aspects; first, in reference to the allegations of misconduct and negligence, producing the collision; and, second, in reference to the allegations of misconduct and negligence, in not taking prompt measures for the safety of the passengers after the collision. The second and fifth counts are those principally relied on by the prosecution; and the views which I propose to present, will be confined to these.

The second count charges substantially, that the defendants, in their several capacities, were guilty of misconduct and neglect, in not keeping a proper lookout, and in not using the proper efforts to steer and navigate the boat, whereby she came in collision with the schooner John Porter, and the lives of the persons named were destroyed by drowning. As the testimony clearly shows, the captain and first mate were not on duty for some time before, and when the collision took place, they can not be held answerable for it; and, under the second count, the inquiries of the jury will be confined to the conduct of the second mate, who was then the officer on deck. Did the second mate, Demond, fail in his duty, in not keeping a proper lookout, as the officer on deck? Captains Kelsey, Shook, Perkins, and Stannard, experienced and skillful navigators on the Lakes, have been sworn as experts in this case. They concur in stating that the officer on deck is for the time being, the sailing-master, and charged with the general supervision of the boat; that it is his duty to be on the lookout for lights, obstructions, etc.; to give orders, when necessary, to the wheelsman and to the engineer, and that in general his proper place is on the deck, though it is his duty to be in other parts of the boat, where his presence may be required; and these witnesses also state, that it is proper and usual for the mate, when leaving the deck, except it be for a very short period, to give notice to the wheelsman of his intention, and request him to keep a lookout during his absence. It is also stated, by all the experts except one, that it is the duty of the wheelsman, not only to steer, but to keep a lookout for lights, etc., and that his position for this purpose is the most favorable one on the boat. The witness Kirby, who was at the wheel, when the collision took place, says the defendant, Demond, was on deck very shortly before it happened, and had just left the wheel-house, as the boat struck the schooner. He saw Demond run to the bell and ring to stop the engine, and immediately after, the collision took place. There is no evidence that Demond gave any orders to the wheelsman; nor does it appear he saw the schooner, till at the very moment of the collision. The witness Seymour states, that he was at the wheelhouse for some time before the collision happened; that Demond was on the deck, walking back and forth, and, part of the time, sitting with witness in conversation with him. Witness retired to his berth, and had hardly got to his room, till he heard two bells in quick succession, one to stop the engine, and one to back off. He also says, that while on deck he saw no lights, but those of the lighthouse at Conneaut, and of the steamboat Constellation.

This is all the material testimony as to this point; and from this, the jury will decide whether Demond was guilty of negligence or omission in not having discovered the schooner in time to avoid the collision. The jury will also inquire, under the second count, whether Demond, as the sailing master of the

boat, failed in duty, in not giving proper orders to the wheelsman, as to the course and direction of the boat. And in this inquiry, it will be proper for the jury to bear in mind, that if the wheelsman was steering the boat correctly, no order was required from the sailing master, and he cannot, therefore, be in fault for not giving an order. It seems, from the testimony of all the experts, that the steamboat, at the time she struck the schooner, was in the track usually followed by boats, going up the lake, which at that place is about six miles off shore. Kirby, the wheelsman, says he saw the schooner's light flash up for a moment; saw the light over the left bow of the boat, about one mile distant, witness steering at the time W. S. W. He then put the boat one point further out into the lake—in a few minutes saw the schooner very near; put the helm hard a-port, and immediately the boat struck the schooner. Witness says, after he saw the light of the schooner, it disappeared, and he saw it no more—supposed it was hid by the sails. Capt. Thomas, the master of the schooner, states, that he first saw the steamer's lights six or seven miles ahead, he steering at that time N. E. by E. He then put his vessel one point further out into the lake, and kept her steadily on that course. This witness says, it is the usage for sailing vessels, descending the lake at that point, to keep in shore from the steamboat track; but he thought he was rather too near the land, and therefore gave the order to put the schooner further out. He also testifies that there was a light at the end of the jib of the schooner, and also that just before the collision, he took the light out of the binnacle, held it up and hailed the steamboat. Although several witnesses state there was no light on the schooner at the time the collision happened, the weight of evidence proves there was a light.

In coming to a conclusion as to who was in fault in this collision, it will be important for the jury to attend specially to the testimony concerning the relative position and course of the schooner and the steamboat just before and at the time they came together. For, if, as before stated, the accident occurred through the improper navigation, and wrong course of the schooner, the sailing master of the steamer can not be held accountable. The captains already named, testifying as experts, agree in the opinion, that the schooner steering N. E. by E., and the steamer W. S. W., being six miles apart, the schooner must have been considerably in shore from the line of the steamer's course, and that it was the duty of the schooner to have kept inside of that line, hugging the shore. And these witnesses say, if she had pursued that course, a collision would have been impossible, without a change of the steamer's direction. Kirby says, he first saw the schooner's light over the left bow of the steamer, and if so, the schooner was then in shore from the line of the steamer's direction. It is proved by the experts, to be the general usage in the navigation of the lakes, that when a sailing vessel and a steamboat are approaching in opposite directions, it is the duty of the former to pursue her course steadily; and, if necessary, the steamboat is expected to diverge from her previous direction. Capt. Shook, and perhaps some of the other professional navigators, say, Kirby, the wheelsman of the Chesapeake, was right, under the circumstances, in first putting the boat one point out into the lake, and when very near the schooner, putting the helm hard a-port, the effect of which was to give her a still more northerly direction.

If the jury, upon full consideration of the evidence, shall come to the conclusion that the schooner, through mistake, or unskillfulness of her sailing master, was proceeding across the line of the steamer's proper course, and that therefore the collision was unavoidable, the defendant, Demond, can not be held responsible for the consequences. Upon this supposition, there is no ground for the conclusion, that the accident was the result of neglect, or inattention on his part. If, however, the jury are satisfied, the collision is attributable to his delinquency in duty, in not keeping a vigilant lookout, and in not properly navigating the boat, as charged in the second count, it will then be their duty to inquire further, whether, as the result of the collision, the lives of the individuals named in the indictment were lost by drowning. There is no room to doubt, from the evidence, that the lives of those persons were destroyed by drowning. But, it is insisted, and the court is requested so to instruct the jury, that if the loss of their lives was not a necessary result of the collision, the allegation in the indictment, as to the means by which they came to their deaths, is not sustained, and, consequently, that there can not be a verdict of guilty on this count, or, indeed, any of the counts in the indictment.

The evidence is not satisfactory to prove, that any lives were lost, except those of persons, who left the boat, on floats or rafts. And it is proved, beyond all doubt, that the captain, and probably some other officers of the Chesapeake, notified the passengers that they would be safe by getting on the hurricane deck; and it is also clearly proved, that all who sought this place of safety were preserved. Whether the persons who unfortunately resorted to other means to save themselves, were apprized of the security afforded by the hurricane deck, is not known. If, being made acquainted with the fact, or if, by reasonable vigilance, they could have acquired this information, the persons whose lives were destroyed, under the influence of excessive alarm, unnecessarily and indiscreetly left the boat, preferring to run the hazard of launching into the lake, on floats or rafts, and as a consequence, were drowned, the destruction of

their lives is not so connected with, and a necessary result of the steamboat disaster, as to make the defendants answerable for their loss. On the other hand, if these persons, under the pressure of the circumstances in which they were placed, conducted with ordinary prudence and discretion, then the allegation in the indictment, as to the means by which they came to their deaths, is sustained.

The court will now call the attention of the jury to the fifth, or last count of the indictment. This count charges the defendant with a failure in duty, after the collision, in the following particulars: (1) In not causing an immediate examination to ascertain the nature and extent of the injury to the boat. (2) In neglecting to close the ash-holes. (3) In neglecting to run the boat ashore at the nearest and most convenient point, without delay.

I will not detain the jury by a re-statement of the evidence of each witness on these points; but will present a summary of the material facts proved, in relation to each of them. First, as to the allegation of improper delay in the examination of the injury to the boat. The degree of promptitude required of the officers of the boat, in making this examination, must depend in some degree on the character of the shock produced by the collision. If it was severe, and of a nature which should have induced the apprehension in the mind of an experienced and skillful navigator that the boat was seriously injured, the officers should be held to greater promptitude and vigilance in the examination of the injury, than under the opposite state of facts. It appears, that to some of the witnesses, the shock from the collision seemed slight, and produced no apprehension of serious injury to the boat; while others thought it severe, and such as necessarily to jeopard the safety of the persons on board. The defendant, Capt. Warner, had retired to his room for the night, but was roused by the shock of the collision; and some of the witnesses say, they saw him very soon after the collision, leaving his room without coat, hat or boots, and going to the forward part of the boat. These witnesses state, that no more time elapsed between the shock of the collision and the appearance of Capt. Warner on the deck, than was necessary to enable him partially to dress himself. The witness, Lytle, states, that he had not gone to his berth when the collision took place, but was near the saloon below the promenade deck. He was alarmed by hearing the engineer's bell ring in a very quick and hurried manner; and immediately the collision occurred; the schooner and the boat stuck together for a very short time, when the boat backed off, and they separated. This witness immediately lowered a light over the bow of the boat, and discovered a hole, in the left side of the bow, through which the water was coming in. He went at once on deck, where he met the captain, and reported to him the result of his examination. The captain then ordered the second mate to make a thorough examination, and very soon the order was given to put the boat ashore. The witnesses, Hubbard, Kimball, and Dwight, agree in stating there was an examination, but can not state the precise time which elapsed from the collision till the examination was made. The last named witness says, he does not know that the captain could have done more than he did do. The witness, Howk, thinks about twelve minutes passed from the time of the collision, till it was discovered the boat was leaking.

As to the averment of neglect, in not stopping the ash-hole, the jury will have no difficulty in the conclusion that it is not sustained. This hole, it would seem, opens on the outside of the boat about six inches below the timbers of the main deck. Capt. Shook and others testify, that when the boat had so far sunk as to take in water at this hole, it would be impossible to prevent her from going down, and that the only effect of closing it, would be to retard the sinking for a short time.

I now call the attention of the jury to the third specification of the fifth count, namely, neglect in not running the boat ashore at the nearest and most convenient point without delay. It was clearly the duty of the captain, as the best mode of securing the lives of the passengers, as soon as it was ascertained there was danger the boat would go down, to run her ashore, with as little delay as circumstances would allow. In the adoption of this course, the law will hold him to reasonable promptitude. And if, from indecision or gross neglect of duty, he omitted to give the proper order in time, and as a consequence, the lives of passengers were lost, he is responsible for that result. It is therefore an important inquiry, whether there was unreasonable delay in giving the order to run ashore. There is some variation in the statements of the witnesses, as to the time that elapsed between the collision and the giving of this order. Howk says, this time was between twenty-five and thirty minutes; Kimball thinks, that about twenty minutes after the boat struck, he heard the captain say, he was about to run the boat ashore; Dwight says, that in about fifteen minutes after the collision, the boat was under headway for the land; Hubbard thinks, from twenty to thirty minutes elapsed; Stern states the time at from ten to fifteen minutes; Mrs. Bradbury thinks it was twenty minutes; Church says, he was on deck within fifteen minutes after the boat struck, and she was headed for shore; Mr. McIlvane says it was twenty minutes after the collision, before he heard there was a leak; Seymour gives it as his opinion, the time did not exceed eight or nine minutes; and Lytle says, the schooner sunk in ten minutes after

the collision, and that the boat started for shore immediately after. Capt. Thomas says, the schooner went down in ten minutes, and he supposes the boat started for shore as soon as it could be done. It is in evidence that after the discovery of the leak, an attempt was made to stop it, by forcing mattrasses and bed clothing into the hole, from the inside of the boat, and also to check the inflow of water by passing a sail over the bow; but both attempts were unsuccessful. It also appears, that strenuous efforts were made to keep the boat afloat, by putting the pumps to work, and by bailing, but without avail. And it is also proved that after the order was given to head the boat for the shore, every possible effort was made to increase her speed, by making all the steam that could be made, and that the firemen and engineers remained at their posts, doing their duty, till the fires were put out by the water, and the engine stopped.

There seems to be no doubt, from the opinion of the experts, that the captain was right in directing the boat for the pier at Conneaut, although that was not the nearest point of land in a direct line from the boat. The experts also concur in the opinion that the defendant, Warner, was in the strict line of his duty, as a humane seaman, in providing for the safety of the crew of the sinking schooner, by transferring them to his boat. And, in so far as any delay occurred from his attention to this duty, he is not liable to censure. Upon the whole, the jury will judge, taking all the circumstances into view, whether Capt. Warner conducted with reasonable promptitude in giving the order to run the boat ashore.

Without any further comments on the evidence, the case is now committed to the jury. If satisfied, from the proof, the defendants are guilty of "negligence, misconduct, or inattention," and that human life has been lost thereby, it will be the duty of the jury to return a verdict of guilty. And here it may be proper to remark, that it is not claimed—nor does the evidence afford the slightest ground for such an assumption—that the defendants, or any of them, were actuated by any malicious purpose, as connected with this unfortunate disaster. And, in some respects, it is clearly proved, they were active and prompt in attending to their duties after the collision took place, and that their conduct was highly meritorious. It is also proper that I should remark, that the defendants are entitled to the full benefit of the evidence which they have adduced, proving their general good professional characters. And in reference to allegations of negligence or misconduct, concerning which the jury may be in doubt as to weight of the testimony, the fair professional reputations of the defendants, may properly have such weight as to turn the scale in their favor.

Verdict of acquittal.

Case No. 16,644.

UNITED STATES v. WARR.

[3 N. Y. Leg. Obs. 346.]

District Court, S. D. New York. 1845.

EXTRADITION—TREATIES—EVIDENCE.

What evidence is necessary to justify the delivery up of a prisoner charged with having forged an acceptance in England, under the provisions of the treaty between the United States and Great Britain of the 9th of August, 1842, commonly called the Ashburton treaty [8 Stat. 572].

The prisoner [Henry Warr] was arrested under section 10 of the treaty between the United States and Great Britain concluded at Washington August 9, 1842. That section is in these words: "It is agreed that the United States and her Britannic majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice, all persons who being charged with the crime of murder, of piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: provided, that this shall only be done upon such evidence of criminality, as according to the laws of the place where the fugitive, or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath to issue a warrant for the apprehension of the fugitive or person so charged that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing the evidence be denied sufficient to sustain the charge, it shall be the duty of the examining judge, or magistrate, to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive." The warrant by virtue of which the arrest took place had been issued by United States Commissioner Morton upon the affidavit of Samuel R. Champ that Henry Warr had fled secretly from Bridgeport, in the county of Dorset, England, where he was postmaster, and carried on a large business as master currier for a number of years, and copies of affidavits showing a probability that he had forged an acceptance of one Richard Kerslake for £28 10s., and produced the same to be cashed by Messrs. Eustace, Grundey & Co., bankers, at Bridgeport. In the latter part of May, the prisoner was brought before the commissioner, when Samuel R. Champ was sworn, and testified that he was attached to the Bridgeport police in Dorset, England, and had known the prisoner sixteen years; that he was post-

master and master currier at Bridgeport; that he there left secretly on April 14th or 15th last; that he had come to this country in the packet ship George Washington; that the witness came over in the Britannia steamer, which arrived here before the George Washington; that he knew the mayor of Bridgeport, Samuel Bennett, "and I was present, and saw the depositions of John Kerslake, John Hodder, and William Hounsall taken by him, and had heard those persons depose to what is stated in the copies of those depositions produced"; that he had compared these copies with the originals, which were made at the time the originals were taken; and he saw the mayor certify such copies under his seal, when they were immediately delivered to him, together with a warrant for Warr issued by Bennett, as justice of peace. Neither the day nor month when the originals were taken was stated in the jurat, and the copies were certified to be true under the hand and seal of "Samuel Bennett, Mayor."

The counsel for the Messrs. Grundey then offered in evidence the warrant issued by Bennett, and copies of the affidavits of Kerslake, Hodder, and Hounsall, alluded to in the testimony of Champ.

L. B. Shepard appeared on behalf of the prisoner, and urged the following objections to their being read in evidence:

(1) They are not verified by oath, and therefore cannot be received in evidence against the prisoner. First. The treaty requires such evidence of criminality as, according to the laws of the place when the fugitive or person charged shall be found, would justify his apprehension and commitment for trial if the offence had been there committed. Second. The prisoner is found in the United States, in the state of New York, and the constitution of the former and the bill of rights of the latter provide that no warrant "to seize the person" shall issue, but upon probable cause supported by oath or affirmation. Const. Amend. U. S. 1; Rev. St. (2d Ed.) p. 84, § 11.

(2) This provision is to be closely interpreted. And so it was held in Pennsylvania (Conner v. Com., 3 Bin. 38) that a warrant of arrest in a criminal case, issued upon common rumor and report of the party's guilt, though it recite that there is danger of his escape before witnesses could be summoned to enable the magistrate to issue it upon oath, was illegal and void on the face of it, and that an officer was not liable for refusing to execute it. And in Vermont, in State v. J. H., 1 Tyler, 444, it was held that a warrant to arrest a person charged with a crime upon the complaint of a private informer could not legally issue without the oath of the complainant. Both these decisions were made under constitutional provisions precisely like that contained in the constitution of the United States and the bill of rights of this state. These provisions can only be satisfied by the oath or affirmation of the complainant, taken before some officer of the government that issues the warrant, because otherwise no indictment for perjury will lie against the complainant if his affidavit be wilfully false in the tribunals of such government, and in this case a person arrested would be deprived of his liberty by our laws while he was under their protection, through the act of one who was in no respect amenable to them. There may be some civil cases that seem to go on the converse of this rule, such as Turnbull v. Moreton, 1 Chit. 721, and Ellis v. Sinclair, 3 Younge & J. 273; but the distinction between those cases and this is that in the former the court before which the affidavit, taken in a foreign country, was used had control of the cause, and were to keep it for all the purposes of substantial justice, while these copies can only be used to divest this tribunal altogether of such control, and place one who is entitled to it beyond the protection of our laws. The originals were not taken before a proper officer. The laws of New York (the place where the prisoner is found) provide that, "in cases when by law the affidavit of any person residing in any foreign country is required, or may be received, in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows: First. It must be certified by some judge of a court having a seal to have been subscribed and taken before him, specifying the time and place when taken. Second. The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court under the seal thereof. 2 Rev. St. (2d Ed.) p. 307, § 33." No such authentication is made in this case. Therefore, the originals of these affidavits cannot be read, and, a fortiori, the copies could not. A mayor has not a right, by the mere virtue of that office, to administer oaths. Judicial notice cannot be taken by our courts that the mayor of Bridgeport is, ex officio, a justice of peace, and the presumption is the other way, for his office is the same as that of president of an incorporated village with us. See, also, 2 Rev. St. (2d Ed.) p. 213, § 50, as to who may administer oaths.

(3) The originals could not be read here. They do not set forth the day when they were sworn to in the jurat, and this is necessary. Doe v. Roe, 1 Chit. 228. See, also, Wood v. Stephens, 3 Moore, 236, and Anon., 1 Chit. 562n.

(4) The article of the treaty under consideration requires "complaint under oath" before the magistrate can issue warrant for the arrest. This clearly refers to an oath taken before the magistrate himself, for the words "under oath" only define the kind of complaint that is requisite. The power to issue a warrant upon the complaint, that implies that it shall contain matter enough for this purpose, under oath before the magistrate. It cannot be possible that the "evidence of criminality" contemplated by the treaty can be less than that required as a basis for the warrant.

(5) Duplicates of the original affidavits would have been better evidence than the certified copies produced.

L. R. Marsh and O. W. Sturtevant, for the British Government.

The warrant issued by Bennett as justice of peace shows his official character. Besides, it is certified upon that process. As justice of peace, he filed the original affidavits upon which the warrant was issued, and they are original records, that cannot be removed. A sworn copy of such a record is undoubtedly evidence, and that is what is offered here.

B. F. Butler, for the United States.

It never could have been in contemplation of the treaty-making power that the living witnesses should be brought into this country. The original affidavits are judicial proceedings that cannot be removed. Sworn copies are sufficient.

MORTON, Commissioner. A complaint under oath having been made before me that one Harry Warr, a British subject, had committed the crime of forging an acceptance to a bill of exchange in England, and had fled from justice, and was on his way, or was in New York, a warrant was granted for his apprehension, and thereupon he was brought before me, to the end that the evidence of his criminality might be heard and considered. Which having been done, the same is deemed sufficient to sustain the charge, and, according to the laws in force in the district and city of New York, the said evidence is judged sufficient to justify the aprehension and commitment of said Harry Warr for trial. Which is hereby certified to his excellency, the president of the United States, in pursuance of the 10th article of the treaty signed at Washington, the 9th day of August, 1842. The phraseology of the 10th article of the treaty in question, which bears directly upon the duty and power of the examining magistrate, is but a reiteration of the statute of New York conferring analogous power upon the state executive (1 Rev. St., 2d Ed., p. 149, pt. 1, c. 8, § 10), and was obviously intended to provide for a qualified and limited co-operation with the foreign government in placing fugitive criminals within the operation of the laws which they had violated, and from which they had fled, at the same time avoiding, while so doing, a compromise of the spirit of our institutions, and of the penal legislation of the United States and of the states; the substance of the provision being that if, under the evidence and circumstances, the accused person would be committed for trial if perpetrating the offence here, the same result shall, in effect, take place by handing him over to the authorities of the government whose laws have been violated. The inquiry, therefore, for the examining officer to make is whether the evidence, &c., would justify the commitment of the accused for trial here, if charged with its commission in New York. The offence of forging an acceptance to a bill of exchange, with which the prisoner is charged, would, under the statutes of New York, constitute the offence of forgery in the first degree, and be punishable by imprisonment in the state prison. 2 Rev. St. (2d Ed.) p. 561, pt. 4, art. 3, § 30.

The examination and commitment of persons charged with offences of this character is provided for by the laws of New York (2 Rev. St. p. 690, c. 11, §§ 12, 140), and would be complied with, to all intents and purposes, under the treaty for the commitment of a foreign fugitive for trial by the testimony of one competent and credible witness, or by the voluntary statement of the prisoner, and from which the magistrate should conclude that the offence had been committed, and probable cause to believe the prisoner to have been guilty thereof.

An officer who came out with a warrant to arrest the prisoner testifies that he had known the accused for fifteen years, and up to the time of his sudden disappearance from the place where the crime was committed; that witness saw the original of a bill, a true copy of which is produced, the existence of the original being voluntarily admitted by the prisoner, who is attended by counsel; that he knew the person who purports to have been the acceptor of the said bill, who declared, under examination on oath, in witness' presence, that the same was a forgery, and that the acceptance was not in his handwriting, or had he ever authorized any person to sign his name to the said acceptance; that witness knew the handwriting of the said prisoner, and believed, upon inspecting said bill, that the acceptance was a forgery; that the prisoner left, &c. very secretly; that a warrant for his arrest was granted by a magistrate uniting in himself the character of mayor and justice of the peace, and duly authorized to administer oaths; that, the original warrant being produced, the prisoner voluntarily states that the acceptance in question was not made by the party referred to, but he says it was written by a person having authority to sign the acceptor's name; that it was in his (the prisoner's) possession, and by him was presented, so accepted, &c. Under 2 Rev. St. p. 592, § 21, this would constitute evidence from which the conclusion may certainly be drawn: (1) That an offence had been committed; (2) that there is probable cause for believing that the prisoner is guilty. The existence of the bill, an acceptance forged, and the prisoner's connection therewith, appears in a shape as to evidence that would entitle it to be heard upon a trial.

Certified copies of various affidavits were also offered in corroboration of probable cause, but in my judgment these cannot be received as positive evidence under the laws of this place, nor could they in England, according to the rules of the common law. A statute of the United States, indicating this as a mode

for carrying out in detail the objects of the 10th article of the treaty, would render them fully inadmissible.

Case No. 16,645.

UNITED STATES v. WARY.

[1 Cranch, C. C. 312.] [1]

Circuit Court, District of Columbia. June Term, 1806.

SECONDARY EVIDENCE.

Parol evidence of the contents of a warrant cannot be given, unless the loss of the warrant be proved.

[Cited in U. S. v. Long, Case No. 15,625.]

Indictment [against William Wary] for resisting Clement Venable in the execution of his duty as a constable, in serving a warrant from Samuel N. Smallwood, a justice of the peace. The justice swore that he had searched the papers among which it was probable that the warrant would be filed, but if he had had more time to search he thought it probable it could be found.

THE COURT thought this not sufficient to admit parol evidence of its contents, and refused to wait while the witness should make further search, it being Saturday, half past two o'clock p. m., and the witness' office being more than a mile distant.

Verdict, not guilty.

Case No. 16,646.

UNITED STATES v. WASHINGTON.

[2 Cranch, C. C. 174.] [1]

Circuit Court, District of Columbia. June Term, 1819.

MANDAMUS TO MUNICIPAL CORPORATION.

1. A writ of mandamus is the proper process to compel the corporation of Washington to pay to the county treasurer one half of the expense of erecting a bridge over Rock creek, according to the 11th section of the act of congress of the 1st of July, 1812 [2 Stat. 773].

2. The levy court is authorized by the act to ascertain, conclusively, the sum required for the rebuilding of the bridge.

The treasurer of Washington county, by his petition, prayed the court to issue a writ of mandamus to compel the mayor, aldermen, and common council of the city of Washington to pay over to the treasurer of the county of Washington one half of the expense of rebuilding a bridge over Rock creek. By the act of congress of the 1st of July, 1812, § 12 (2 Stat. 773), it is enacted "that the two bridges over Rock creek, immediately between the city of Washington and Georgetown, shall be kept in repair, and rebuilt in like manner as at present, at the joint expense and cost of the said city and Georgetown; and the sums required for such repairs or rebuildings shall, from time to time, be ascertained by the said board of commissioners or levy court, for the county; and the amount required from each corporation shall be paid over, after sixty days' notice, to the treasurer of the county." The levy court had ascertained the sum required for the rebuilding of the bridge, and given notice to the corporation of Washington. This court thereupon granted a rule on the corporation to show cause why a writ of mandamus should not issue to compel them to pay one half of the amount thus ascertained.

The corporation of Washington appeared by Mr. Law and Mr. Caldwell, and contended that the rule should not be made absolute: (1) Because a mandamus is not the proper remedy in this case for the recovery of whatever claim the levy court might have, but that they ought to proceed by action at law. (2) That the court had no power to issue the writ of mandamus, because it was not necessary to the exercise of its jurisdiction. McIntire v. Wood, 7 Cranch [11 U. S.] 504. (3) That the bridge was not rebuilt in like manner as it originally stood, was much enlarged, and built in a much more expensive manner.

THE COURT (nem. con.) declined hearing the counsel on the other side upon the question whether the writ of mandamus was the proper remedy, being clearly of opinion that it was, and that the levy court had authority, under the act of congress, to ascertain the cost; and requested the counsel for the mandamus to show that the proceedings of the levy court were conformable to the act of congress.

THE COURT said that, if the case was ready for a peremptory mandamus (it being understood that the counsel on both sides had agreed that the case should now be considered as if it were heard upon a return of a mandamus nisi), a peremptory mandamus should issue. The matter was afterwards settled between the parties.

I cannot find that this case was ever entered upon the records or the minutes of the court; the petition for the mandamus, the answer to the rule to show cause, and a note of the opinion of the court are among the papers in No. 45, petition docket of June, 1819.

Case No. 16,647.

UNITED STATES v. WASHINGTON MILLS.

[2 Cliff. 601; [1] 6 Int. Rev. Rec. 146.]

Circuit Court, D. Massachusetts. Sept. 24, 1867.

INTERNAL REVENUE—ASSESSMENT ON YARN.

The defendants were manufacturers of woollen goods. They bought wool, spun it into yarn, and then wove the yarn into fabrics for clothing. This yarn was not known in the

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

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

market as an article of trade, as manufacturers of the particular fabrics spun it themselves. An internal-revenue tax of five per cent upon the full value of the manufactured fabrics had been assessed and paid; and subsequently a reassessment of five per cent on the value of the yarn, from which the fabrics were manufactured, had been made, and assumpsit was brought to recover the same. Assessment was made under the act of June 30, 1864 [13 Stat. 269], and before the passage of the act of March 3, 1865 [Id. 477]. *Held*, that the yarn was a separate and independent manufacture, and was properly subject to the assessment of five per cent.

This was an action of assumpsit for the recovery of $276.95 alleged to be due from the defendants, as taxes on manufactures under the internal-revenue act of June 30, 1864, and the case was submitted upon an agreed statement of fact. The defendants were the manufacturers of woollen goods. They bought wool, spun it into yarn, dyed or bleached the yarn, and then wove it into fabrics, such as shawls and webs for Balmoral skirts. Webs for shawls were manufactured of the proper width for shawls, and were intended for that use, and were not fit for or used for any other purposes. They were woven in patterns with fringes made in the weaving, and which were twisted by machinery. When the web was woven and the shawls cut apart they were ready for wear, and in that condition they were sold by the defendants, and worn by men, women, and children. Yarn such as that from which these shawls and skirts were made was not known in the market as an article of trade, as all manufacturers of such fabrics were accustomed to spin and weave it themselves. The statement showed that a tax of five per centum had been assessed upon the full value of the skirts and shawls, and that the defendants had paid the amount of the tax. The tax in this case was a reassessment of those fabrics, made by the assessor of the internal revenue, adding a tax of five per centum upon the value of the yarn from which they had been woven. The parties agreed that the tax was assessed in the form prescribed by law; that the assessment was duly transmitted to the collector for collection; and that he duly demanded the tax from the defendants. It was also agreed that the taxes sought to be recovered were assessed and forwarded for collection under the act of June 30, 1864, and before the act of March 3, 1865 went into effect. The increased value of the shawls over that of the yarn from which they were woven, was more than five per centum ad valorem. Yarns of certain kinds are found in the market as commodities for sale, but yarn such as that from which these were made was not known in the market as an article of trade, all manufacturers of shawls spinning their own yarn and weaving it themselves into shawls. It was claimed by the plaintiffs that the yarn and shawls made by the defendants in the manner already described were each to be considered under the internal-revenue laws as a separate and independent manufacture; and that there should be assessed and collected one tax upon the full value of the yarn spun by the defendants, and a second tax upon the full value of the shawls made by them of this yarn, which they spun, without any allowance or deduction in fixing the tax on the shawls, for the yarn from which they were woven, and on which the defendants had already paid a tax. The defendants contended that they should pay either one tax on the shawls for their entire value, and no tax on the yarn; or that, if they paid a tax on the yarn spun by them, then the tax on the shawls woven from the yarn should be only on the increased value of the shawls over that of the yarn from which they were made. It was admitted that the result of either of these modes of taxation contended for by the defendants was the same; that is, that a single tax upon the shawls for their full value was exactly equal in amount to one tax upon the yarn, and a second tax upon the shawls for their increased value over that of the yarn from which they are woven. It was also admitted that the defendants had paid this amount in full. If, therefore, the tax on the shawls should be assessed in either of these modes, then judgment is to be entered for the defendants. If, however, the defendants were subject to the tax as reassessed, that is to say, to a tax, first, on the whole value of their yarn, as one manufacture, and again on the entire value of the shawls made by them from the yarn, as a separate and independent manufacture, without any allowance in assessing the tax on the shawls, on account of the previous tax paid by the defendants on the yarn from which they are woven, and were obliged to pay the tax as reassessed by the assessor, as stated above, then judgment was to be for the plaintiffs for said amount of $$276.95, with interest from the date of the writ.

W. A. Field, Asst. U. S. Dist. Atty.

T. K. Lothrop and R. R. Bishop, for defendants.

CLIFFORD, Circuit Justice. The theory of the plaintiffs is, that the yarn is to be considered as a separate and independent manufacture, that a tax of five per centum should be assessed upon the full value of the yarn, and a second tax of the same rate upon the full value of the shawls and skirts, without any reduction or allowance for the tax on the yarn. The defendants deny that proposition and contend, first, that they should pay no tax on the yarn, as they have already paid a tax upon the full value of the woven articles; second, that if they are held to pay a tax on the yarn, then the tax on the fabrics should only be for their increased value over the yarn from which they were made. Articles of dress for the wear of men, women, or children are, by the nine-

ty-fourth section of the act of June 30, 1864, declared to be subject to a tax of five per centum ad valorem. 13 Stat. 269. Mention need not be made of the proviso appended to that clause, as no question arises under it in this case, nor does it affect in any manner any question involved in the record. The only other clause of the section which needs to be particularly noticed is the one which also imposes a duty of five per centum ad valorem on all manufactures of wool in connection with many other manufactured articles, as therein mentioned and enumerated. Id. 270. The second proviso annexed to the clause last cited provides "that any cloth or fabrics as aforesaid, when made of thread, yarn, or warps, upon which a duty as aforesaid shall have been assessed and paid, shall be assessed and pay a duty on the increased value only thereof." Grant that the liability to taxation in this case arose under the second clause cited, then it is clear that the second proposition of the defendants is correct. Cloths or fabrics made of yarn upon which a duty of five per cent ad valorem had been assessed and paid were only liable to a like rate of duty upon their increased value over the yarn from which they were made. But the webs of shawls and skirts manufactured and sold by the defendants, as described in the agreed statement, were properly taxable under the clause first cited, and were actually taxed as articles of dress for the wear of men, women, and children, and that clause contains no words authorizing any such qualification as that contained in the second proviso annexed to the second clause. The absence of qualifying words, however, is not the only difficulty which the defendants have to encounter in their endeavor to maintain their second proposition, that if the yarn is taxed the taxation of the shawls and skirts should be restricted to their increased value, because the express provision of the same section is, that thread and yarn and warps for weaving shall be regarded as manufactures, and shall be subject to a duty of five per cent ad valorem. Thread and yarn for weaving, therefore, as well as articles of dress for the wear of men, women, and children, are subject to taxation under the provisions of that section. Experience has shown that it is not safe, in framing revenue acts, to rely entirely upon any specific enumeration of the articles to be taxed. Such enumeration it is conceded is highly expedient to the extent that it is practicable. Where a general system of taxation is intended, congress finds it necessary to add to such enumeration some general word or phrase to guard against omissions not intended, and vexatious inequalities. Words and phrases, such as wearing apparel, clothing, ready-made clothing, and articles of dress, may be found in most of the tariff acts passed within the last twenty years. Congress in adopting such terms undoubtedly intended to depart from the commercial designation as the test to determine the description within which the duty should or should not be charged, and to leave such determination to the test of the actual use of the article. Maillard v. Lawrence [Case No. 8,971]. Shawls, as manufactured by the defendants, were ready for wear when they were sold by them, and the Balmoral skirts, as the agreed statement shows, were woven in patterns with stripes for borders, and that the skirt webs were intended for that use, and were "not fit and not used for any other purpose." They were woven in patterns, cut apart and sold by the defendants, and when so sold it is not doubted that they were properly regarded by the assessor as an article of dress for the wear of women and children, within the meaning of the clause in the revenue act under consideration. Maillard v. Lawrence, 16 How. [57 U. S.] 260.

The second general proposition advanced by the defendants is, that yarn such as that manufactured by the defendants was not subject to taxation under the revenue acts in force at the time the taxes in this case were assessed. The principal reason assigned in support of the proposition is, that yarn such as that from which these shawls and skirts were made is not known in the market as an article of trade. But the agreed statement shows that the defendants buy wool, spin it into yarn, dye or bleach the yarn, and then weave it into webs for shawls and webs for Balmoral skirts; and the act of congress expressly provides that thread and yarn and warps for weaving shall be regarded as manufactures and be subject to a duty of five per centum ad valorem. The construction of the clause assumed by the defendants interpolates an exception not to be found in the provision. They agree that yarn for weaving, except such as is not known in the market as an article for trade, is declared to be a manufacture, and is subject to duty under that clause; but the clause contains no such exception, and the court possesses no power to allow it. Reference is made to the fact that yarns manufactured exclusively for weaving under the act of the 1st of July, 1862, were not regarded as manufactures subject to duty, but the answer to that suggestion is that the law was changed by the subsequent revenue act. 12 Stat. 460–465; 13 Stat. 266.

Another suggestion is, that the amendment in the act of the 3d of March, 1865, is simply declaratory of the true construction of the clause in question, and that the court should regard the last-named provision as the true exposition of the one found in the prior act of congress. 13 Stat. 477. The purport of the amendments is, that thread and yarn and warps sold before weaving are still regarded as manufactures, but if the thread, yarn, or warp has paid the duty, the cloth, fabric, or article made of such thread,

yarn, or warp shall be assessed only on the increased value. Such undoubtedly is the legal effect of the new provision, but it is not perceived that there is any ground whatever to suppose that the amendments were intended as an exposition of the prior law beyond what is true in every case where the new enactment substitutes a more lenient provision for one which was more stringent. The legal effect of the amendment is to repeal the clause in question and to substitute another in its place, approaching more nearly to the views of the defendants. Taxable manufactures are such as are declared to be subject to taxation by an act of congress, and it is immaterial whether such an article is known in the market as an article of trade or not, if it is a manufactured article, and is so declared to be subject to taxation, the courts must execute the law, and cannot ingraft upon it any exception not authorized by the terms of the enactment.

Objection is also made to the right of the plaintiffs to recover in this case, because it is insisted that the remedy by distraint, as given in the act of congress, is the exclusive remedy in the case. 13 Stat. 258, 259; Andover & M. Turnpike Corp. v. Gould, 6 Mass. 44; Bangor House Proprietary v. Hinckley, 3 Fairf. 388; Moncrief v. Ely, 19 Wend. 405.

Extended argument upon this subject, however, is unnecessary, as the question is regarded as settled by the decisions of the supreme court. The same objection was made in the case of Meredith v. U. S., 13 Pet. [38 U. S.] 493, which was a suit for duties on imports. Duties due upon all goods imported, say the court in that case, constitute a personal debt due to the United States from the importer, independently of any lien on the goods or any bond given for the duties. U. S. v. Lyman [Case No. 15,647].

Assumpsit for taxes imposed under the acts of congress providing for internal revenue is also the proper form of action. U. S. v. Cutting, 3 Wall. [70 U. S.] 441; U. S. v. Fiske, 3 Wall. [70 U. S.] 445.

Judgment under the agreement of the parties must be entered in favor of the plaintiffs for the sum of $2,804.45, with interest from the date of the writ.

Case No. 16,648.

UNITED STATES v. WATERBOROUGH.

[2 Ware (Dav. 154) 158.] [1]

District Court, D. Maine. Sept. Term, 1841.

PENSION MONEY — FOLLOWING TRUST MONEYS — IDENTITY OF FUND.

1. A fraudulently obtained a pension from the United States, and B received the money as the agent of A, and retained $200 as a compensation for aiding in obtaining the pension. The town of Waterborough having a claim against A, the pensioner, for support as a pauper, commenced an action against him to recover it, and summoned B as garnishee, the town having notice of the fraud in obtaining the certificate. The suit was compromised by the payment of a certain sum. *Held*, that the United States might recover of the town the amount they received in an action for money had and received.

2. When property is transferred, which is subject to a lien, or is affected with a trust, with notice, the lien, or trust, follows it into the hands of the assignee, and remains attached to it as long as the identity of the thing continues.

[Cited in School Trustees v. Kirwin, 25 Ill. 65; Union Nat. Bank v. Goetz, 138 Ill. 136, 27 N. E. 909.]

3. The identity of a sum of money, or a debt due, does not exist in the pieces of coin, but in the fund. If it is affected by a trust, it may be followed as long as the identity of the fund can be traced, and whoever receives it, with notice, will be affected by the trust.

This was an action of assumpsit, for money had and received, founded on the following facts. One Susannah Brown, the wife of Jeremiah Brown, had applied for, and obtained, a pension, in the name, and as widow, of Flood, her former husband, who was a revolutionary soldier. She employed Nathaniel Brown, a son of her husband, to do the business for her, and when the pension was obtained he received it for her as her attorney, and with her consent retained $200 of the money as a compensation and reward for his services in obtaining it. The town of Waterborough had a claim against Jeremiah Brown, the husband of the pensioner, for money paid for the support of him and his wife as paupers. They commenced a suit against him, and summoned Nathaniel as his trustee. The action against N. Brown was compromised without a disclosure on the part of the trustees, he consenting to pay $60, for which two notes were given of $30 each, one of which was paid before the commencement of this action, and the other was afterwards, by a vote of the town, surrendered to Brown without payment. It was in proof, that Nathaniel Brown understood that the pension had been illegally obtained, and that the pensioner could not legally retain it, and that he stated this to the agents of the town when the compromise was made; and that it was not pretended that he had any other money or effects of Jeremiah, in his hands, for which he could be held as trustee, except that part of the pension money which he had retained in his possession.

The court instructed the jury, that, the money having been fraudulently obtained from the plaintiffs, they could recover it back from the person who received it, and from any other person into whose hands it had come with a knowledge of the fraud; that if they believed, from the evidence, that the agents of the town at the time when the compromise was made and the money paid, had notice that it had been illegally and fraudulently obtained (as it was not pretend-

[1] [Reported by Edward H. Daveis, Esq.]

ed that Nathaniel Brown had any other money of the defendants in his hands), the money paid might be considered as part of the pension money, although the identical pieces of money received for the pension had not been paid to them by Nathaniel, but that the defendants could not be held liable for any more money than they had actually received, that is, $30.

The jury, under this direction, returned a verdict for $30, and a motion is now made to set aside the verdict for the misdirection of the judge in matters of law.

Mr. Holmes, U. S. Dist. Atty.
Mr. Appleton, for defendants.

WARE, District Judge. The ground on which it is sought to charge the defendants in this case is, that the money paid to them by Nathaniel Brown, on the trustee process, was part of the same money which was received by him of the plaintiffs, for the pension of Susannah Brown. While that was in Nathaniel's hands, there does not seem to be any good reason for questioning the plaintiffs' right to recover it back. He received it as the agent and attorney of the pensioner, and holding it for her, the plaintiffs would have the same right to recover it from him as they would from the pensioner herself. She had clearly no legal or equitable right to retain the money. It is altogether immaterial whether it had been obtained by fraud and deceit on the part of the person receiving it, or had been paid under an erroneous opinion of both parties, innocently entertained, that she was legally entitled to it. In either case, it might be recovered back as money unduly paid, or as money paid that was not due. The private agreement between the pensioner and her agent, that he might retain a part of it as a reward or compensation for his services, could not affect the rights of the plaintiffs. They were strangers to any consideration of that kind, and this was an affair that must be settled between the principal and her agent. If it might be recovered from Nathaniel Brown, why may it not from any one into whose hands it has passed, with notice of the infirmity of his title. The maxim that no one can transfer a better title than he possesses himself,—nemo plus juris in alium transferre potest quam ipse haberet,—applies in all its force, both in law and equity, when the assignee takes the thing with notice of the infirmity of the title of the assignor. As the defendants were apprised of the circumstances under which the money was obtained, and of the equitable claim which the plaintiffs had to recover it back, they can have no better right to retain it, against the party from whom it had been unduly obtained, than Brown himself. Suppose, instead of money, it had been a chattel or a quantity of merchandise, and this had been transferred to the defendants, with notice that it had been delivered to Brown by mistake, or that the plaintiffs had been circumvented by fraud. There can be no doubt that the plaintiffs could recover either the property itself or its value. Buffington v. Gerrish, 15 Mass. 156. Indeed, I did not understand it to be denied at the argument, that the plaintiffs might have recovered, provided the identical pieces of money which Brown received of the plaintiffs had been paid over to the defendants. But it was argued that the suit could not be maintained unless the identical thing could be traced into the defendants' hands. If it should be admitted that this would be necessary in an action of trover (Mason v. Waite, 17 Mass. 560; but see Vin. Abr. "Action Trover," R.; Bac. Abr. "Trover," D.; Chit. Pl. 149), it will not follow, as a matter of course, that this is essential to maintain the present action. The action for money had and received is an equitable action, and lies in almost all cases where a party has received money which ex æquo et bono he ought to refund or pay over to the person who is entitled to it. 3 Bl. Comm. 163. The suit is not to recover the possession of any particular pieces of money, but so much money, belonging to the plaintiffs, as the defendants had received and withhold against equity and good conscience. The real question, then, in this case is, whether the money which the defendants received of Nathaniel Brown, was the plaintiffs' money; that is, whether in the legal sense of the words it was part of the pension money of Susannah Brown. If it was, then it was taken subject to all the legal and equitable claims which the plaintiffs had against it while it was in his hands; for as they had full notice of these claims, they succeeded only to his rights.

The facts proved in the case are, that after Nathaniel Brown had received the pension, and while he still retained in his hands about two hundred dollars of it, the defendants, in this action, commenced a suit against Jeremiah Brown, his father and the husband of the pensioner, for money expended by them for the support of him and his wife, as paupers, and summoned Nathaniel as his trustee. Whatever money of his father's Nathaniel had in his hands, was attached by that process to answer the defendants' claim. But it has not been pretended that he had in his hands any money to which his father had a claim, unless it was that which he received for the pension, or that he was indebted to him on any other account. It was on the ground of his having that money, and to obtain it as money belonging to his father, that he was summoned as trustee. If anything was attached, it was, then, this money, and it was this that was intended to be attached. The suit was not prosecuted against the trustee, but was compromised by the payment of part of the sum claimed. The payment was an admission on the part of Nathaniel that he had money of his father's, to that amount, in his hands. If he had, what money was it, and from whence was it received? Certainly

it was that which he received for the pension, for there is no pretense that he was indebted to his father on any other account. The payment was, then, from this money; not, indeed, made in the same pieces which he had received, but from that fund. Why, then, was it not, in a legal sense, part of that money? The identity of money considered as a debt due, or a credit, that is, as a general value in account, does not consist in the identity of the coins or pieces but in the identity of the fund. If Nathaniel had been indebted to his father on several accounts, he might have imputed this payment to either of the accounts he pleased. It would, then, have been payment from that fund to which it was imputed, and would have reduced that debt in his account, and that credit in his creditor's, to the amount of the payment. As he owed but a single debt, it must be imputed to that. It reduced his father's credit so much, and of course it was a payment from that fund; and it passed into the hands of the defendants with notice of the claim which the plaintiffs had against it. Why, then, should this transfer withdraw it from the claim of the plaintiffs, and defeat their right to recover it? Certainly no reason can be given which has its foundation in justice, nor does any occur to me derived from positive law or public policy. When property of any description is transferred from one to another, which is affected by a trust, or upon which any lien exists in favor of a third person, and the person to whom it is transferred has notice of the fact, the trust or lien will follow it into his hands. The assignee will be bound by the trust. The property will be subject to the lien, to the same extent as before the transfer was made and the possession changed. The assignee will merely succeed to the rights of the assignor, and will be subject to the same duties and liabilities with respect to the property. This is not only a principle of natural justice, but one that is familiarly enforced by courts of equity in a great variety of cases. 1 Story, Eq. Jur. § 533. If this is a rule with respect to specific property, as real estate or chattels, it is no less just that it should be applied to money, so long as its identity is preserved; and its identity as money is preserved so long as it can be followed and distinguished from all other money, not regarding the individual coins or pieces of money, but so long as it can be followed as a separate and independent fund or value, distinguishable from all other funds. This principle was acted upon by the court of king's bench, in the case of Taylor v. Plummer, 3 Maule & S. 562, after a very full and elaborate argument. Sir Thomas Plummer had placed in the hands of a broker £22,200, to be invested for him in exchequer bills. Part was invested and the bills delivered. The residue the broker invested in American stocks and bullion, intending to abscond with them, thus converting the money to his own use. He was arrested, and the stocks and bullion obtained. It was contended that the property having been wrongfully converted by the bankrupt to his own use, it became incorporated into the general mass of the bankrupt's property, and passed to his assignees as part of the assets of the bankruptcy. But the court decided that the money having gone into the hands of the broker covered with a trust, notwithstanding any change it had undergone in form, that it remained affected by the trust, and the lien of the owner continued as long as the property was capable of being identified and distinguished from all other property. The argument that the owner loses his right to follow his property after it had been tortiously converted into another form is unfounded in principle and unsupported by authority. It being proved that the stocks and bullion were purchased with the money of Sir Thomas, it was decided that he was entitled to hold them against the assignees.

Upon the whole, after the best consideration that I have been able to give to the case, it appears to me that the money which Nathaniel Brown paid to the defendants was, in the legal sense of the words, part of the money which he received of the plaintiffs for the pension of Susannah Brown. It was paid to them with notice of the infirmity of his title, and of the claim which the plaintiffs might have against it, and they, therefore, merely succeeded to his rights, and it is in their hands equally subject to repetition as it would be in the hands of the pensioner herself or of her agent.

Judgment for the plaintiffs.

Case No. 16,649.

UNITED STATES v. WATKINS.

[3 Cranch, C. C. 441.] [1]

Circuit Court, District of Columbia. July, 1829.

CIRCUIT COURT, D. C.—CRIMINAL JURISDICTION—FRAUDS AGAINST U. S.—INDICTMENT—VENUE OF CRIME—INSTRUCTIONS TO GRAND JURY—PLEADING—PROCEDURE—LIMITATIONS—JURY—VERDICT—NAVY AGENT—PAYMENT OF DRAFTS.

1. The circuit court of the District of Columbia for the county of Washington has jurisdiction of an offence committed in that county against the common law of Maryland, adopted as the law of the United States for that county, by the act of congress of February 27, 1801 [2 Stat. 103], although that offence may consist in the fraudulently obtaining of the money of the United States, by an officer of the United States, by means of false pretences.

2. By the cession of this part of the district to the United States by Maryland, all the state prerogative which Maryland enjoyed under the common law which she had adopted, so far as concerned the ceded territory, passed to the United States. All the power which Maryland had, by virtue of that common-law prerogative, to punish, by indictment, offenders against her sovereignty, and to protect that sovereignty,

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

as to this district, became vested in the United States. The United States, therefore, have a criminal common-law jurisdiction in this part of the district, and this court has a criminal common-law jurisdiction.

[Cited in U. S. v. Coppersmith, 4 Fed. 205.]

3. Frauds affecting the public at large, or the public revenue, constitute a distinct class of cases, punishable by indictment; although the fraud be not effected by means of false public tokens, or by forgery, or conspiracy, or by any particular sort of means.

4. The principle which, in transactions between individuals, requires, in order to make the fraud indictable as a public offence, that it should be committed by tokens, or false pretences, or forgery, or conspiracy, does not apply to direct frauds upon the public. All frauds affecting the public at large, or an indefinite number of persons who have suffered a common or joint damage, by reason of the fraud, are indictable offences at common law.

5. Every indictment must be "certain to a certain intent in general."

6. Money lawfully in the hands of an officer of the United States, and for which he is accountable, is money of the United States, and may be so charged in an indictment.

7. An indictment charging fraud ought to aver the means by which the fraud was effected.

[Approved in U. S. v. Goggin, 1 Fed. 51.]

[Cited in People v. McKenna, 81 Cal. 160, 22 Pac. 489.]

8. In an indictment for obtaining money by false pretences, the averment must state what was pretended, and that what was pretended was false; and wherein and in what particular it was false.

9. An indictment averring that the defendant, "ostensibly for the public service, but falsely and without authority, caused and procured to be issued from the navy department of the United States" a certain requisition, set forth in the indictment, cannot be supported as an indictment for forgery.

10. An indictment for obtaining money by false pretences, one of which is stated to be an erasure in an account rendered to the defendant, cannot be supported as an indictment for forgery.

11. Fraud is an inference of law from certain facts, and the indictment must aver all the facts which constitute the fraud. Whether an act be done fraudulently or not, is a question of law, so far as the moral character of the act is involved. To aver that an act was fraudulently done is, therefore, so far as the moral character of the act is involved, to aver a matter of law, and not a matter of fact. An averment that an act was done with intent to commit a fraud, is equivalent to an averment that it was done fraudulently.

[Approved in U. S. v. Goggin, 1 Fed. 51.]

[Cited in People v. McKenna, 81 Cal. 160, 22 Pac. 489.]

12. No epithet, or averment of a fraudulent intent, can supply the place of an averment of the fact, or facts, from which the legal inference of fraud is to be drawn.

13. Deceit is an essential ingredient in fraud. No fraud can be committed but by deceitful practices; and the particular deceitful practices, by which the fraud is alleged to have been committed, must be specially set forth, so that the deceit may appear upon the face of the indictment, that the court may judge whether the fraud, which constitutes the crime, can be inferred from the facts stated in the indictment.

14. An indictment is not a good indictment, at common law, for forgery by erasure, unless it use the technical term, "forge or counterfeit."

15. The court may, in its discretion, give an additional charge to the grand jury, although they should not ask it; and, when they do ask it, the court may, perhaps, be bound to give it, if it be such an instruction as can be given without committing the court upon points which might come before them, to be decided on the trial in chief.

16. When an instruction to the grand jury is asked, either by the accused or the prosecutor, it is a matter of discretion with the court to give the instruction or not, considering the extent of the prayer, and all the circumstances under which it is asked.

[Cited in Patrick v. State, 16 Neb. 331, 20 N. W. 121.]

17. If an officer of the government of the United States, not intrusted with public money, get it into his hands by fraud, and appropriate it to his own use, the offence is not an official misdemeanor, but is an offence at common law.

18. A count, describing the deceptive means by which the defendant procured the placing of public money in the hands of a navy agent, and also the means by which the defendant got the money into his own hands, for his own use, from that agent. does not charge two separate offences.

19. If one necessary link in the chain of means to accomplish the fraud, was obtained by deceptive practices, those deceptive practices are as effectual in constituting the offence as if every other link in the chain had been forged by the like deception. The deceitful practices, used in obtaining one of the means of effecting the fraud, infect the whole transaction.

20. If a person in Washington, D. C., by deceitful practices, causes money of the United States to be placed to his credit in New York, and subject to his draft; and he draws, accordingly, in Washington, and there gets the draft discounted by a broker, and there receives the proceeds of the draft, the fraud is consummated in Washington, if the drawee honors and pays the draft, and thereby ratifies the act of the broker, in advancing the money; but until the draft is paid the offence is not complete.

21. The time of finding the indictment will appear by the caption, when the record is made up; and, upon demurrer, the judgment must be upon the whole record; and if upon the whole record it should appear to the court that the offence was committed beyond the time limited, judgment must be rendered for the defendant.

[Cited in U. S. v. White, Cases Nos. 16,676, 16,677.]

22. The defendant has a right, upon demurrer, to avail himself of the statute of limitations.

23. The limitation of two years, in the act of April 30, 1790 [1 Stat. 112], is applicable to common-law offences in the District of Columbia.

24. The court may, in a criminal case, suffer the defendant to withdraw his demurrer to the indictment, after argument, and after the court has intimated an opinion that it ought to be overruled, and before judgment entered upon the demurrer.

25. Although a judgment against the defendant upon demurrer, in a case of misdemeanor, is peremptory, yet it is not so if against the United States; for they may send up new bills of indictment, successively, until they have made their case perfect in form.

26. Upon suffering a defendant to withdraw his demurrer, after argument, and after an intimation of the opinion of the court, they may require him to waive his right to move in arrest of judgment for any matter apparent upon the indictment.

27. A party cannot discredit his own witness by testimony as to his general character, but

may give evidence to contradict any important fact to which the witness has testified. A fact is not immaterial if it shows that the party prevaricated in relation to a fact in issue.

28. If the jury bring in a verdict, not answering to the whole matter in issue, the court, without recording it, will inform the jury that they may retire again and reconsider their verdict. If they return a verdict to which neither party objects, it will be recorded.

29. It is no legal objection to a juror that he had been one of the jury in another cause against the same defendant for a different offence; and it seems that the court has no authority to order talesmen to be sworn until the regular panel has been exhausted; and the names of all the attending jurors will be put into the box, and twelve drawn by lot by the clerk. The juror, when called up to be sworn, may be asked whether he has "formed and expressed an opinion upon the guilt or innocence of the defendant upon the indictment in this case;" and before the question is put, the indictment may be read by the clerk in the hearing of all the jurors attending the court. If the question be answered in the negative, the juror may still be challenged for cause; and if challenged for favor, the challenge will be tried by two triors, (appointed by the court,) who are to be sworn upon each challenge; and if they cannot agree, the challenge is not supported, and the juror must be sworn.

[Cited in Patterson v. State, 48 N. J. Law, 390, 4 Atl. 449.]

30. After a juror is sworn, he cannot be challenged; and the court cannot discharge him without the consent of the parties, although he should state to the court matters which would be proper evidence upon a challenge for favor.

31. When a tales is returned, the parties have a right to challenge any of the original panel already sworn in chief, but it must be for a cause arising after the juror was sworn.

32. The circuit court of the District of Columbia has jurisdiction of any common-law offence committed in the county of Washington, by an officer of the government of the United States, of which it would have jurisdiction if committed by a person not an officer of the United States, although such offence should have been committed by means consisting in part of acts done by virtue, or by color, of his office.

33. After the jury has been out a long time without any probability of agreeing, the court may, in a case of misdemeanor, discharge them without the consent of the defendant.

34. If a verdict is so imperfect that no judgment can be given upon it, it must be considered as no verdict; the defendant has not been in jeopardy, and a venire de novo must be awarded.

35. The recording of a verdict does not prevent the court from deciding that it is so imperfect as not to justify a judgment.

36. A verdict which finds only one or two, out of many facts which are all necessary to constitute the offence, and saying nothing of the residue, is not a "partial" verdict in the technical sense of those words.

37. If the jury do not find a general verdict, nor a partial verdict, nor a special verdict, they find no verdict.

38. A verdict, in a criminal case, finding a fact which, if specially pleaded, would be a good defence, is to be considered, and entered, as a general verdict; so also, if it find a fact inconsistent with the guilt of the defendant; but it is otherwise when the facts found neither establish nor are inconsistent with the guilt or the innocence of the defendant.

39. Upon the trial of an indictment for a fraud at common law upon the United States, by an officer of the United States, in getting into his own hands and appropriating to his own use, money of the United States, which he had no right or authority to receive, the fact that he obtained the money in his official capacity is immaterial.

40. The court refused to instruct the grand jury that a certain paper, intended to be offered in evidence to them by the attorney for the United States, was such a paper as could be the subject of forgery at common law, and that certain specified facts and intents amounted to forgery at common law; and that if they found those facts and intents, they ought to find the bill, although it contained the word "forged."

41. Counsel are not permitted to argue to the jury the question of law which has been by both parties, submitted to the court, and by them decided, and the jury instructed thereupon.

42. The only way in which a jury can decide the law of a case is by finding a general verdict.

43. If the instruction given exceed the matter submitted to the court, and involve questions of law not involved in the instruction prayed, the counsel will be permitted to argue, before the jury, the questions of law not involved in the instruction asked and submitted to the court; and if the opposite counsel withdraw their prayer, the court will withdraw its instruction, and leave the question of law to be argued before the jury, reserving the right of the court to instruct the jury on the questions of law after the close of the argument to the jury.

44. Although the 4th auditor had no authority by law, to direct the disposition of the money of the United States in the hands of a navy agent, the payments, by the latter, of the drafts of the former, were not, necessarily, payments, in his own wrong. If the 4th auditor had such authority, the navy agent might, under possible circumstances, be excused for paying his drafts not officially drawn; and such drafts and payments might be a fraud on the United States. The fact, that the government has credited the navy agent for such payments, and charged the same to the drawer, does not exculpate him. The fact, that the money drawn for was ultimately paid by the navy agent in New York or Boston, does not prevent the circuit court of the District of Columbia from having jurisdiction of the cause, if the defendant received the money in Washington by a discount of the draft.

45. If the official character of an officer of the United States be not a necessary ingredient of the offence charged in the indictment, the naming him as such, and the averment that he was such an officer, will not prevent a court of law from taking cognizance of the offence.

The defendant in this case was arrested on the 1st of May, 1829, in Philadelphia, by a warrant issued at the instance of the United States, upon an affidavit made before a justice of the peace in Washington, D. C., by Mr. Amos Kendall, who, on the 23d of March, 1829, was appointed to the office of 4th auditor in the place of the defendant, who was sent for trial to Washington, by a warrant issued by Judge Hopkinson, under the 33d section of the judiciary act of 1789. In the progress of the cause a number of indictments were successively found by the grand jury, and were, in some instances, so blended in argument, that the whole may be considered as one cause and one prosecution. It came before the court first upon demurrer to two indictments.

The first count in the first indictment stat-

ed: "That Tobias Watkins, late of Washington county, gentleman, on the 5th of July, 1827, at Washington county, being then and there the fourth auditor of the treasury of the United States, and being an evil-disposed person, and devising and intending fraudulently and unjustly to obtain and acquire for himself and for his own private use, divers sums of money of the United States, with force and arms, at, &c., on, &c., falsely and fraudulently, wrote and addressed, and caused to be sent to a certain J. K. Paulding, then a navy agent of the United States, at the city of New York, a letter in the words and figures following, to wit: 'Treasury Department, 4th Auditor's Office, 5th July, 1827. Sir: You will receive by the mail of to-morrow, or next day, the treasurer's draft for $500 (five hundred dollars), under the appropriation for "arrearages," in order to meet my draft on you of this date, for that sum. That time might be given for the remittance of the draft, my order is made payable at three days' sight, and will be charged, when paid, to arrearages. It is in favor of S. and M. Allen & Co. I am, sir, very respectfully, your ob'dt. servant, T. Watkins. J. K. Paulding, Esq., Navy Agent, New York.' That on the same day the said T. W. made and executed a draft on the said J. K. Paulding, navy agent as aforesaid, according to the advice of the aforesaid letter, in favor of S. & M. Allen & Co., for $500, at three days' sight, and sold it to C. S. Fowler, and received of him therefor $500, which he kept and disposed of for his own use." That the said T. W. did, on the 6th of July, 1827, "ostensibly for the public service, but falsely and without authority, cause and procure to be issued from the navy department of the United States, a certain requisition to the secretary of the treasury of the United States for the purpose and intent of placing in the hands of the said J. K. Paulding, navy agent as aforesaid, the sum of $1,000 of the moneys of the United States, which requisition is in the words and figures following, to wit," &c., (being in substance a request by Mr. Southard, the secretary of the navy to the secretary of the treasury to issue a warrant to J. K. P., navy agent at New York, for $1,000, to be charged to him, and to be charged to the appropriation for "arrearages prior to 1827," dated July 6, 1827.) "By means of which requisition, the said sum of $1,000 of the moneys of the United States, was placed in the hands of the said J. K. Paulding. That the said T. W. on the 9th of July, 1827, wrote and addressed, and caused to be sent to the said J. K. Paulding, a letter in the words and figures following, namely, (in substance, that instead of $500 he would receive $1,000 under the appropriation for the payment of arrearages,) and on the 25th of July, 1827, drew again on J. K. P. for $500, and sold the draft to Fowler for $500, which he, (T. W.) kept and disposed of for his own use, and wrote another letter of advice of that date to J. K. P., and directed him to charge it to arrearages. That the said letters and drafts so as aforesaid written and sent and drawn and sold as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was so written, drawn, and sold, and caused and procured to be issued without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and with intent to defraud the said United States, and as false pretences to enable him to obtain to his own use and benefit, the said two sums of $500 each; and that by means of the said several false pretences, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said two sums of $500 each, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

The second count in the same indictment charges a similar transaction to the amount of $750 in January, 1828, and contains an additional averment, that the draft on J. K. P., in this count mentioned, was paid by him; and that the requisition was procured by the said T. W. "ostensibly for the public service, but falsely and without authority" for $12,889.12, exceeding the sum for which J. K. P. had asked a requisition by the sum of $750; "which sum of $750 was by the false suggestion and procurement of the said Tobias Watkins, added to the amount required by the said Paulding, for the purpose and intent of placing in the hands of said J. K. Paulding, navy agent as aforesaid, the said sum of $750 of the moneys of the United States, to meet the payment of the said draft so made and sold as aforesaid to the said C. S. Fowler, which requisition is in the words and figures following, to wit," &c. The averment of false pretences is exactly like that in the former count.

The second indictment charged a similar transaction with Mr. Harris, a navy agent in Boston, to the amount of $2,000, with similar averments, and that the drafts were paid by Mr. Harris. Two of the drafts were in favor of Thomas Pottinger, and there is an averment that the indorsements of the name of Pottinger were either genuine, for the accommodation of the said Tobias Watkins, or were falsely made by the said Watkins. There is also an averment that Mr. Harris sent his regular quarterly abstract of expenditures, (containing three charges of three drafts of Watkins,) to the said T. W. as 4th auditor, "who was the proper officer to receive the same; and that the said Watkins having received the same, the said Watkins, in pursuance of his said fraudulent intent to deceive and defraud the United States, and to consummate his said fraud, and to cover and conceal the same, that he might thereby be enabled to keep to his own use the moneys

he had obtained by means of the said drafts, and thereby to defraud the United States, did afterwards, to wit," &c. "falsely and fraudulently alter the said abstract by erasing therefrom the words, 'T. Watkins,' 'Draft,' 'Do. of 500,' 'Do. Do. —,' opposite to the dates September 1st, 10th, and 20th, prefixed to the aforesaid three items in the said abstract, under the head of 'arrearages prior to 1827,' hereinbefore set out, with intent to defraud the United States. And the said letters and drafts, so as aforesaid written and sent and drawn and sold and paid as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was so written, sent, drawn, and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said T. W., and that the same were made and done and procured, and also the erasure of the said abstract made and done, with intent to defraud the said United States, and as false pretences, to enable him to obtain and keep to his own use and benefit," &c., as at the conclusion of the first indictment.

Mr. Jones, for defendant, contended that the indictments did not charge any common-law offence. The offence, at most, is the misapplication of public funds to his own use—nothing worse than peculation. At the worst, he is only a public defaulter. The obtaining of money by false pretences, at common law, must be by some means which are likely to affect the public; such as false weights—means which common prudence cannot guard against—means in which the public have a right to place confidence—public false tokens. Nor is it sufficient that the fraud should affect the public. But if false pretences are relied upon, they must be distinctly averred. The pretence must be set out, and averred to be false. These indictments do not set out any pretence that is averred to be false.

Mr. Jones cited Rex v. Lara, Leach, 647; Id. 6 Term R. 565; Rex v. Wheatly, 2 Burrows, 1125; Id., Leach, 489; Id., W. Bl. 273; Rex v. Dunnage, 2 Burrows, 1130; Rex v. Osborn, 3 Burrows, 1697; Rex v. Channell, 2 Strange, 793; Rex v. Bryan, Id. 866; Rex v. Bower, Cowp. 323; East, P. C. 820; Reg. v. Mackarty, 2 Ld. Raym. 1179; Id., 1 Salk. 286; East, P. C. 823; 1 Hawk. P. C. c. 23, § 1; 2 Hawk. P. C. c. 25, §§ 57, 59, pp. 320, 322; 1 Hawk. P. C. c. 30, §§ 28, 29; Russ. Crimes, 1362, 1367; Rex v. Mason, 2 Term R. 581; Rex v. Perrott, 2 Maule & S. 379.

Mr. Coxe, on the same side, contended that this is a charge of an offence against the United States in their national character, and in that character they have no criminal common law; there are no criminal common-law offences against the United States; and this court has no jurisdiction of any common-law offence against the United States in its national character. Our common law here is only the common law as it existed in Maryland on the 27th of February, 1801, when it was adopted as the law of this part of the district. At that time no state court in Maryland could have tried such a case as this, because it is a case of purely federal jurisdiction, it being an offence against the United States in its federal character; and no court of the United States would have had cognizance of the cause, because the United States courts have no common-law criminal jurisdiction. This court has only the jurisdiction of the circuit courts of the United States, and of the state courts in Maryland; and as neither of them could have had jurisdiction of this case, this court has not.

Mr. Coxe cited, upon this point, 6 Dane, Abr. 752; 1 Kent, Comm. Lect. 16, pp. 311, 312, 320, 378; U. S. v. Coolidge, 1 Wheat. [14 U. S.] 415 [Case No. 14,857]; Serg. Const. Law; U. S. v. Worrall [Case No. 16,766]; U. S. v. Hudson, 7 Cranch [11 U. S.] 32; Dup. Jur.; Burr's Trial [Cases Nos. 14,692–14,693], cited in Kent, Comm. But the charge in the indictment is not of an offence at common law. It contains no averment of false pretences. It is not sufficient that it is a fraud upon the government. It must be a fraud committed by means which affect the public. It is not sufficient that the fraud which is the effect of those means should affect the public. 2 East, P. C. 816, 817, § 2; Russ. 1370; 3 Chit. 421, 425; 1 Chit. Cr. Law, 154, 159, 230.

The second indictment cannot be sustained as an indictment for forgery, as is now suggested by the counsel for the prosecution. The words "falsely forged and counterfeited" are necessary in an indictment for forgery, whether at common law or by statute. East, Cr. Law, 985. If it contains two distinct offences, namely, fraud by false pretences, and forgery, it is multifarious, and therefore bad upon demurrer. Rex v. Perrott, 2 Maule & S. 385. Fraud on the revenue does not constitute a distinct class of offences. The question as to common-law offences against the United States in their national character is not a question of jurisdiction; but whether there are such offences. This court has a common-law criminal jurisdiction in such cases only as were cognizable in the state courts of Maryland. The exclusive legislation over this district is only exclusive of all state legislation. This is a peculiar offence, by an officer of the United States against his government. If this court can take cognizance of it, every officer of the government may be subjected to trial in the state courts for his official acts. The money which the defendant obtained was not the money of the United States, but of the navy agent to whom it was charged, and who was accountable for it.

Another objection taken to the second indictment was, that the indorsement of Pottinger is stated alternatively and not positively. 1 Chit. 159. The abstract was not

such a paper as could be the subject of forgery at common law.

Mr. Swann and Mr. Key, for the United States. This court has all the common-law jurisdiction as to offences against the United States which a court in Maryland, on the 27th of February, 1801, had, as to offences against the state. In regard to offences committed in this district, the United States have a common-law criminal jurisdiction; and all offences against the common law as it existed in Maryland on the 27th February, 1801, committed in this county, are offences against the United States; and this court exercises both the federal and state jurisdiction. There is not here any distinction between them. It is here all federal jurisdiction. These indictments are good at common law. They charge that certain things were done as false pretences, and without authority, and with intent to defraud the United States; and that "ostensibly for the public service, but falsely and without authority, he caused to be issued" a certain requisition, &c. The abstract is a public document, and, as such, is a subject of forgery at common law. If it is not forgery it is fraud. But this is a fraud upon the public, and needs not the aid of false pretences. All frauds which affect the public at large, or a great number of persons, are indictable. Russ. 1360, 1361, 1362; 2 East, P. C. 816; Rex v. Wheatly, 2 Burrows, 1125; Channell's Case, 2 Strange, 793; Saund. 81; Jones' Case, 1 Salk. 379; Pinkney's Case, Sess. Cas. 198; Sayer, 146; Bryan's Case, 2 Strange, 866; Lara's Case, 6 Term R. 565; Wilder's Case, 2 Burrows, 1128; Treeve's Case, 2 East, P. C. 813, 821; Rex v. Southerton, 6 East, 134, 136; Rex v. Brisac, 4 East, 164, 172; 1 Russ. 219; Reg. v. Woodward, 11 Mod. 137; Rex v. Minister, etc., of St. Botolph, Bishopsgate, 1 W. Bl. 443; 3 Chit. Pl. 699, 701; Powell's Case, 1 Dall. 47; Rex v. Osborn, 3 Burrows, 1697. The defendant's office of fourth auditor did not give him any authority to receive the money, nor make him a trustee. The indictments may be supported as a fraud upon the public, and effected by false writings. Fraud affecting the public does not require false tokens, or false pretences. It is a distinct head of indictable offences. 3 Chit. 700, 701, 995, 1001; 2 East, P. C. 824; Govers' Case, Sayer, 206; Sweers' Case, 1 Dall. [1 U. S.] 45; 2 East, 840, 855, 989.

The second indictment is a good indictment for forgery at common law. The words "forge and counterfeit" are not necessary. Govers' Case, 2 East, P. C. 824; 3 Chit. 978; Russ. 1377; 2 East, P. C. 862.

CRANCH, Chief Judge, delivered the opinion of the court as follows (THRUSTON, Circuit Judge, dissenting). The substance of the first indictment is: That Tobias Watkins, being fourth auditor of the treasury of the United States, and intending fraudulently to obtain, for his own use, money of the United States, falsely and fraudulently wrote a letter to J. K. Paulding, a navy agent of the United States, advising him of his (T. W.'s) draft on him for $500, to be charged to "arrearages," and that he would receive a treasury draft for the same, to meet it. That T. W. drew such a draft, and sold it to C. S. Fowler for, and received of him, the same amount, and applied it to his own use. That the said T. W. did, ostensibly for the public service, but falsely, and without authority, procure to be issued from the navy department a certain requisition to the secretary of the treasury, for the purpose of placing in the hands of the said J. K. P., navy agent, the sum of $1,000; which requisition is set out in verbis, to be charged to "arrearages prior to 1827"; by means of which requisition the said sum of $1,000 was placed in the hands of the said navy agent. That the said T. W. afterwards wrote another letter to the said navy agent, informing him that the remittance under the appropriation for "arrearages" would be $1,000 instead of $500 as before advised, and afterwards drew another draft on him for $500, which sum he received for it of C. S. Fowler, and applied to his own use; of which draft he also informed the said navy agent by letter. "That the said letters and drafts so as aforesaid written and sent and drawn and sold as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was, so written, sent, drawn, and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said T. W., and with intent to defraud the said United States, and as false pretences to enable him to obtain to his own use and benefit the said two sums of $500 each; and that by means of the said several false pretences the said T. W. did, at the time and times aforesaid, defraud the said United States of the said two sums of $500 each, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof." There is another similar count, upon another similar transaction, for $750, with the like averments.

To this indictment there is a general demurrer and joinder. By the demurrer the facts are admitted, if they amount to an indictable offence at common law, and are well set forth.

The first ground of demurrer relied upon is, that the United States, as a nation, has no common law, in relation to crimes and offences; and, consequently, that there can be no common-law offences against the United States, in its national character; that this offence, if it be an offence, is against the United States in that character, and not as the local sovereign of this district; and, therefore, it is not an indictable of-

fence. It is said that this court can only exercise the jurisdiction of federal courts and of the state courts. That the federal courts could not hold jurisdiction of this cause, because it is not a criminal offence against the United States, who have no criminal common law. And that the state courts could not hold jurisdiction of it, because, if it be an offence at all, it is exclusively an offence against the United States. This argument is certainly, at first view, quite plausible; but to our minds not entirely satisfactory. Is it clear that this offence is of such an exclusive character, that it could be prosecuted only in a court of the United States? If it had been committed in one of the states, say in Maryland, is it clear that it would not have been an offence against that state? The offence charged, we will say, for the sake of argument, is in substance a cheat; that is, an act of fraud, done to the injury of the United States. The state court has jurisdiction of cheats and frauds. Does that jurisdiction depend upon the question, to whose injury the cheat or fraud was committed? Whether it be to the injury of a citizen of Maryland, or of a foreigner, or of another state, or of a foreign sovereign, or of the United States? If a fraud to the injury of the state of Pennsylvania should be committed in Maryland, it could not be tried in Pennsylvania; and shall it be said that it is no crime in Maryland to do an unlawful act to the injury of Pennsylvania? What is there in the circumstances of the transaction, to make it a case of exclusive federal jurisdiction? Is it because the defendant is stated to have been fourth auditor of the treasury of the United States? He is not charged with having done any act in that character, or by color of that office; nor is he charged with the violation of any official duty, nor with having made use of his office, or official character, to perpetrate the fraud. Is it because the person, upon whom the drafts were drawn, was an officer of the United States? That circumstance is perfectly immaterial, and cannot change the nature of the transaction. The foundation and substance of the offence is fraud,—moral fraud,—crimen falsi; the turpitude of which is neither increased nor diminished by the circumstance, that the draft was drawn by one officer of the United States, and accepted by another, neither of them acting in his official character, nor by virtue of his office. Is it because the fraud was committed by means of a requisition from the navy department upon the treasury of the United States? That circumstance does not alter the nature of the offence; it is still a simple cheat or fraud. Is it because the United States is the sufferer by the fraud? The same answer may be given,—the nature of the offence is not thereby altered. We are, therefore, of opinion that there is nothing in the character of the parties, or in the circumstances of the transaction, which would make it a case of exclusive federal jurisdiction; but that if it be, in its nature, a common-law offence, and had been committed in a state, it might have been tried in a state court, as an offence against that state. We think, therefore, that if it be a common-law offence, committed in this county, it is within the jurisdiction of this court, whose common-law jurisdiction is derived from the common law of Maryland, which was, by the cession of Maryland and the acceptance of congress, under the provision in the constitution of the United States, transferred from Maryland to the United States, with that remnant of state sovereignty, which, after the adoption of the federal constitution, was left to Maryland. All the state prerogative which Maryland enjoyed under the common law, which she adopted, so far as concerned the ceded territory, passed to the United States. All the power which Maryland had, by virtue of that common-law prerogative, to punish, by indictment, offenders against her sovereignty, and to protect that sovereignty, became vested in the United States; and authorized them to punish offenders against their sovereignty, and to protect that sovereignty by the same means, so far as regarded the territory ceded. We therefore think that, in regard to offences committed within this part of the district, the United States have a criminal common law, and that this court has a criminal common-law jurisdiction.

The next ground of demurrer is, that fraud is not an indictable offence at common law, unless it be effected by means of some false public token, such as false weights, or measures, or marks; or by means which affect the public generally, unless it be fraud against the king, and the public at large; and, even then, it is not sufficient that the king, or the public at large, is the party injured, but the fraud must be effected by means which are likely to affect the public at large,—means which are generally mischievous, such as adulterating provisions, &c. But to this it was answered, that frauds affecting the public at large, or the public revenue, constitute a distinct class of cases, punishable by indictment, although the fraud be not effected by means of false public tokens, or by forgery, or by conspiracy, or by any particular sort of means; and this position seems to be supported by principle and by precedents.

1. By principle. Why are any acts made punishable by public prosecution? Because they are acts which, in their nature, are injurious to the public interests. The interests to be protected by the government are, the public peace, the public morals, the public property, and the public justice. Why is theft or robbery an offence against the state? Because they lead to a breach of the peace, to violence and bloodshed, in the protection or the recovery of the property

stolen. Why are public lewdness and disorderly houses indictable offences? Because they tend to injure the public morals, they are mischievous to many,—to an indefinite number,—to the public at large. Why are violations of the public property offences against the state? Because they immediately affect the public interest,—the interest of an indefinite number, who cannot individually complain,—whose separate interest is not injured, but who, collectively only, are sufferers; and who, collectively only, have the right to seek redress. Why are acts which tend to obstruct the due administration of justice indictable offences? Because they are, in their nature, injurious to the public at large; for the due administration of justice is necessary to the protection of all the other great interests of society. To such cases the rule, vigilantibus non dormientibus jura subveniunt, cannot apply. The public cannot, like an individual, be always on the watch. If they employ agents, those agents may sleep, or, what may be worse, they may wink; and how can the public watch the winker? The public is continually exposed to imposition; and if they trust, it is because they are obliged to trust. Their confidence is not voluntary, like that of an individual, who may transact his own business. The public can act only by agents, and cannot, therefore, be subjected to the rule of watchfulness. The principle, therefore, which, in transactions between individuals, requires, in order to make the fraud indictable as a public offence, that it should be committed by means of tokens, or false pretences, or forgery, or conspiracy, does not apply to direct frauds upon the public.

2. This distinction in principle is illustrated by many precedents, which are collected by the elementary writers upon this subject. East, in his Pleas of the Crown (page 821), prefaces his collection of them by this observation—"So all frauds affecting the crown, and the public at large, are indictable, though arising out of a particular transaction, or contract with the party. This was admitted by the very terms of the objection in the following case." He then proceeds to give the substance of the indictment in Treeves's Case, from the manuscript notes of Judge Buller, and the other judges. It was for knowingly, wilfully, deceitfully, and maliciously furnishing certain French prisoners, whose names were unknown, then being under the king's protection in Eastwood Hospital, five hundred pounds of unwholesome bread, whereby they became injured in their health, to the great damage of the prisoners, the discredit of the king, the evil example, &c., and against the peace. The objection was, that it did not appear that what was done was in breach of any contract with the public, or of any moral or civil duty This objection was overruled, but it did not appear upon what ground; nor is it material, because the case is cited for the principle admitted in the objection; which principle is, that if it had been in fraud of a contract with the public, the indictment would have been good. It may have been supported upon the principle which we have before assumed, that a fraud, which is to the injury of an indefinite number of persons, who have no separate individual cause of complaint, is indictable at common law. Such was the case in 2 Chit. Cr. Law, 559, 560, against a baker, for delivering bread short in weight, under a contract with the guardians of the poor of Norwich, "to the great damage and prejudice of the said poor persons, of and belonging to the said city of Norwich and the liberties thereof, for whose use, sustenance, and support the said loaves of bread were so made and delivered, as aforesaid." Here the immediate injury was done to a sort of public,—a quasi public,—the poor of the city; an indefinite number of persons, who, individually, could not prosecute, unless for separate and individual injury actually received, as in the case of a public nuisance. Chitty, in his note to this case, says—"This indictment, for non-delivery of bread of sufficient weight, was settled on the decided opinion of a very experienced barrister, that the offence was indictable, on the ground stated in 2 East, P. C. 281 (821);—that all frauds, affecting the public at large, are indictable, though arising out of a particular transaction or contract." The case of Dixon, in 3 Maule & S. 11, was for furnishing unwholesome bread for the children at the Royal Military Asylum at Chelsea. This was an indictment at common law, and had three ingredients, either of which was sufficient to support it, namely: First, that it was a fraud upon the government, the asylum being a royal institution; second, that it was to the injury of an indefinite number of children, who were supported at the asylum; and, third, that the means used, namely, selling of unwholesome bread, were such as were likely to injure the public at large. No question was made whether it was not an offence at common law. In Powell's Case, 1 Dall. [1 U. S.] 47, the principle is more clearly recognized by the supreme court of Pennsylvania. It was an indictment at common law against a baker employed by the army of the United States, for a cheat in baking two hundred and nineteen barrels of bread, and marking them as weighing eighty-eight pounds each, whereas they weighed only sixty-eight pounds. It was objected that such fraud was not indictable at common law. But "the court said that this was clearly an injury to the public; and the fraud the more easily perpetrated, since it was the custom to take the barrels of bread at the marked weight, without weighing them again. The public, indeed, could not, by common prudence, prevent the fraud; as the defendant himself was the officer of the public, pro hac vice. They were, therefore, of opinion that the offence was indictable." Here it is evident, that the ground upon which the indictment was obtained was, the injury to

the public. So in the case of Rex v. Bembridge, cited in 6 East, 136, "who were indicted for enabling persons to pass their accounts, at the pay-office, in such a way as to enable them to defraud the government; it was objected, that it was only a private matter of account, and not indictable; but the court held otherwise, as it related to the public revenue." In Brown's Case, 3 Chit. Cr. Law, 701, the indictment was against an overseer of the poor of the parish of Twickenham, for fraudulently applying to his own use money received by him for the parishioners, and rendering false accounts, to conceal the fraud, "to the damage and impoverishment of the said parishioners." This was a fraud upon an indefinite number of persons, who could not individually obtain redress. See, also, Martin's Case, 3 Chit. Cr. Law, 704. Other cases of indictments for frauds upon the parish, may be found in Comb. 287; 5 Mod. 179; 2 Camp. 269; 1 Bott. 342; 2 Nol. Poor Laws, 248, 371. Robinson's Case, 3 Chit. Cr. Law, 666, was an indictment against a surveyor of highways, for a fraud upon the parishioners, by appropriating gravel, labor, &c., to his own emolument. So in the Case of Minister, etc., of St. Botolph, 1 W. Bl. 443, the rendering of a false account of moneys collected for the relief of certain sufferers by fire was said to be an indictable offence. This could only be because it was a fraud upon an indefinite number of persons, who had no individual means of redress. So a fraud upon a parish by procuring the marriage of a pauper, so as to charge the parish, is indictable, upon the same principle. Tarrant's Case, 4 Burrows, 2106. So also a fraud by an apprentice in obtaining the public money, by falsely enlisting himself as a freeman, is indictable at common law, because it concerns the public revenue. Jones' Case, 1 Leach, 174.

These cases seem to establish the broad principle stated by East in his Pleas of the Crown, 818, 821, "that all frauds affecting the crown and the public at large," or effected "by any deceitful and illegal practice or token, (short of felony,) which affects, or may affect the public, are indictable offences at common law; and that under the terms 'public,' and 'public at large,' are included indefinite numbers of persons who have suffered a common or joint damage by reason of the fraud, and who have not individually a right to prosecute the offender." In regard, however, to the present indictment, it is not necessary to extend the principle beyond fraud upon the public, if such be sufficiently set forth in the indictment.

The question then occurs, Does this indictment sufficiently set forth a fraud upon the public? By the long established rules of criminal law in this country, every indictment must be "certain to a certain intent in general;" and "nothing material shall be taken by intendment." 2 Hawk. P. C. c. 25, § 60; Bayard v. Malcom, 2 East, 33. In the case of Rex v. Mayor, etc., of Lyme Regis, Doug. 158, Mr. Justice Buller says: "Certainty, to a certain intent in general means what upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear; and is what is required in declarations, replications, and indictments, in the charge or accusation, and in returns to writs of mandamus." "The charge must contain such a description of the crime, &c. that without intending anything but what appears, the defendant may know what he is to answer, and what is intended to be proved, in order that the jury may be warranted in their verdict, and the court in the judgment they are to give." Rex v. Horne, Cowp. 682; 1 Chit. Pl. 237. It is true, "that it is a maxim, in pleading, that every thing shall be taken most strongly against the party pleading; or rather, that if the words be equivocal they shall be taken most strongly against the party pleading them; for it is to be intended that every person states his case as favorably to himself as possible; but the language of the pleading is to have a reasonable intendment and construction; and where an expression is capable of different meanings, that shall be taken which will support the declaration, &c., and not the other, which would defeat it." Wyat v. Aland, 1 Salk. 325; Rex v. Stevens, 5 East, 257; Amhurst v. Skynner, 12 East, 270; and Woolnoth v. Meadows, 5 East, 463.

The first question upon this point is, whether, if any fraud is sufficiently set forth in the indictment, it is a fraud upon the public. It has been suggested, in argument, that as the money was charged by the United States to the account of Mr. Paulding, who is responsible for it, it was his money, and not the money of the United States, which was drawn out of his hands by the accused; and that, as Mr. Paulding is liable to the United States, and has given security, they have suffered, and can suffer, no loss; and, therefore, if any fraud was committed, it was a fraud upon Mr. Paulding, and not upon the United States. But to this objection we think it may be answered, that it is not averred, in the indictment, that the money was charged to Mr. Paulding; it is only averred that it was "placed in his hands" "as navy agent;" and there is nothing stated in the indictment to show that it ceased to be public money in his hands. By the 4th section of the act of congress of the 3d of March, 1809 (2 Stat. 535), the navy agents are directed, "whenever practicable, to keep the public moneys in their hands in some incorporated bank, to be designated for the purpose by the president of the United States." This clearly shows that the understanding of the legislature was, that the money, when it came into the hands of the agent, did not cease to be public money; and that if it should be lost without any negligence or fault of the agent, it would not be his loss, but that of the United States; and if the money should have been charged to him

in account, we must suppose that under such circumstances the United States would credit him for the loss.

It has been suggested, on the part of the accused, that he is only liable to the United States in a civil action for the money which he received. But if he is so liable, it must be upon the ground that the money which he received was the money of the United States. If Mr. Paulding was induced to pay these drafts by such artful contrivances or false pretences or tokens as could not be guarded against by ordinary care and prudence, the United States might, very justly, allow him credit for the loss; and as the loss in that case would fall on the United States, it would be a fraud on the public; and how would it be less a fraud upon the public if Mr. Paulding was not so deceived and imposed upon, but paid the drafts, knowing that the accused had no right to draw? It could not have been less a fraud upon the United States if others had participated in it. For these reasons we think that the money drawn by the accused, out of the hands of Mr. Paulding, was the money of the United States; and therefore that the fraud, if any, was a fraud upon the public.

The next question is, whether the fraud be sufficiently set forth in the indictment. An indictment must be at least as certain and precise as a special verdict, in which no material fact can be inferred. This indictment is undoubtedly intended to be for a fraud, and ought to aver the means by which the fraud was effected. This is admitted by the terms of the indictment; for it avers "that by means of the said several false pretences, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said two sums of five hundred dollars each, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof." The offence, therefore, which the accused is called upon to answer, is a fraud upon the United States, perpetrated by means of the false pretences previously set forth in the indictment; yet there is not, in the previous part of the indictment, any direct averment of any pretence, either true or false. It is true that there is a preceding averment "that the said letters and drafts, so as aforesaid written and sent and drawn and sold, and caused and procured to be issued as aforesaid, were, and each of them was, so written, sent, drawn, and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and with intent to defraud the United States, and as false pretences, to enable him to obtain to his own use and benefit the said two sums of five hundred dollars each." But it does not state what the pretence was. It does not state that the accused pretended or affirmed any thing to anybody. If there was no pretence there was no false pretence. Let us analyze this averment, and apply, as was, no doubt, intended, singula singulis. It is: (1) An averment that the letters were written without authority. (2) That they were sent without authority. (3) That the drafts were drawn without authority. (4) That they were sold without authority. (5) That the requisition was obtained without authority. (6) That these things were not done for or on account of the public service, but for the private gain and benefit of the accused, and with intent to defraud the United States. But it is not averred that the accused ever pretended to any one that he had authority to write those letters, or to draw the drafts, or to obtain the requisition, or that they were for the public service, or that they were not for his own use. It is true that it is previously averred, in the indictment, that he did "ostensibly for the public service, but falsely and without authority, cause and procure to be issued from the navy department a certain requisition," &c. But the words "ostensibly for the public service" do not amount to an averment that the accused pretended or affirmed to the secretary of the navy, or to any other officer of the navy department, that the requisition was for the public service. But it is averred that the letters were written and sent, and the drafts were drawn and sold, and the requisition was obtained, "as false pretences." The word "as" means like—not the thing itself, but something like it. But if it were to be construed as an averment that the letters, the drafts, and the requisition were false pretences, and by means of such false pretences the accused defrauded the United States, such an averment in an indictment is not sufficiently certain. The averment must state what was pretended; and that what was pretended was false; and wherein and in what particular it was false. The gist of the crime is the falsehood of the pretence; and it is therefore necessary that it should be made apparent upon the face of the indictment by positive and precise averments. This rule is supported by many authorities. One only will be cited. It is the case of Rex v. Perrott, 2 Maule & S. 379. It is true, that this was an indictment upon the statute of 30 Geo. II. c. 24; but the statute does not require that the pretences should be particularly set out, nor specifically negatived, the words of the statute being merely these: "That all persons who knowingly or designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares, or merchandises, with intent to cheat or defraud any person or persons of the same," "shall be deemed offenders against law and the public peace," and shall be punished by fine, imprisonment, pillory, whipping, or transportation, &c. But the judgment of the court was only an application of a general rule in regard to all indictments, whether upon a statute or the common law. The indictment averred that the defendant, intending "to cheat and defraud one Bullen of his moneys," &c., "un-

lawfully, wickedly, knowingly, and designedly, did falsely pretend to the said Bullen, that he, the defendant, could obtain a protection for Bullen by favor of the lords of the admiralty, by feeing the clerks, as he had an uncle, a lord of the admiralty, and that it would be no great expense, as he could get it done through favor," &c., "by means of which said several false pretences" the defendant obtained the money, &c. The cause was brought up from the assizes to the king's bench by writ of error; and the error assigned was, that there was no averment to falsify the matters of the several pretences set forth in the indictment, by which it could appear to the court, upon the face of the indictment, that any or either of the pretences alleged was false and untrue. Lord Ellenborough, in delivering his opinion, said: "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him." "To state merely the whole of the false pretence, is to state a matter generally combined of some truth as well as falsehood. It hardly ever happens that it is unaccompanied by some truth. Suppose the offence, instead of being comprised within five or six separate matters of pretence, as here, had branched out into twenty or thirty, of which some might be true, and used only as a vehicle of the falsity; are we to understand from this form of charge, that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the fabrication should be applied to the particular thing to be falsified, and not to the whole. And the convenience also of mankind demands, and in furtherance of that convenience it is part of the duty of those who administer justice to require, that the charge should be specific, in order to give notice to the party of what he is to come prepared to defend, and prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached of falsehood." "It has been argued, that perhaps every one of these charges may be false; but the rule, as it has been derived from cases of a mixed nature, where part is true and part false, has introduced a course of separating, by specific averments, all that which is intended to be relied upon as false. The analogy to the crime of perjury is so strict, and justice also suggests the same, that I think it should be specifically announced to the party, by distinct averments, what the precise charge is. It has always been done in indictments for obtaining money by false pretences; and whenever a more general form of indictment has come under consideration, it has not met with countenance; but the court, as in Rex v. Mason, have reprobated it. If it were good, every man might be brought into court without any possibility of knowing how to defend himself." Mr. Justice Le Blanc in the same case said: "The argument is, that alleging that the defendant did falsely pretend," &c., generally, and in a lump is equivalent to an averment that each of those pretences was false. But a number of pretences may consist of some facts which are true, and some false; and it is a necessary rule in framing indictments not only that the offence should be truly described, but that it should be described in such a manner as to give the party indicted notice of the charge. Therefore, when a party is charged with obtaining money under false pretences, the indictment ought to state in what particular such pretences are false. Here it is charged in the first count, that the defendant did falsely pretend "that he could obtain a protection from the lords of the admiralty, by feeing the clerk, as he had an uncle, a lord, and that it would be no great expense." "Now that is a pretence consisting of several facts, part of which may be true, and part false. It may be true that he had an uncle, a lord of the admiralty; and if he had, it does not follow that the rest may not be true; therefore the indictment should have charged what part was false." This case shows that, according to the general rule of certainty applicable to indictments, the particular pretences must be set forth, and it must be averred in what particulars they were false. We are, therefore, of opinion that this cannot be sustained as an indictment for a fraud or cheat by false pretences.

But it has been contended, that it is a good indictment for a forgery at common law. The forgery, it is said, consists in having, "ostensibly for the public service, but falsely, and without authority, caused and procured to be issued from the navy department of the United States," the requisition set forth in the indictment. It is a sufficient answer to this idea to say, that the indictment itself admits it to be a true requisition, and contains no allegation that the defendant forged and counterfeited it.

The second count does not vary, substantially, in point of law, from the first. Upon the whole, the judgment of the court upon this demurrer, must be for the defendant.

The indictment upon the transaction with Mr. Harris, differs, in matter of law, from that upon the transaction with Mr. Paulding, in the following particulars only, namely: (1) That it avers that two of the drafts drawn by the defendant upon Mr. Harris, were drawn in favor of a certain Thomas B. Pottinger, and sold by the defendant with the indorsements thereon of the said Pottinger, to C. S. Fowler, and "that the indorsements of the said Pottinger on the said drafts, were either the genuine indorsements of the said Pottinger, made thereon by him for the accommodation, and at the request of the said Watkins, and without any interest of the said Pottinger therein; or were falsely made thereon by the said Watkins." (2) That it avers that Mr. Harris, being navy agent, on the 30th of September, 1827, at Boston, "made out his

abstract of expenditures, as such navy agent, as required by the rules and orders of the navy department of the United States, for the 3d quarter of that year, ending on the said 30th of September; which abstract contained, among many other charges of expenditures as aforesaid, the following three items and charges, under the head of arrearages prior to 1827:

167.	Sept. 1,	T. Watkins	draft	$300	
168.	" 10,	do.	do. of $500	499.50	
169.	" 22,	do.	do.	500	
					$1,299.50

—which abstract is set forth in words and figures; and it is further averred that the drafts referred to in the said three items were the drafts before charged to have been drawn in favor of C. S. Fowler. The indictment then proceeds thus: "And the said Harris, having transmitted the said abstract to the said Watkins, as fourth auditor of the treasury of the United States, who was the proper officer to receive the same, the said Watkins, in pursuance of his said fraudulent intent to deceive and defraud the said United States, and to consummate his said fraud, and to cover and conceal the same, that he might thereby be enabled to keep to his own use, the moneys he had obtained by means of the said drafts, and thereby to defraud the United States, did, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, falsely and fraudulently alter the said abstract, by erasing therefrom the words:

T. Watkins	draft	
do.	do.	of $500.
do.	do.	

opposite to the said dates of September 1st, 10th, and 22d, prefixed to the aforesaid three items and charges in the said abstract under the head of "arrearages prior to 1827, hereinbefore set out, with intent to defraud the United States." And there is a subsequent averment, that the letters, drafts, and requisition, "and also the erasure of the said abstract, were made and done with intent to defraud the United States, and as false pretences to enable him to obtain and keep to his own use and benefit, the said several sums of money therein mentioned; and that by means of the said several false pretences, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said several sums, amounting to the sum of $2,000, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

The averment respecting the indorsement of Mr. Pottinger, seems to be wholly immaterial to the charge contained in this indictment, which, like that in the other indictment, is for obtaining money by false pretences, and there is no false pretence alleged in regard to that indorsement. But if it were material, its alternative form would render it perfectly nugatory. It is an averment that it was made either by Mr. Pottinger, or Mr. Watkins, without fixing it upon either. This averment has no connection with the charge, and may be considered as mere surplusage. The erasure of part of the abstract is charged to have been done by the defendant as a false pretence for obtaining the money for his own use. The indictment itself shows this to be impossible, because it shows that the money was obtained before the erasure was made. But it is also averred, that it was done by the defendant to enable him to keep the money to his own use. But the offence charged is not the keeping the money, but the obtaining it by false pretences. The erasure, however, is also averred to have been made with intent to consummate his said fraud, that is, the fraud in obtaining money by false pretences. But the indictment shows that that fraud, if committed at all, had been consummated before the erasure was made.

It is also averred, that the erasure was made with intent to cover and conceal his said fraud; but the charge in the indictment is for perpetrating, not for covering and concealing, the fraud. This averment, therefore, so far as it regards the charge in the indictment of obtaining money by false pretences, is wholly immaterial and irrelevant, and therefore may, in that respect, be considered as mere surplusage. But it is said, that the averment concerning this erasure, constitutes a substantive and sufficient charge of another offence, namely, a charge of forgery at common law; and that whether the indictment be good or bad as an indictment for obtaining money by false pretences, it is good as an indictment for forgery. It cannot escape our notice, that the only injury to the United States complained of in this indictment is by the fraud committed by false pretences; and that this forgery, if it be one, is only alleged incidentally as one of those pretences. The defendant was not informed by this indictment that he was to come prepared to answer to the crime of forgery. It contains but one count, and that is for obtaining money by false pretences; and if that same count contains also a specific charge of forgery, it is bad for duplicity. No man is bound to answer to two or more criminal offences in one count; and even if they are contained in several counts, and be not of the same nature or class, the court will compel the prosecutor to elect that upon which he intends to put the accused upon his trial (Young v. Rex, 3 Term R. 106); but in no case is he permitted to join several offences in one count. In civil actions, advantage can be taken of duplicity only by special demurrer; but in criminal cases it is fatal on general demurrer. Archb. Cr. Pl. 25; Com. v. Symonds, 2 Mass. 163; U. S. v. Sharpe, 1 Pet. [26 U. S.] 131; State v. Montague, 2 McCord, 287.

The present count undoubtedly contains a clear and distinct, although not a sufficient,

charge of fraud by false pretences. If it contains also a charge of forgery, it is bad for duplicity. It does not, however, seem to us to contain a charge of forgery as a separate offence. What is said of the erasure is merely surplusage. If this indictment cannot be supported as an indictment for forgery, (and we think it cannot,) it is bad as an indictment for obtaining money by false pretences, for the reasons stated respecting the preceding indictment. The judgment upon this demurrer, also, must therefore be for the defendant.

THRUSTON, Circuit Judge, dissented, and said, that on the day that the argument in this case was opened, he had not sat in court, and the state of the weather, his ill health, and the distance of his residence from the court room, had put it out of his power to examine the authorities on the subject as closely as he could have wished; but he believed he had heard the main part of the argument, and had paid very close attention to it; and he had brought his mind to the conclusion, that the demurrer ought to be overruled, and that the indictment was sufficient. In many of the views of his brethren he had concurred; but as to the insufficient averment in the indictment of a fraud at common law, he differed from them. There was not a single charge in it of an act done, that was not set out most specifically to have been done with a fraudulent design. He did not know, he said, what the precise duties of the fourth auditor are. He did not doubt that the fourth auditor might have had a right to demand of the secretary of the navy a requisition, and that the issuing of the requisition might, if properly done, have been a legitimate act, which could not be questioned here. But the design with which the requisition was procured to be issued must be looked at. Subsequent acts, said he, show the design to have been fraudulent; and it is sufficiently set out, in the indictment, that all the acts enumerated in the bill were fraudulent, and were, therefore, false pretences. He did not concur with his brethren in their disquisition as to the signification of the word "as," which, he said, did not merely mean similitude, but properly formed part of the sentence containing the allegation of false pretences. "I think," said he, "that the indictment is sufficient, and that it gives full notice to the party of the charges against him." He did not express his opinion more precisely, for the reasons which he had stated; which was of less importance in this case, as his brethren had pronounced a contrary opinion. If this indictment was not a sufficient one, he concluded by saying he thought it was hardly possible to frame one that would sustain a prosecution for a fraud at common law against the United States.

Wednesday, June 3d. A third indictment was this day presented to the court, to which, also, there was a general demurrer. This indictment charged that the defendant, being fourth auditor of the treasury of the United States, and "intending fraudulently and unjustly to obtain and acquire for himself and for his own private use, the money of the United States," "falsely and fraudulently" wrote a letter to Mr. Paulding, navy agent at New York, informing him that he had drawn on him for $300, to be charged to arrearages prior to 1827, under which head a remittance would be made to him, immediately on the secretary's return to the city; and requesting Mr. Paulding, in the meantime, to pay the draft out of any unexpended balance in his hands, to be replaced on receipt of the treasurer's remittance. That the defendant drew the draft, sold it to Mr. Fowler, received from him the money, and disposed of it for his own use; and that the draft was afterwards paid by Mr. Paulding. That the defendant, "ostensibly for the public service, but falsely, fraudulently, and without authority, caused to be procured and issued from the navy department of the United States a certain requisition to the secretary of the treasury of the United States, for the purpose and intent of placing in the hands of the said J. K. Paulding, navy agent, as aforesaid, the sum of $300 of the moneys of the United States, (which requisition is set out verbatim,) by which the money was placed in the hands of Mr. Paulding; and the indictment charges that the said letter and draft, so as aforesaid written and sent, and drawn and sold as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was, so written and sent, drawn and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and with intent to defraud the said United States, and as false pretences, to enable him to obtain and keep to his own use and benefit the said sum of $300; and that, by means thereof, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said sum of $300, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

Mr. Key, for the United States, presumed that it would not be thought either unreasonable or disrespectful to the court, that his learned associate (Mr. Swann, the district attorney,) and himself had thought themselves justified and bound to offer an argument on this occasion. That this duty was, in some measure, thrown upon them by the circumstance, that the ground on which the indictments were now held to be insufficient was not touched by the argument offered under the former demurrers, and only now brought to their view, and the

strong conviction they felt that it could be shown to be untenable. They therefore hoped that, if the question presented by the present demurrer was the same, in every respect, with those already settled by the court, the court would reconsider their determination of this question; and, if they had inadvertently decided what was inconsistent with the principles they had themselves laid down, they would retract it. He thought also, that the indictment now in question might possibly be considered by the court as presenting a different question, though he confessed that, to himself, it appeared to present the same. He considered that two questions were now settled, as to this and the other indictments, by the opinion delivered: First, that defrauding the United States was indictable at common law, without the use of false pretences; secondly, that these indictments, as indictments for using false pretences, were not sustainable.

Considering these two points as not to be disputed, now the question for consideration is this—Is this indictment, though insufficient for a fraud effected by false pretences, good, as an indictment at common law, for a fraud on the United States, without false pretences? In other words, does the indictment, being insufficient for false pretences, vitiate it altogether, although there be a sufficient charge in it of a fraud on the United States? He contended that, if the indictment contained a sufficient charge of the latter offence, namely, a fraud upon the United States, which required no false pretences, (as is decided,) and set out, also, a fraud perpetrated by false pretences, which were insufficiently set forth, the indictment must be held good for the offence which was well laid, and the rest would be held surplusage. It is on this ground that the indictments are now decided to be bad; a ground not taken in the argument. He contended that the indictments were sustainable, as containing a charge of a fraud on the United States, which required no false pretences to be set out. The only argument urged against this position was, that a fraud upon the United States, like a fraud upon an individual, was not indictable unless effected by false pretences; and the court has decided this question for us. It was never urged until now, in the court's opinion, that if such a fraud was indictable on account of its affecting the public, though unaccompanied by false pretences, yet that an indictment which sufficiently set forth such a charge, though it need set out no false pretences, would be wholly vitiated by undertaking to set out such pretences, and setting them forth insufficiently. He thought they would be able to satisfy the court, from the clearest authorities, that the insufficient setting forth of such unnecessary matter could not vitiate what was sufficiently charged; that "utile per inutile non vitiatur;" and that, laying aside the averment of the acts being done as false pretences, there was, without it, a clear, definite, and sufficient charge of a fraud upon the United States, indictable, according to the court's opinion, at common law. Here, as he understood the opinion of the court, was the point of difference. Though not necessary to set out the acts done as false pretences, yet, if they are so set out, they must be proved as such; and, if insufficiently set out, the indictment is bad. This is the opinion, and this the ground of it, upon which the decision is made against the indictments. He should endeavor, with all respect to the court, to show that it had been inconsiderately adopted.

As it may, however, be questioned whether the indictment contains, apart from the alleged false pretences, a proper charge of a fraud upon the United States, he would first consider what such an indictment ought to allege, as a sufficient statement of such an offence. The offence is fraud upon the United States, and all that can be necessary to set out in the indictment is, that the party accused intended to defraud the United States; that, in pursuance of that intent, he committed certain specific acts, and that, by those acts, the United States were defrauded. There can be no other necessary ingredient of the offence, according to the court's opinion; for that has determined that the gist of the offence is defrauding the public,—defrauding the public by any acts, whether false pretences or not. Now it cannot be pretended that any of those ingredients are wanting here. It is alleged that the accused, devising and intending to defraud the United States, wrote and sent the letter of advice set out in the indictment, made the draft, and procured the requisition to be issued; and it is distinctly averred that, by these acts, he did defraud the United States of the sum of money mentioned in these instruments. Let the precedents be looked to, of the indictments for frauds on the public, in the cases cited in the argument, and they will be found to sustain this view of the case. None of them are more distinct and particular in their statements and averments,—few of them as much so,—as the indictment now before the court. Here he referred to the indictment in the Case of Jones, the apprentice, in 1 Leach, and of the Chelsea pensioner, and the overseers of the poor, in East and Chitty; and contended that these cases, and the clear principles of criminal law, showed that nothing else could be necessary in an indictment than to state the intent, the fraud, and the acts by which it was perpetrated. He proceeded, then, to inquire whether, as more than this was done,—as the acts by which the fraud charged to have been effected are called "false pretences," or "as false pretences," (as the court have considered the averment,) with averments of the falsehood of the pretences,—this unnecessary addition to the indictment can be held to avoid it

altogether, admitting it to be settled by the court's opinion that these are not such false pretences, nor so set out as would be sufficient to sustain the indictment, as an indictment for obtaining money by false pretences. That all these parts of the indictment are unnecessary parts, either wholly irrelevant, or immaterial to the indictment, considered as an indictment for fraud on the United States, must be conceded, if he had correctly stated what such an indictment should contain.

The inquiry, then, is as to the effect of introducing unnecessary matter into an indictment which contains a sufficient charge of the offence. According to the court's opinion, it vitiates the whole indictment. The well settled principles of pleading, and the authority of numerous adjudged cases, will be found otherwise. 1 Chit. Pl. 231, 233–235; Archb. Cr. Pl. 16. It is there plainly laid down, that matter wholly irrelevant, if stated, need not be proved; that matter relating to the offence, but not necessary to be stated, if stated must be proved; and that in neither case can the introduction of such matter vitiate the indictment, declaration, or plea, (for there is no difference, as to this inquiry, between civil and criminal cases,) except where the matter thus unnecessarily introduced, shows that the party using it has no cause of action. In that case he agreed that the party, thus showing what defeats himself, makes his count good for nothing. But nothing short of this will have such an effect upon his pleading. It must, as both Chitty and Archbold state it, show that he has no cause of action, and the setting out of such unnecessary matter defectively and informally, is quite a different thing; the passage cited from Archbold, shows that it does not vitiate, and may be considered as surplusage. The cases by which both these writers illustrate the principle they lay down, make this distinction obvious. It is the distinction, well taken,—and which must be familiar with the court,—between a cause of action defectively set forth, and a defective or bad cause of action. It may seem subtile; but the least attention comprehends it. It may be illustrated in the case of an indictment for forgery. You must charge the act done with intent to defraud another. To what extent and in what way the fraud was to affect him, need not be set out. But if you do set it out unnecessarily, and it appears from your own showing, that it could not in any way defraud him, the indictment is bad. Not so if you set it out informally and defectively, so as not to appear whether it could or could not defraud him. The cases are innumerable which sustain this position. In East, P. C. 821, 822, is a case of indictment for a cheat at common law, by false pretences, which were by the court deemed insufficient, so that that ground of the prosecution failed; yet the court, seeing enough in the indictment to constitute a charge for conspiracy, apart from the false pretences, sustained it on that ground. The next case also was for a cheat by false tokens, and the false tokens were not sufficiently set forth; but the court sustained it as an indictment for forgery at common law, because it contained enough to constitute such a charge. So in Sweer's Case, 1 Dall. [1 U. S.] 45, which was upon an indictment for forgery at common law; but the court, being of opinion that the paper altered was not the subject of forgery at common law, rendered judgment as for a cheat. So in Com. v. Boynton, 2 Mass. 77, the indictment was for forgery under a statute; and not being sustainable on that ground, the court sustained it as for a cheat at common law, and this court and all other courts continually do the same thing. There is a large class of cases of indictments for various offences under particular statutes, and if the special circumstances necessary to bring them within the purview of the statute are insufficiently set out, the uniform and settled practice of this, and every criminal court, is to consider all those parts of the indictment which refer to the statute, and which go to state and aver the offence to be within the statute, as mere surplusage, and to sustain the indictment upon the common-law charge.

The only remaining inquiry is this: Does the statement of the unnecessary matter in this indictment show a defect in any of the ingredients necessary to constitute the charge of a fraud upon the public? The intent to defraud is plainly charged, the actual perpetration of the fraud as plainly, and the acts, by which the fraud was committed, are set forth; namely, the letter, the draft, and the requisition. Are these acts such as could not defraud the United States? This is all that is left to hang an objection upon; and can the court say that these acts cannot defraud the United States? The only ground upon which it could be so pretended, is removed by the opinion delivered, that it was the money of the United States that was obtained by these acts, from Mr. Paulding, and that, if so obtained, it was a fraud upon them.

If such nice criticisms and objections are to be discussed, not only upon the material parts, but upon every unnecessary statement and averment that may be found in indictments, we shall have more than doubled upon us the evils that are already justly complained of. There was enough of this evil without such a practice, in the estimation of Lord Hale, who expresses himself thus upon the subject: "In favor of life, great strictness has been, at all times, required in point of indictments; and the truth is, that it is grown to be a blemish and inconvenience in the law and the administration thereof. More offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offences escape by these.

unseemly niceties, to the reproach of the law, to the shame of the government, to the encouragement of villany, and to the dishonor of God. And it were fit, that by some law, this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, grow mortal without some timely remedy."

Mr. Key admitted, that in his view of this case it presented the questions already decided. But he thought the court's view of these cases would oblige them to consider it differently. The court had insisted that the former indictments were for obtaining money by false pretences. But he did not think that an indictment, charging a fraud upon the public, in obtaining and keeping public money by certain acts specifically set forth, could be so considered because those acts were called false pretences. But the name thus given to those acts, it seemed, had unfortunately overthrown the indictments. Take away the name, and the indictments must have stood. For it has not been pretended in the argument, or in the opinion, that the acts of fraud are not set out with sufficient precision as acts of fraud. All the objection is, that they are not sufficiently set out as false pretences. As the acts of fraud by which the intended offence was effected, they are set out with all the certainty and precision possible. The defendant is said to have written the letter, made the draft, and caused the requisition to be issued, with intent to defraud the United States, and the letter and requisition are set out in words and figures; the letter dated, "Treasury United States, Fourth Auditor's Office," and bearing on its face every official character; the requisition is averred to have been caused to be issued without public authority, ostensibly for the public service, but falsely and fraudulently for his own use. It is plain that nothing more particular could be necessary, or perhaps possible, to say about these acts. The fraud consisted in these acts; in these acts alone; unaccompanied by any other acts or circumstances. Nothing surely need have been said about them, but that the defendant committed them with the fraudulent intent charged. But still these acts were called false pretences, and the indictments are bad. Now it has so happened, that the indictment now before the court does not give to the acts of fraud this unlucky name. In the conclusion of these indictments, where alone this appellation is pretended to be given to the fraudulent acts, there will be found a little variation in the language. The former indictments spoke of these acts "as false pretences," and then said, "by means of which said false pretences" the United States were defrauded. The indictment now before the court speaks of the acts "as false pretences," and adds, that "by means thereof" the United States were defrauded. "By means thereof" is, by means of the acts before set out; and the averment therefore is, that by the acts set forth the United States were defrauded, and not that the United States were defrauded by means of false pretences; so that this indictment is clear of any averment of false pretences, which was fatal to the others. If it be said that it charges them to have been done and used "as false pretences," then we say, with the court, that "as" means "like"; and that the averment is, that the fraud was committed by means of certain acts, which were not false pretences, but "like" false pretences; so that the former indictments were for frauds by false pretences, and this is for a fraud by acts "like" false pretences, and thus, not having the ill-fated name given to the acts, it is clear of the faults of the other indictments.

Mr. Key also referred to U. S. v. Lindsay [Case No. 15,602], in this court, indicted under the Maryland act of 1723 (chapter 16), for that he, being a shop-keeper, sold liquors to slaves on Sundays, and kept a disorderly house. It was objected that the act of 1723 did not apply, because there was no averment that the traverser was a house-keeper, as required by that act; and that the indictment could not be sustained under the act of 1784, because it was not averred that he was a retailer. But it was contended that, if not good under the statute, it was good at common law, for keeping a disorderly house, and it was so decided by the court.

Mr. Key also cited the following passage from Starkie, Cr. Pl. p. 103—"Next it is to be considered how far it is necessary to particularize, in describing the means of effecting a fraud. And first it may be observed, that if some means be specified, and by those the fraud could have been effected, no objection can be taken on the ground that the description is not sufficiently circumstantial."

Mr. Swann, Dist. Atty., on the same side, complained that the decision of the court had left him in doubt as to the course he ought to pursue in framing new indictments upon the same transactions, and he was glad that this third indictment would afford the court an opportunity of revising its decision. The court, in their opinion, seem to require averments which it may not be in the power of the government to sustain. The court has said, that the cases cited "seem to establish the broad principle stated by East, in his Pleas of the Crown, 818, 821, that all frauds affecting the crown, and the public at large, are indictable offences at common law." All, then, which was necessary in the indictment was, to set forth a fraud upon the public; and the court went into an examination of the indictment, to see whether a fraud upon the public was sufficiently set forth. In this case, then, we must inquire whether the fraud alleged in the indictment is sufficiently set forth. The facts are few. It is alleged, in the first place, that the accused falsely and fraudulently wrote, addressed, and caused to be sent to J. K. Paulding the letter therein stated. In the next place, that he

fraudulently and without authority caused and procured a requisition to be issued, for the money therein stated. And, finally, that he fraudulently drew upon Mr. Paulding for the money, and received and applied it to his own use; and that all this was done to defraud the United States.

As to the first of these allegations, nothing can be added to it. The accused wrote and sent it; and that is all, perhaps, that can be proved upon him.

The second allegation is, that he caused the requisition to be issued fraudulently, and without authority; and it presents the important question, whether, if an officer of the government shall fraudulently cause a requisition to be issued, without authority, upon the public treasury, and contrive to get and apply the money to his own use, he would be indictable at common law. In deciding this question, it would seem to be unnecessary to bring to our assistance the previous letter and the subsequent draft. The question might be rested upon the requisition itself; and upon that ground, and that alone, he should hold any man, who should practise such a fraud, indictable at common law. It is not necessary that the accused should have made any false affirmation to any one respecting the fraud charged. The case in Maule & Selwyn was correctly decided; but it was a case of private fraud, and the indictment was under the statute, and required allegation of false pretences; and therefore is not applicable to this case, which is for a fraud upon the public at common law, and does not require false pretences.

Mr. Coxe, for defendant. All these indictments appear to be based on one erroneous fundamental principle. The true principle, which pervades the whole criminal law, is, that every indictment must contain specific averments of the facts which constitute the crime imputed, in order that the parties accused may be prepared to meet it. The facts stated in the indictment are not, per se, criminal; and the addition of the adverbs "fraudulently" and "falsely" cannot supply the want of the averment of those facts, which make the facts stated in the indictment criminal. The manner in which the fraud was effected must be stated. Rex v. Mason, 2 Term R. 581; Rex v. Holland, 5 Term R. 607; Rex v. Munoz, 2 Strange, 1127. The averment that these things were done without authority, and with intent to defraud the United States, is not sufficient. The manner of the offence must be charged. 2 Hale, P. C. 184. If the averment of false pretences be stricken out, as surplusage, there is no fact alleged which shows that the acts done were criminal.

Mr. Jones, on the same side. There are two reasons for precision in indictments, namely, that the charge should be simple, and reduced to a single point; and that the defendant may know with certainty against what he is to defend himself. This precision is as necessary in an indictment for a fraud upon the public, as for a fraud upon an individual. Every injury to the revenue, or to the public, is not necessarily a fraud. A direct and open breach of trust in a public officer is not an indictable offence at common law. There must be some deceit. It must be by a practice, or token, which may affect the public. East, P. C. 818. It is the machinery of the fraud which makes it indictable. Russ. 1308. It must be by means which affect, or may affect the public, and against which common prudence cannot guard. As great precision is necessary in an indictment at common law as under a statute. The means, the facts that show the fraud, must be set forth; the contrivance, the machinery. Archb. 16–18. If the averments which are said to be mere aggravation be struck out, what is there left? The words "falsely" and "fraudulently," and "with intent," &c., will not supply the want of an averment of the facts necessary to show the deceit. "Without authority." Whose authority?—what authority? "Ostensibly for the public service." How ostensibly? It is no averment of a fact.

It is contended, on the side of the prosecution, that if the indictment states enough to constitute an offence, it is immaterial what else is averred; but if you set out what is not material you must prove it. Govers' Case does not show that you may indict for false pretences and convict for forgery, upon the same count. You can charge only one distinct offence in one count. Too much is as bad as too little. But this indictment does not contain distinct charges of distinct offences. It purports to charge one offence only, and that is for obtaining money by false pretences.

Mr. Jones cited Archb. Cr. Pl. 19, 27, 30; Govers' Case, East, P. C. 824; Id., Sayer, 206; Macarty's Case, East, P. C. 823; Russ. 1361–1370.

Mr. Key, as to the definition of forgery at common law, cited East, P. C. 852, 1022; Starkie, Cr. Law, 103; U. S. v. Castor [Case No. 14,748], in this court, at Alexandria.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, dissenting). This is a third indictment at common law, against the late fourth auditor of the treasury of the United States, for a fraud upon the public, in obtaining the money of the United States by means of false pretences. It is said to be, in point of law, exactly like the former indictment, founded upon the transaction with Mr. Paulding, except that, instead of averring, at the conclusion of the charge in the indictment, that the fraud was effected by means of the said several "false pretences," it avers that it was effected "by means thereof," that is, of all the acts which, in the preceding part of the indictment, had been set forth and averred to have been done by the defendant, "as false pretences." The demurrer upon this indict-

ment not having been submitted to the court, with that in the former case, has afforded the counsel of the United States an occasion to question the correctness of the principles and of the conclusions which are stated in the opinion of the court in that case, and has given the court an opportunity, of which it has availed itself, to review its opinion, under the additional light afforded by the able argument of the learned counsel, directed exactly at the opinion itself. We have been the more willing to do this, because, as there is no appeal in these cases, a heavier responsibility is thrown upon this court. We shall proceed, therefore, to a consideration of the points in which the correctness of our former opinion has been questioned, with a hope and a confidence that, if in this examination we shall find that we have committed an error, we shall not be prevented, by any pride of opinion, from acknowledging it with candor, and correcting it with pleasure. We have taken time to examine the authorities to which we have been referred, with a degree of attention, as we hope, in some degree commensurate with the importance of this cause in the estimation of the public, and with its real importance in point of law.

The objection taken, by the counsel of the United States, to the decision of the court in the former case, is, in substance, that the court drew a false conclusion from the premises which they had established.

The argument on the part of the United States is, in substance, this: According to the opinion of the court, every indictment which sufficiently sets forth a fraud on the public, effected by means other than false pretences, is a good indictment at common law. This indictment does sufficiently set forth a fraud upon the public, effected by means other than false pretences. This is, therefore, a good indictment at common law. The conclusion is just if the premises are true. The major proposition may, for the sake of argument, be admitted to be true. But the minor proposition, namely, "that this indictment does sufficiently set forth a fraud upon the public, effected by means other than false pretences," is now, as it was in effect before, denied by the court. It was, therefore, incumbent upon the counsel of the United States to prove it before they could arrive at their conclusion. Have they done so? and how? They take it for granted that they have proved the proposition when they show, that it is alleged in the indictment that "the accused, devising and intending to defraud the United States, wrote and sent the letter of advice set out in the indictment—made the draft and procured the requisition to be issued"—(and we will add, what they omitted, sold the draft, received the money, and applied it to his own use,) "and that it is distinctly averred that by these acts he did defraud the United States of the money mentioned in these indictments."

And the counsel for the United States contend that "all that can be necessary to set out in the indictment is, that the party accused intended to defraud the United States; that in pursuance of that intent he committed certain specific acts; and that by those acts the United States were defrauded." By the expression "set out" the court understood the counsel of the United States as meaning no more than "aver" or "allege;" and the court, therefore, understood them, in effect, to say, that it is only necessary, in an indictment at common law, for a fraud upon the United States, to aver that the defendant did certain acts with intent to defraud the United States, and that by those acts the United States were defrauded; although the same acts, without the averment of a criminal intent, should appear to be innocent. The proposition to be proved is, "that this indictment does sufficiently set forth a fraud upon the public, effected by means other than false pretences." It must sufficiently set forth a fraud. Fraud is an inference of law from certain facts. A fraud, therefore, is not sufficiently set forth in an indictment, unless all the facts are averred which in law constitute the fraud. Whether an act be done fraudulently or not is a question of law, so far as the moral character of the act is involved. To aver that an act is fraudulently done, is, therefore, so far as the guilt or innocence of the act is concerned, to aver a matter of law, and not a matter of fact. An averment that the act was done with intent to commit a fraud, is equivalent to an averment that the act was done fraudulently. No epithets, no averment of fraudulent intent, can supply the place of an averment of the fact or facts from which the legal inference of fraud is to be drawn. Starkie, in his late treatise on Criminal Pleading (page 163), says: "Whether particular circumstances constitute an indictable fraud, is a question of law; and, therefore, according to a fundamental rule of description in indictments, such circumstances must be set out, in order to show that the facts amount to an indictable offence." The case of Rex v. Knight, 1 Salk. 375, was an information against a receiver-general for falsely indorsing certain exchequer bills, and paying them into the exchequer "as if they had been received for customs, and as if they had been truly indorsed; to the deceit and fraud of the king." The statute of 8 & 9 Wm. III. c. 20, § 65, required him "to put his name to the bill." The information only charged that he indorsed it. Lord Chief Justice Holt, in delivering the opinion of the court, said: "The word 'indorse' is not sufficient; for 'indorsavit' imports a writing on the back of a thing, but not putting his name upon it. But it was urged by the king's counsel that it might plainly be understood by the words 'quasi receptæ essent pro custumiis.' I answer this by argument only; and informations are nought for that very cause; for all charges ought certainly to be set out in

pleading. But further it was urged that it is said, 'falso indorsavit in deceptionem domini regis,' and so found by the jury; and, though a fact that appears innocent cannot be made a crime by adverbs of aggravation, as 'falso,' 'fraudulenter,' &c., yet where a fact stands indifferent, as writing, which may be true or false, and is charged to be 'falso,' and the jury find it so, all are then estopped to say the contrary. On the other side it was said, 'in deceptionem' is only matter of conclusion. But here is no charge; it is not enough to say the king is cheated; he must appear to be so." Again, in the same case, as reported in 3 Salk. 186, it is said: "To say, 'falso indorsavit quasi receptæ essent,' is no direct charge of any thing that is criminal. 'Tis true it is said 'in deceptionem domini regis'; but this is only matter of inference and conclusion; whereas the charges contained in every indictment ought to be so certain that the defendant may know what answer to make, and that the court may set the fine in proportion to the offence; and likewise, that if the defendant should be indicted again for the same fact, he may plead 'autrefois convict,' (that is, that he has been before convicted.) 'Tis true that the jury have found that the defendant 'falso indorsavit'; but that will not fix the guilt; for they are only to find the contents of the indictment, and if that will not amount to a crime, the adverb 'falso' will not make it so." So, also, Lord Mansfield, in Rex v. Woodfall, 5 Burrows, 2666, says, "that all the epithets in the information were formal inferences of law from the printing and publishing," and "that the verdict finds only what the law infers from the fact." Again, in page 2669 he says, "if they" (the jury) "meant to say that they did not find it a libel, or did not find the epithets, or did not find any malicious intent, it would not affect the verdict, because none of those things were to be proved or found either way." The language of Starkie, also, (Starkie, Cr. Pl. 85,) is this: "It has been said, that where the fact laid in the indictment appears to be unlawful, it is unnecessary to allege it to have been unlawfully done. In truth the averment is in no case essential, unless it be part of the description of the offence as defined in some statute; for if the fact, as stated, be illegal, it would be superfluous to allege it to be unlawful; if the fact stated be legal, the word 'illicite' cannot render it indictable; and the same observation is applicable to the terms 'wrongfully,' 'unjustly,' 'wickedly,' 'wilfully,' 'corruptly,' 'to the evil example,' 'maliciously,' and such like; which are unnecessary if they are not to be found in the very definition of the offence, either at common law, or in the purview of the statute." So, also, Archbold, in his treatise on Criminal Pleadings (page 23), says, "An indictment for an offence against the statute must, with certainty and precision, charge the defendant to have committed the acts, under the circumstances, and with the intent mentioned in the statute; and if any one of these ingredients in the offence be omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error. The defect will not be aided by verdict, nor will the conclusion, 'contra formam statuti,' cure it."

One of the necessary and essential ingredients of fraud is deceit. Without deceit there can be no fraud, in the legal sense of the word. No fraud can be committed but by deceitful practices; practices calculated to deceive. There may be injuries to the public without deceit, and they may be indictable at common law, but they cannot be frauds. The particular deceitful practices, by means of which the fraud is alleged to have been committed, must be specially set forth; so that the deceit may appear upon the face of the indictment, in order that the court may judge whether the fraud which constitutes the crime can be inferred from the facts stated in the indictment. Whether the deceitful practices consist of false tokens, or fabricated letters, or forged notes, or false pretences, expressed either by words or signs or acts, they must be set forth with proper averments, showing and falsifying the pretended facts which were the means of the deceit.

If, then, the law is, as we have stated it to be, that fraud is an inference of law from certain facts; that every indictment for fraud is bad which does not positively aver all the facts necessary to raise that inference of law; that the expressions "fraudulently and with intent to defraud the United States," and "that the United States were defrauded," are not averments of matters of fact, but of inferences of law; there will be nothing left, according to the idea of the counsel of the United States, as to what is necessary in an indictment for fraud upon the United States, but the averment that certain apparently innocent acts were done by the defendant.

Let us, then, according to the terms of the proposition, exclude from this indictment all the averments respecting false pretences; and let us exclude those allegations which are not averments of matters of fact, but of inferences of law; and the following averments of facts will be all that are left, namely: That Tobias Watkins, on the 8th of October, 1827, being then 4th auditor, &c. at Washington county aforesaid, with force and arms, wrote and addressed and caused to be sent to J. K. Paulding, then a navy agent of the United States at the city of New York, the letter of that date set forth in the indictment; and on the same day drew the draft on the said J. K. Paulding, navy agent, for $300, and sold and delivered it to C. S. Fowler, and received from him $300 therefor, and kept and disposed of the same for his own use; which draft was afterwards paid by the said J. K. Paulding. That the said

T. Watkins did afterwards, on the 6th of November, 1827, at Washington county aforesaid, cause and procure to be issued from the navy department of the United States, the requisition set forth in the indictment, for the purpose of placing in the hands of J. K. Paulding, navy agent as aforesaid, the sum of $300 of the moneys of the United States, which was by that means done. And that these things were so done by the said Tobias Watkins, not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and to enable him to obtain and keep, to his own use and benefit, the said sum of three hundred dollars; and that, by means thereof, the said Tobias Watkins did, at the time and times aforesaid, dispose of the same to his own use and benefit.

These are all the facts remaining in the indictment, upon which the court is called upon to decide whether the indictment is good, as an indictment at common law, for a fraud upon the United States. We look in vain among these facts, for such as show that deceit which is an essential ingredient in fraud. There is no fact averred in relation to the letter, or the draft, or the requisition, which shows any deceitful practice, any attempt to deceive anybody, or to impose upon any agent of the government. Upon that most essential point the facts give us no information. Fraud, even in civil cases, is never to be presumed; and in criminal cases the accused is always presumed to be innocent until the contrary appears. But it has been suggested that the letter, the draft, the requisition, and the receipt and application of the money to his own use, by the defendant, he then being 4th auditor of the treasury department of the United States, do, of themselves, show a fraud. They might, indeed, be evidence contributing to establish a charge of fraud, upon the trial before the jury; but the court is not now to inquire what might be the evidence of fraud. The question is, what are the allegations, not what is the proof; for, however strong the proof might be, the court could not give judgment against the accused, if the offence should not be sufficiently alleged. The simple averment that the defendant wrote the letter is not the averment of any fact which might be inferred from the fact of his writing the letter. So in regard to the averments respecting the draft and the requisition, and the receipt and misapplication of the money; they do not amount to an averment of any inference which might be drawn from either of those acts, or from the combination of the whole. Whatever material inferences of fact might, in the opinion of the counsel for the United States, be drawn from those facts, ought to have been averred as facts; and without such an averment those inferences cannot be taken into consideration by the court in deciding upon the validity of the indictment, for the same reason which would exclude them in the case of a special verdict. Excluding, therefore, those averments of false pretences, which, by the terms of the proposition, are to be excluded, and those averments which are only averments of inferences of law, and there remains no averment of fact showing that most important of all ingredients of fraud, the deceitful practice by which the fraud was or could be effected. The counsel for the United States, therefore, having failed to support the minor proposition of the syllogism upon which their argument is founded, must, of course, fail in their conclusion.

A great part of the argument of the counsel for the United States, in the present case, was founded upon a misapprehension of the opinion of the court upon the former case. They, in effect, assumed, as one of the grounds of their argument, this proposition: that the court decided the former indictments to be bad, because they were insufficient as indictments for fraud by false pretences, although they contained sufficient averments to make them good as indictments for fraud upon the United States without false pretences. But no such proposition was stated by the court in its opinion. No opinion upon that point was given by the court. On the contrary, the court said: "It cannot escape our notice, that the only injury to the United States, complained of in this indictment, is by fraud committed by false pretences." And again, "The offence, therefore, which the accused is called upon to answer, is a fraud upon the United States, perpetrated by means of the false pretences previously set forth in the indictment." If, indeed, the court had seen, that, independent of the averments respecting false pretences, there were, in the indictments, other sufficient averments of facts showing other deceitful practices by which the fraud was committed, the question might have occurred which is now made, to wit, whether the indictments might not be good notwithstanding the allegation that the fraud was committed by means of certain false pretences imperfectly set out. The court, however, did not see, in the indictments, any allegations of other facts showing other deceitful practices by means of which the fraud (in the language of Starkie, in the passage cited by the counsel for the United States in pages 103, 104,) "could have been effected." That passage was cited to show that it is not necessary to be very particular in setting forth the means by which the fraud was committed. After saying, as before noticed, that, whether particular circumstances constitute an indictable fraud, is a question of law, and therefore must be set out, in order to show that the facts amount to an indictable offence, Mr. Starkie observes, in regard to the question, how far it may be necessary to particularize in describing the means of effecting the fraud, "that if some means be specified, and by those the fraud could have been effected, no objection can be taken on the ground that

the description is not sufficiently circumstantial." The case from which alone he seems to have drawn this conclusion, was that of Young v. Rex, 3 Term R. 98. The fraud, in that case, was effected by means of a false pretence, respecting a certain bet which the defendant had made "with a colonel in the army, then in Bath." Upon a writ of error, one of the errors alleged was, that the name of the colonel was not stated in the indictment. But the objection was overruled by the court, who said, that "perhaps his name was not mentioned, so that he could not have been described in the indictment with greater accuracy." The general principle thus extracted by Mr. Starkie from this lean case of Young v. Rex, is cited to justify the court in saying, that it is only necessary, in an indictment at common law for fraud against the United States, to state that the defendant did certain acts (whether fraudulent in their nature or not) with an intent to defraud the United States, and that they were defrauded thereby. It is evident, however, that Mr. Starkie intended to say, in effect, that the means specified must be means by which it might be apparent to the court that a fraud could be committed; that is, deceptive means, deceitful practices; for without deceit, or the use of deceptive practices, fraud cannot be committed. The court, therefore, not having perceived in the former indictments any facts alleged, (except the false pretences, which are now admitted to have been imperfectly set out,) which showed any deceptive means or deceitful practices by which a fraud upon the United States could be effected, had no occasion to advance the doctrine which the counsel for the United States have supposed was advanced by the court, nor to deny the principle contended for on the part of the prosecution, that "utile per inutile non vitiatur." Whenever the circumstances of a case shall raise the question, whether an indictment for fraud alleged to have been committed by false pretences imperfectly set out, can be supported by evidence of other deceitful practices which may happen to have been set out in the indictment, but not averred to be the means by which the alleged fraud was committed, it will be proper to decide it; and the cases cited by the counsel will deserve great consideration; but as we think that that question is not raised by the circumstances of the present case, it is not necessary to decide it now.

It has been stated in argument, by the counsel for the prosecution, that it has been settled by the opinion of this court upon the former indictments, "that defrauding the United States was indictable at common law without the use of false pretences." The proposition thus extracted, and drawn away from the ideas by which it was accompanied in the opinion which was given, and presented to the view thus baldly, appears to have misled the counsel for the United States, and may tend to mislead others. If the expression, "false pretences," be taken in its most extensive sense, it might, at first view, be doubted whether a fraud could be committed without a false pretence, for falsehood and deceit are the essence of fraud. But the phrase, "false pretences," has become familiar to the lawyer's ear; and ever since the statute of 30 Geo. II. c. 24, which made certain frauds upon individuals indictable which were not indictable by the common law, the phrase has acquired a technical character, and has generally been understood as descriptive of such false pretences as were punishable by that statute, and as would make those frauds indictable which were not so before. It is evident, by the manner in which it was used by this court in its former opinion, that it was so understood by the court, and was used as a description of a particular class of deceitful practices. It is evident also, that the court was considering the question, whether, in an indictment for a direct fraud upon the public, it was necessary that the fraud should appear to have been committed by the same sort of means which would be required to support an indictment at common law for a fraud upon an individual. Thus, after stating one of the grounds of the demurrer, namely, that fraud is not indictable at common law unless effected by means of some false token, such as false weights or measures or marks, &c., the court said: "But to this it was answered, that frauds affecting the public at large, or the public revenue, constitute a distinct class of cases punishable by indictment, although the fraud be not effected by means of false public tokens, or by forgery, or by conspiracy, or by any particular sort of means; and this position seems to be supported by principle and by precedent." Again, the court said: "The principle, therefore, which, in transactions between individuals, requires, in order to make the fraud indictable as a public offence, that it should be committed by means of tokens, or of false pretences, or forgery, or conspiracy, does not apply to direct frauds upon the public." The court then proceeded to illustrate the distinction in principle, between public and private frauds, by many cases of indictable frauds, in which the deceitful practices by which the frauds upon the public were effected did not consist of false tokens, or false pretences, or forgery, or conspiracy; and then observed, that "these cases seem to establish the broad principle stated by East (P. C. 818, 821), that all frauds affecting the crown, and the public at large, or effected by any deceitful or illegal practice or token (short of felony,) which affects, or may affect the public, are indictable offences at common law."

These citations from the former opinion of the court seem to us to show, conclusively, that the court ought not to be understood as saying, that an indictment at common law for a fraud upon the United States, can be supported without the averment of facts which show that the fraud was committed by de-

ceitful practices of some sort or other; although the court did, in effect, say that it was unnecessary to show that the fraud was effected by means of tokens, or of false pretences, or forgery, or conspiracy; because there may be deceitful practices not included in either of those classes.

The counsel for the United States also misunderstood the opinion of the court, in supposing the court to have said, that an indictment which sufficiently sets forth a fraud upon the public, unaccompanied by false pretences, and which would be a good indictment without any averment of false pretences, would be wholly vitiated by undertaking to set out such pretences, and setting them forth insufficiently. Whatever the opinion of the court might be in such case, it certainly was not expressed.

Again, it was stated by the counsel for the United States, that, according to the opinion of this court, the introduction of unnecessary matter into an indictment vitiates the whole indictment. In this respect, also, the opinion of the court was misunderstood. The court gave no such opinion.

It was contended on the part of the United States, that the indictment is sufficient, because "the intent to defraud is plainly charged; the actual perpetration of the fraud as plainly, and the acts by which the fraud was committed, are set forth, the letter, the draft, the requisition;" and it was asked, "Are these acts such as could not defraud the United States?" It has been before observed, that the averment of an intent to defraud, will not supply the want of the averment of facts showing the deceitful practice which constitutes the essence of the fraud. It is not the injury alone, but the injury by means of the deceit, which constitutes the crime. But it is said, that the actual perpetration of the fraud is plainly averred. The simple averment of fraud, or that the United States were defrauded, is only the averment of a matter of law; a legal inference from facts; which facts must, themselves, appear to justify it. The acts, by which the fraud was committed, it is said, are also set forth, namely, the letter, the draft, and the requisition. These may be among the acts by which the injury was done to the United States, but they are not such acts as show the deceitful practices by which the fraud was effected. The only facts, averred respecting those papers, are, that the letter was written and sent; the draft was drawn and sold and paid, and the requisition was procured. These facts, alone, do not show the fraud. Again; it is contended, on the part of the United States, that, "whether these acts did defraud the United States as charged in the indictment, is matter of proof—is exclusively for the jury, and not for the court." Whether the acts were done, is certainly a question for the jury. But whether those acts did defraud the United States, namely, whether they amount to fraud, is unquestionably a matter of law. It is true, that in finding a general verdict, upon the general issue, in a criminal case, the jury must incidentally decide upon the law as well as the fact, because the question of guilt depends upon both law and fact, which cannot be separated in a general verdict; yet whenever, by the pleadings, or by a special verdict, which the jury have always a right to find if they will, the law is separated from the fact; the law is to be decided by the court alone. As the court said so much, in its former opinion, respecting the degree of certainty required by the rules of the common law, in indictments, it forbears to add any thing upon that point. But the propriety of adhering to the rule has been questioned, and the passage from Hale's History of the Pleas of the Crown (volume 2, p. 193), so often quoted in support of defective indictments, has been again cited upon us. But his complaint of the overnicety of the practice under the rule, is the strongest evidence of the existence of the rule itself. And the same venerated judge, in another part of his book, in speaking of presumptive evidence (pages 289, 290), says: "It is better that five guilty persons should escape unpunished, than one innocent person should die;" and if his opinion had been required, there can be no doubt that his patriotism would have prompted him to say, that it is better that ten guilty persons should escape punishment, than that any one of those rules of the common law which were adopted for the protection of the personal liberty and safety of the subject or citizen, should be abrogated. Those rules of the common law were not imposed upon the people by an impending arbitrary power, but sprang up spontaneously in the midst of them, according to the exigency of the times. They were rights claimed and enforced by the unconquerable spirit of our sturdy ancestors, who to all the attempts made to deprive them of those rights, answered, with stern resolution, "Leges Angliæ nolumus mutari." Such of our ancestors as were either driven or allured to this country, claimed the common law as their birthright; and of all its provisions, they clung with most pertinacity to those upon which the security of their personal liberty depended.

It was upon the principles of the common law that our Revolution was based and defended; and when the colonies assumed the right of self-government, many, if not all of them, expressly declared that the people were entitled to the privileges and the protection of the common law, and this court would betray the people if it should give them up. Next in importance to certainty in the law, is certainty in the accusation. Mr. Starkie, in his treatise on Criminal Pleadings (page 73), says: "The general rule has long been established that no person can be indicted, but for some specific act or omission; or punished, unless such act or omission be charged in apt and technical terms, with precision and certainty on the face of the record. Before

this important part of the subject is resolved into its elementary divisions, it may be proper briefly to notice the principal reasons, on the ground of which the law exacts a certain particular description of the offence; for these, it is evident, supply the true test by which the sufficiency of any particular charge is to be ascertained. It is necessary, then, to specify, on the face of the indictment, the criminal nature and degree of the offence, which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offence: (1) In order to identify the charge, lest the grand jury should find a bill for one offence, and the defendant be put upon his trial in chief, for another, without any authority. (2) That the defendant's conviction or acquittal may enure to his subsequent protection, should he be again questioned on the same grounds. The offence, therefore, should be defined by such circumstances as will, in such case, enable him to plead a previous conviction or acquittal of the same offence. (3) To warrant the court in granting or refusing any particular right or indulgence which the defendant claims as incident to the nature of his case. (4) To enable the defendant to prepare for his defence in particular cases, and to plead in all; or if he prefer it, to submit to the court by demurrer, whether the facts alleged (supposing them to be true,) so support the conclusion in law, as to render it necessary for him to make any answer to the charge. (5) And finally and chiefly, to enable the court, looking at the record, after conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime, and to warrant their judgment; and also in some instances, to guide them in the infliction of a proportionate measure of punishment upon the offender." Such being the rule of the common law, such its foundation, and such its reasons, this court thinks itself, not only warranted, but obliged, to adhere to it, whenever its benefit is claimed.

Upon the whole, the court, after a very deliberate and anxious revision of its former opinion, has seen no cause to modify it in any respect; and perceiving no material difference, in point of law, between the present and the former indictment, we are of opinion that the judgment, upon this demurrer also, should be rendered in favor of the defendant.

THRUSTON, Circuit Judge, dissented. He observed that his indifferent state of health, and the distance of his residence from Washington, had, perhaps, abridged his opportunity of studying the legal points of the case; but he had listened attentively to the ingenious and elaborate argument upon it on the part of the counsel, and also to the opinion, just read, of the majority of the court; and he thought that, though the reasoning of the latter might amount to good abstract law, it did not apply to the case before them. He thought that if so plain a subject could not be understood by argument, it could receive but little light from books. He had not had an opportunity to look at the indictment for more than a few minutes, and he had formed his opinion, which was based upon a conviction that the indictment ought to be sustained. In determining a legal question, there were two extremes which ought equally to be avoided—there were two evils, the Scylla and the Charybdis;—too much refinement and subtlety on the one hand, was as much to be dreaded as too great a laxity on the other. It was, as had been argued, highly proper that an accused party should know with what offence he was charged, in order that he might be enabled to make his defence. A statement of the crime alleged formed the substance of the indictment. And could any one say that the present indictment left the accused unprepared for defence, or unapprised of the charge against him? He could see no omission. He had read the indictment two or three times, and considered it to be fully sufficient; and as he had dissented from a majority of the court, he thought it better to deliver his opinion now, than to delay the proceedings by taking further time for consideration. He would briefly notice two or three of the points on which the majority of the court thought the indictment not sustainable.

It had been urged, in reference to many of the cases cited, that it was not enough to allege that the king or the public had been cheated; but that it must appear that the cheat had been effected, and by certain means. Well, he asked, did it not appear in the present case that the United States had been cheated? And was it not set forth that it was by the false and fraudulent means used? Here the judge read that part of the indictment charging the false and fraudulent means; and continued by asking, was not that a clear averment of falsehood and fraud? Then as to the false papers being written, &c., by him, as fourth auditor, or in his private capacity; in either case, he imagined the offence was punishable. Supposing the same character to run through all the charges, he could not see why the indictment could be considered as not borne out. If the official character of the party run through the indictment, the offence would not only be a fraud, but also a violation of the dignity and duties of his office. If fraud was not sufficiently averred, he really did not know what words could be employed in charging it.

The judge proceeded to review the course adopted by the accused, to obtain possession of the public money. He draws upon Mr. Paulding, not as an individual, but as a public officer,—a navy agent. He directs the draft to be charged to "arrearages,"—a public fund. He states, also, that on the return of the secretary of the navy to the city, a remittance would be made to cover the draft. All these things showed that the proceed-

ings were to be considered as public, or official. By these deceitful practices he entraps the navy agent, and obtains the public money. The letter further directs the draft to be paid out of any unexpended balance in the navy agent's hands. Was there no fraud, no deceit in that? It was evident that the accused had no right to the money; was this direction, then, innocent, or was it a deceit? The indictment goes on to state that he drew and received the money, and that he applied it to his own use; was that no malversation? If the entrapping of the navy agent, and the application of the public money to his own private purposes, did not constitute fraud, he did not know what fraud was. The denouement of the drama was shown by the requisition. And there the judge begged to observe, that certainly it was not his desire to prejudice the defendant's cause, or to do him injury in any way; he would rather extenuate, as far as his official duty permitted; but he must ask if the averments, as to the requisition, did not show a gross fraud? It was charged that, for his own private gain and emolument, he procured this requisition to be issued, to replace the money he had previously drawn by artifice. And did not the requisition, connected with the other papers, —the letter and the draft,—show a plain and palpable fraud? It was a deceit in going to the secretary of the navy; the deceit, or rather the fraud, might not appear on the face of any one of the papers, taken by itself; but considering the papers in connection with each other, taking them altogether, the fraud was apparent.

The judge went on to repeat his opinon, that, taking into view the official relations of the accused and the navy agent, and the letter and draft, it was manifest that the former drew upon the latter out of the public funds. Did that, then, come up to the doctrine of the court, that the papers themselves were not, on the face of the indictment, sufficient evidence of the fraud charged? He thought they were; and he thought that they had clearly shown a deceit ab initio. Then as to the false pretences, by means of which the fraud was alleged to have been effected, if the documents appeared to be deceptive, he did not know why they should not be considered as such pretences. He thought they all appeared sufficient to sustain the indictment; they all imported a deceit, a false practice, a means to defraud the United States. He referred again to the rule illustrated by Chitty, in respect to the position, that it was not enough to charge that the king had been cheated, but to make it appear that such is the case; and reasoned from it that, as fraud is an inference of law from matters of fact, the facts charged in this indictment were sufficient; and, as they are set out, show sufficiently the deceit on the face of them. Here, then, are not only averments of fraud, but the court are enabled to see and judge of it, from the writings and documents set forth in the indictment. He again reviewed the documents, and drew the conclusion, that, taken in connection, they showed the false and fraudulent purpose, and the deceitful practices. In private cases, the false pretences must be averred specifically and in full. In cases affecting the public it was not so. All that was necessary was to avoid stating the charge loosely, and in general terms, and to show that deceit had been practised. In was his decided opinion, therefore, founded upon the deepest conviction, that the indictment was good, and ought to be sustained. In conclusion he observed, that, in giving that opinion, he had been actuated solely by what he conceived to be a sense of duty to himself, to the laws, and to the country. He was equally anxious for the preservation of the rights of justice, and for the prevention of any encroachments on the privileges of the citizens. He regretted to dissent from the views taken by the majority of the court; but the opinion he held, he trusted, had been properly expressed; he was sure it was conscientiously entertained.

The next indictment brought before the court, by demurrer, was against the defendant, for having falsely and fraudulently altered a certain abstract of account, rendered by Mr. Harris, navy agent at Boston, to the defendant, as fourth auditor, by obliterating the words "T. Watkins's draft," and "do. do.," prefixed to three items of the account, charging the United States with three drafts of the defendant, paid by Mr. Harris.

Mr. Coxe, for defendant, contended that if this indictment charged any offence, it was forgery; for what is "falsely and fraudulently altering a paper," but forgery, if the paper be such as to be a subject of forgery? And yet the grand jury yesterday returned ignoramus to exactly such a bill as this, except that it contained the words "forge and." To alter, is to forge and counterfeit. Archb. Cr. Pl. 189; 3 Chit. 1022; Curwood's Hawk. c. 21, p. 262. But it is not such a paper as can be the subject of forgery at common law. The abstract is only an account of the expenditures of the navy agent, for the quarter ending September 30, 1827. The erasure is only of the words, "T. Watkins's draft," in each of the three items; but the head of expenditures, namely, "arrearages prior to 1827," the dates of the items, and the sums, were left. This erasure could not injure or defraud the United States; and, at common law, there can be no forgery unless it be of a paper, or instrument, by the false making of which some person may be defrauded. Ward's Case, Ld. Raym. 1466; 1 Curwood's Hawk. c. 21, pp. 262, 265.

Mr. Key, for the United States, contra, contended that this was a good indictment at common law for forgery. It is not necessary that the words "forge and counterfeit" should be used. They are not technical words necessary in the description of the offence, like the

words "feloniously" in felony, "traitorously" in treason, "burglariously" in burglary, and "murdravit" in murder. Forgery, at common law, is but a misdemeanor, of the same nature with fraud and cheating; and no technical words are necessary in describing it. 4 Bl. Comm. 307; Rex v. Dawson, 1 Strange, 19; Rex v. Stocker, 1 Salk. 371; Id., 5 Mod. 137; Russ. 1411. Those terms of art are only necessary in capital cases. Any writing, to the prejudice of another man's right, may be the subject of forgery at common law. The intent to defraud is necessary in forgery; and it is sufficient if some person could be defrauded by the alteration of it. The United States could be injured by the erasure, because it prevented the United States from seeing who got this money under the head of arrearages; so that they might follow it into the hands of the person who received it, and to recover it if he received it wrongfully, or misapplied it to his own use. The paper, unaltered, showed the defendant to be the debtor; but the altered paper showed Mr. Harris to be the debtor. Can it be said that the United States could not be injured by this alteration? It is not necessary that the United States should have been actually injured; it is sufficient if they might have been. Archb. Cr. Pl. 191, 194; 3 Chit. 1022.

Mr. Jones, in reply. If the question be doubtful, the circumstance that the counsel for the United States had sent up an indictment containing the words "forge and counterfeit," which was rejected by the grand jury, is a matter of fair argument that the counsel of the United States thought those words necessary in an indictment for forgery; or that this indictment was for a different offence. But it does not charge any offence; or, if it does, it is not sufficiently set forth. "Fraudulently altered" would not be sufficient to charge a forgery. "Falsely," at least, must be added. But the words, "falsely and fraudulently alter," are not a sufficient substitute for "fabricavit" or "contrafecit." Certain terms do of themselves import a crime. Precedents are the best evidence of the law. All the forms of indictment for forgery, at common law, adopt the word "forge;" and the reason is, that it is a word which has acquired, by long usage, a technical sense. There is no difference between felony and misdemeanor, as to the necessity of certainty; and the necessity of describing the offence in technical language is not confined to capital cases. Whenever technical terms are a part of the description of the offence, they must be used. If other terms are substituted, by way of periphrasis, they must comprehend every idea contained in the word for which they are substituted. Rex v. Knight, 1 Salk. 375; Dawson's Case, 1 Strange, 19, is only as to the evidence sufficient to prove a forgery, not as to the allegations in the indictment. An indictment must be more specific than a special verdict. East, P. C. 862, 985; Com. v. Mycall, 2 Mass. 136. This paper is not such as that the alteration of it can be, per se, a forgery. East, P. C. 859; 2 Curwood's Hawk. 263; Ward's Case, Ld. Raym. 1466; East, P. C. 864, note b. The alteration was not in a material part. A public document, the alteration of which is, per se, forgery, must be a paper which purports to proceed from public authority, and to import public confidence. East, P. C. 859. If it be not such a paper, the indictment must set forth such circumstances as show how the United States could be defrauded by the alteration. Ward's Case, Ld. Raym. 1466; Hunter's Case, 2 Leach, 624; East, P. C. 928, 977; Rex v. Collins, Palmer, 367, 373.

Mr. Key, in answer to these cases, cited Rex v. Powell, 1 Leach, 77; Russ. 1440; 4 Bl. Comm. 307.[2]

The Chief Justice having been taken suddenly ill with a fever was obliged to leave the court, which adjourned to Monday, the 15th, and from that day to Tuesday, the 23d of June, when the Chief Justice resumed his seat upon the bench, and on the 24th the opinion of the court was delivered by THRUSTON, Circuit Judge, as follows (CRANCH, Chief Judge, dissenting):

Various objections have been made to the sufficiency of the indictment in this case. It will not be necessary, however, to notice any other than the first, which is, that the crime of forgery is not charged with sufficient technical precision.

It has been contended, by the counsel for the United States, that in none of the enumerated instances stated in the books, in which certain technical words are necessary to be used in the indictment, in the description of the particular crime, is forgery to be found as one; and hence the inference has been drawn that in an indictment for forgery, it is not necessary to state that the instrument was forged or counterfeited. The principal case relied on to strengthen this

[2] If any part of a true instrument be altered, the indictment may lay it to be a forgery of the whole instrument. 2 East, P. C. 978, c. 19, § 55; Archb. Cr. Pl. 189–191; 2 Chit. 1038 (465). Quære, whether it be necessary, in an indictment at common law, for forgery by alteration, to use the word "forge." 2 East, P. C. 987; Elsworth's Case, Archb. 189, 191; Rex v. Stevens, 5 East, 259; 2 Chit. 1042; 4 Day's Com. Dig. tit. "Indictment," G 6, p. 689 (542, n.a.). As to certainty and over-nicety, see Rex v. Suddis, 1 East, 314. Lord Kenyon's opinion; 1 Chit. Cr. Pl. 153, 168–170, &c., 227; Morgan v. Sargent, 1 Bos. & P. 59, C. J. Eyre's opinion. When terms of art must be used. 1 Chit. 175, 176 (119), 239 (162). The want of addition is bad on demurrer. 2 Hale, Hist. P. C. 176; Rex v. Haddock, And. 137. If the act charged be not in itself unlawful, all the circumstances which render it unlawful must be set forth. 1 Chit. 228 (154); 2 Chit. 1041 (468), 1042. Form of indictment at common law, for altering a sheriff's warrant to his bailiff. 3 Chit. Cr. Pl. 1047 (474). Form of indictment for forgery by erasement, under the statute of 8 & 9 Wm. III. c. 20, § 36. Rex v. Bigg, 3 P. Wms. 419.

position, is Rex v. Dawson, in 1 Strange, 19. But upon a careful examination of that case, it will be found that the only question was, on the special finding of the jury, whether the facts so found amounted to forgery; and therefore we think it not applicable to the question in the present case. We have felt very sincerely disposed duly to weigh and appreciate the able arguments which have been urged in support of the indictment. Upon a careful examination, however, of all the precedents of indictments for forgery at common law, which we have been able to lay our hands on, not one is to be found where the term "forged" or "counterfeited" has not been used, except in the present instance; and there is a circumstance, even in this instance, very worthy of notice; which is, that the learned counsel for the United States, in framing their indictment in a former recent case against this defendant for the same erasures or alterations of the abstract attached to the present indictment, and which, after having been acted on by the grand jury, was returned, "ignoramus," seemed to think it necessary to use the term, "forged," in addition to all the other terms used in this indictment. This opinion is certainly entitled to respect, and may be well added to the number of precedents before alluded to. In the absence, then, of any adjudged case to the contrary, we think there is much reason to say that where such has been the long, universal, and uninterrupted usage, such usage may be considered as having grown into law.

In further support of the necessity of using the technical term, "forged," or counterfeited, is the case in the Massachusetts Reports (Com. v. Mycall, 2 Mass. 136). That was an indictment for altering a writ, after service, and before the return-day; and the terms used in the indictment, after stating the introductory part, were, "That he" (the accused.) "before the time of trial, did unlawfully erase in and from the said writ the word 'Essex,' and did falsely and unlawfully insert in the room and place thereof, the word 'Worcester,' thereby falsely and unlawfully changing the same writ from a writ directed to the sheriff of the county of Essex, or either of his deputies, or the constable of Harvard within the said county, to a writ directed to the sheriff of the county of Worcester, or either of his deputies, or the constable of Harvard within the said county, with an intent to injure, oppress, wrong, and defraud the said J. R., against the peace," &c. On a motion, in arrest of judgment, on the ground that these terms contain no technical description of forgery. the court say: "If the facts stated in the indictment constitute any crime at common law, it is forgery, but there is not the necessary technical precision in the indictment, to support a conviction of forgery, and judgment must be arrested." Now, what was the term, in that case, which was required to give that indictment legal precision? It seems to us, none other than the word "forged." Are not the terms used in the indictment, in that case, as amply descriptive of the crime of forgery as those used in this case? We think they are. These considerations are strongly corroborated by the observations of the able editor of the late American edition of 4 Comyn, Dig. tit. "Indictment" (G. 6), p. 688, note y.[3]

We are, therefore, brought to this conclusion; that there is a want of technical precision in the indictment, in the case before us, and as it is admitted that it cannot be sustained as an indictment of fraud at common law, the majority of the court are of

[3] Speaking of technical terms, or words of art, he says: "Though for many of those terms, sufficient reason can be given, others, there are, which may not be so readily traced to their original, unless we consider them as invented by the lawyers of old, to confine the conduct of a cause to themselves; or as the offspring of chance, made sacred by time and habit; or ascribe them to a zeal for that system and method which ennoble even the meanest art, and give the air of science and wisdom. But from whatever source they spring, it seems proper to preserve them, to avoid, as well the possibility of error, as the disputes that may arise on every innovation. And however untenable upon principles of reason, it is sufficient that they are warranted by precedent; for it was observed, long ago, by Mr. Justice Stanford, upon the question whether any averment by the term licet was sufficient, 'if it was the usual form to allege it by licet, then I would hold with it.' And after instancing certain cases in which the omnipotence of custom over reason was conspicuous, he concludes: 'Wherefore, we ought to adhere to the usual form; but in this case it was not the usual form to allege the election under the word licet, as you may see in the book of entries; wherefore, since the prosecutor was not tied down to any usual form, but was at liberty to take such words as were proper for the matter, and has not done so, we ought not to hold with the words more than will warrant.' And again, upon another occasion, though at the first, an avowry was held bad for want of being averred, yet afterwards, says the reporter, the prothonotaries searched their precedents, and told the justices that the common usage was to make the avowry without averment; with which the justices were satisfied. Mr. Starkie, in his Criminal Pleading (pages 69, 70), has the following judicious observations: 'The law distributes crime into three great classes; treason, felonies, and misdemeanors inferior to felony. Each of these is attended with peculiar incidents, both before and after conviction. It is, therefore, one important office of an indictment to specify, in technical language, the particular genus of crime imputed to the defendant, that he may avail himself of those advantages which the law allows him; that he may be excluded from those which the law withholds; and that the court may be authorized, after conviction, to inflict the appropriate punishment.' A strict adherence to such language may, in some cases, appear too nice and critical, to serve the ends of justice; yet it seems founded upon strong and substantial reasons. For instance, by successive decisions, the legal value and weight of a term or phrase, of art, is ascertained, and should a doubt arise as to its meaning, reference, for the purpose of removing it, may be had to former authorities, whilst every new expression would introduce fresh uncertainty, and the benefit to be derived from precedent, would be wholly lost."

opinion that the judgment on the demurrer must be for the defendant. See, also, in support of the opinion of the court, Burridge's Case, 3 P. Wms. 484, and Cooper's Case, 2 Strange, 1246.

CRANCH, Chief Judge (dissenting). With the highest respect for the weight and authority of the judgment delivered by the majority of the court, I am, nevertheless compelled to dissent from their opinion. This is the fourth indictment against the defendant, to which he has demurred. It is in these words: "District of Columbia, Washington County, ss.: The grand inquest, for the body of Washington county, do, upon their oaths present: That Richard D. Harris, being a navy agent of the United States, at Boston, on the thirtieth day of September, in the year eighteen hundred and twenty-seven, and having, on that day, made out his abstract of expenditures, as such navy agent, as required by the rules and orders of the navy department of the United States, for the third quarter of that year, ending on the said thirtieth day of September, which abstract was headed and entitled, 'Abstract B, of expenditures during the 3d quarter year 1827, ending Sept. 30th, by Richard D. Harris, navy agent, Boston,' and purported to set forth the expenditures disbursed and paid by the said Harris as such navy agent, for and on account of the United States, and contained, among other charges of expenditures as aforesaid, the following three items and charges under the head of 'Arrearages prior to 1827:

'167.	Sept. 1	T. Watkins's draft,	$300.00		
168.	" 10	do. do. of $500,	499.50		
169.	" 22	do. do.	500.00	$1,299.50	$1,299.50'

—which said abstract was in the words and figures following; (here was inserted the abstract,) which said drafts, so stated and referred to in the said three items and charges, were drafts drawn by said Watkins on the said Harris, navy agent as aforesaid, and dated on the fourteenth day of August, and the fourth day of September, and the nineteenth day of September, respectively, the year last aforesaid, in favor of Charles S. Fowler, and sold and delivered by said Watkins to said Fowler; and the said Harris, having transmitted the said abstract to the said Watkins, as 4th auditor of the treasury of the United States, who was the proper officer to receive the same; and the said Watkins, having received the same, the said Watkins afterwards, to wit, on the first day of November, in the year last aforesaid, at the county aforesaid falsely and fraudulently,[4] altered the said abstract, by erasing therefrom the words

'T. Watkin's draft.
do. do.
do. do.'

opposite to the said dates of September 1st, 10th, and 22d, prefixed to the aforesaid three items and charges in the said abstract under the head of 'arrearages prior to 1827,' hereinbefore set out, with intent to defraud the United States, to the great damage of the United States, and against the peace and government thereof. Thomas Swann, Attorney United States."

It is contended, on the part of the defendant, that this indictment, if it describes any offence, must be considered either as an indictment for a fraud or a forgery; that, as an indictment for a fraud, it is bad, because there is no averment of an injury actually done; that as an indictment for forgery it is also bad for several reasons: (1) Because the offence is not set forth in the usual technical language descriptive of the crime of forgery, so that the grand jury might be aware of the nature of the offence with which they were charging the defendant. (2) Because the paper altered is not such a paper, per se, as can be the subject of forgery by alteration. (3) Because it does not appear by any circumstances stated in the indictment, that the United States could be injured by the alteration.

1. Under the first objection, it was contended that the word "forged" was a technical term, as necessary, in the description of forgery at common law, as the terms "felonice" in felony, "burglariter" in burglary, and "proditorie" in treason. But this position does not seem to me to be supported by the authorities. There has been no case cited in which it has been so ruled. On the contrary, the elementary writers, when they enumerate the crimes which must be described by certain terms of art, or technical phrases, do not include forgery in their list of crimes, nor the word "forged" in their list of terms. But when they come to define forgery, they call it "the false making, or alteration of such writings as, either at common law or by statute, are its objects, with intent to defraud another." 3 Chit. Cr. Law, 1022. And East, P. C. 852, says: "Forgery at common law denotes a false making, (which includes every alteration of, or addition to, a true instrument,) a making, malo animo, of any written instrument, for the purpose of fraud and deceit." "This definition," he says, "results from all the authorities, ancient and modern, taken together." Hawk. P. C. bk. 2, c. 25, § 57, after stating the cases in which no periphrasis, or circumlocution, will supply those words of art which the law has appropriated for the description of the offence, namely, murder, larceny, mayhem, felony, burglary, and treason, says, "that in other cases it is generally a good rule in indictments, as well as appeals, that the special manner of the whole fact ought to be set out with such certainty, that it may judicially appear to the court that the indictors have not gone on insufficient grounds." It is true that the indictments for forgery generally use the term "forge," espe-

[4] The indictment which the grand jury had previously returned "ignoramus" was precisely like this, excepting that it had the words "forged and" before the word "altered."

cially where the forgery consists in the false making of the writing; and the statutes having used that word in describing the crime, it became necessary to use it in indictments under those statutes, as part of the description of the offence. But when the forgery has been committed by alteration of an instrument by erasure only, the word "forge" does not seem to be properly applicable to, or descriptive of, the act done. There is a precedent in 3 Chit. Cr. Law, 1047, in which the words are "falsely alter," by deceitfully and falsely inserting and forging the name J. A., and "by deceitfully and falsely adding" s to the word bailiff. In the present indictment the word "forge" could not, with propriety, be introduced, unless the indictment were to charge the defendant with forging the whole abstract. It is said, indeed, that "if any part of a true instrument be altered, the indictment may lay it to be a forgery of the whole instrument" (2 East, P. C. 978), and proof of altering a part will support the indictment. "It is more usual, however, and perhaps more prudent," says Archbold (Cr. Pl. 191), "at least in one set of counts, to charge it as an alteration merely, and to allege the alteration specially." See, also, Harrison's Case, 2 East, P. C. 980, 988, to the same effect. The case of Mycall, cited from 2 Mass. 136, was shortly this: A magistrate of Worcester county issued a writ of attachment, directed to the sheriff of Essex county, and to the constable of Harvard within the same county, whereas Harvard was in Worcester county, and not in Essex. The writ having been returned served by a constable of Harvard, the magistrate, before the trial, erased "Essex" and inserted "Worcester." The indictment charged that the defendant did unlawfully erase the word "Essex," and did falsely and unlawfully insert, in the place thereof, the word "Worcester;" thereby unlawfully and falsely changing the same from &c. to &c., with intent to injure and defraud J. R., against the peace &c. After a verdict of guilty, and a motion in arrest of judgment, the court stopped the defendant's counsel, who was about to argue the point, and said: "If the facts stated in the indictment constitute a crime at common law, it is forgery: but there is not the necessary technical precision in the indictment to support a conviction of forgery, and judgment must be arrested." The attorney-general had before stated to the court that it was not the intention of the grand jury to charge the defendant with forgery. It will be observed, in that case, that the court did not specify in what particulars the indictment wanted precision; they did not say that the word "forge" was necessary; nor is it so said in any other case which has come to my knowledge. But in the case of Rex v. Stevens, 5 East, 259, Lord Ellenborough, in delivering the opinion of the court, said: "Every indictment or information ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; and, except in particular cases where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use." Forgery at common law is but a misdemeanor, and ranks with cheating and fraud, both as to the moral turpitude of the offence, and the degree of punishment. It is a branch of the crimen falsi, and differs principally from any other kind of indictable fraud in this: that it requires the use of a particular sort of means to effect the fraud, and is complete whether the intended injury be effected or not. There seems to be no reason why it should not be sufficient in an indictment for this, as for any other misdemeanor, to state all the facts which, in law, constitute the crime. I have not been able to find any precedent of an indictment at common law, for a forgery committed by erasure merely. I am therefore not satisfied that a forgery, at common law, by erasure only, may not be sufficiently set forth, without using the word "forge" or the word "counterfeit." [5]

After the judges had delivered their opinions, Mr. Key, for the United States, made a motion, which, at the request of the court, he reduced to writing, as follows: "The court having delivered their opinion, on the demurrer, that the indictment in the above case is defective in not charging the alleged false and fraudulent alteration of the abstract by the technical term 'forged,' the counsel for the United States produced to the court an indictment returned 'ignoramus' by the grand jury, which is a literal copy of the indictment upon which the judgment of the court had been just delivered, with the exception that it contained the words 'forged and' in addition to the terms in the indictment now decided on. And the counsel for the United States producing a new bill of indictment similar to the one now decided on, except that the technical term 'forged' is used in addition to the words charging the offence; and stating that they were about to send the same to the grand jury, prayed the court to send for the grand jury and instruct them to the following effect: That the facts and intent found, in the indictment just decided on by the grand jury, as therein stated, constitute, in law, the offence of forgery at common law; and that the grand jury, if they find, in a bill of indictment, all the facts and intents necessary to constitute a legal offence, are bound to call the offence, in the indictment, by its necessary legal and technical name."

Mr. Key contended that the court has a right to instruct either the grand or the petit jury upon the law of the case, either on

[5] Upon the back of the original MS. of this opinion is the following indorsement, in the handwriting of the chief justice:—"Upon reflection, and seeing some other cases where technical words are required, such as 'scold' and 'barrator,' I am led to doubt whether this opinion is correct. W. Cr. 20th July, 1829."

behalf of the government or of the prisoner. The grand jurors are not lawyers; they may reject proper testimony, or receive improper. Such instruction may be required by either party; and without such a right justice cannot be done. If the grand jury ask instruction as to matter of law, the court never refuses to give it; not because it is asked, but because it is wanted. If it appear, by any other means than asking, that they want the instruction, the court will give it. It appears in Dalton's Sheriff (page 515) that the grand jury may be brought into court and hear the witnesses in open court, where the court can instruct them. Suppose the evidence be all in writing, and the grand jury reject it—or suppose they return an insensible indictment; the court will instruct them. The jury, indeed, may possibly disregard the instruction of the court as to matter of law, but this is no reason why the court should not instruct them. The right to ask instruction to the grand jury is reciprocal. It belongs to both parties; and this is a case in which, if in any, it ought to be asked and granted. 2 Holt, P. C. 157. In 1 Burr's Trial, 157, the motion to instruct the grand jury was made by Mr. Burr, debated, opposed, but granted by Chief Justice Marshall. So it has been always usual, in the general charge to the grand jury at the beginning of the term, to give them information as to the law of such cases as may be likely to come before them.

This is a case in which it is necessary to instruct them. The fact that they rejected the bill which contained the word "forged," and found the same bill without that word, shows that the reason why they rejected the first, was, that they thought the second bill did not charge forgery. But the facts contained in it did amount to forgery, and they ought to have found the first bill. It is evident, then, that they mistook the law. The grand jury have found all the facts which constitute the crime of forgery, and yet the prisoner escapes because a particular technical word is omitted! Is it fit that a culprit should escape on such a ground? Suppose the grand jury should find that the prisoner killed a man with malice aforethought, but should refuse to insert the word murdered, in the indictment, the court would send them back and instruct them that the facts found amount to murder, and that they ought so to find. It would be a disgrace to the court that should refuse so to instruct them. The abstract was such a writing as might be the subject of forgery, and this he understands to be the opinion of this court, or they would suffer him to argue this motion. If a grand jury should refuse to find a bill for treason, although they should have found all the facts which constitute treason, he would, if he were prosecutor, move the court to discharge them, and have another grand jury immediately summoned, and should think it his duty to send up another indictment for treason. No grand jury can conscientiously reject a bill from feelings of tenderness, when the facts are clearly proved which constitute the offence. What will be the appearance of our records, if these two indictments should remain upon them, as the matter now rests?

Mr. Jones, for defendant. We are continually doomed to be assailed with novel and irregular projects. The regular course is to send up the bill and the evidence, and the grand jury proceeds to consider the case, ex parte.

The court in charging the grand jury does not anticipate the questions which may be involved in the issue to be tried. The instruction is wholly ex parte. Neither the accused, nor the government has a right to call upon the court to instruct the grand jury upon the merits of the charge. The court will not, in their charge, instruct the grand jury upon the whole facts of the individual case, and commit itself and prejudice the cause ex parte. It is only upon general principles which are clear, that the court will charge a grand jury. This is a glaring invasion of the regular practice in this and all other courts in this country, and in England. There is no case where the court has charged the grand jury upon the particular circumstances of the individual case. The case of admissibility of evidence is a very different matter, and depends on a different principle. The old practice mentioned in Dalton's Sheriff is obsolete. Grand juries are never called to the bar to hear the evidence. Hale only says that the grand jury is to return the bill "a true bill;" or "ignoramus," they cannot say that the killing was se defendendo, 2 Hale, Hist. P. C. 157–159. In Burr's Case the instructions prayed went only to the admissibility of evidence, and were mere abstract propositions of law. The chief justice did not give the instructions as prayed, but only as to the admissibility of the evidence, and said, that it must be given to the grand jury in general terms; and that it must be different from instructions to the petit jury. Robinson's Report of Burr's Trial [Case No. 14,693]. Such a proposition as this was never made to the worst of English judges in the worst of times. It is not necessary, as contended by the counsel of the United States.

The charge by the United States against the grand jury is, that they mistook the law, in refusing to find the indictment which charged forgery, eo nomine; and the proof is, that they found the other indictment, which does not, in terms, charge a forgery. The United States acquiesced in the return of ignoramus upon the first, by sending up the second. The time to object was when the first indorsement was returned, and before they sent up the second. If the jury was of opinion that the offence was not, under all the circumstances, forgery, they did right to reject it; and they found the second indict-

ment because it did not charge forgery, but some other offence. They had a right so to suppose. We will not now argue upon the merits of the instruction prayed. The present question is only preliminary; namely, whether the court will give any instruction at all. It is a motion ex parte. The prisoner is not yet before the court, for he is not now charged judicially, before this court, with any offence, and therefore has no right to appear; and if any thing is said by us in his behalf upon this motion, it is ex gratiâ, and as amici curiæ. To go into the merits of the instruction would be to forestall the trial, and anticipate the opinion of the court. Upon the merits of the question, the court is not committed. It does not follow that the jury mistook the law because they found one of the indictments, and rejected the other. He does not mean to discuss the merits of the instruction; but, in order to constitute any offence does it not require some inferences of fact from the facts stated in the indictment, which inferences can only be made by the jury.

It is conceded by the United States, that the altered instrument must be a paper by which the United States might be defrauded; but whether it be such a paper is a fact which must be found by the jury, and they have supposed circumstances in which it might happen that they might be defrauded by it; but those circumstances ought to be stated in the indictment. One indictment rejected by the grand jury puts an end to the prosecution of that offence for that term, and the court will not suffer a new indictment to be sent up to the grand jury, at the same term, if the rejected indictment was a good one. There is no instance in which the court has instructed the jury to find a bill which they rejected, after it has been returned and recorded. 4 Bl. Comm. 308; 1 Chit. 314, 315; 3 Hen. VII. c. 1.

Mr. Coxe, on the same side, contended that by giving the instruction the court prejudicate the whole case, and deprive the defendant of the benefit of a demurrer, by deciding, upon an ex parte hearing, that the indictment was good in law as an indictment for forgery. That the grand jury did not misunderstand the law. They supposed the first was an indictment for forgery, and therefore refused to find it. They supposed the second was not an indictment for forgery, and therefore they found it. In these opinions they have been sustained by the judgment which the court has pronounced upon the second indictment.

Mr. Swann, attorney for the United States, in reply, contended that the court had the same power over the grand, as over the petit jury, and the same right to instruct them as to the law of any case before them. Suppose some great and unexpected crime should be committed during the sitting of the court, not noticed in the general charge, could not the court instruct them as to the law of the case, in a supplemental charge? If they should find a bill for murder, without the word "murdravit," the court would instruct them to insert that word in the indictment, and this may be done at the instance of the United States attorney. So in the present case, the grand jury have found all the facts which amount to forgery; and as the court has decided that the word "forged" is necessary, they will order the grand jury so to find it.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, dissenting) upon the motion to instruct the grand jury. The counsel for the United States have moved the court to instruct the grand jury, "that the facts and intents, found by them in the indictment, which was decided by the court to be insufficient because it did not use the word 'forged' or 'counterfeited,' constitute in law, the offence of forgery at common law; and that if they find, in a bill of indictment, all the facts and intents necessary to constitute a legal offence, they are bound to call the offence, in the indictment, by its legal and technical name." The circumstances which have led to this motion are these: In the early part of this term an indictment was found against the present defendant, for a fraud upon the United States, by means of false pretences, in a transaction with Mr. Harris, a navy agent at Boston. That indictment was, upon demurrer, adjudged insufficient, for want of proper averments in regard to the pretences used. Among those pretences was an allegation of the same facts, relative to the alteration of the abstract B., which, with the addition of the words "forge and," before the word "alter," constituted another bill, which was afterwards sent up to the grand jury, and returned "ignoramus." This bill being thus returned, and filed in the court, the counsel for the United States sent up to the grand jury another bill exactly like it, but leaving out the words "forge and," before the word "alter," which the grand jury returned "a true bill;" the only difference between the two bills being, that the former charged that the defendant did "falsely and fraudulently forge and alter" the abstract; and the latter, that the defendant did "falsely and fraudulently alter" the abstract. Both averred the intent to defraud the United States. This latter indictment the court adjudged to be insufficient, because it did not use the word "forge," or the word "counterfeit."

It is stated, in argument, by the counsel for the United States, that when the bill, which used the word "forge," was sent up to the grand jury, the indictment for defrauding the United States by false pretences, which the court had, upon demurrer, adjudged to be insufficient, was also sent up, in order to show the grand jury that they had already found all the facts stated in the

indictment for forgery, although they had not used the word "forge." The grand jury, after consultation, informed the attorney of the United States that they could not find the bill with the word "forge" in it, and wished to know whether they might strike it out; to which he replied that they could not alter the bill, but must find or reject it as it was. That, in his opinion, the facts stated in the indictment amounted to forgery at common law, and would justify them in finding the bill as it was sent to them; and, that if they were not satisfied with this opinion, they had better ask the advice of the court. They said they were willing to find the bill without the word "forge." To which the attorney replied, that if they did not agree to find the bill as it was, he would send them another exactly like it, but omitting that word, and the court would decide whether the facts amounted to forgery. The grand jury, without asking the advice of the court, returned the bill, containing the word "forge," ignoramus; upon which the other bill, which omitted that word, was sent up, and the grand jury returned it "a true bill." Upon long argument and great deliberation, the court, upon demurrer, decided that it did not charge the offence with sufficient legal precision, because it did not aver, in express terms, that the defendant "forged," or "counterfeited," the abstract. But the court did not give any opinion upon the question, whether the facts stated in the indictment did, in law, constitute the offence of forgery at common law. Whereupon the counsel of the United States made the motion to instruct the grand jury, which is now the subject of consideration, and which, at the request of the court, they reduced to writing, in the following terms, namely—(Here the chief justice read the motion in the words before stated, and proceeded—) It will be perceived that this is, in effect, a motion to the court to send back to the grand jury an indictment, which the same grand jury had, some days before, at the same term, returned "ignoramus," with an instruction that, if they should find the facts stated in it to be true, they should return it a true bill. Such a motion is certainly unprecedented in this court, and no case has been found, even in the acts of the most arbitrary of the English judges, in the worst of times, which could justify the court in giving the instruction asked, in the particular circumstances of this case. On the contrary, in 3 Harg. St. Trials, 152, it appears that Chief Justice Scroggs, Chief Justice North, Mr. Justice Jones, and Mr. Baron Weston, were impeached by the house of commons, in 32 Car. II; and one of the charges against them was, that they had discharged the grand jury before they had finished their business, because they had asked the court to present their petition to the king, praying him to call a parliament. Yet the counsel for the United States contend, that if this court should be of opinion that the grand jury refused to find that bill, from an unwillingness to convict the accused of the crime of forgery, the court ought to discharge this grand jury, and hold the party bound to answer to another, which should be immediately summoned.

The opinion of the chief justice of the supreme court of the United States, in the case of Colonel Burr, has been cited in support of this motion. But the motion in this case is far more extensive than the motion in that; and the instruction now asked goes far beyond that which was actually given by the chief justice. There, the instructions prayed were confined to the admissibility and competence of evidence in general. Here, they extend to all the particular facts charged in the bill, as constituting an offence. To give this instruction, therefore, is to prejudge the whole question, which would arise upon a demurrer to the indictment. There, the opinion actually given, extended only to papers of a certain description, which might, possibly, be offered as evidence to the grand jury. 1 Robertson's Report of Burr's Trial, p. 202. Here, it is not confined to the admissibility or competency of the evidence, but takes in the whole merits of the case, upon the particular facts alleged in the bill. There, the motion was originally made immediately after the chief justice had delivered his general charge to the grand jury, at the opening of the court, and before any bill had been sent up; and the instruction was given while the bills were pending before the grand jury. Here, the instruction is prayed after the grand jury have acted upon the case, and returned the bill ignoramus. There is, therefore, no similarity whatever in the circumstances of the two cases, except that the prayer for instruction did not, in either case, come from the grand jury themselves.

There is no doubt that this court may, in its discretion, give an additional charge to the grand jury, although they should not ask it; and, when they do ask it, the court, perhaps, may be bound to give it, if it be such an instruction as can be given without committing the court upon points which might come before them on the trial in chief. This is the utmost extent of the dictum of the chief justice, in the trial of Colonel Burr; for he there said—"That it was usual, and the best course, for the court to charge the jury generally, at the commencement of the term, and to give their opinion upon incidental points as they arose, when the grand jury should apply to them for information; that it was manifestly improper to commit the opinion of the court on points which might come before them, to be decided on the trial in chief; that he had generally confined his charges to a few general points, without launching into many details. One reason was, that some of the detailed points might never arise during the session of the grand jury, and any instructions on them would, of course, be unnecessary; another was, that some of these points might be

extremely difficult to be decided, and would require an argument of counsel, because there was no judge or man who would not often find the solitary meditations of his closet very much assisted by the discussions of others; that he would have had no difficulty, however, in expanding his charge, if he had been particularly requested to do it, if he could have anticipated any necessity for it; and that he would have no difficulty in giving his opinions, at this time, on certain points on which he could obtain a discussion by counsel, provided he did not thereby commit his opinion on the trial in chief." 1 Burr's Trial, p. 174.

When an instruction to a grand jury is asked, either by the accused or the prosecutor, it is a matter of discretion with the court to give the instruction or not; and, in exercising that discretion, they will take into consideration all the circumstances under which the instruction is prayed, and the extent of the prayer. The counsel for the United States, however, have contended, that whenever the court shall perceive that the grand jury have erred in matter of law, by rejecting a bill which they ought to have found, and it is presumed that their doctrine includes also the finding a bill which they ought to have rejected, the court ought to instruct them as to the law, if asked so to do by either party. But to what purpose should the court instruct them after they have acted upon the case, and found or rejected the bill, unless a new bill should be sent to them for the same offence, by means of which they could correct their mistake? This is now proposed by the counsel for the United States to be done, by sending up to the same grand jury a new bill, exactly like that which they have rejected. This is, in effect, to return them the same bill. But this is contrary to the well-established immemorial usage of courts in England and in this country. The usage is stated by Sir W. Blackstone; who says, that when the bill is returned "ignoramus," or "not found," the party is discharged without further answer; but a fresh bill may afterwards be referred to a subsequent grand jury. Vol. 4, pp. 305, 308. It is also stated by Archbold (Cr. Pl. 34), by Chitty (1 Cr. Law, 325), and by other elementary writers; and, after a diligent search, we have found no case, nor dictum, to the contrary. Nor have we found any case in which it has been decided by a court, either in this country or in England, that the grand jury should be discharged because they had found or rejected a bill, contrary to the instruction of the court, and a new grand jury, for that reason, summoned to attend at the same term. The usage is supported by the same principles which support the trial by jury; for of what value would the trial by jury be, as the "palladium" of personal liberty, unless the jury should be independent, and could give their verdict, especially in criminal cases, freely and according to the dictates of their consciences? Sir William Blackstone says, that the trial by jury is the grand bulwark of an Englishman's liberties. "The antiquity and excellence of this trial, for settling of civil property," he says, "has been before explained at large; and it will hold much stronger in criminal cases, since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown." "The founders of the English law have, with excellent forecast, contrived that no man shall be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should be afterwards confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make,) but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient,) yet, let it be again remembered, that delays and little inconveniences, in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." And Sir Matthew Hale (2 Hale, Hist. P. C. 160) says—"But, in my opinion, fines set upon grand juries by justices of the peace, oyer and terminer, or jail-delivery, for concealments or non-presentments, in any other manner" than by another inquest, under the statute of 3 Hen. VII. c. 1, "are not warrantable by law; and although the late practice hath been for justices to set fines arbitrarily, yea, not only upon grand inquests, but also upon the petit jury, in criminal cases, if they find not according to their directions, it weighs not much with me, for these reasons: (1) Because I have seen arbitrary practice still going from one thing to another. The fine set upon grand inquests began; then they set fines upon the petit juries, for not finding according to the directions of the court; then, afterwards, the judges of nisi prius proceeded to fine juries in civil causes, if they gave not their verdict according to direction, even in

points of fact. (2) My second reason is, because the statute of 3 Hen. VII., c. 1, prescribes a way for their finding, which would not have been if they had been arbitrarily subjected to a fine before. (3) It is of very ill consequence; for the privilege of an Englishman is, that his life shall not be drawn in danger, without due presentment or indictment; and this would be but a slender screen or safeguard, if every justice of peace, or commissioner of oyer and terminer, or jail-delivery, may make the grand jury present what he pleases, or otherwise fine them."

The principal value of a grand jury, as a protection to the personal liberty of the citizen or subject, consists in the independence of the jurors. That independence, in order to be valuable at all, must be such as to prompt and enable them to oppose or to disregard what they may deem the arbitrary and illegal instructions of the court; and to render that independence available, the right of a grand jury to find or reject a bill, without assigning any reason therefor, and thereby to take upon themselves the decision of both law and fact, must be maintained inviolate, however true it may be, in theory, that ad quæstionem juris non respondent juratores. And the same principle is applicable, with equal force, to the right of the petit jury to find a general verdict in criminal cases. So strongly has this principle been adhered to by the people of England, that not a case, it is believed, can be found among the decisions of the most arbitrary judges, in the most turbulent times, in which a new trial has been granted in a criminal cause, because the verdict of acquittal was against the plainest evidence, and the most positive instruction of the court in matter of law. Hawkins (bk. 2, c. 47, §§ 11, 12) says: "It hath been adjudged that if a jury acquit a prisoner of an indictment of felony, against manifest evidence, the court may, before the verdict is recorded, but not after, order them to go out again and reconsider the matter; but this is, by many, thought hard, and seems not, of late years, to have been so frequently practised as formerly." "However, it is settled, that the court cannot set aside a verdict which acquits a defendant of a prosecution properly criminal, (as it seems they may a verdict that convicts him,) for having been given contrary to evidence, and the directions of the judge." If a verdict of acquittal, found upon consideration of the evidence on both sides, is thus peremptory and intangible, à fortiori, should the return of "ignoramus," by a grand jury, upon consideration of the evidence on the part of the prosecution alone, be equally sacred; at least during that term. This rule, which we think as well settled as that in respect to the verdict of the petit jury, seems to us to render it improper that we should now give the instruction which is asked by the counsel for the United States. But there are other reasons why we should not give it, some of which have been before intimated. One is, that the instruction extends to the whole case as stated in the bill, and is, in effect, an instruction that the bill, if found, will be a sufficient indictment, in law, to charge the defendant with the crime of forgery at common law; thereby forestalling the opinion of the court upon all questions of law which might arise on demurrer. Such a commitment of the opinion of the court, upon points which may arise in a subsequent stage of the prosecution, we consider (to use the language of the chief justice of the United States) to be "manifestly improper."

Upon this subject Lord Coke, in his 3d Inst. p. 29, has the following observations: "And to the end that the trial may be more indifferent, seeing that the safety of the prisoner consisteth in the indifferency of the court, the judges ought not to deliver their opinion beforehand, of any criminal case that may come before them judicially." "And therefore the judges ought not to deliver their opinions beforehand upon a case put and proofs urged on one side, in the absence of the party accused." "For how can they be indifferent, who have delivered their opinions beforehand without hearing of the party, when a small addition or subtraction may alter the case? And how doth it stand with their oath who are sworn that they should well and lawfully serve our lord the king and his people, in the office of a justice, and that they should do equal law and execution of right to all his subjects." And again, in the next page he says: "The king's learned counsel should not, in the absence of the party accused, upon any case put, or matter showed by them, privately preoccupate the opinion of the judges." But upon a point so clearly supported by the principles of natural justice, it is needless to state authorities. Another reason why the court should not give the instruction, is, that it is a very debatable question whether the facts stated in the bill which is now proposed to be sent up, or rather sent back, to the grand jury, do, in law, constitute the offence of forgery, at common law. Much may be said, and much has been said, on both sides. The court did not find itself obliged to decide that question upon the former argument, and therefore declined. For the same reason it declines now. These reasons for not giving the instruction, it will be perceived, are equally valid, whether the grand jury did or did not, act under a mistake of the law. That question, the court does not undertake to decide in this stage of the prosecution, for the reasons before stated. For the same reasons the court deems it to be its duty to refuse to instruct the grand jury as prayed by the counsel for the United States. See 1 Chit. Cr. Law, 696. Judges not to give their opinion prematurely.

THRUSTON, Circuit Judge, dissented from the opinion of the court, as follows: This is a motion on the part of the counsel of the United States to instruct the grand jury in the following terms: (Here the judge read the motion in the terms before mentioned.) The

prosecution presents very extraordinary incidents which have occurred in the various efforts of the prosecutors to reduce their charges to legal forms, so as to present some specific charge which may put the accused on his trial before a jury of his peers. Among the numerous bills of indictment which have been preferred, and found by the grand jury, not one has had sufficient technical precision to stand the test of the touchstone of the law. They have been found, in the opinion of the court too inartificially drawn up, and therefore, not sufficient to compel the accused to deny the charges, and submit to trial. They have been all, therefore, upon demurrer, deemed insufficient and invalid. But, notwithstanding, I have seen in every one of those indictments sufficient evidence of crime imputed to the accused, although their forms have been defective. I have seen substantial evidence of gross frauds against the public, and, (as at present advised,) of forgery at common law. Two distinct charges have been attempted to be preferred against the accused; the one for fraud, the other for forgery. The one for fraud has been divided into, I think, three independent grounds of accusation; for fraud committed in transactions with certain navy agents at different times. So that though there are as many as three grave charges against the accused, supported by such facts and intents, found by the grand jury, as satisfy the court that the accused ought to be put to answer them, yet, in some six or seven weeks spent in disquisitions on technical niceties, we have not advanced one inch, but are brought by the ambages of the law, after a six weeks' tour through fields and wastes of thorny subtleties, to the point from which we started; and yet it is remarkable that all those indictments have been deliberately prepared by two distinguished and learned counsellors; and although, to my conception, they exhibited to the accused, in every instance, according to common sense, and common understanding, manifest and clear information of the crimes imputed to him, so as to enable him to know how to defend himself; which is, I believe, the only essential matter required by the law as regards certainty and precision in indictments; yet they were deficient in legal intendment; the averments were wanting, or wanting in the right place, or were inartificially made, a fatal "as," in one instance infected the averment, and defeated the charge of false pretences. In a second indictment for fraud at common law merely, without false pretences, I had the misfortune to differ from the two other judges; and after all that I have heard, I am still at a loss to discern in what it was deficient; but it has been so ruled, and I bow with deference to the judgment of the court. In the next indictment for forgery, where I was one of the majority of the court, the indictment failed because the word "forged" was wanting. Now, at this moment, after further reflection, I am not clear that I was right in deeming this word so essential in a charge of forgery, that it cannot be dispensed with and supplied by what may be supposed equivalent words. But I considered it one of those, of which there are a number well settled, that no paraphrase will do where there are no equivalent words, as there are none for that very classical and elegant word, "murdravit," in an indictment for murder. I have heard from very good authority, that learned lawyers have differed in opinion as to the judgment of the court on this indictment; some maintaining the word "forged," in an indictment for forgery, to be indispensable; others holding to the contrary. I said I was not clear that I was right in the opinion I gave as to the word "forged," and what judge can be clear in such niceties? I thought, however, I was right as the law now stands, and so I gave my opinion. And as to distinct and clear perceptions of law, on points of special pleading, or indeed, almost any other points, founded on common law, and the decision of courts, and not on statutory enactments, (laying aside those great departments of the law which define the general rights of persons and things, and are, perhaps, reasonably definite and settled,) few judges will have the boldness to assert that they are fortunate enough to entertain them. Advance into the intricate fields of practice, of special pleading, of the innumerable cases growing out of nisi prius trials, and what perplexities occur? And where is the law, in these latter branches to be found? In thousands of books daily issuing from the press, in reports, treatises, and elementary writers, of which we have bales and boxes flowing in from England, and from the state courts of twenty-four states, from the supreme court, from the circuit courts of the United States, which far surpass all human power to read and understand; and if they could be read and understood, they are beyond the means of any judge to procure. There is not a term of the court in which I am not surprised with some new book brought forward as authority, I never heard of before; they have supplanted the good old authorities and reporters which I was familiar with in my younger days, and which one seldom hears cited now. These multiplied instruments of puzzling and perplexing a court, in the hands of ingenious counsel, afford, I trust, an apology for judges who hesitate or doubt on difficult cases, inasmuch as, from the very nature and character of language in general, the indefinite meaning of words, and more especially from the discrepancy that necessarily must exist between any case pending before a court, and any other adjudged case, in circumstances and incidents, it is a very difficult matter to discern when a precedent appears to it, and when not. It may truly be said, therefore, that nothing is more uncertain than the law; if it were not so, how do those frequent reversals occur in the appellate courts, of the decisions of the most learned judges? Among

the most renowned jurisconsults in the United States, was a reverend gentleman who was considered as the most learned man of his day, as well as the most eminent lawyer, and whose name is to be found among the distinguished patriots who asserted our independence, and signed its charter; and since this gentleman became a judge or chancellor of Virginia, his opinion on law matters was deemed infallible, yet no judge ever had the misfortune to meet with more reversals of his decrees, so that he was at length driven to publish a book in vindication of his opinions. A rare book, but which I once met with, and was greatly amused with his acrimonious strictures on the appellate court. If such be the fate of so great a man, shall we not be excused, if we have been mistaken? and more particularly as we have crude points growing out of the most intricate branch of the law, namely, special pleadings? Now if two learned counsellors have not been able to frame one single indictment, (out of a number, some six or seven,) which has stood judicial scrutiny, it affords a proof that this department of the law is exceedingly unsettled and doubtful, and yet, let any man, not learned in the law, take any one of these indictments, and be asked if he does not clearly discern the nature of the accusation, and if it does not afford a satisfactory notice to the accused, of the offence with which he is charged, and I think he would answer affirmatively—the common sense and legal sense are at variance. Then, if I had the power, I would do away with all this artificial logic and reduce pleading and all judicial proceedings to more plainness and simplicity. Now, suppose instead of all the forms, averments and intents required, it seems, in an indictment for forgery, that now subsist, such an indictment as the following, merely by way of example were substituted: A. B. you are indicted for forgery in making certain alterations, with a fraudulent intent to defraud the United States, in a certain abstract returned by —— Harris, navy agent, and which abstract is in the following words (here insert it,) which alterations are as follows, you erased the words, &c., &c. Now will any man say he would not have sufficient notice, from such a statement, to enable him to defend himself? Take a civil case, trover for instance, instead of those foolish fictions and falsehoods of the loss of the horse by the plaintiff, and the finding him by the defendant, the plaintiff were to file his declaration in the following words: I have sued you for a horse (here describing him,) which you have in your possession, and which I claim to be mine. Or a note of hand; I have sued you on a note of hand, a copy of which here following, (insert a copy of the note.) And so, or some such simple but clear exposition, of the cause of action in every case. Shall I be deemed to have travelled out of the line of my judicial functions in suggesting these evils of our present system, and the advantages of some legislative correction of them? They have been for a long time forcibly pressed on my mind and I have been tempted, from the six or eight weeks' discussion of the subject, in the case of Mr. Watkins, to give vent to them. We have the example of a very eminent lawyer in England, who has taken up the matter there, and suggested many beneficial clauses in the laws; but he took care to withhold his good until he had made his fortune, and reaped the golden harvest of the existing vicious system. Let not these few cursory observations subject me to the criticisms of the gentlemen of the long robe. I pretend not to be able to suggest a corrective of the evils of such deep root and long standing. I hope some abler hand will do this. I know they are evils of great magnitude, and vast injury to society. It would not avail now to add more on this topic, and it is time to take up the consideration of the question before us.

We are asked to instruct the grand jury, "that the facts and intents," in the indictment (which the court adjudged not sufficient as an indictment for forgery for want of the words "forged," and "counterfeited" as one of those,) amount to the crime of forgery at common law; "and that the grand jury if they find in a bill of indictment all the facts and intents necessary to constitute a legal offence, are bound to call the offence in the indictment, by its necessary legal and technical name." It is with much solicitude that I enter on the examination of this proposition, because it is one of those cases in which we have few lights to guide us; that is of rare occurrence and precedents are hardly to be met with. The first point to be considered is, do the facts and intents, found by the grand jury in the two indictments, the one which was returned by the grand jury "ignoramus," where the word "forged" was inserted; and the second returned "a true bill" where that word was wanting, but which were identical in every other respect, amount in law, to forgery at common law? Now this point was fully argued on the demurrer to the indictment; but the court having adjudged it lost for the want of the word "forged," refused to give an opinion on any other point. I was, myself, willing, at that time, to have given an opinion; nor did I see any just ground to refuse to do so; but I acquiesced in the judgment of a majority of the court.

I now pronounce my opinion, that the facts and intents, so found, do amount to forgery at common law. In 2 East, P. C. p. 859, the writer says it was never doubted that forgery, at common law, extended to the falsification of records and other instruments of a public nature; and, after a review of the opinions of the most respectable authorities, as to what private instruments there may be forgery of, at common law, concludes the paragraph (page 861) with these words—"but the following case has now settled the rule," that the counterfeiting of any writing with a

fraudulent intent, whereby another may be injured, is forgery at common law. The case alluded to is Ward's Case, reported in 2 Ld. Raym. 1461. It was not contended, in the argument, that the abstract set out in the indictment, of (as) a public instrument, was not one of which forgery might be committed; it was declared only that it was (not) a public instrument. It behooves us, then, to consider the character of this paper. A navy agent is a public officer, into whose hands large sums are confided, to be disbursed for the public service. An abstract is, as far as I understand it, a condensed statement of those disbursements, returned to the proper accounting officers of the treasury department, and there filed, as the account of the agent of those disbursements; the public is a party to it; it informs them how the money, intrusted to the agent, has been employed; and, if this be so, why is it not an instrument of a public nature? But admit the paper not to have been a public paper, but a private one; suppose it to have concerned the interests of the navy agent only. A material alteration of an instrument of this sort, according to Ward's Case, would be forgery at common law; and then the alteration might, perhaps, have been alleged to injure the agent, because it would have the effect of preventing his obtaining a credit with the government for the moneys paid to the drafts of the accused. Whether the government would, or will, give the agent credit for those moneys or not, is immaterial. The agent may, certainly, it appears to me, be prejudiced by this alteration. But however that may be, it is of no importance if the instrument be of a public character; of which, it seems to me, there can be no doubt.

It remains to be considered, whether or not the public may be injured or prejudiced by this alteration. And surely they may be, and, indeed, have been injured by it. Has not their money been withdrawn from public purposes, its true destination, and gotten into the hands of an individual, for private purposes? This is unquestionable. Now this took place in 1827, and was not detected until 1829. Why? Because the items, charging that money to the accused, were obliterated. They could not, therefore, have the means of calling their agent to account for it. Then, whatever may have been their ulterior views, as to making the agent responsible for this misapplication of public funds in his hands, they have been deprived of the means of doing so for a year and a half. If the accused be responsible, they have equally been deprived of the means of calling him to account. If this be no detriment, or prejudice, then the public not only may have been, but actually have been, prejudiced by this alteration, or falsification of the abstract. In fact, their money is gone, and it is no argument that the navy agent is responsible for it. If my check on the bank is forged, is it less a fraud, on me, that if the money be paid on such forged check, I may recover it of the bank? Then the instrument is one susceptible of forgery, and the public may be prejudiced, and the alteration of it in a material part is forgery. Now for the averments and intents. The alteration is charged to have been falsely and fraudulently made, with intent to defraud the United States. Here there is charged falsification, or alteration of a public instrument, in a material part, with sufficient averments and intents, and this constitutes forgery; and the charge in the indictment, as laid, amounts to forgery, but the technical words, "forged" or "counterfeited," are wanting; and although the charge in the indictment amount to forgery, yet is the indictment not good for want of those, or one, at least, of those technical words.

The only, but indeed the most difficult and momentous question, which now remains to be considered is: Shall this court instruct the grand jury, that they should supply or insert those words; or, in the words of the instruction, call the offence in the indictment by its necessary, legal, and technical name? We have been warned that this proposition leads us into almost untrodden ground. That the provinces of the court and grand juries are so distinct, that we must not, unadvised, invade their sanctuary. That supplemental charges are rarely made, and only on genuine and abstract topics. That we are now called on to give a specific instruction in a particular case. I confess I am in great perplexity, from the novelty, as well as the great importance of the proposition. But all that is left for us, in the dearth of precedents, is to try the question by the touchstone of reason, with such lights as the few cases cited afford; of which, perhaps, the strongest are reflected by the observations of the enlightened chief judge in Burr's Trial, and to which I shall confine myself. Instructions to grand juries, after their retirements, are of very rare occurrence, from the nature and character of their institution. The court can never be informed that the grand jury desires their advice, unless they themselves suggest it. And, as indictments are generally prepared by learned counsel, few cases occur, of informality or inaccuracy, in the technical part of the instrument. It can rarely happen that an application can be made to the court, to supply any formal defect in the bill, after it is returned into court. Hence, perhaps, the want of precedents. Instruction to petit jurors, at the instance of either party, is of every day's occurrence; and, on principle, it is not easy to discern the difference between an instruction to a petit and a grand jury, except what grows out of the organization and the peculiar character of each of those tribunals. In trials before the court, by petit juries, the judges hear all the evidence and the case set out in the declaration. They have it all before them, and never refuse to instruct, if required by either party, on the

law of the case; leaving the facts exclusively to the consideration of the jury. But they hear nothing of the investigations before the grand juries; and, until the bill or presentment is returned, are utterly ignorant of what the jury are about. Then if a party, whose case is before the grand jury, or the attorney for the United States, were to ask the court for instructions upon the facts, could the court grant instructions? Shall the party accused, against whom a bill is filed, ask the court to instruct the jury that certain facts, stated in the instructions prayed for, do not constitute, in law, larceny, or forgery, or robbery, or whatever charge the accused apprehends may be laid against him before the grand jury? Or, on the other, (hand,) shall the prosecutor ask the opposite, that such do amount to such or such an offence? Clearly, for obvious reasons, the court would reject such an application. They have not heard the testimony, and, therefore, cannot discern that the instruction prayed is founded on the facts of the case; nor that the grand jury desire information; and the court will not, unadvisedly, commit themselves on propositions connected with particular cases. The character and credit of the judge might be in jeopardy by such a proceeding. Hence it may well be asserted, as a general rule, that a court will not give supplemental charges to a grand jury, especially touching a case before them. But, as to supplemental general charges, I do not see why a judge may not have the grand jury brought into court at any time, to supply an omission in his charge before their retirement. Suppose a judge had omitted to animadvert upon some particular statutory offence, which he is, by the same statute, required especially to call the grand jury's attention to, shall he not be permitted to supply this omission in a supplemental charge? Suppose he had omitted to notice some particularly prominent mischief, which required the corrective notice of the grand jury, shall he not, also, give a supplemental charge in this case? It seems to be as untenable a general proposition, that a court or judge ought not to make general supplemental charges, as that no circumstances can occur in which they can instruct and charge in particular cases; but instances of either character are exceedingly rare, and, therefore, the want of precedents is considered as equivalent to a want of power. But as rare as precedents are, we have a notable one in the report of Burr's Trial. Let us examine carefully the reasoning of the judge in that case; and, as whatever law opinion he has pronounced, ought, deservedly, to be of the highest authority, I shall take it for my guide, as far as it is applicable to the case before the court.

I have not been able to find what charges the chief justice had prepared to give the grand jury, as it does not appear in the volumes submitted by the counsel to the court, namely, 1 Robertson's Report of Burr's Trial. But the chief justice says, in page 175, that he had drawn a charge, and submitted it to Mr. Hay; nor does it appear, that I can find, that he ever gave his charge to the grand jury; but there does not seem to be any doubt that he would have given it, if subsequent events had made it necessary. From this proceeding, then, I understand that the chief justice was prepared to charge or instruct the grand jury, on a particular case before them, and before a bill was found, on points of law bearing on that case. I do not know, either, whether the prepared charge embraced all the points submitted to the court by Mr. Burr; but it is a fair presumption that it did, as the chief justice made no exception to any of them. In page 74, the chief justice says—"It was manifestly improper to commit the opinion of the court, on points which might come before them to be decided on the trial in chief." Not improper to charge or instruct, but to commit the opinion of the court. And, in page 175, he says—"He would have no difficulty, at this time, in giving his opinions on certain points, on which he could obtain a discussion by the counsel," with a proviso, "still, that he did not thereby commit his opinion on the trial in chief." Then the chief justice had no hesitation to charge the grand jury, in a particular case before them, on certain points; and if the points are those stated in Burr's seven propositions,—and we have no reasons to suppose otherwise,—we see what they are. Now let us examine those, and see whether the instruction prayed for from this court would be more a committal of our opinions on the trial in chief, than those would have been in that case. If the instructions embraced those seven propositions,—and it is very reasonable to suppose they did, as they alone were prayed for of the court, and it is not to be presumed that the chief justice would volunteer instructions,—can any man read them and say, that, if not all, most of them might be the subject of contest on the trial in chief? Mr. Hay, in his objections to them, intimates that they may be subjects of discussion which might consume much time; then they were not all self-evident propositions; and, if so, I cannot observe why they might not, if given in charge to the grand jury, be as much a committal as any other matter of law, for every one of those points might be disputed, and some of them successfully; for I can hardly suppose them all true, under all possible circumstances and modifications. But, perhaps, the chief justice's prepared instructions did not embrace all, or any of these points. But he certainly prepared and offered to give instructions. Could the chief justice mean, by not committing his opinion, that the instruction embraced only self-evident propositions? There are not many such in law, nor could an instruction be well needed on a self-evident point; but

they could not be self-evident points, because the chief justice says (page 175) he would have no hesitation in giving his opinions, at this time, on certain points on which he could obtain a discussion by counsel, provided, &c.; therefore they were not self-evident, but disputable points, and he would be sure to meet them again on the trial in chief. What, then, is a committal of opinion? Does it mean an opinion given on a point, which cannot recur on the trial in chief? I should be glad to be informed what sort of point of law this could be. If the chief justice would not have met these points again, on the trial in chief, after this declaration of non-committal, I can only say that the counsel would have conducted their client's cause with very little astuteness, and that is not to be presumed. Nor can I hardly imagine a point, on which instruction can be given to a grand jury in a matter of law, touching a case before them, which may not be contested, and the opinion of the court required on the trial in chief. But it was urged by the defendant's counsel, who did not deny that instructions were given, that they were confined to the competency or admissibility of evidence; and what points are more disputed, or more difficult, often, of solution, than the competency of evidence? If a judge can instruct a jury on this point, I do not see why he may not on any other.

One word more, on the limitation which the chief justice establishes to instructions to be given to a grand jury; it is, "that thereby he did not commit his opinion on the trial in chief." As far as I can understand this limitation, it means this, that he will not anticipate opinions in this stage of the proceedings, which he may, afterwards, on more full and solemn argument and consideration, be exposed to the necessity of revoking on the trial in chief. There is good reason in this; and if I could discern what points such might be, I should not hesitate to approve this limitation, and to be governed by it. At all events, however difficult it may be to characterize or generalize instructions, that may or may not be given, we shall, before we conclude, examine the instructions prayed in the case before us, and see how far a judge would commit his opinions on giving them; and I think I shall be able to show that no instruction could be well asked for, in which less hazard of committal could be incurred. Then it is manifest that, in the opinion of the chief justice, there is no impropriety in giving opinions or instructions to the grand jury in particular cases, then under examination by them; and, as to this, the chief justice uses strong language. He says, that he would have no difficulty in giving his opinions at this time. Now let us see what difference there was in the case before the chief justice, when instructions were asked from him, and the one before this court, in which instructions are asked from us. In that case, instructions were asked and agreed to be given before any bill was found; the instructions, then, must have had an influence on the grand jury,—they must have been led by them. But, in the case before this court, the jury have acted untrammelled, by their own light. They have found the bill. We are not asked to tell them what they might, and what they might not lawfully do; we are only requested to inform them of the effect, in law, of what they have already done, and merely to supply a matter of form; to give a legal name, in the language of the instruction prayed, to what they have done. Now, if the day shall ever come, (which may God avert from us,) when courts might be supposed corruptly to favor prosecutions on the part of the government, there might be some danger of their interfering with grand juries, while the party charged was under examination before them; because they might artfully lead them to find bills against innocent persons, and on frivolous accusations. When the bill is found, the jury have performed their office; the act is entirely theirs; they have not been directed, instructed, or influenced by the court.

I have already given my opinion as to the legal import and effect of the facts and intents found in the indictment before us. I have said that, in my judgment, they amount to forgery; and of this opinion, I believe, were the other judges, or, at least, I so understood them, although they refrained from pronouncing it. This point has been solemnly argued on demurrer; the character of the abstract was examined; it was denied, by the counsel for the accused, to be a public paper, and, therefore, not susceptible of forgery; and if it were, it was denied that, by the alteration of it, the United States could be prejudiced. These points having been fully discussed, we were called upon to give an opinion on them. Now, as to these main points, no instruction is prayed for; we are only asked to instruct the jury that the bill found by them charges forgery. They are not, therefore, to do any thing more; not to act again on these points. The only thing they would be required to do, would be to supply a matter of form,—to call the thing by its right name. Now, in instructing the jury to do this, it is impossible we can commit our opinions; because the counsel for the accused can never urge that this word "forged," if inserted in the indictment, can vitiate it. On the contrary, they argued that the indictment was bad without it. The question can never occur again, on the import and effect of this technical phrase.

It was argued, by the counsel for the accused, that if the court should instruct the jury to insert the necessary technical words, it would be impeaching the integrity of the jury; inasmuch as it would be an insinuation that the jury had found the essence of the crime, but had refused to give it a name. God forbid that I should impeach the integrity of the jury. I would much rather applaud their diffidence, their reluctance to de-

cide doubtful points of law,—points which have admitted of very long and able attempts of learned counsel at the bar, whether the facts and intents found amounted to forgery or not; and of this the jury might well doubt, and, therefore, might well hesitate to find the first indictment, where forgery was charged in all the forms of law. Without violating every principle of that comity, of that respectful consideration due from one tribunal of the same court to another, no other interpretation can be put on their doings in regard to these two bills. But we are not driven to the necessity of resorting even to common courtesy for this interpretation; we have evidence of it. The attorney for the United States informs us, "that when the first indictment was before the grand jury, they asked him whether they might strike out the word 'forge,' and find the facts and intents alone. The attorney said no; he would prefer laying before the grand jury a new indictment, in the same words, without the technical word 'forge,' and the court might then decide whether the facts and intents set forth in the bill amounted to forgery or not." These are the very words of the attorney. Now, as far as motives can be proved, does not this statement of the attorney come as near positive proof as may be, that the jury were influenced by doubts as to the legal character of the offence, growing out of the facts and intents found. He informs them they might so find the bill, and "the court might decide on the effect of the finding;" they therefore found the facts and intents. Had the jury been influenced by improper motives, by any unwarrantable lenity towards the accused, they would hardly have discussed this matter with the attorney for the United States. No other construction can be put upon their doings, than that they very laudably refrained from committing themselves on a doubtful point of law. But the attorney told them "the court might decide;" and thereupon they found the facts and intents. Decide what? Why, the law, of which the jury were doubtful. Decide, for what purpose? To inform the minds of the jury? If so, it is a submission, through the attorney, of the law of the case to the court; and the court ought, therefore, to decide it, and inform the jury of that decision. This, then, is tantamount to asking an instruction; not, to be sure, through their foreman, but through their law adviser, the attorney for the United States.

But suppose the attorney had permitted the jury to strike out the word "forged" in the first bill, and they had returned it a true bill, —and this, perhaps, would have been the most simple course of proceeding; would not the court, under the general authority given to them, when grand juries return presentments and bills into court, to "alter matter of form, not matter of substance," have been bound, on inspecting the bill and finding that the facts and intents found amounted to forgery, to inform the jury of the fact, and that the word "forged" was a formal technical word, necessary to give a legal name to the offence? It seems so to me. Suppose, in Burr's Case, the jury had found all the facts and intents necessary to constitute treason, and the chief justice, on inspecting the bill returned into court, had found the technical word proditorie wanting, would he not have been in the line of his duty in saying to the jury,—"Gentlemen, you have returned a good bill for treason, except in one word; you have omitted the word proditorie, (or treacherously, in English.) It is a word sanctioned by immemorial use, and, therefore, indispensable in an indictment for treason; be pleased to insert it. You have found the substance, but omitted a form." I see no objection to such a proceeding. If this be the case, can the scruples of the attorney, as to the jury's striking out the word "forged," in the first indictment, and submitting a second to them, of the identical tenor of the first, without this word, alter the case?

From the foregoing observations and reasoning, (if these remarks may be dignified with such a name,) I am led to the following conclusions. That we have the highest authority for saying that the court may give general supplemental instructions to a grand jury; that they may go further and instruct them on points of law touching cases under examination before the grand jury and before the bill is returned by them; and, à fortiori, on matters of law growing out of the indictment itself when found by the grand jury, that the only limit is, that the court will not, in the exercise of this discretionary power, (not that they may not) commit their opinion on the trial in chief. That in instructing the jury that the word "forged" was a necessary form in an indictment for forgery, after they had found the essence of the offence, could not commit the opinion of the court on the trial in chief, because it could never be the subject of future debate, inasmuch as the counsel for the accused themselves, maintained that this word was necessary to give effect to an indictment. That as to the essence of the offence found in the indictment in question, it is incumbent to inform the jury that it is forgery, or there must be a failure of justice, inasmuch as we have undoubted evidence of an offence having been committed, or, at least, the strongest probable cause for believing that it has been committed; and unless we act on the case in the manner required of us, the offender, so far from being punished, if guilty, cannot even be brought to trial. That if, by this refusal of the court to do what is required, there be a failure of justice, it is the strongest evidence that the court cannot be right. That it is a solecism to suppose an offence of great moral turpitude, and of dangerous example, and evil to the community, can be perpetrated, and yet that the laws afford no means of bringing the guilty to atone for his offence. That it is of the utmost importance to the well being of

society that whilst courts are protecting with jealous care the personal rights of individuals, they forget not their duty to the people and the rights of the community; and, finally, that as I am of opinion that the facts and intents found in the indictment amount to the crime of forgery at common law, it is incumbent upon me under the circumstances of the case, and for the reasons assigned above, to tell the jury so, and that they ought therefore to give validity to their act, and sanction and vigor to the law, "by calling the offence in the indictment," (to pursue the language of the instruction,) "by its necessary, legal, and technical name."

The result of these opinions was, that the motion to instruct the grand jury was overruled. Before that motion was made, namely, before the 25th of June, the grand jury had found three other indictments against this defendant, upon three separate transactions:

(1) The first was upon a transaction for $750 with Mr. J. K. Paulding, navy agent at New York. It avers that the defendant, T. W., was 4th auditor of the treasury of the United States, and as such required by law to receive all accounts accruing in the navy department, or relative thereto; to keep all accounts of the receipts and expenditures of the public moneys of the United States in regard to that department, and of all debts due to the United States, or moneys advanced relative to the said department; to receive from the second comptroller the accounts relative to the said department, which had been finally adjusted, and to prepare such accounts with their vouchers and certificates, and to record all warrants drawn by the secretary of the navy, the examination of the accounts of which is by law assigned to the said 4th auditor; and to make such reports on the business of the said 4th auditor as the secretary of the navy should deem necessary and require for the services of that department. It further avers that Samuel L. Southard was secretary of the navy of the United States, and as such had authority to issue requisitions to the secretary of the treasury of the United States, countersigned by the second comptroller and registered by the 4th auditor, for moneys appropriated by law for the use of the navy department; whereupon the secretary of the treasury was authorized by law to grant his warrants on the treasurer of the United States for the amounts, and according to the sums of the said requisitions. That J. K. Paulding was a navy agent, residing in the city of New York, and was required by law to render his accounts to the 4th auditor. That on the 2d of March, 1827, an act of congress (4 Stat. 206) was passed, making appropriations for the support of the navy of the United States, in which the sum of $20,000 was appropriated "for arrearages prior to the first day of January, 1827." That the defendant, so being 4th auditor as aforesaid, and being an evil-disposed person, and devising and intending fraudulently and unjustly to obtain and acquire for himself and for his own private use the money of the United States, with force and arms, on the 16th of January, 1828, at Washington county, in the District of Columbia, falsely and fraudulently wrote and addressed, and caused to be sent to the said J. K. Paulding, navy agent as aforesaid, in the city and state of New York, a letter in the words and figures following, to wit (here was inserted the letter of the 16th of January, 1828, which was inserted in the first indictment which was quashed on demurrer). It then avers that the defendant drew the draft on J. K. P., navy agent in New York, for $750, in favor of C. S. Fowler, at one day's sight, and sold it to Mr. Fowler, and received therefor the sum of $750, and kept and disposed of the same for his own use. That on the 16th of January, 1828, Mr. Paulding, as navy agent, wrote and sent to Mr. Southard, the following letter:

"Navy Agent's Office,

"New York, 16th January, 1828.

"Sir: Be pleased to direct a warrant to issue in my favor for the sum of $12,139.12, to be charged to the following appropriations, viz.:

Pay Aft	$ 1,942	
" Shore stations	1,058	25
" Civil establishmen:	643	32
" Repairs	2,488	54
" Medicines	1,000	
" Increase	2,904	90
" Slocps of war	2,102	11
	$12,139	12

—Required for the purposes expressed in the list herewith inclosed. I have the honor to be, very respectfully, your obedient servant,

"J. K. Paulding."

"Hon. Samuel L. Southard, Secretary of the Navy Department, Washington."

—Which letter was received by Mr. Southard, at Washington, on the 19th of January, 1828. That the said T. W., "being then and there 4th auditor of the treasury department of the United States as aforesaid, and being an evil-disposed person, and devising and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the said nineteenth day of January, which was in the year of our Lord one thousand eight hundred and twenty-eight, as aforesaid, at the county of Washington aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly, apply to the said Samuel L. Southard, then being secretary of the navy of the United States as aforesaid, to add to the said sum of twelve thousand one hundred and thirty-nine dollars and twelve cents, for which the said J. K. Paulding had requested a warrant to be issued as aforesaid, the sum of seven hundred and fifty dollars, and did then and there pretend to the said Samuel L. Southard, secretary of the navy of the United

States as aforesaid, that the said sum of seven hundred and fifty dollars, was required for the use and service of the navy of the United States, for the payment of claims settled and adjusted under the appropriation for arrearages due by the navy department prior to the first day of January, which was in the year of our Lord one thousand eight hundred and twenty-seven, and to cause the same to be placed in the hands of the said J. K. Paulding, navy agent as aforesaid, for the purpose aforesaid, at the same time, and together with the said sum of twelve thousand and one hundred and thirty-nine dollars and twelve cents, for which the said J. K. Paulding had required a warrant to be issued as aforesaid; and he, the said Tobias Watkins, did then and there unlawfully, fraudulently, deceitfully, knowingly, and designedly, cause and procure to be issued by the said Samuel L. Southard, then being secretary of the navy of the United States as aforesaid, a requisition to the treasurer of the United States for the additional sum of seven hundred and fifty dollars, and did cause and procure the said sum of seven hundred and fifty dollars to be added to the said requisition of twelve thousand one hundred and thirty-nine dollars and twelve cents, which he, the said J. K. Paulding had requested to be issued as aforesaid, and thereby caused the sum of twelve thousand eight hundred and eighty-nine dollars and twelve cents to be included in the said requisition, instead of the said sum of twelve thousand one hundred and thirty-nine dollars and twelve cents, so required to be so issued by the said J. K. Paulding as aforesaid; which said requisition, so caused and procured to be issued as aforesaid, is in the words and figures following" (here was inserted the requisition verbatim, including the sum of $750, under the head of "Arrearages prior to 1827"), "which said sum of twelve thousand eight hundred and eighty-nine dollars and twelve cents, in the said requisition mentioned, was, in conformity thereto, by warrant from under the hand of the secretary of the treasury of the United States, drawn out of the treasury thereof, and placed in the hands of the said J. K. Paulding, navy agent as aforesaid, the said sum of twelve thousand eight hundred and eighty-nine dollars and twelve cents, then and there being the property of the United States, with intent to defraud the United States out of the said sum of seven hundred and fifty dollars, in the said requisition mentioned and included as aforesaid, and by means thereof, and of the warrant of the secretary of the treasury issued thereon in manner aforesaid, drawn from the treasury of the United States; whereas, in truth and in fact, he, the said Tobias Watkins, at the time of making the said false pretences, well knew that the said sum of seven hundred and fifty dollars, in the said requisition included, was not required for the use and service of the navy of the United States, and that it was not necessary to draw the same from the treasury of the United States, for the payment of claims settled and adjusted under the appropriation for arrearages due by the navy department of the United States prior to the first day of January, which was in the year one thousand eight hundred and twenty seven, nor to place the same in the hands of the said J. K. Paulding, navy agent as aforesaid, for the purpose aforesaid; and whereas, in truth and in fact, he, the said Tobias Watkins, at the time of making the said false pretences as aforesaid, did not intend that the said sum of seven hundred and fifty dollars in the said requisition included, and, by means thereof, in manner aforesaid, drawn from the treasury of the United States, should be applied to the use and service of the navy of the United States, nor to claims settled and adjusted under the appropriation for arrearages due by the navy department prior to the first day of January, which was in the year one thousand eight hundred and twenty-seven, nor that the same should be placed in the hands of the said J. K. Paulding, navy agent as aforesaid, for the purposes aforesaid; but then and there intended fraudulently to defraud the United States of the same, and to convert the said sum of seven hundred and fifty dollars to his own use and benefit, and did thereby defraud the said United States of the said sum of seven hundred and fifty dollars, to the great damage of the United States, to the evil example of all others in like cases offending, and against the peace and government of the United States. Thomas Swann, Attorney U. S."

(2) The 2d of the said three indictments was upon a transaction with Mr. Paulding for $300, and had two counts. The first count states that the defendant, on the eighth of October, 1827, being 4th auditor, &c., and intending fraudulently and unjustly to obtain and acquire to himself from J. K. Paulding, navy agent at New York, the sum of $300 of the moneys of the United States in the hands of the said J. K. Paulding, "unlawfully, fraudulently, and deceitfully" wrote and caused to be sent to the said J. K. Paulding, navy agent at New York, the following letter, purporting to be dated and written from the office of the 4th auditor, &c. "Treasury Department, 4th Auditor's Office, 8th October, 1827. Sir: I have this day drawn on you in favor of Charles S. Fowler for three hundred dollars, which you will please to charge to 'Arrearages prior to 1827;' under which head a remittance will be made to you immediately on the secretary's return to the city. In the mean time be pleased to pay the draft out of any unexpended balance in your hands, to be replaced on receipt of the treasurer's remittance. I am, sir, very respectfully your obedient servant, T. Watkins." It then avers that the defendant drew the draft, sold it to C. S.

Fowler, received the sum of $300 and converted it to his own use; and that the draft was afterwards paid by J. K. Paulding out of the moneys of the United States in his hands. "And the jurors aforesaid, upon their oath aforesaid, do find that the said letter thus written and dated, and addressed and sent from the said treasury department and the office of the 4th auditor thereof, purported to be and was fraudulently intended by said Watkins, to appear as an official letter of said Watkins, and was so written, dated, addressed, and sent to deceive the said Paulding by such appearance, and to induce him to pay the draft aforesaid, out of the moneys of the United States in his hands; and the said Paulding was so deceived, and did, in consequence of such deceit, so pay the same out of the said moneys of the United States in his hands. And the jurors aforesaid, upon their oath aforesaid, do find that the letter aforesaid, so written, dated, addressed, and sent as aforesaid, purported to be, and was fraudulently intended by said Watkins to appear, and did appear, as an official letter of the said Watkins, and as representing that the said sum of money, therein mentioned, was to be paid for the public service of the United States, and that the draft, therein mentioned, was drawn on account of the public service of the United States, and to deceive the said Paulding by such appearance and to induce him to pay the same out of the moneys of the United States in his hands; and the said Paulding was thereby so deceived, and did pay the same out of the said moneys of the United States in his hands. And the jurors aforesaid, upon their oath aforesaid, do find, that, at the time of writing, addressing, and sending said letter, and of making said draft, the public service of the United States did not require the payment of the said sum of money in the said letter and draft mentioned, and the said Watkins well knew the same not to be so required, and that said Watkins had no authority to draw for the said sum of money, or to write the said letter of advice on account of the public service of the United States, as an official letter of him, the said Watkins, 4th auditor as aforesaid, and well knew he had no such authority; and that said Watkins wrote and dated, and addressed and sent the said letter, and made the said draft, ostensibly for the public service as aforesaid, but falsely and fraudulently for his own use and benefit, and to deceive the said Paulding as aforesaid, and to defraud the United States; and that by means of the said letter and draft, so written, dated, addressed, and sent as aforesaid, he, the said Watkins, did unlawfully, fraudulently, and deceitfully, obtain to and for his own use and benefit, the said sum of three hundred dollars of the moneys of the United States, from, and out of, the hands of the said Paulding, navy agent as aforesaid, to the great deceit, fraud, and damage of the United States, and against the peace and government of the United States." The second count stated, that the defendant, then fourth auditor, &c., intending to deceive and defraud the United States of the sum of $300 of the moneys of the United States, on the 8th of October, 1827, having informed J. K. Paulding, navy agent at New York, by letter of that date, and dated "Treasury Department, Fourth Auditor's Office," that he had drawn on him in favor of C. S. Fowler for $300, to be charged to "arrearages prior to 1827," and that, under that head a remittance would be made to him immediately on the return of the secretary of the navy to the city, and desiring the said J. K. Paulding to pay the draft out of any unexpended balance in his hands, to be replaced on his receipt of the treasurer's remittance, made the said draft and sold it to C. S. Fowler, and received from him therefor, the sum of $300, and applied the same to his own use; which draft was afterwards paid by the said J. K. Paulding out of the moneys of the United States in his hands. "And the jurors aforesaid, on their oath aforesaid, present that the said letter was written, and addressed, and sent, as aforesaid, fraudulently, and with the intent to impose on the said Paulding the belief that the said draft was made on account of, and intended to be applied to the public service of the United States, and to induce him to pay the same, and with intent to defraud the United States. And that the said draft was fraudulently made and sold as aforesaid, with the intent that the same should be paid by said Paulding, under such belief and inducement as aforesaid, out of the moneys of the United States in his hands as aforesaid; and with the intent thus to obtain and apply to his own use the said sum of three hundred dollars of the moneys of the United States, and with intent to defraud the United States. And the jurors aforesaid, upon their oath aforesaid, present, that by means of the said letter so written, addressed, and sent, the said Paulding was imposed on to believe that the said draft was made on account of, and intended to be applied to, the public service of the United States, and was thereby induced to pay the same out of the moneys of the United States in his hands, and did, under such belief and inducement, pay the same out of the said moneys of the United States in his hands. And the said Watkins did, by said imposition and deceit, thus used and practised upon the said Paulding, and by the said letter so written, addressed, and sent as aforesaid, defraud the United States of the said sum of three hundred dollars, to the great wrong of the United States, and against the peace and government thereof. Thomas Swann, Attorney U. S."

(3) The third of the said three indictments was upon a transaction of $2,000 with Mr. Hambleton, a purser in the navy of the United States at the navy-yard in Pensacola. This

indictment states that the defendant was fourth auditor of the treasury of the United States, and recites his duties; that Samuel L. Southard was secretary of the navy, and had authority to issue requisitions to the secretary of the treasury for moneys appropriated for the service of the navy of the United States, whereupon the secretary of the treasury had authority to grant his warrants on the treasury of the United States, for the amount of such requisitions. That Samuel Hambleton was a purser in the navy of the United States, residing at the navy-yard of the United States, at Pensacola. That the defendant, being fourth auditor, &c., "and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the 6th of March, 1827, at the county of Washington aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly write, address, and cause to be delivered to the said Samuel L. Southard, secretary of the navy, as aforesaid, a letter, in the words following, to wit: "Fourth Auditor's Office, 6th March, 1827. Sir,—I will thank you to cause a requisition to be issued in favor of Purser S. Hambleton, for $2,000, under the head of 'Pay Afloat,' made payable to my order, at the request of Mr. Hambleton, for the purpose of paying his drafts on me to that amount. I am, sir, respectfully, your obedient servant, T. Watkins. The Secretary of the Navy."

It is then averred that, confiding in the said letter, and believing that the said purser had requested such a requisition to be issued for $2,000, and that that sum was required for the use and service of the United States, Mr. Southard, as secretary of the navy, issued the requisition, as requested. That the said sum of $2,000, in conformity with the said requisition, was, by warrant from the secretary of the treasury, drawn out of the treasury of the United States, and placed in the hands of the defendant; "Whereas, in truth and in fact, the said T. Watkins, at the time he wrote his letter aforesaid to the said Samuel L. Southard, secretary of the navy, as aforesaid," "had not been requested by the said S. Hambleton, purser, as aforesaid, to cause any requisition to be issued in favor of him," "payable to the order of him, the said T. Watkins, as aforesaid, for the said sum of $2,000; nor had the said S. Hambleton drawn any drafts upon him, the said T. Watkins, for the said $2,000; and whereas, in fact and in truth, the said Tobias Watkins, at the time he wrote his letter, as aforesaid, did not intend that the said sum of $2,000 should be applied to the use of him, the said S. Hambleton, purser, as aforesaid, or to the use or service of the navy of the United States, or to the payment of any such drafts, as aforesaid, but then and there intended to defraud the United States of the same, and to convert the said sum of money to his own proper use and benefit; and did, by means of the pretences aforesaid, defraud the said United States of the said sum of $2,000, and did thereby then and there convert and appropriate the said sum to his own proper use and benefit, to the great damage of the United States, to the evil example of all others in like cases offending, and against the peace and government of the United States."

There was a second count in this indictment, containing the same preliminary allegations as in the first count, and averring that the defendant, "intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the said sixth day of March, 1827, aforesaid, at the county aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly apply to the said Samuel L. Southard, then being secretary of the navy of the United States, as aforesaid, to cause a requisition to be issued on account of the said S. Hambleton, purser, as aforesaid, for the sum of $2,000, under the head of 'Pay Afloat,' to be paid to him, the said Watkins; and did then and there pretend to the said Samuel L. Southard, secretary of the navy of the United States, as aforesaid, that the said sum was required for the use and service of the United States; and did then and there pretend that the said S. Hambleton, purser, as aforesaid, had drawn drafts upon him, the said Tobias Watkins, to the amount of the said $2,000, and that he, the said S. Hambleton, had requested the said requisition to be issued, for the purpose of meeting and paying his said drafts. And the said Samuel L. Southard, confiding in the statement and representation so made to him by the said Tobias Watkins, as aforesaid, and believing the said sum of $2,000 was required for the use and service of the United States, and that the said S. Hambleton had drawn drafts upon him, the said Tobias Watkins, to the amount of the said $2,000, and that he, the said S. Hambleton, had requested a requisition to be issued," &c., required a letter to be written by the said Watkins to him, the said Mr. Southard, secretary of the navy, &c., which letter (namely, the letter of March 6, 1827, set forth in the first count,) was written, &c., and caused the said requisition to be issued, &c.; whereupon the secretary of the treasury issued his warrant to the treasurer, &c., for the said sum of $2,000, in favor of the defendant, whereby the said sum was drawn out of the treasury of the United States, and placed in the hands of the defendant. "Whereas, in truth and in fact, the said sum of money, in the said requisition mentioned, was not required for the use and service of the United States; and the said Watkins, at the time he applied to the said Samuel L. Southard, to cause the requisition to be issued, as aforesaid, that is to say, on the said sixth day of March, 1827, well knew that the same was not so required for the use-

and service of the United States; and that the said Watkins had not been requested by the said Samuel Hambleton to apply to the said Southard, secretary, as aforesaid, for any such requisition to be issued, as aforesaid; nor had the said S. Hambleton, purser, as aforesaid, drawn drafts upon him, the said Watkins, to the amount of $2,000; nor had the said Hambleton requested the said requisition to be issued, for the purpose of meeting and paying such drafts. And whereas, in truth and in fact, the said Tobias Watkins, at the time he made his said application for the requisition aforesaid, and wrote and delivered the letter, as aforesaid, did not intend that the said $2,000 should be applied to the use of him, the said S. Hambleton, purser, as aforesaid, nor to the use or service of the navy of the United States, or to pay any such drafts of the said Hambleton; but then and there intended to defraud the United States of the same, and to convert the said sum of money to his own proper use and benefit; and did, by means of the false and deceitful means aforesaid, defraud the said United States of the said sum of $2,000, and did then and there convert and appropriate the same to his own proper use and benefit; to the great damage of the United States, &c. Thomas Swann, Attorney, United States."

To each of these three indictments the defendant's counsel filed a general demurrer.

Mr. R. S. Coxe, for defendant, observed that the objections which he should take would go to the gist of the transaction, and to the whole merits of the case. His first objection was, that this court has no jurisdiction of the case, whether sitting as a state court, under the adopted laws of Maryland, or, as a federal court, exercising the powers and jurisdiction of the other circuit courts of the United States. In these indictments, every thing is alleged to have been done officially, and the offences charged are charged as official misdemeanors. In the former cases, the acts done were not charged as having been done officially. These are cases of one officer of the United States imposing upon another officer of the United States, and obtaining the money of the United States. They are entirely and exclusively offences against the United States, as the government of the Union, in its federal and national character. The offence would have been the same, if it had been committed in any one of the states, instead of this district. It is a charge of violating his official duty, and employing his official powers and means to improper and private purposes. It is only a violation of his official duty; a breach of contract between him and his government. 2 Bl. Comm. (Chit. Ed.) 108; Co. Litt. pp. 234a, 232b, § 378. The United States has no common law. No state court can punish an officer of the United States for a violation of his duty, nor prevent or punish the destruction of the property of the United States, by any person. The constitution of the United States provides for impeachment of the officers of the United States, and defines treason. And congress has defined by law all the offences which can be committed against the United States, and provided for their punishment. Those offences must be in regard to those things of which the United States have jurisdiction; and those offences can be tried and punished only in the courts of the United States,—courts of purely federal jurisdiction. Congress has made the office of fourth auditor, and has defined its duties; and has exclusive jurisdiction over the whole subject-matter of these indictments. A man could not be punished in a state court, under any statute of a state, or under the common law of any state, for burning a navy-yard of the United States; nor could he be punished by the courts of the United States, because there is no statute of the United States to punish such burning. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 411, 416. The constitution must give congress jurisdiction over the subject, and congress must legislate upon it, before the courts of the United States can exercise jurisdiction over the offence, (or, rather, over the act done.) Whatever congress have the power of prohibiting, and have not prohibited, is lawful, and cannot be made penal by a state law. The federal jurisdiction, if it exists at all, is exclusive. The United States has a right and the power to protect itself, and to punish its officers for malversation in office. Gibbon v. Ogden, 9 Wheat. [22 U. S.] 17, 209; Houston v. Moore, 5 Wheat. [18 U. S.] 22. The negotiation with Great Britain, respecting the suppression of the slave trade, failed upon the ground that the United States could not give power to the courts of another nation to punish the violation of the laws of the United States. The judicial power must be co-extensive with the legislative; and e converso. The state courts cannot decide what are the duties of an officer of the United States. Why do these indictments aver the duties of the officer? Because the act done was a violation of official duty. Because, in order to show an offence, it was necessary to aver that the act was done officially. This court, then, if sitting as a state court, could not decide these points. If this indictment had been found in a state court, and the defendant had contended that he had a right, by virtue of his office, to do the act, and the state court had decided against that right, the cause might have been removed to the federal court under the 25th section of the judiciary act of 1789. Cohen's Case was brought before the supreme court of the United States, because he claimed a right to sell the lottery ticket under an act of congress. The defendant, in the present case, was arrested in Pennsylvania by the warrant of a district judge, because he was charged with an offence against the United States. See the judiciary act of 1789 (section 33). This is one of the cases expressly stated by Mr. Justice Story in U. S. v. Coolidge [Case No. 14,857], as being within the exclusive cognizance of the federal courts. In the former opinion of

this court, this was said to be an indictable fraud, because it was a fraud upon the United States—upon the public. But in a Maryland court it would not be a fraud on that public;—that public would be the state of Maryland—not the United States;—it would, therefore, not be an indictable fraud in Maryland. It could not be sustained in a state court by virtue of a law merely municipal, because it is an offence against the United States only. The judicial tribunals of one country will not enforce the municipal laws of another, especially the criminal laws; and in this respect the state tribunals and the United States tribunals are as distinct as the tribunals of different nations. They are, in truth, distinct sovereignties. In a prosecution under the state law, the executive of that state alone has the power to pardon. 1 Kent, Comm. 301, 313.

The constitution of Maryland was abridged by the constitution of the United States, and when congress adopted the common law of Maryland, it took it as it was modified by the constitution and laws of the United States. The common law of Maryland never extended to offences against the United States. The Militia Case, 5 Wheat. [18 U. S.] 17. By the constitution of the United States, the judicial power of the United States shall extend to all cases of law and equity arising under the constitution and laws of the United States, and such jurisdiction, at least in criminal cases, is exclusive. Martin v. Hunter, 1 Wheat. [14 U. S.] 329–331, 333. Cohen's Case, 6 Wheat. [19 U. S.] 381.

The treasury, and the offices and officers of the United States, are the creatures of the constitution and laws of the United States, and the right of legislation respecting them is exclusive. The laws of the United States can only be executed by the courts of the United States. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 401; Gibbon v. Ogden, 9 Wheat. [22 U. S.] 196, 197, 209; Com. v. Thompson, 1 Va. Cas. 319; U. S. v. Smith, 1 South. [4 N. J. Law] 33; 1 Kent, Comm. 312, lect. 16.

What difference is made by the power of exclusive legislation over this district, given by the constitution of the United States, art. 1, § 8? If this court could not, either as a state court, or as a court of the United States, take cognizance of this case, how can it by the junction of the two jurisdictions? This clause of the constitution operates no change; it only authorizes legislation. Neither the Maryland act of cession of December 23, 1788, nor the act of acceptance of July 16, 1790, nor the act of February 27, 1801, changed the law. The laws of Maryland were to remain in force; no new offence was to be created by the change of jurisdiction; nothing was added to the list of crimes punishable by the laws of Maryland. This offence, then, was not an offence against the state of Maryland, nor punishable by that law. This court, in its former opinion, has not decided this point, for the court expressly said that the defendant was not, in that indictment, charged with any official misconduct. Again, the public, to be defrauded, must be the public in whose court the indictment is pending.

The second objection is, that the offence was not consummated in this county. All the facts which constitute the offence must have been committed within the jurisdiction of the court before which the trial is to be had. Such is the rule of the common law. Here the indictments charge that J. K. Paulding was a navy agent at the city of New York; that the intent was to get the money of the United States out of the hands of that navy agent in New York. The crime consists of two distinct facts—the intent, and the obtaining the money; the means are not of themselves unlawful unless accompanied by the intent, and an actual injury. But time and place are material, and must be alleged. If the offence be commenced in one county and consummated in another, the venue cannot at common law be laid in either county, and the offender cannot be convicted. Archb. 11; 1 Chit. Cr. Law, 177, 178; 2 Cur. Hawk. 255, 325.

The third objection is, that the pretences are not well set forth. In this respect, Mr. Coxe contended that these indictments were liable to the same objections which the court decided to be fatal to the former indictments upon the same transactions; and as to the transaction of $2,000 with Mr. Hambleton, it appeared, upon the face of the indictment, that more than two years had expired before the indictment was found. Starkie, 58, 64, 67, 71; 6 Dane, Abr. 154, § 22; Goding v. Ferris, 2 H. Bl. 14; 2 Laws U. S. p. 99, April 30, 1790, § 31; 1 Chit. Cr. Law, 151, 223. In the first and third of these indictments the false pretence alleged is a mere naked lie, which is not an indictable offence at common law. 1 Cur. Hawk. 318, note. It is not averred that the sum of $750, drawn from Mr. Paulding, was obtained by any false pretence. The pretence is only averred to be with intent to place the money in the hands of Paulding,—not to draw it out. Then as to the $300 transaction, there is no distinct offence charged—no averment of any false pretence. The intent averred is to obtain money from Paulding, not from the United States. The only averments are, that he wrote the letter and drew the draft.

Mr. Key and Mr. Swann, contrà, took nearly the same ground as in the former cases. They contended that the charge is not for misfeasance, or nonfeasance in office. His official station only furnished him the means of perpetrating the fraud. The offence would have been the same if he had not been in office. This is as much a common-law offence as if one of the high officers of the government should commit murder, or larceny, or assault and battery. The averment of his official character was only to show how the deceit was effected.

As to the objection that the money was paid in New York, and therefore the offence was

not complete here, the payment of the money by Mr. Paulding to Mr. Fowler is not a necessary ingredient in the offence. The whole fraud was committed here. The pretence, the letter, the draft, the requisition, the receipt of the money by the defendant, were all done by him here. He could not be tried in New York, for he had committed no offence there. The only reason for averring that the money was paid by Paulding was to show that the fraud had been effectual. 1 Chit. 190–193; U. S. v. Wright [Case No. 16,773], in this court, April, 1822.

As to the objection to the false pretence, that it was a naked lie—a naked lie, in a fraud upon the public, is sufficient. "False pretences" are not necessary words in the indictment. Falsehood is enough. A falsehood is a false pretence. Imposition is sufficient. Jones' Case, Leach, 204; 2 East, P. C. 838. As to Hambleton's Case, it does not appear on the face of the indictment, when the indictment was found, although the act is said to have been committed on the 6th of March, 1827. But the day is immaterial, and the limitation cannot be taken advantage of by demurrer. It must be pleaded; for the United States may reply that the defendant fled from justice, which they cannot do upon demurrer. This objection would not be good upon a motion in arrest of judgment. U. S. v. Porter [Case No. 16,072], in this court, at December term, 1812; Archb. 14; 7 Wm. III. c. 3; Starkie, 64; 5 East, 259; 1 Chit. 223; Lee v. Clarke, 2 East, 333; Loyd v. Williams, 3 Wils. 258; 1 Chit. 283–285. The proviso in the act of April 30, 1790, § 32 (1 Stat. 119), is only applicable to offences created by the statutes of the United States; for the United States had no criminal common law, and there could be no common-law misdemeanors against the United States to which the limitation could apply.

Mr. Jones, in reply. By the act of congress of the 27th of February, 1801 (2 Stat. 103), the laws of Maryland were to remain in force here as they existed in Maryland on that day, and were to be administered here exactly as, and no otherwise than, they could have been administered by the courts in Maryland; and there can be no common-law offence here which would not have been a common-law offence in Maryland. This court is only a court of the District of Columbia, with the superadded jurisdiction of a circuit court of the United States. As a circuit court of the United States they cannot exercise jurisdiction of these offences, because they are not created by an act of congress; and as a court of the District of Columbia, they can only exercise the jurisdiction which a state court could exercise. Then, what is the nature and essence of the offences charged in these indictments? It is true that in some senses, all offences committed within this district, are offences against the United States. The United States is the territorial sovereign of this district; and every offence must be either against a statute of the United States, or would have been an offence against the state of Maryland. Every immoral act is not necessarily a common-law offence. Common-law offences are all defined; for although it is said to be lex non scripta; yet its evidences are written, in the reports of the judgments of the courts, and in the elementary treatises of the sages of the law. No such offence as this, against the United States, is known to the common law of Maryland; therefore this offence could not be tried in the state courts of Maryland.

The argument, that what would be in Maryland a common-law offence against the sovereignty of Maryland, would be here a common-law offence against the sovereignty of this district, has grown out of the same confusion of ideas. There can be no common-law offence here, but against the United States as the local sovereign; but if it be an offence against the United States, as the national sovereign, it cannot be a common-law offence. If the offence affect the treasury of the United States, if it affect the whole nation, it is an offence against the United States, as sovereign of the Union, and cannot be punished unless the offence has been defined, and its punishment prescribed by statute. The officers of the general government have no local habitation, and cannot be punished for an act done here, for which they could not be punished in any of the states. These offences depend essentially on the performance, or non-performance of the official functions of a public officer, which affect the Union at large. Our objection turns exclusively upon the quality of the act, not upon the official character merely of the defendant. The means and the turpitude of this offence, grew out of his connection with the United States as a public officer. Before the argument from the analogy of sovereign can apply, the offence must be an offence against the local sovereign of the district. The United States as the local sovereign of this district, is as distinct from the United States as the sovereign of the Union, as two independent sovereignties.

These principles are applicable to the present case. They are not opposed to the opinion heretofore given by this court, because the court then decided that those indictments did not charge official misconduct. If these indictments do not charge official misconduct, they charge no offence.

As to the $750 case, two distinct charges are made in the same count, and it is therefore bad. It charges: (1) That the defendant wrote a letter of advice, and drew a draft, and received the money from Mr. Fowler, and applied it to his own use. (2) That he obtained the requisition, &c. The intent only is averred to be the offence, the intent to acquire for his own use the money of the United States; that he pretended, &c., and procured the money to be placed in the hands of the navy agent; but no deceitful practice is averred by which the defendant got the money out of the hands of the navy agent. How could his official character be the means of effecting

the fraud, without misconduct in office? It must be a breach of his official trust. If he assumes to do an act which he has no authority to do, his office is not the means of effecting the fraud. The defendant had no authority to do what he did, and therefore the secretary of the navy, and the navy agent, could not be deceived by any pretence of such authority. They both knew the extent of his authority. His official character, therefore, could induce no confidence quoad hoc, namely, the necessity of placing this money in the hands of the navy agent. The secretary of the navy had no right to trust the assertion of the defendant. He could not be deceived, unless the defendant had a public primâ facie authority to do what he did. It is not averred that he wrote the letter as 4th auditor; but being 4th auditor. The averments of his official character and duties, therefore, are not made for the purpose of showing the means by which the deceit was practised.

As to the $300 case, it is not pretended that the defendant had authority to write the letter, and therefore it could not appear to be an official letter. If he had authority, then it was an official misdemeanor. In the first and third of these indictments, a misrepresentation is averred, but that misrepresentation could not deceive the secretary of the navy, because he had no right to look to the defendant for information upon matters of which the secretary was, or ought to have been better informed than the defendant. The pretence was too shallow to deceive. If there was no pretence, nor deceitful practice, there was no indictable fraud. Stripped of its official character, it is worse than the former one upon the same fact. Deceitful practices must be set out; the means must be effectual, and the fraud must be effected by those means.

Then as to the averments of place and time: (1) As to place. If the fraud be not carried into effect, it is not indictable. It is not a public offence unless consummated. The place must be stated, to show that the court has jurisdiction. All the acts necessary to complete the offence must be done within this county. The law of England is very strict on this point. The payment of the money in New York was necessary to complete the offence; for if Mr. Paulding had not paid the draft, the United States would not have been defrauded. 2 Hale, P. C. cc. 3-5; 1 Chit. 190-192. But it is said that in misdemeanors, the ingredients may be subdivided; and that where one of the acts constituting the offence was done in one county, the trial may be there; but it must be the final act, that which consummates the offence. The instance put is misprision of a felony committed partly in one county, and partly in another; but the misprision, which is a separate and independent offence, was committed in one county only, namely, the county in which the knowledge of the felony came to the accused. If the last act done by the present defendant was that which was done here, then he is innocent, for the offence was not complete when his last act here was done. The last act was done by this defendant in New York, by receiving, through and by his agent, Mr. Fowler, the money of the United States from Mr. Paulding, when he paid the draft. There is no election of jurisdiction. The place where the offence is consummated, fixes the jurisdiction. So if a man here, by letter procure a murder to be committed in New York by an innocent agent, he is guilty of the murder in New York, and may be tried there. 1 Hale, P. C. 190, 191, 374, 618, 652, 653, 708; Rex v. Munton, 1 Esp. 62; 1 Chit. 191, 192; U. S. v. Wright [Case No. 16,773], in this court in April, 1822. (2) As to the time. If it regard a material averment, it must be consistently stated, and an indictable offence must be shown upon the face of the indictment; if not, it is bad upon demurrer. But it is said that it must be pleaded, so as to give the prosecutor an opportunity of replying the flight of the defendant. If the defect does not appear on the face of the indictment, the defendant may avail himself of it upon the general issue. Larner's Case, in this court (not reported); U. S. v. Porter [Case No. 16,072], in this court; Adams v. Wood, 2 Cranch [6 U. S.] 336. The indictment must show the time to be within two years before the finding of the indictment; but it need not be averred, that the time was within the limitation. And this explains the case of Lee v. Clarke, 2 East, 333, where it was only decided that the averment that the act was done within six months, was unnecessary. Rex v. Stevens, 5 East, 259.

It is said that the United States cannot, upon demurrer, show the flight of the defendant. But the United States ought to have stated it in the indictment, if the indictment itself showed that the time limited for the prosecution had expired. Or they might have stated the offence to have been committed on some day within the limitation. It has been supposed that the proviso in the act of April 30, 1790, limiting the prosecution to two years, does not apply to common-law cases. But this court has decided that point in the cases before mentioned of Larner and Porter, and the law has been ever since considered as settled, and the benefit of the limitation has been allowed in many cases of common-law offences. See, also, Steph. Pl. 312.

CRANCH, Chief Judge, delivered the opinion of the majority of the court, as follows: Three new indictments have been found by the grand jury, to which the defendant has demurred. The first ground of demurrer is common to the three indictments and if available at all, is a bar to any prosecution whatever for the matters therein charged. It supposes the charge in each case to be merely for official misconduct of the defendant as 4th auditor in the treasury department of the United States, in which case it is contended by the counsel of the defendant, that it is an offence, exclusively against the United States

in their national character, in which character they have no common law; and, therefore, there can be no offence against the United States, (in that character,) which has not been defined, and its punishment prescribed by statute. And that, as there is no statute applicable to the matters charged in these indictments, those matters are not indictable or cognizable by any court of the United States as such. That as the creation of offices and officers, and their duties, are matters of exclusive federal legislation, and as the judicial power of the United States is coextensive with its legislative power, no state court can take cognizance of the malversations in office of any federal officer. That this court cannot, by virtue of any transfer of jurisdiction by Maryland to the United States, exercise any jurisdiction, which a state court in Maryland could not have exercised on the 27th of February, 1801, or on the first Monday of December, 1800, when this district became, by law, the seat of the government of the United States; and as no court in Maryland could, at that time, have had cognizance of the matters charged in these indictments, it follows that this court has no cognizance of them by virtue of any authority derived, by the United States, from Maryland, by virtue of the cession of this part of the District of Columbia. This doctrine may or may not be correct; but, if correct, it does not apply to the present cases, if the charges in these indictments be not for official misconduct of the defendant, as an officer of the national government.

In considering the demurrer to the former indictments against this defendant, the court was satisfied that the charges in those cases, were not for official misconduct, but for frauds at common law; and, in that respect, we see no material difference between those indictments and these. It is true that the first of these indictments avers that the defendant was fourth auditor, &c., at the time when he did the act complained of, and sets forth so much of his duty as such fourth auditor, and so much of the duty of the navy agent as was supposed necessary or proper to show how the defendant's letter and draft, of the 16th of January, 1828, might deceive or impose upon the navy agent, so as to induce him to pay the draft; and how his pretence, that the sum of $750 was required for the use and service of the navy of the United States, for payment of arrearages, might deceive or impose upon the secretary of the navy, to induce him to increase the requisition in favor of Mr. Paulding, and to show why these officers should have given their confidence to the defendant. But this averment of his official character and duties is not an averment that the acts, with which he is charged, were committed in, or by virtue of, his office, or constituted any violation or neglect of his official duties.

It has been justly observed, that to charge that the defendant, being fourth auditor, &c., committed larceny, or robbery, or murder, is not to charge him with official malversation.

THE COURT is, therefore, of opinion that these indictments (for that which we have just considered appears to be the strongest case in favor of the defendant, upon this point,) do not charge the defendant with official misconduct only, but that they stand, in this respect, upon the same ground as those upon which the former opinion of this court was given; which opinion, we think, is not shaken by the argument in the present cases, but is as applicable to these as it was to those.

But it is said, that if these indictments are not for official misconduct, yet each of them is insufficient, for want of precise and explicit averments of the deceitful practices by which the frauds are supposed to have been effected, and that the frauds were effected by means of such deceitful practices.

With a view to this question, it will be necessary to examine them separately.

The first is for the $750 obtained from Mr. Paulding. After setting out the official character of the defendant, as fourth auditor, and his duties, the authority of the secretary of the navy to issue requisitions to the secretary of the treasury, and of the latter to grant warrants on the treasury of the United States, according to such requisitions, the official character of Mr. Paulding, and a part of his duties, as navy agent; and that an appropriation of $20,000 had been made by law, on the 2d of March, 1827, for the use of the navy department, for arrearages prior to the 1st of January, 1827, the indictment charges that the defendant, being fourth auditor, &c., and intending fraudulently and unjustly to obtain and acquire for himself, and for his own private use, the money of the United States, with force and arms, on the 16th of January, 1828, at Washington county, in the District of Columbia, falsely and fraudulently wrote, addressed, and caused to be sent to Mr. Paulding, navy agent in New York, a letter of that date, in the words and figures following — "Treasury Department, Fourth Auditor's Office, January 16, 1828. Sir,—I have this day drawn on you for seven hundred and fifty dollars, in favor of C. S. Fowler, on one day's sight, to meet which a remittance will be made to you by the treasurer of the United States, so soon as the requisition can pass through the forms of office, under the head of 'Arrearages prior to 1827,' of the like sum, and to this head you will be pleased to charge the draft, when paid. The draft is made at one day's sight, that time may be allowed for the remittance to reach you in due season; but should any thing occur to prevent this, you will be pleased to pay it out of any fund in your hand, and make the necessary transfer on the receipt of the treasurer's draft. I am, respectfully, your obedient servant, T. Watkins. J. K. Paulding, Navy Agent." And, on the same day, at, &c., made his draft on Mr. Paulding,

navy agent, as aforesaid, according to the advice of the said letter, in favor of C. S. Fowler, for the said sum of $750, and then and there sold and delivered it to the said Fowler, and received of him therefor the said sum of $750, and kept and disposed of the same for his own use; which draft was afterwards paid by the said navy agent, out of the moneys of the United States in his hands. The indictment further charges, in the same count, that the said J. K. Paulding, navy agent, as aforesaid, on the 16th of January, 1828, wrote, addressed, and sent to the secretary of the navy a letter, requesting him to issue a requisition, in his favor, for the sum of $12,139.12, under certain specified heads of appropriation, the head of "Arrearages" not being one of them; which letter was received by the secretary of the navy, at Washington, on the 19th of January, 1828. That the defendant then and there, being fourth auditor, &c., and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, &c., on the said 19th of January, 1828, at, &c., did falsely, fraudulently, deceitfully, knowingly, and designedly apply to the secretary of the navy to add to the sum for which Mr. Paulding had requested a warrant to be issued, as aforesaid, the sum of $750, and did then and there pretend to the said Samuel L. Southard, secretary of the navy of the United States, as aforesaid, that the said sum of $750 was required for the use and service of the navy of the United States, for the payment of claims adjusted and settled under the appropriation for arrearages due by the navy department of the United States, prior to the 1st of January, 1827; and did then and there unawfully, fraudulently, deceitfully, and designedly cause and procure to be issued by the said Samuel L. Southard, then being secretary of the navy of the United States, as aforesaid, a requisition to the treasurer of the United States, for the said additional sum of $750; and did cause and procure the said sum of $750 to be added to the said requisition of $12,139.12, which the said J. K. Paulding had requested to be issued, as aforesaid, thereby causing the said sum of $12,889.12 to be included in the said requisition, instead of the sum of $12,139.12, so required, &c., by the said J. K. Paulding, as aforesaid, (which requisition is set out in words and figures,) which said sum of $12,889.12, mentioned in the said requisition, was, in conformity thereto, by warrant under the hand of the secretary of the treasury of the United States, drawn out of the treasury thereof, and placed in the hands of the said J. K. Paulding, navy agent, as aforesaid, the said sum of $12,889.12, then and there being the property of the United States, with intent to defraud the said United States out of the said sum of $750. Whereas, in truth and in fact, he, the said T. Watkins, at the time of making the said false pretences, well knew that the said sum of $750, in the said requisition included, was not required for the use and service of the United States; and whereas, in truth and in fact, the said T. Watkins, at the time, &c., did not intend that the said sum of $750 should be applied to the use and service of the navy of the United States, but then and there intended to defraud the United States of the same, and to convert the said sum of $750 to his own use and benefit, and did thereby defraud the United States of the said sum of $750, to the great damage of the United States, &c.

The first objection to this indictment is, that it charges two distinct offences in the same count: first, that the defendant, with force and arms, intending to acquire the public money for his own use, wrote the letter of the 16th of January, 1828, and drew, and sold, and received the money for, the draft of $750 on the navy agent, who afterwards paid it out of the moneys of the United States in his hands; secondly, that the defendant, with force and arms, intending, as aforesaid, and knowing that the navy agent had asked for a requisition for $12,139 only, on the 19th of January, 1828, applied to the secretary of the navy to add $750 to the requisition; and falsely pretended that it was for the public use and service, and caused a requisition to be issued, including the $750, which sum was, in conformity thereto, by warrant drawn from the treasury of the United States, and placed in the hands of the navy agent, and did thereby defraud the United States of the said sum of $750.

This objection, we think, cannot be sustained. It seems to the court that this count charges only one offence, the defrauding of the United States of the $750, by the means set out in the whole count. The first part of the count charges only some of the means used to accomplish the fraud; the second part states the residue, and its actual accomplishment, which is averred to have been done thereby; which word, the counsel for the defendant have justly said, refers to the whole preceding matter contained in the count.

The next objection is, that it does not appear in the count by what deceitful practices the defendant got, or could have got the money of the United States out of the hands of the navy agent; for until the money was got out of his hands, the offence, it is said, was not complete. The false pretence to the secretary, it is supposed, only shows the deceit by which the money was drawn from the treasury, and placed in the hands of the navy agent; but that was no fraud on the United States, for it was safe in his hands. But the answer to that objection is, that the getting the money out of the treasury was a necessary link in the chain of means to accomplish the fraud; and if that single link was obtained by the deceptive practices of the defendant, those deceptive practices are as ef-

fectual in constituting the offence, as if every other link in the chain had been forged by the like deception.

Another objection has been taken to this indictment. It is said that, in order to show an indictable fraud in this case, it must not only appear that the defendant drew the draft on Mr. Paulding and received the money, and that the draft was paid by Mr. Paulding out of the public moneys in his hands, but that the requisition which was obtained by false pretences, and by means of which the money was drawn out of the treasury, and placed in the hands of Mr. Paulding, should, by a proper averment, be connected with the transaction between the defendant and Mr. Paulding, in regard to the draft, which, it is supposed, is not done in this indictment; and that, as there does not appear, on the face of the indictment, any connection between the $750 drawn for and received by the defendant, and the $750 transferred from the treasury to the navy agent, it must be intended that there are two distinct sums of $750 mentioned in the indictment; and that, therefore, when it is said, in the conclusion of the indictment, that the defendant "did thereby defraud the United States of the said sum of $750," it is uncertain which of the two sums of $750 is meant; and that, therefore, the indictment is bad for uncertainty, and for not connecting the defendant's receipt of the money with the false pretences.

It has already been said, by this court, that the getting the money out of the treasury was a necessary link in the chain of means to accomplish the fraud; and that if that were done by the deceptive practices of the defendant, those deceptive practices are as effectual in constituting the offence, as if every other link of the chain had been made by the like deception. But it is now urged that the links of that chain are not connected; that the chain consists of two parts, which have never been joined; and that the false pretence is applicable to one of those parts.

The chain of facts is this: (1) The letter from the defendant to the navy agent at New York, in which he informs him that he has drawn on him, in favor of C. S. Fowler, for $750, at one day's sight, to meet which a remittance of a like sum will be made to the said navy agent, by the treasurer of the United States, as soon as the requisition can pass through the forms of office, under the head of "Arrearages prior to 1827," and that to this head he should charge the draft, when paid; and that, if the remittance should not reach him in due season, he should pay it out of any fund in his hands, and make the necessary transfer on the receipt of the treasurer's draft. (2) The draft, drawn on the same day, according to the advice of the letter. (3) The sale of the draft to Mr. Fowler. (4) The receipt of the money, by the defendant, from Mr. Fowler. (5) The payment of the draft by the navy agent out of the moneys of the United States in his hands. (6) The requisition and the treasurer's draft, in conformity with the assurance contained in the letter. (7) The false pretences by which the requisition and the treasurer's draft were obtained; and by which the 750 dollars were drawn from the treasury and placed in the hands of the navy agent. (8) The averment that the defendant did thereby defraud the United States of the said sum of 750 dollars.

We see no want of connection in this chain. The treasurer's draft, which transferred the 750 dollars from the treasury to the hands of Mr. Paulding, is as much connected with the original letter of the 16th of January, as the draft of the defendant is connected with it. They are both mentioned in that letter; and Mr. Paulding had as good a right to expect the one as the other. It is true, there are other facts mentioned in the indictment, but they are only such as were necessary to show the false pretences by which the defendant obtained that treasury draft; and do not break the connection of the material circumstances by means of which the fraud is supposed to have been effected. If the allegation respecting the treasury warrant had immediately followed the averment of the payment of the draft by Mr. Paulding, and it had been introduced by such words as these: "And the jurors aforesaid, upon their oaths aforesaid, further present that the said Tobias Watkins, in conformity with the assurance contained in the said letter of the 16th of January, 1828, afterwards, to wit, on the 19th of January, 1828, at the county of Washington aforesaid, did cause the like sum of 750 dollars to be drawn from the treasury of the United States, and placed in the hands of the said J. K. Paulding, navy agent as aforesaid, by means of a warrant issued by the secretary of the treasury of the United States," &c., and if it had been followed by the proper averment of the deceitful practices used by the defendant to obtain the warrant, we think this objection would not have been taken; yet the words "in conformity with the assurance contained in the said letter of the 16th of January, 1828," would have been only an averment of an inference of law from the facts stated. For, whether the remittance was in conformity with the assurance contained in the letter, was a mere question of law; it would, therefore, have been an immaterial averment, and would have amounted to nothing more than the law would infer from a comparison of the terms of the letter with the averment respecting the warrant. We think, therefore, that the connection between the defendant's letter of the 16th of January, 1828, and his draft, and the treasurer's remittance, is sufficiently apparent upon the face of the indictment; and that it does sufficiently appear that the 750 dollars, of which the defendant is charged with defrauding the United States, are the 750 dollars included in the requisition and warrant, which the defendant, by anticipation, perhaps, drew out of the hands of the navy agent, through the medium

of Mr. Fowler, the broker. We have said, "by anticipation, perhaps;" for it does not appear, upon the indictment, whether the treasurer's remittance reached Mr. Paulding before or after he had paid the draft. Nor is that question material; for if he paid it before he received the remittance, he paid it upon the assurance of a remittance which was afterwards actually made. In either case, therefore, he paid it out of the moneys of the United States in his hands. It seems to us, therefore, that the chain of facts and circumstances which are set forth in the indictment, as the means of effecting the supposed fraud, are sufficiently connected; and that the deceitful practices averred to have been used, by the defendant, in obtaining one of those means, (namely, the requisition,) infect with fraud the whole transaction, as it appears upon the face of the indictment.

Another objection taken to this indictment is, that the offence was not complete until the money was paid by the navy agent in New York, and that unless all the acts which constitute the fraud were committed in this county, this court has not jurisdiction of the cause. It was suggested, however, that, even if that doctrine be correct, it will apply only to the acts of the defendant himself, and not to the act of the navy agent in New York who paid the money. But to this it was answered that Mr. Fowler, in whose favor the bill was drawn, and who received the money from the navy agent in New York, was the innocent agent of the defendant, and acted under his authority in receiving the money there. Admitting this to be so, yet Mr. Fowler, with some reason, may be considered as the innocent agent of Mr. Paulding in paying the money here, in Washington; for his act was ratified by Mr. Paulding, when he accepted and paid the bill in New York; and a ratification is equivalent to an original authority, according to the maxim which the common law lawyers have drawn from the civil law, "omnis ratihabitio retrotrahitur, ac mandato æquiparatur." Dig. 50, 17, 152, 2.[6]

The discount of a bill is only the anticipation of the fund upon which the bill is drawn. The money is advanced on the credit of the bill, and in the expectation that it will be accepted and paid. If it be accepted and paid, the broker who discounted it is reimbursed. His act, in advancing the money, has been ratified; and the drawer of the bill, for whose accommodation it was discounted, has got by anticipation the very fund upon which he drew. The ratification by the drawee, of the act of the broker, relates to the time of that act, and constitutes the money advanced, the money of the drawee, at the very time of advancing it. In the present case, the defendant did not receive the money of the United States in New York; he received it at Washington from Mr. Fowler, who advanced it on the credit of the bill; and when the navy agent in New York paid the bill, he adopted and ratified Mr. Fowler's act in advancing the money, and this ratification related to the time of the discount. It is only by a fiction of law that it can be pretended that the defendant received the money of the United States in New York, and it is not a greater fiction to suppose that Mr. Paulding, by the instrumentality of Mr. Fowler, paid the money in Washington, than that the defendant, through the same instrumentality, received it of Mr. Paulding in New York. If the defendant received Mr. Fowler's money in Washington, and afterwards received the money of the United States in New York, then he must have received the money twice, which is not pretended. Then, if he received 750 dollars only once, and if he received 750 dollars of the money of the United States, the 750 dollars which he received was the money of the United States. If the only money he received was received by him in Washington, and if he received 750 dollars of the money of the United States, then the money of the United States which he received was received by him in Washington. The argument is, at least, as strong in favor of his having received the money of the United States at Washington, as it is of his having received it at New York.

But there is another view of this subject which has been taken by the counsel for the United States, and which it may be proper for the court to notice. It is contended by them that the offence (meaning the offence charged in this indictment, which is a fraud upon the United States,) was complete when the defendant sold the draft and received the money from Mr. Fowler, and before the draft had been paid by Mr. Paulding out of the moneys of the United States in his hands; and that the defendant might have been immediately prosecuted and convicted for this offence, even if Mr. Paulding had refused to honor the draft, because the United States might have been prejudiced thereby if the draft had been paid, and that the risk which was thereby occasioned to the United States by the drawing of the bill was an actual prejudice to the United States, although that prejudice is not stated in the indictment as the injury done to the United States by the fraud; and although the injury alleged in the indictment is the defrauding of the United States, by the defendant's getting and applying to his own use 750 dollars of the money of the United States. It is said that the fraud was complete, upon somebody, when the defendant received the money from Mr. Fowler; that it is immaterial whether it was then a fraud upon the United States or upon Mr. Fowler; that it certainly was a fraud upon one or the other; and that the defendant is equally guilty whether one or the other was, or whether both were injured thereby. That the question who was injured thereby, or how injured, does not

[6] The Digest, 50, 17, 152, 2, extends the principle to criminal cases—"in maleficio ratihabitio mandato comparatur."

affect the question of guilt. That they are immaterial circumstances, and need not be set forth with averment of time and place. But a majority of the court is of opinion that this indictment, which is for obtaining by false pretences, or deceitful practices, 750 dollars of the money of the United States, could not have been maintained if Mr. Paulding had not paid the draft; and that until the draft was paid, the offence charged in this indictment was not complete. Upon the whole, it is the unanimous opinion of the court, that none of the objections taken to this indictment can be supported.

As to the second of these indictments, the court wishes further time for consideration.

As to the third of these indictments, (that upon the transaction with Mr. Hambleton,) the principal objection is, that it appears, upon its face, that the offence, if any, was committed more than two years before the finding of the indictment,—the time limited by the thirty-second section of the act of the 30th of April, 1790,—by which it is enacted: "That no person or persons shall be prosecuted, tried, or punished, for treason, or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury, within three years next after the treason, or capital offence aforesaid, shall be done or committed; nor shall any person be prosecuted, tried, or punished, for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid. Provided that nothing herein contained shall extend to any person or persons fleeing from justice."

In answer to this objection it has been said, —(1) That it does not appear, upon the face of the indictment, at what time it was found; (2) that advantage of the limitation cannot be taken upon demurrer, because the United States would thereby be precluded from replying, according to the proviso of the act, that the defendant fled from justice within the two years; and (3) that the limitation extends only to such offences and penalties, &c., as are created by acts of congress, and not to common-law offences, because there could be none such against the United States, in its national character.

(1) The answer to the first objection is, that it will appear, from the caption of the indictment, whenever the record is made up, at what time the indictment was found; and, upon demurrer, the judgment of the court must be upon the whole record. And if, upon the whole record, it should appear to the court that the offence was committed beyond the time limited, they could not give judgment against the defendant. Thus, in Rex v. Fearnley, 1 Term R. 320, "the court said they were of opinion that this was a good objection; because, by the caption of the indictment, it appeared that the quarter sessions had no jurisdiction. Upon a demurrer to an indictment, the court must look to the whole record, to see whether they are warranted in giving judgment on it." So in the cases of Rex v. Fisher, and Rex v. Saunders, 2 Strange, 865. "In the case of Fisher, judgment was arrested after verdict; and, in the case of Saunders, one indictment was quashed, being taken at an adjourned sessions. and it not appearing what day the original sessions began, to bring it within the time prescribed by the statute."

(2) To the second objection, that the defendant cannot take advantage of the limitation upon demurrer, the answer is this, that however it may be in practice, yet in theory, and by law, if judgment, upon demurrer to an indictment for a misdemeanor, be given against the defendant, it is a peremptory judgment of condemnation; and although, in practice, the court will often rather intimate its opinion than pronounce sentence, and will permit the defendant to withdraw his demurrer and plead to issue, yet upon the question, whether the defendant may avail himself, by demurrer, of a bar apparent upon the record, the court must consider what would be the legal consequence of a judgment upon the demurrer; and when we see that it may be a peremptory judgment, and that the defendant has a good defence upon the face of the record, the court cannot deprive him of the benefit of it. Pugh v. Robinson, 1 Term R. 116. We think, therefore, that the defendant has a right, upon demurrer, to avail himself of the limitation of the statute. It has been said, that the United States would thereby be precluded from replying the flight of the defendant, if such should have been the fact. But that is not the fault of the defendant; the United States have put themselves in that situation by stating the fact to have happened at a time beyond the day of limitation. They were not bound to do so, for they might have laid the day to be within the time of limitation, and have proved a different day at the trial; and if the day proved should be beyond the time of limitation, and the United States could have shown that the defendant fled within the two years after committing the offence, they might have given it in evidence; or they might have stated in the indictment the true time, and any facts which existed, and went to show that the defendant could not avail himself of the limitation.

(3) As to the third objection, that the statute does not apply to common-law offences, committed within this district, the answer is, that this court, so long ago as December term, 1812, in the case of U. S. v. Porter [Case No. 16,072], who was indicted for certain frauds at common law, decided that the limitation of the act of 1790 did apply to such cases. It is true that, in that case, it appears by the docket-entries that the defendant pleaded "not guilty, and the act of limitations;" but Mr. Key, who was counsel

for the defendant in that cause, having, upon the trial, objected to evidence of transactions which took place more than two years before the finding of the indictments, said—"We do not rely upon the special plea of the statute of limitations, but make the motion on the plea of 'not guilty.'" Mr. Jones, who was then attorney for the United States, contended, as it is now contended by the counsel for the United States, "that the act of congress does not apply to this case. It was passed in 1790, and refers only to the cases within the jurisdiction of the circuit courts of the United States, and only to crimes punishable in those courts. It does not apply to jurisdictions created subsequent to that act. What crimes and offences were then in the contemplation of the legislature? Nothing but offences created by act of congress. The circuit courts of the United States had no common-law jurisdiction. They had no cognizance of common-law offences." Mr. Key, contra, observed—"The law ought to be construed liberally, for the benefit of the accused. This case is in the very words of the statute." This court, in that case, was clearly of opinion that the act of congress of the 30th of April, 1790, § 32 (1 Stat. 119), applied to the case, and directed the jury that they could not find the defendant guilty upon that evidence. This decision of the court has been acquiesced in by the public; and the question, we believe, has never been made since.

We are, therefore, of opinion that the judgment upon the demurrer to this indictment must be for the defendant.

THRUSTON, Circuit Judge. On demurrers to two indictments, known to the bench and bar as indictments Nos. 1 and 2,—No. 1 charging the defrauding the United States of $750, and No. 2 of $300, I remarked, on Saturday last, in the course of the argument on a point which the court, at the earnest instance of the defendant's counsel, permitted them to be heard upon, because the reasons assigned by the court, in their opinion, (which was against the demurrer No. 1,) on the much agitated question of jurisdiction, were such as had not been before considered and discussed, that I had not an opportunity of full examination of the indictments, but that I had met the other two judges, and advised with them; and that, as to the one for $750, I had concurred with the court in its sufficiency, and that the demurrer ought to be overruled; but that I had, on Thursday evening, taken home with me the two indictments aforesaid, and attentively examined them, and that I was more confirmed in my belief that the court were right in their opinion, delivered in the one for $750, or No. 1, although, perhaps, my reasons for this belief were not entirely the same as those assigned in the opinion of the court. I also remarked that I was prepared, when the court gave their opinion on the said indictment, No. 1, but took time for further consideration on No. 2, to give my opinion as to the sufficiency of No. 2, which, I said, I deemed the most unexceptionable of the two; but I did not think proper, at the time the said opinion was pronounced, to mention my satisfaction with the said No. 2, from courtesy to the majority of the court. After a few preliminary remarks, I shall state my reasons for the opinions above suggested. An intimation was thrown out, also, on Saturday last, that I had indicated some impatience, occasioned by the protracted discussion of the cases before us. If I have done so, I was not sensible of it; and if my deportment subjected me to such suspicion, or if I unconsciously exposed myself to it, I must look for an apology in the eight or nine weeks of daily debate, of at least six hours each day, chiefly on technical points, which ought to be understood, if they can be understood at all, at least in as many days as we have consumed weeks. But we have, as I thought, with great patience listened to all that we were desired to hear; and with the more willingness, as the importance of the case has been urged with much solemnity, although I have never been able to discern any peculiar circumstances which can distinguish this case from that of others of the same grade. Fraud at common law is but a misdemeanor. This is a general term for that class of offences which are considered the least heinous; and I understand that the punishment, on conviction, is but one degree above that of the lowest offence. Pecuniary fine is considered, I believe, the lightest punishment known to the law for fraud; imprisonment may be superadded, but at the discretion of the court. If this case, then, be of any particular importance, we must search for it in extrinsic circumstances; this is forbidden ground to judges; we cannot travel out of the record, and if, in the course of judicial investigations, or from other sources, any knowledge may reach us, of facts calculated to excite, in our breasts, sympathy for the accused, we are bound by the stern mandates of duty to suppress them, while we occupy these seats.

The questions now before the court, are on the sufficiency of the two indictments. Two points have been made: (1) That offences, charged in the indictments, are not cognizable in this court; and if they are, that they are not properly charged. The question of jurisdiction results from the statement, (as it is alleged,) in both indictments, that the fraud, if any, was completed in New York, where the money was received from the navy agent, Paulding; and that, therefore, if the facts alleged, constitute a fraud, it is indictable there, and not here. The indictment, No. 1, has also been impeached on the ground that it charges two distinct offences; the one for $750 received, by the means of Fowler's draft from Paulding in New York, and another, for a like sum, from the treas-

ury, by means of the treasurer's warrant issued here on the order of the secretary of the treasury, upon the requisition of the secretary of the navy, which requisition included the false and spurious item of $750 for "arrearages prior to 1827," imposed, by false pretences, on the said secretary, to lead him to add it to Mr. Paulding's legitimate demand of $12,139.12, thereby causing falsely, and fraudulently, the said secretary to issue a requisition on the treasury department for $12,889.12, including this imposed item, instead of the first lawful amount. The indictment No. 2, has been stigmatized as wanting precision and proper averments. In support of these criticisms on the indictments, a great number of authorities were cited, chiefly from compilations and digests of modern date, which, if I had the books now before me, as in truth I have not, I should not have time to examine them with sufficient deliberation, and, therefore, must make up my opinion from the impressions received at the time the authorities were cited, from general principles of law, and the exercise of such understanding as it has pleased Providence to endue me with. But these books were, principally, as I said before, compilations and digests, which, if I understand them, are attempts to frame general rules out of particular cases, and in support of those rules, the authorities are cited in the margin; that is, reports of adjudged cases. Now, as to so much of the case before us, as relates to the form and structure of the indictments, the allegations, averments, the narrative part, if I may so call it, of a course of transactions resulting in a breach of the laws, particularly in frauds, nothing can be more fallacious than general rules. Let us consider the infinite diversity of stratagems and devices by which a fraud may be achieved. Some, like the old legitimate drama, consist of unity of time, place, and action; others, like the more modern, have a number of acts and scenes, which are shifted from place to place, and time to time, till the plot ripens and is perfected. Hence, and from the peculiar and diversified nature of the contrivances made use of to accomplish a fraud, there must be an equally diversified form and manner in the statements in an indictment. A fraud may be completed, at one time, one place, and by one act; and if A. uses a false token to B., and cheats and imposes on him, to get hold of B.'s money, this is a simple fraud, and easily charged in an indictment. But a fraud, which requires, for its accomplishment, a more extended and compound course of deceptions, partly by false representations in writing, and partly verbal, where several persons are to be deceived, before the attainment of the end, and where operations are to be carried on in several distant places; here all these various circumstances being required to be set out in an indictment, such an indictment must necessarily vary from any other indictment that was ever drawn before it; and therefore, as to its peculiar form and structure, no precedent of forms can be found to apply to it. I do not want precedents to inform me of the leading principles which must govern all indictments, that they must be certain and precise in their charges; that the quo animo must be averred, the scienter, &c.; that the negations must exclude any possible legal inference of innocence in the acts or intents of the accused, &c., and as far as such general rules and principles as these go, I will pay all due respect, and have applied them, and measured these indictments by them, and have not found them deficient. My confidence in those books, also, is much impaired by what I have seen on this trial, and what I have often seen before. I have seen book opposed to book by opposite counsel; nay, I have seen the same book used to bear on the same point by both sides, which leads me to the mention of an observation of a very learned judge on this subject, whom I had occasion to allude to once before. This distinguished chancellor of Virginia, having been rendered exceedingly impatient at the frequent reversals of his decisions by the court of appeals of Virginia, he published, as I said before, a book in vindication of his opinions, and arraigning those of the appellate court. I remember, in a certain case, the superior court had cited a precedent from Bulstrode, which pressed hard on the chancellor's decree. He did not know how to get rid of the force of this case, and therefore, belittled—if I may use the term, it has high authority for its legitimacy—the author by saying, "Ah! as for Bulstrode he is like a Swiss soldier, he will fight any side for pay." May not this be said of some of our innumerable modern bookmakers? I have often seen them (to carry on the venerable chancellor's figure) battling on both sides. I do most seriously deplore and deprecate this overwhelming inundation of books, particularly of the class just mentioned. They are good labor-saving machines to the practitioner, but they have a woful effect on the administration of justice; and I really do apprehend, that they will, if not stopped, subvert to its foundations the empire of common sense, and render the law, which is said by my Lord Coke to be the most miserable slavery if it be vague or uncertain, the most unsettled and doubtful of all human sciences. Now, to apply the form of any one indictment, (which has been attempted,) from the books to the indictments before the court, so different in the facts, intents, incidents, stratagems, and artifices, by which to test them, is like applying two vacant figures and forms, one to the other, to test their coincidence. As to those books, again; I have observed that many of the authorities cited by them do not support the rules laid down by them; whether this proceeds from misprints, or a want of understanding of the spirit of those authorities, I know not.

I will now go into the examination of the indictment No. 1, for $750, and try it, not by precedents of other forms of indictments for other offences, but by the principles I have mentioned above. This indictment is said to charge two distinct offences. Let us dissect it, and see if this be the case. (1) The first paragraph alleges that on the 16th and 19th of January, 1828, and before and after that time, Tobias Watkins was auditor of the navy department, and states his duties as such 4th auditor. (2) The second parapraph alleges that Samuel L. Southard, at the same time was secretary of the navy, and sets out his authority as such. (3) The third paragraph states, that, at the same time, J. K. Paulding was navy agent of the United States, residing in New York, and was required by law to render his accounts to the 4th auditor of the treasury department, &c. (4) The fourth paragraph states that an act of congress was passed on the 2d day of March, 1827, appropriating $20,000 for the use of the navy department, for arrearages prior to the 1st day of January, 1827. So far, it is manifest, the indictment is merely historical or narrative, but necessarily connected with the charges which follow; then comes the narrative of the fraud and deception practised on Paulding to obtain, out of the public money, the $750, commencing with the letter advising Paulding of his design to draw on him in favor of Fowler, which sum would be replaced in his hands "by a remittance to be made in due season, so soon as a requisition can pass through the forms of office," &c., therein premeditating the remittance which the indictment, in a subsequent part, charges to have been obtained by false pretences used to the secretary of the navy. Then follows the draft in favor of Fowler, and the procuring the $750 from him, by means of the said draft, and the payment of the draft by Paulding. Now, although this transaction is stated in the form of a charge, and to be done with force and arms, &c., yet it is not the offence which constitutes the gravamen of this indictment. It might have been made, perhaps, a ground of indictment as a distinct offence per se, as in the $300 indictment, but is not so contemplated in this indictment. It is here introduced, because of its connexion with the real charge, the fraud practised upon the secretary of the navy; for it was to supply this defect in the public funds drawn out of the hands of Paulding, that the subsequent fraud on the secretary of the navy became necessary; and it is that fraud and its consequences which are the real subjects of this indictment. Then comes another narrative part of the indictment, stating the letter sent by Paulding to the secretary of the navy, dated the 16th of January, 1828, requesting a warrant to issue in his, Paulding's favor, for $12,139.12, to be charged to certain specified appropriations at the foot of that letter, which letter is stated to have been received by the secretary, on the 19th of January, 1828.

The indictment, thus far consisting merely of narrative, I consider as introductory or introducing to the main charge, that of obtaining the public money by means of false pretences made to the secretary of the navy, and deceit and imposition practised on him. Because it professes to be, on its face, an indictment for fraudulently obtaining the public money by false pretences, and no false pretence is set out in the former part of the indictment. Now, here commences the real charge—the true gravamen of the indictment, which is, "that the said Tobias Watkins, being then and there 4th auditor of the treasury department of the United States as aforesaid, and being an evil-disposed person, and devising and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the said nineteenth day of January, which was in the year of our Lord" 1828, "as aforesaid, at the county of Washington aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly apply to the said Samuel L. Southard, then being secretary of the navy of the United States as aforesaid, to add to the said sum of" $12,139.12, "for which the said J. K. Paulding had requested a warrant to be issued as aforesaid, the sum of" 750 "dollars; and did then and there pretend to the said Samuel L. Southard, secretary of the navy of the United States as aforesaid, that the said sum of" 750 "dollars was required for the use and service of the navy of the United States, for the payment of claims for arrearages due by the navy department of the United States prior to the first day of January, which was in the year of our Lord" 1827, "and to cause the same to be placed in the hands of the said J. K. Paulding, navy agent as aforesaid, for the purposes aforesaid, at the same time and together with the said sum of" $12,139.12, for which "the said J. K. Paulding had requested a warrant to be issued as aforesaid." Then follows the requisition of the secretary of the navy on the secretary of the treasury, at the foot whereof are the specifications of Paulding, under the title of appropriations, in which are stated the particular services for which the money is wanted, namely: "Pay &c., navy afloat, $1,942;" "shore stations, $1,058.25;" and, after some others, comes last this $750, the specified service of which is "arrearages prior to 1827, $750." The indictment then avers "that the said sum of $12,889.12, in the said requisition mentioned," (which includes this false and spurious item of $750,) "was, in conformity with the said requisition, by warrant from the secretary of the treasury, drawn out of the treasury of the United States, and placed in the hands of the said Paulding, navy agent as aforesaid," with intent to defraud the United States out of $750. It then states, "whereas, in truth and in fact, the said T. Watkins, at the time of making the said false pretences, well knew," &c. From hence to the conclu-

sion follow the averments of the scienter, of the criminal intent, and the necessary negations; the whole of which are, to my understanding, in apt and technical form, and relate entirely to these $750 gotten from the treasury by means of the false pretences practised on the secretary of the navy, and the subsequent transactions consequent thereon, and to no other $750 whatever.

Having now taken this indictment to pieces, and examined its parts, we will put it together again and examine it as a whole. And I will premise, that as to precision in the charges, the averment of the fraudulent intents, of the false pretences, and, in short, as to all the forms required in indictments, it seems to be unimpeachable; nor has a single passage been selected and presented to the court wherein any defect of form has been suggested. Let it be examined, and shown where any such defect appears.

But the character of the offence charged has been questioned. It was urged that it was entirely official, as laid, and therefore not cognizable here. But the indictment deserves no such reproach; the charges are exclusively of a private, and not official aspect; there is no allegation of a breach of official duty. It is true, that in the three first clauses, the official titles, powers, and duties of T. Watkins, as 4th auditor, Samuel L. Southard, as secretary of the navy, and J. K. Paulding, as navy agent, are stated; but this seems necessary for the purpose of explaining and illustrating the connected links in the long chain of deceptions that were practised; because it was from the facilities derived to two of these functionaries from their official stations, and the influence of his own official station, that the defendant was able to effect his fraudulent devices, but he himself exercised no official function in the course of his fraudulent doings, although he availed himself of the official powers and faculties of the other two. What he did was not an abuse of any official authority vested in him, but was entirely in his personal and private character, though he was aided in facilitating his plans by the influence of his official station. So much as to this objection.

The next was to the frame and structure of the indictment; that it charged two distinct and independent offences in the same indictment. I think I have sufficiently answered this objection in my analysis of the instrument. I will add no more on this point.

The next and last objection there is no ground for, that the fraud was not completed within the jurisdiction of this court, but in a foreign jurisdiction, namely, New York. Now, the $750 having been obtained from the treasury by the secretary's warrant, rendered the offence complete here; for if the treasury be anywhere it is here; and where Paulding received it is of no account, nor does the indictment state where he received it. The money was also appropriated to the private use of the defendant, for it was applied to the payment of his debt to Paulding, to reimburse that sum which, by fraudulent devices, he had drawn out of his hands, and the public have sustained a loss to that amount. This indictment, in the view I have taken of it, is not liable to the objection, that the fraud was completed in a foreign jurisdiction; and if it were, I should doubt of the validity of the objection. I think the whole of the late argument on this point, as to this indictment, was totally inapplicable to it. I am, therefore, of opinion, that judgment on this indictment be for the United States.

Mr. Coxe, for the defendant, then prayed leave to withdraw the demurrer to the indictment in the 750 dollar case, and plead the general issue.

Mr. Key, for the United States, objected, contending that after argument, and after the opinion of the court delivered, the court had no discretion to suffer the demurrer to be withdrawn, and to permit the defendant to plead. 1 Chit. Cr. Pl. 437–442. See, also, Gibson's Case, 8 East, 110.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, dissenting). After the court had given an opinion that none of the exceptions taken to this indictment, for defrauding the United States of 750 dollars, could be sustained, and before any judgment had been rendered by the court upon the demurrer, the counsel for the defendant moved the court for leave to withdraw the demurrer and plead the general issue. To this motion the counsel for the United States objected, and prayed that peremptory judgment of condemnation should be entered against the defendant; contending that the court has no discretionary power to permit the defendant to withdraw his demurrer and plead the general issue, after the argument upon the demurrer, and after the delivery of the opinion of the court.

It seems to be certain, that if the court should now proceed to give judgment upon the demurrer, that judgment cannot be judgment of respondeas ouster, but must be judgment of condemnation. The questions then are: (1) Whether the court has a right, in its discretion, to give the defendant leave to withdraw his demurrer, and plead the general issue, after the opinion of the court has been expressed against the validity of the objections taken to the indictment? and, (2) whether the court, if it has that right, ought, under the circumstances of this case, to exercise it?

(1) Upon the first question it may be observed, that the right in civil cases is conceded, and has been often exercised. But it is said, that there is no instance in which this court has exercised it in a criminal case. This may be true, but it may be because demurrers, in criminal cases, are very rare, inasmuch as upon a motion to quash, or in arrest of judgment, the defendant may avail himself of all the matters which he could upon demurrer. But, because no criminal cases in this court

have called for the exercise of the right, it does not follow that the right does not exist; and no reason is perceived why it should not exist in criminal as well as in civil cases. On the contrary, Chitty, in his Criminal Law (vol. 1, p. 437), speaking of criminal cases, says, that "by leave a demurrer may be withdrawn." And again, in page 440, he says: "When once a demurrer is filed, the defendant cannot withdraw it without the consent of the parties on whose prosecution he is indicted; or, at least, without the permission of the court." And although he says, in page 439, that "in cases of misdemeanor no judgment of respondeas ouster is of right demandable, when an issue in law is found against the defendant, for the decision operates as conviction," yet he says, "as a matter of favor, the defendant may still be permitted to plead not guilty." That a respondeas ouster is not of right demandable, in the present case, is admitted; and if we now proceed to judgment, that judgment must be peremptory. And the law is admitted as laid down by Chitty (page 441) that, "in mere misdemeanors, if the defendant demur to the indictment, and fail in the argument, he shall not have judgment to answer over; but the decision will operate a conviction." Here the defendant does not ask the judgment of the court, upon the demurrer, that he shall answer over; but he asks leave to withdraw the demurrer, before the actual decision of the court upon it. The cases cited, which, at first view, seem to support the counsel of the United States in opposing the motion, on the ground of the want of such a discretionary power to suffer the demurrer to be withdrawn, only show that the judgment, when given upon the demurrer, must be a peremptory judgment. In civil cases, such a motion has been often made and granted, in this court; and we think we have as much right, in our discretion, to grant it in a criminal case as in a civil. Indeed, we think the reasons for it are much stronger in the former than in the latter, in proportion as a man's reputation and liberty are dearer to him than his lands or goods.

(2) The second question is, whether the court, in the exercise of its discretion, ought to grant the leave which has been asked? That a man has mistaken the law, and, therefore, mistaken his defence, does not seem, of itself, to afford a reason why a peremptory judgment of condemnation should be entered up against him; and if he had a probable ground to suppose that he was not bound to answer criminally for the act charged, but is mistaken, it seems hard that he should not be permitted to deny the fact. For although, technically speaking, he must be considered as having admitted the facts, before he could call upon the court for their opinion, whether those facts constituted a crime, yet it must be seen that such admission is only made for the purpose of raising the question of law. That the questions of law, which have arisen in this case, were important, and in some degree doubtful, and that some of them were new, at least in this court, must be apparent from the time consumed in argument by the very able counsel, and by the time which the court deemed necessary for deliberation. This, therefore, cannot be called a frivolous demurrer. It may be observed, also, that, although the judgment of the court upon the demurrer, if against the defendant, is peremptory, it is not so if against the United States; for they may send up new bills of indictment successively, until they shall have made their case perfect in form. Another circumstance is, that in this case there is no appellate court to reverse our judgment, and correct it if it should be erroneous. It also deserves consideration, that, from the known practice of this court to suffer demurrers, in civil cases, to be withdrawn after argument, and after an expression of the opinion of the court, and from the circumstances that there has been no criminal case, in this court, in which such leave has been denied, and that the reasons in favor of it, in criminal cases, were apparently as strong, at least, as in civil cases; the defendant, or his counsel, may have been led to believe that the same indulgence would be extended to criminal cases; and this belief may have been kept up during the argument of these causes, by the circumstance that the witnesses for the United States, who were to support the indictment before the petit jury, have been detained here during the whole of the arguments upon the demurrers. Whereas, if the United States had discharged those witnesses as soon as the defendant had demurred to the indictment, so that the defendant might have understood that the United States expected a peremptory judgment, the defendant might have offered to abandon his demurrer before the opinion of the court was declared, and even before the argument of counsel. It is true that the defendant might have availed himself of the same objections to the indictment upon a motion in arrest of judgment, as by demurrer; but it is not perceived how the United States would have been in any degree benefited by such a course. On the contrary, if the judgment upon the demurrer to any one of the indictments should be against the United States, it would save the expense of a jury trial upon that indictment, and the United States might send up a better.

The court is, therefore, of opinion that the leave asked by the defendant's counsel ought to be granted; provided the defendant shall waive his right of moving in arrest of judgment for any matters apparent upon the indictment.

THRUSTON, Circuit Judge, dissented, and gave his opinion orally, to the following effect, as reported by a stenographer: That he felt himself compelled to differ from a

majority of the court, in the opinion just rendered by them. That he should be well satisfied that the merits of the case should be heard, which would give the accused a fair opportunity of proving his innocence to the world, and which, by the judgment of the court, he will have; but he could not see that he had any discretion which he could exercise on this occasion. And although the majority of the court, among the reasons they assigned for granting leave to withdraw the demurrer, said that they did not see why this cannot be done in a criminal, as well as a civil case, he thought there was a very strong reason for it, and that was that the law forbade. And although he was not, perhaps, among those judges who entertain a very profound respect for all the dicta to be found in compilations and digests, yet, when they are supported by solemn decisions of courts of great dignity and authority, he felt himself bound by them. That no case could be found in which, after a demurrer was fully argued, and the opinion of the court delivered thereon, that the demurrer could be withdrawn, and the demurrant permitted to plead over. The judge then read certain passages from Chitty's Criminal Law, in support of his position. The first was 1 Chit. Cr. Law, 440: "When once a demurrer is filed, the defendant cannot withdraw it without the consent of the parties on whose prosecution he is indicted, or at least without the leave of the court." That, although this passage might seem to favor an application, in certain cases, for leave to withdraw, yet it is far from sustaining the motion in the present case. That it was very true, perhaps, that, after demurrer filed, even in a case of misdemeanor, the court, before argument, would allow the accused a locus pœnitentiæ; and not tie him down to a step which he may have taken without due deliberation. That if the court have a discretionary power, it is in this stage of the proceeding, and not after full deliberation, and after the defendant had fought every inch of ground in support of his demurrer, and found himself defeated, after one of the most obstinate and pertinacious conflicts that was, perhaps, ever witnessed in a court of justice. That he could see no substantial difference between the opinion of the court, solemnly delivered after argument, and the judgment of the court. That the judgment ought to be entered after the opinion delivered, in which case the defence would be concluded, and he understands that the majority of the court so considers it; and that, before the clerk can be directed to enter the judgment of the court on the opinion delivered, if the defendant's counsel choose to interpose a motion of this kind, it seemed to him that it should not make any difference in the principle or in the results. The judge further observed, that even if it was clear that he had a discretion to permit the demurrer to be withdrawn, under existing circumstances he should doubt the propriety of exercising it in the present case, after the defendant had rested on his demurrer with such confidence, and supported it with such obstinacy; and persisted in refusing to ask the exercise of this power in his behalf, until he had become informed of the opinion of the court. The judge, then, to sustain the remarks above made, read the following authorities: 1 Chit. Cr. Law, 442: "But in mere misdemeanors, if the defendant demur to the indictment, whether in abatement or otherwise, and fail in the argument, he shall not have judgment to answer over, but the decision will operate as a conviction." That this authority appeared, from the references, to be supported by a solemn decision of the court of king's bench, in which all the judges concurred. That the language of Lord Ellenborough, and all the judges, in that case, was so positive, and therefore the authority (in the absence of a single case against it, either in the books or in our own practice), so imperative, that he could not resist it. This case is to be found in 8 East, 112 (Rex v. Gibson). Lord Ellenborough there say: "Only one instance has been mentioned of the same privilege," (meaning the privilege asked of this court to withdraw the demurrer and to plead over), "and that it is the precedent referred to in Tremaine, on account of the magnitude of the punishment for striking another in the king's palace, being no less than the loss of the offender's hands." Grose, Justice, concludes his opinion with these words: "But it seems that in criminal cases not capital, if the defendant demur to an indictment, &c., whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgment." "All the judges of the king's bench concurred in that opinion; and he felt himself bound by such positive authorities, and therefore was obliged to dissent from the opinion of the court, and to refuse the motion." The defendant having thus had leave to withdraw the demurrer to the indictment for the 750 dollars, pleaded not guilty, and the case came on for trial upon the general issue.

Mr. Coxe, for defendant, said they would challenge two of the jurors, Mr. Mitchell and Mr. Gover.

Mr. Key, for the United States, said that the time to challenge was when the jurors were called to the book to be sworn. To which the court assented.

Mr. Key then proposed that all the jurors should be asked, as they came to the book, whether they had formed and delivered any opinion in regard to the matters charged in the indictment in this case, and cited 1 Burr's Trial, 371, 373, 414; Case of Upsher, Trials Per Pais, 136, 145; Joice v. Alexander [Case No. 7,435], in this court at December term, 1808; and U. S. v. Porter [Id. 16,072], in this court at December term, 1812.

THE COURT suggested, and the counsel on both sides assented, that the whole panel should be informed by the court that if any of them had formed and expressed any opinion respecting the matters charged in this indictment, it would be proper for them to say so when called to be sworn.

THE COURT also said, that if either side wished that any of the jurors should be specially asked the same question, when called to the book, it might be asked. A doubt was suggested whether, after having been asked, and having answered that question in the negative, the defendant would have a right to challenge for favor, and have that challenge tried by the triors.

But THE COURT intimated an opinion that the defendant might so challenge, and have the challenge so tried after the juror should have so answered the general question.

Mr. Mitchell and Mr. Gover having been called to the book, and having been asked the general question, Mr. Mitchell answered fully and decidedly in the negative; Mr. Gover said that he had, at times, been of opinion, from what he heard, that the charges might be true; but that he had no evidence, and had not made up a definite opinion, and believed himself to be impartial. They were then both challenged for favor by the defendant, and tried by the triors, (the two first of the ten jurors; for when the challenges were made, the jurors challenged were set aside until all were sworn who were not challenged.) Mr. Mitchell and Mr. Gover were then examined upon their voir dire, in the presence of the triors; and Mr. Mitchell having answered as before, the counsel for the defendant waived his challenge, and Mr. M. was sworn. But the triors, being asked if they had agreed upon their verdict, said that Mr. Gover did not stand indifferent, and he was rejected.

Mr. Southard being under examination as a witness for the United States, Mr. Key proposed to ask him the following question: "From the course of business pursued in your department in relation to ordering requisitions, would you, or would you not, have written the letter now shown to you" (Mr. Southard's letter of January 19, 1828, to Mr. Paulding). "and have ordered the requisition now shown to you to be issued, unless it had been officially represented to you, either orally or in writing, that the 750 dollars therein contained, for arrearages prior to 1827, were wanting for the service of the United States navy for claims arising under such arrearages?"

Mr. Jones, for defendant, objected to the question. If the information was official it did not come from the defendant, for he is not charged with official misconduct. The only official information which the defendant could have given would have been, that some account for arrearages had been settled by him officially. The belief of the witness is not evidence. The facts on which that belief is founded are proper for the consideration of the jury; from which they may or may not infer the existence of the fact which the witness believes. Mr. Southard's letter of January 19, 1828, is no more than his private memorandum to refresh his memory. It is not evidence per se. The case of the books of a notary-public is an exception to the general rule. That exception is founded upon particular reasons stated by the supreme court in its decision. The book of a notary-public is a document sui generis, and is admitted upon principles which cannot be extended by analogy to any other document. Jones v. Johns [Case No. 7,471], in this court at October term, 1823. The notary's book can prove no fact but what was stated in it.

THE COURT (THRUSTON, Circuit Judge, contrà) refused to permit the question to be asked.

The counsel for the United States having given in evidence the defendant's letter of the 16th of January, 1828, and having proved that the letter of Mr. Southard of the 19th to Mr. Paulding was signed at the same time with the requisition, and was copied into a letter-book to which the defendant might have had access by application to the secretary, or to the copying clerk, moved the court to permit that letter of the 19th of January, 1828, to be read in evidence to the jury; but the court refused.

MORSELL, Circuit Judge, dissented, because he thought it ought to go to the jury as part of the res gestæ.

The counsel for the United States then offered to ask Mr. Southard this question: "Did you direct the requisition to be issued, and write the letter" (of 19th of January, 1828) "now shown to you, from a conviction that the 750 dollars mentioned therein were wanting for the navy service of the United States, under that appropriation, to be sent on to Mr. Paulding?"

THE COURT (CRANCH, Chief Judge, dissenting) permitted the question to be asked.

MORSELL, Circuit Judge, concurred, for the reason before stated, namely, that the letter ought to go to the jury as part of the res gestæ.

CRANCH, Chief Judge, dissented, because he thought, and a majority of the judges had just decided, that the letter of the 19th of January could not go in evidence to the jury; and, therefore, to give evidence to the jury that that letter was written under any conviction whatever, was to give evidence to the jury of an immaterial fact.

Several other questions of admissibility of evidence were raised and decided, but they are not deemed of sufficient importance to be reported.

The jury, after argument by Mr. Swann and Mr. Key for the United States, and Mr. Coxe and Mr. Jones, for defendant, retired on Sat-

urday the 18th of July, at half past eleven o'clock, a. m., and returned at half past one, p. m., with the following verdict:

"The jurors in the case of the United States against Tobias Watkins, find him guilty of obtaining $750 in his official capacity, and of applying the same to his own private use."

Mr. Coxe, for defendant, insisted that the verdict must be received, and that it is not necessary that the jury should negative the residue of the matter charged in the indictment. The negative will be presumed. No objection of this kind has ever been sustained in a criminal case. 1 Chit. Cr. Law, 638; Hawks v. Crofton, 2 Burrows, 698; 7 Bac. Abr. 22, 25, 28; 1 Chit. 637, 647, 648.

THRUSTON, Circuit Judge, suggested that the safest course would be, to receive the verdict and hear the objections on a motion in arrest of judgment.

THE COURT (THRUSTON, Circuit Judge, dissenting) informed the jury that the court had doubts whether they could, upon the verdict which the jury has offered to return, render a final judgment, either for or against the defendant; because the jury had not found whether the money was obtained with a fraudulent intent, nor whether the money received was the money of the United States; and that if they wished to retire and reconsider their verdict in those particulars, the court would permit them to do so.

THRUSTON, Circuit Judge, was of opinion that it was a dangerous practice to interfere at all with the verdict of the jury; and that the verdict, such as it was, ought to be received, and the objections heard on a motion in arrest of judgment.

The jury retired, and soon came back with the same verdict, only adding, after the figures $750, the words "of the money of the United States," which verdict was received and recorded without objection by either party.

Mr. Coxe, for defendant, moved the court to enter up judgment for the defendant upon this verdict, and Mr. Key, for the United States, moved for a venire de novo.

In support of his motion, Mr. Key cited the following authorities: 1 Chit. Cr. Law, 646; Rex v. Huggins, 2 Ld. Raym. 1585; Woodfall's Case, 5 Burrows, 2663; Rex v. Hayes, 2 Ld. Raym. 1521; Keat's Case, Skin. 667; 2 Hawk. P. C. 47, § 9; 1 Chit. 654; Docker's Case [Case No. 3,946,] in this court.

Mr. Coxe, contrà. Chitty does not say that, after a verdict has been received and recorded, venire de novo may be granted. If the jury find an immaterial verdict, and persist in it, they may be discharged, and a venire de novo awarded; but when the facts found are material, it is not a sufficient ground for a new venire, that facts enough are not found; but the court must give judgment on the facts found; and this rule applies to civil as well as criminal cases. So if the jury should be of opinion that the killing was se defendendo. they may say so without finding as to any other of the facts, or they may find a general verdict of not guilty. The facts not found are to be considered as found for the defendant, who is to be considered as innocent until all the facts are found which constitute his guilt. If the facts found are not sufficient to authorize a judgment against the defendant, there must be judgment of acquittal. 2 Hale, 302; Rex v. Huggins, 2 Strange, 882, 887; Francis' Case, 2 Strange, 1015; Woodfall's Case, 5 Burrows, 2661, 2668; Jacob, Law Dict. 343, tit. "Verdict"; Thompson v. Musser, 1 Dall. [1 U. S.] 458; Brockway v. Kinney, 2 Johns. 210; Bank of England v. Morrice, Hardw. Cas. Temp. 219, 229; Rex v. Hayes, 2 Ld. Raym. 1518; Id., 2 Strange, 843; Witham v. Levis, 1 Wils. 55; 6 Com. Dig. 250, "Pleader," (S. 26); Rex v. Bigg, 1 Strange, 18; Marten v. Jenkin, 2 Strange, 1145; 1 Chit. 445, 647.

Mr. Key, in reply. All the cases in which a venire de novo has been refused, are capital cases, and in favorem vitæ. Huggins' Case, 2 Ld. Raym. 1580; People v. Olcott, 2 Johns. Cas. 301.

CRANCH, Chief Judge, delivered the opinion of the court (nem. con.) as follows: The jury after having been out some time, returned with the following verdict: "The jurors, in the case of the United States against Tobias Watkins, find him guilty of obtaining $750, in his official capacity, and of applying the same to his own private use."

The defendant's counsel insisted that the verdict should be received and recorded, but the counsel for the United States objected, on the ground that the verdict was imperfect. The court desired the jury to retire while the court should consider whether it was such a verdict as they could receive. After deliberation the court sent for the jury, and informed them that the court had doubts whether the court could, upon the verdict which the jury had offered to return, give a final judgment either for or against the defendant, because the jury had not found whether the money was obtained by the defendant with a fraudulent intent; nor whether the money received was the money of the United States. And that if they wished to retire and reconsider their verdict in those particulars, the court would permit them to do so. Whereupon the jury retired, and soon after returned the same verdict, with the addition of the words "of the money of the United States," after the figures $750. This verdict was then received by the court, and recorded without objection; and the jury was discharged.

The counsel for the United States have moved for a venire de novo; and the counsel for the defendant have moved the court to enter judgment for the defendant.

The questions arising upon these motions, are: (1) Whether the verdict is so imperfect that the court cannot enter up any judgment whatever upon it? (2) If any judgment can

be rendered upon this verdict, what shall it be? (3) If the court cannot render a judgment upon it, can they order a venire de novo?

The counsel for the United States contend, that the verdict is so imperfect that no judgment can be given upon it, and that a venire facias de novo ought to be awarded.

The counsel for the defendant contend, that enough is found by the jury to enable the court to render judgment for the defendant.

It is urged by the defendant's counsel: (1) That by the constitution of the United States, the defendant is not to be twice put in jeopardy. (2) That this verdict, having been received by the court and recorded, must be treated by the court as a verdict of conviction, or of acquittal; otherwise the court would not have received it, but would have kept the jury together until they had given such a verdict. (3) That the jury, by finding some of the material facts charged in the indictment, and being silent as to the others, must be considered as having found a verdict for the defendant upon the latter; and that, as they have not found, affirmatively, all the facts which are necessary to convict the defendant, he must be acquitted.

(1) As to the first ground. The 5th amendment of the constitution of the United States has these words: "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of his life or limb." Without deciding whether this clause of the constitution is applicable to misdemeanors, in which there can be no jeopardy of life or limb, it may be sufficient to say, that, if this verdict be so imperfect that no judgment can be given upon it, it must be considered as no verdict; and if the jury has been discharged without a verdict, the defendant has been in no jeopardy; and if it be such a verdict as will enable the court to give a judgment upon it, the court will proceed to render the judgment, and will not award a venire de novo.

(2) The second ground is, that the court has received and recorded the verdict, and must, therefore, consider it as a verdict of conviction or acquittal; for it must be a verdict of conviction or acquittal, or it must be no verdict; and if it had been no verdict, the court would have kept the jury together until they had found one. "But," it is said, "after it has been deliberately accepted and recorded as a verdict, it must be conclusive some way;" and, in the language of one of the counsel for the defendant, "there is a complete estoppel against saying, there is no verdict." The answer to this is, that the verdict, such as it was, was received and recorded without objection by the defendant or his counsel. But no case can be found in which the court was estopped, by the receipt and recording of the verdict, from saying that the verdict was so imperfect as not to justify a judgment.

(3) But, thirdly, it is contended, that the jury by finding some of the material facts charged in the indictment, have, in effect, found for the defendant as to all the rest. It is said, that verdicts are of three kinds, general, partial, and special. That this is not a general nor a special verdict, but is a partial verdict, inasmuch as it finds only a part of the facts charged in the indictment. Chitty, it is true (Cr. Law, vol. 1, p. 636), divides verdicts into those three classes, and defines them thus: "The verdict thus given is either general to the whole of the charge, partial as to part of it, or special, where the facts of the case alone, and the legal inference is referred to the judges." But it may well be doubted whether a verdict which finds only one or two out of many facts which are all necessary to constitute the offence, and saying nothing of the residue, is such a partial verdict as is intended to be described by Mr. Chitty. The examples which he gives are all of a different character. They all find the defendant guilty of part of the charge, and expressly acquit him of the residue. Thus, he says, in page 637, under the head of "Partial Verdict," "The jury may acquit the defendant of a part and find him guilty of the residue. Thus they may convict him upon one count of the indictment, and acquit him of the charge contained in another, or upon one part of a count capable of division, and not guilty of the other part; and on a count for composing and publishing a libel, the defendant may be found guilty of publishing only. And in general, where from the evidence it appears that the defendant has not been guilty to the extent of the charge specified, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue." "And where the accusation includes an offence of an inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious. Thus, upon an indictment for burglariously stealing, the prisoner may be convicted of the theft, and acquitted of the nocturnal entry. Upon an indictment for murder, he may be convicted of manslaughter; on an indictment on the statute of stabbing, he may be acquitted of the statutable offence, and found guilty of felonious homicide; on an indictment for stealing privately from the person, he may be found guilty of larceny only; on an indictment for grand, the offence may be reduced to petit larceny; robbery may be softened into felonious theft, and petit treason lessened to murder, or any description of less atrocious homicide; and on an indictment founded on a statute, the defendant may be found guilty at common law."

These are all the examples given by Mr. Chitty; and in no one of them is it intimated that a verdict, finding some, only, of many facts necessary to constitute the offence, without negativing the residue, has been considered as a verdict of acquittal, or even as a partial verdict, within his idea of the term. This verdict, therefore, is not included in Mr. Chitty's class of partial verdicts. It certainly is not a general verdict, nor a special verdict. If it be neither of these, it cannot be a verdict.

The jury may, indeed, find a fact or facts, inconsistent with the guilt of the defendant, without undertaking to find all the facts, as in a special verdict; but, in that case, it seems probable that it would be considered by the court, and ordered to be recorded by the clerk, as a general verdict of not guilty. Thus, in the case of Hawks v. Crofton, 2 Burrows, 698, which was an action of trespass, the pleas were—not guilty, as to the vi et armis; and son assault demesne, as to the special damages. The verdict was—"guilty of the trespass within written." The question was, whether the verdict was so uncertain as to require a venire de novo. Lord Mansfield said—"That where the intention of the jury is manifest, and beyond doubt, the court will set right matters of form, and the mere act of the clerk; and I think the present case is such a clear case, that the court may here give judgment upon the substantial finding, though the clerk may have been irregular and faulty in point of form. It is very clear what the jury meant." The other judges concurred; and Mr. Justice Dennison said—"Verdicts are not to be taken strictly, like pleadings; but the court will collect the meaning of the jury, if they give such a verdict that the court can understand them." And he says that the rule laid down by Hobart, 54, was a very just rule, where he says—"But howsoever the verdict seem to stray, and conclude not formally or punctually unto the issue, so as you cannot find the words of the issue in the verdict, yet, if a verdict may be concluded out of it to the point in issue, the court will work it into form, and make it serve." So if the defendant were to plead specially, and deny the existence of one of the material facts charged, which constitute the offence, such plea would, in effect, amount to the general issue; and a verdict, finding the issue for the defendant on that single fact would, in effect, be equivalent to a general verdict on the general issue. If, therefore, upon the general issue, the jury should find the same fact for the defendant, such a verdict would also, in effect, amount to a general verdict, and ought to be so entered by the clerk. So, also, a verdict in a criminal case, finding a fact which, if specially pleaded, would be a good defence, would be considered by the court, and entered as a general verdict. So, also, if the jury find a fact which is inconsistent with the guilt of the defendant. In all these cases, the intention of the jury would, in the language of Lord Mansfield, be "manifest, and beyond doubt," and the court "would set right matters of form, and the mere act of the clerk." But, in the present case, the intention of the jury is not manifest, and beyond doubt. The facts which the jury have found neither establish, nor are inconsistent with, the guilt or the innocence of the defendant, as to the crime with which he is charged. A number of cases, however, have been cited, with a view to show that when the jury has found some of the material facts against the defendant, but not enough to convict him, all the rest are considered as having been found in his favor; and that, "from the absence of matter of conviction in the verdict, acquittal results." But all the cases cited to establish that principle, are cases of special verdict. A special verdict professes to find all the material facts which have been proved to the satisfaction of the jury, and concludes that if, upon the facts so found, the court should be of opinion that the defendant is, in law, guilty, then the jury find him guilty; but if, upon the facts thus found, the court should be of opinion that the defendant is not, in law, guilty, then they find him not guilty. If, therefore, the jury should have found only a part of the facts which are necessary to constitute the crime, the court cannot say that, in law, the defendant is guilty; and, if they cannot say he is guilty, they must, upon the same facts, say that he is not guilty. This shows the reason why, in the Case of Huggins, 2 Ld. Raym. 1585, "though search was made with the greatest diligence, yet they could not find one instance, or so much as an opinion of a judge," that a venire de novo, in a criminal case, was granted after a special verdict. But it is not said that a venire de novo could not be granted, when the verdict was neither a general nor a special, but an imperfect verdict. This verdict does not profess to be, and does not, in effect, amount to a general verdict, and does not profess to find all the facts proved, to the satisfaction of the jury; nor to refer any matter of law to the court; nor to negative any one of the material facts necessary to constitute the offence charged in the indictment; nor to find any fact inconsistent with the guilt of the defendant. This is so different from a special verdict, that it can hardly be necessary to say, that the precedents of judgments upon special verdicts are not applicable to it.

The following cases, cited by the defendant's counsel, were all upon special verdicts: Rex v. Keite, 1 Ld. Raym. 141; Rex v. Huggins, 2 Ld. Raym. 1585; Rex v. Hayes, 2 Ld. Raym. 1518; Rex v. Francis, 2 Strange, 1015; and Witham v. Lewis, 1 Wils. 55. So, also, were the following cases: Plummer's Case, J. Kelyng, 111; Green's Case and Bedell's Case, J. Kelyng, 79; and Tomson's Case, J. Kelyng, 66.

We have said, that the verdict does not find any fact inconsistent with the guilt of the defendant. It is true that the jury have found that he received the money in his official capacity. It might, perhaps, be a sufficient answer to say that the question,—What were the official powers, authority, and duty of the fourth auditor of the treasury department of the United States? is a question of law, and that he had no official authority to get the money into his own hands; that it was no part of his duty to disburse any of the money appropriated for arrearages prior to 1827; nor had he an official right to receive it. But the court is of opinion that, if by de-

ceitful practices, or false pretences, he received it, either officially, or under color of his office, with intent to appropriate it unlawfully to his own private use, it was not less a fraud than if he had not received it officially, or under color of his office. The fact, therefore, that he received it in his official capacity, is immaterial to the issue.

This verdict, therefore, is imperfect: (1) Because it does not profess to find all the material facts proved to the satisfaction of the jury, and submit the matter of law to the court, and find for or against the defendant, according as the opinion of the court should be upon the law; which would make it a special verdict. (2) Because it does not negative any one of the facts necessary to constitute the offence charged; nor find any fact inconsistent with the guilt of the defendant, which would, in effect, amount to a general verdict. (3) Because it does not find the defendant guilty of a less offence, included in the offence charged, and acquit him of the greater, as in the case of finding manslaughter upon an indictment for murder, which would bring the case within the class of partial verdicts, as it is defined by Mr. Chitty; and (4) Because it does not find all the facts necessary to constitute the offence charged in the indictment.

The court, therefore, cannot render a judgment upon it, either for or against the defendant.

The only remaining question is, whether, in such a case, the court can order a writ of venire facias de novo? This question is too clearly settled, to admit of a doubt in cases of misdemeanor. The only cases in which it has been doubted were capital cases, after a special verdict finding the prisoner not guilty, if the court should be of opinion, upon the facts found, that he was not, in law, guilty. Upon such a verdict the courts have always acquitted the prisoner, if the special verdict did not find all the facts necessary, in law, to establish his guilt; and this, because such is the express verdict of the jury. A special verdict, it is true, is at first conditional; but, when the court has decided the condition, the verdict becomes absolute. The only case in which a doubt was ever suggested, as appears from the diligent search made in Huggins' Case, was Keite's Case, 1 Ld. Raym. 141, in which Lord Holt seems to have thrown out a dictum, that if the verdict, in that case, was uncertain, no judgment could be given; but a venire de novo ought to issue.. But the court was divided upon the question, whether the verdict was uncertain. Three of the judges, however, expressed an opinion, which was not contested, that, if it were so uncertain that judgment could not be given upon it, a venire de novo ought to issue. But, in regard to misdemeanors, we do not find any case in which the right of the court to issue a venire de novo, upon an imperfect verdict, has been questioned. Co. Litt. 227a, says—"A verdict, finding matter uncertainly or ambiguously, is insufficient, and no judgment shall be given thereupon." "A verdict, that finds part of the issue, and finds nothing for the residue, is insufficient for the whole; because they have not tried the whole issue with which they were charged." 1 Chit. Cr. Law, 646—"Where the verdict is so imperfect that no judgment can be given on it, it is certain that, in case of misdemeanor, a venire de novo may be awarded." So in the case of Rex v. Dean of St. Asaph, 3 Term. R. 428, in notes, Lord Mansfield said—"If the verdict were defective, and omitted finding any thing within the province of the jury to find, no judgment could be given, and there must be a venire de novo." So in Patterson v. U. S., 2 Wheat. [15 U. S.] 225, Mr. Justice Washington, in delivering the opinion of the supreme court of the United States, said—"The rule of law is precise upon this point. A verdict is bad, if it varies from the issue in a substantial matter; or if it find only a part of that which is in issue. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court, in which the cause is tried, may give form to a general finding, so as to make it harmonize with the issue, yet if it appear to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict." In that case the judgment was reversed, and a venire facias de novo was ordered to be issued by the circuit court. So, also, in the case of People v. Olcott, 2 Johns. Cas. 301, for conspiracy. The verdict offered by the jury was—"That there was an agreement between Roe and the prisoner, to obtain money from the Bank of New York, but with intent to return it again;" the court considered it an imperfect verdict, refused to receive it, and sent the jury back several times. But the jury refusing to find any other verdict, and having been out a long time, the court discharged them without the prisoner's consent. In that case, two points were decided by the supreme court of New York: (1) That the court had a right to discharge the jury, under such circumstances, without the prisoner's consent; and, (2) that the finding was so imperfect, that, had it been received, the court could not have given judgment upon it, and would have been obliged to award a venire de novo. Chief Justice Kent, in delivering the opinion of the court, said: "The offence charged was a conspiracy to defraud the bank, and the verdict was, 'That there was an agreement between Roe and the defendant to obtain money from the bank, but with intent to return it again.' This, however, is no answer to the substance of the charge, which was the unlawful and fraudulent intent to procure money from the bank. That finding leaves the truth or falsity of the accusation in equal uncertainty. The intent afterwards to return the money might consist equally with a fraudulent or an innocent

intent to procure the money in the first instance. The finding was, therefore, so imperfect that had it been received the court could not have given judgment upon it, and would have been obliged to award a venire de novo. The jury might have found either a special verdict, stating the facts at large, and leaving the law to the court; or by a general verdict they ought to have affirmed or negatived the fraudulent intent. I am satisfied that this is no verdict of acquittal. If it had any operation it would be against the defendant; for, in answer to the indictment, the jury have found the fact that the defendant and Roe did agree together to obtain money from the bank, and they have not negatived the fraudulent intent."

Upon the whole, this court is of opinion that this verdict is so imperfect that no judgment can be rendered upon it, and that a venire facias de novo must be awarded.

Mr. Key, for the United States, moved the court to deliver the opinion, which it had been stated by the court was, on the demurrer to the indictment for falsely altering the abstract B, prepared on the question argued before the court on that indictment, whether such alteration, in the manner and with the intent charged in that indictment, amounted to forgery at common law; the court having thought it unnecessary to deliver any opinion on that question, because they adjudged the indictment insufficient for want of the technical term "forge."

The counsel for the United States stated that they considered it their duty to ask the court for their opinion upon that point, because (as the court saw from the evidence given on the former trials,) there was another abstract (abstract C,) altered and erased in the same manner, and under similar circumstances; that it was their duty to send up an indictment for the alteration and erasure of this second abstract, as a forgery at common law, unless they were apprised that the court's opinion was that such an alteration of such a paper under all the circumstances, and with the intent charged in relation to the other abstract (abstract B,) did not amount to a forgery. It was, therefore, necessary that the United States counsel should know whether such was the opinion of the court or not, in order that they might govern themselves, in the discharge of their duty, accordingly. Which motion to deliver now an opinion in the cause alluded to by the counsel for the United States, this court (THRUSTON, Circuit Judge, contra) overruled, because that cause has been decided, and is not now judicially before the court; and because, although one of the judges, supposing that it might be necessary in that case to give an opinion upon the question alluded to in this motion, had written an opinion which would, perhaps, have been delivered as the opinion of the court if it had been necessary, at that time, to give an opinion upon that point; yet two of the judges were not perfectly satisfied with that opinion, and were desirous of further time to consider it; and finding it to be unnecessary, refused to give the opinion for that reason, and because it would have been unnecessary to commit the court upon a very important point which might have afterwards arisen in the trial of the cause; and for the same reason the court now refuses to give an opinion upon that point.

Mr. Key, for the United States, then made the following motion, in these words: The counsel for the United States (THE COURT having declined delivering their opinion as applied for in the preceding motion,) then moved the court to instruct the grand jury upon the law in reference to the said abstract C's being such a paper as could be the subject of forgery at common law; and whether the facts and intents charged in the former indictment for the alteration of abstract B, and stated in the indictment now submitted to the court, and about to be sent up to the grand jury for the alteration of the abstract C, amounted to forgery at common law, or not. Also to instruct them that it was the duty of the grand jury, if they found the facts and intents as charged in the indictment, to find it, notwithstanding it contained the word "forge."

THE COURT (THRUSTON, Circuit Judge, contra) refused to instruct the grand jury as required, saying "that their reasons will appear in the opinion already given upon the motion to instruct the grand jury in a former case against this defendant; for although all the reasons for refusing it in that case do not exist in the present, yet many of them do, and, in their opinion, enough to make it their duty to overrule the motion."

The trial of the case upon the transaction with Mr. Paulding for $300 commenced on the 20th of July.

Mr. Key, for the United States, suggested that the jurors who tried the former cause should be excluded from the panel for the trial of this cause; and that as there were not twelve other jurors attending, the marshal should be directed to summon talesmen to complete the panel.

Mr. Coxe, for the defendant, objected. This is entirely a new cause; and there is no legal objection to the jurors who tried the other.

CRANCH, Chief Judge, said that he did not perceive any legal objection to the former jurors; and if there was not, there was no defect of jurors, and the court would have no authority to order talesmen; and if we did so, it might be the ground for a new trial; that his only motive for this suggestion was that we may not be drawn into a new trial. He then suggested that jurors who were not on the former trial should be first called, and the deficiency made up by drawing from the names of the former jury; but Mr. Coxe would not agree to this, and THE COURT ordered all the names of the attending jurors

to be returned to the box, and twelve drawn out by lot, by the clerk, which was done.

The panel being called into the jury box, and one of the jurors, Mr. Haller, being called to the book to be sworn, and being asked by the counsel of the United States, "whether he had formed and expressed any opinion respecting the innocence or guilt of the defendant upon the present indictment," said he did not know what the charge was; whereupon THE COURT directed the indictment to be read in the hearing of the whole panel. The jurors were then respectively asked the same question as they came to the book to be sworn. The jurors who had been upon the former panel answered that they had formed and expressed an opinion as to the manner in which the defendant obtained the money. They were then separately challenged for favor and tried by the triors, and then each respectively was sworn as a witness to the triors, who were sworn upon each challenge. See the form of the oath in 1 Chitty, and in Harris' Entries. The following authorities were cited: Trials per Pais, 187, 189, 204; 2 Hals. [7 N. J. Law] 220, note to Zeller's Case; Anon., 1 Salk. 153; Respublica v. Dennie, 4 Yeates, 267. After two or three hours, only four jurors were sworn in chief, and the marshal was ordered to summon eight talesmen for the next morning.

Mr. Robert Beverly having been challenged for favor by the defendant's counsel, the two triors could not agree.

THE COURT (nem. con.) said, that it seems by the books that only two triors can be chosen. Every juror is presumed to be indifferent until the contrary appears; and if the party challenging for favor does not support his challenge with effect, the juror must be sworn. Mr. Beverly was then sworn in chief. Before Mr. Beverly was sworn, Mr. Stettinius, having been asked the usual question, whether he had formed and expressed any opinion respecting the guilt or innocence of the defendant upon this indictment, which was read to him, answered that he had not, and was sworn in chief without objection. After he was thus sworn and had taken his seat, he rose and informed the court that he had formed and expressed an opinion upon the matters contained in the former indictment (for $750) upon which the jury had given their verdict.

THE COURT said that as the juror was sworn, no exception could now be taken to him unless by consent.

The counsel for the defendant, Mr. Coxe, refused to consent to his being now challenged.

Mr. Key contended that this was not a challenge by either of the parties, but was a challenge by the juror himself, and therefore not within the rule. That this was good cause for a new trial, and it would not be worse to reject him, for the rejection would only be a ground for a motion for a new trial, which the court would not grant if they should be satisfied that the juror was not really prejudiced.

THE COURT (nem. con.) said, that as the juror was sworn, they could not discharge him without the consent of the defendant. Of the eight talesmen ordered and summoned, only one was sworn, and only one of seven others who were summoned in the course of the day. THE COURT ordered six more to be summoned for the next day.

Wednesday, July 22. With great difficulty five jurors were obtained this day, making eleven; and ordered one to be summoned for tomorrow.

Thursday, July 23. This day the panel was completed.

Mr. Key, for the United States, then moved the court to discharge Mr. Stettinius, one of the jurors, who had been sworn as before mentioned; or to permit the United States now to challenge him, unless the counsel for the defendant would say that he did not object to him.

CRANCH, Chief Judge, said, that when a tales is returned, the parties have a right to challenge any one of the original panel who has been formerly sworn in chief, but it must be for a cause arising after he was sworn; not for a cause existing before he was sworn, although it did not come to the knowledge of the party until after he was sworn; and that the court could not, ex mero motu, or even upon the motion of the counsel for the United States, discharge a juror who had been sworn in chief, without challenge, because the juror had disclosed to the court matter, which might be given in evidence upon a challenge. And that he understood this to be the opinion of the court; to which the other judges did not express any dissent.

In the course of the trial, Mr. Key, for the United States, prayed the court to instruct the jury "that whether the letter and draft were written and drawn by the defendant, in his private capacity or in his public capacity, if they were done ostensibly for the public service, but fraudulently, for his own private use and benefit, and the United States' agent was thereby imposed upon; and the money obtained on the draft thus applied to his private use, and the United States thus defrauded of the said $300, the jury should find the prisoner guilty on this indictment." This prayer was submitted without argument, and, on the following morning,

THE COURT (THRUSTON, Circuit Judge, absent) gave the following opinion and instruction:

THE COURT, being of opinion that the offence charged in this indictment is not charged as an official offence only, but is an offence at common law, whether committed by official means or not, the question, whether this court has jurisdiction of an offence consisting exclusively of official misconduct

of any officer of the United States, does not necessarily arise in this cause, and is not intended to be decided by the court. But THE COURT is of opinion that it has jurisdiction of any common-law offence committed in this county, by an officer of the government of the United States, of which it would have jurisdiction if committed by a person not an officer of the government of the United States, although such offence should have been committed by such officer of the government of the United States by means consisting, in part, of acts done by virtue, or by color of his office.

THE COURT, therefore, upon the motion of the counsel for the United States, instructs the jury as follows: That if the jury should be satisfied, by the evidence in this cause, that the letter and draft, in the indictment set forth, were respectively written and drawn by the defendant, in manner and form, at the time and place, and with the intent therein set forth, either in his private capacity, or in his public capacity, as fourth auditor of the treasury department of the United States, ostensibly for the public service of the United States, but fraudulently, for his own private use and benefit, with intent to defraud the United States of the sum of money in the said draft mentioned; and that the said J. K. Paulding, the navy agent named in the said indictment, was thereby deceived, and induced to believe that the said letter and draft were respectively written and drawn by the defendant for the public service of the United States, and, in consequence of being so deceived and induced to believe, did pay the said draft out of the money of the United States then in his hands; and that the defendant received the money for the said draft, as stated in the said indictment, and that all the other facts stated in the said indictment are true, as therein stated, and that the defendant did thereby defraud the United States of the said sum of $300, in the said draft mentioned, then they ought to find the defendant guilty upon this indictment.

The jury having been out thirty hours, and not being able to agree on a verdict, were discharged on Saturday evening, 25th July.

On the 3d of August, the trial of the defendant, upon the three indictments, came on, namely: (1) Upon the transaction with Mr. Paulding, for $750; (2) upon the transaction with the same, for $300; (3) upon the transaction with Mr. Harris, for $2,000; the latter being a new indictment upon the same matter as that contained in the former indictment upon the same transaction, which had been adjudged insufficient upon demurrer.

Tuesday, August 4.

THE COURT (THRUSTON, Circuit Judge, absent) gave the same instruction in the case for $300, which they had given in the former trial of the same case.

Mr. Coxe, for defendant, was about to argue the law to the jury, in opposition to the instruction which the court had just given; but

THE COURT (THRUSTON, Circuit Judge, absent) interrupted him, by saying that, according to the uniform practice of the court, the counsel are not permitted to argue the question of law to the jury, which has been submitted by both parties to the court, and by them decided, and the jury thereupon instructed. That the only way in which the jury can decide the law of a case is, by giving a general verdict, which necessarily involves the question of law as well as of fact.

Mr. Coxe observed, that he had had no opportunity of arguing, before the court the questions of law involved in that instruction.

CRANCH, Chief Judge, replied that the instruction asked by Mr. Key (meaning on the 23d of July, 1829) was understood by the court as having been submitted to the court, by the counsel for both sides, when the court adjourned; and that, on the next morning, when the court suggested to the counsel the instruction which they thought they ought to give, they had an opportunity of objecting, and arguing the law involved in the proposed instruction, which the court then said they considered as being in substance, the same as had been asked by the counsel of the United States.

Mr. Coxe said he thought it varied substantially from that which was asked; and it was only the propriety of that which was asked that he agreed to submit to the court. And that the court, by not giving that, had decided the question in his favor.

CRANCH, Chief Judge, said, that so far as the court had instructed the jury upon the questions of law involved in Mr. Key's prayer, and submitted to the court by the counsel on both sides, the court could not permit the same questions of law to be argued before the jury, in contradiction to the instruction given by the court. But if the instruction actually given exceeded the matter submitted to the court, and involved questions of law not involved in the instruction asked, he was at liberty to argue before the jury any such questions of law as were not involved in the instructions asked and submitted to the court.

Mr. Coxe replied that it was difficult to separate them, and to confine his observations to them; and contended that he had a right to argue the whole law of the case to the jury; and referred to Mr. Rodney's argument in the impeachment of Judge Chase, upon the matter of Frye's Trial. 2 Chase's Trial, 421.

THE COURT again informed him that he might argue to the jury any question of law, not submitted to and decided by the court.

MORSELL, Circuit Judge, observed that he should have no objection to withdraw the instruction, and permit Mr. Coxe to argue the law to the jury, if the counsel for the United States would withdraw their prayer until the argument should be concluded; and

CRANCH, Chief Judge, said, that if the counsel for the United States would withdraw their prayer, the court would withdraw their instruction; which was done, and Mr. Coxe proceeded to argue the law to the jury.

Mr. Key then moved the court to give the instruction which had been withdrawn; which was done.

Mr. Coxe then moved the court to instruct the jury: (1) "That if they believe that the defendant had, by law, no authority to direct the disposition of money in the hands of the navy agents, the payments made by them, of the various drafts, was unauthorized, and in their own wrong;" and, (2) "that if the jury shall believe that the fourth auditor had lawful power and authority to direct the appropriation of such money, then the navy agents were bound to pay the official drafts of the fourth auditor, and none other."

THE COURT refused these two instructions: (1) Because, to give them, would be to submit to the jury matter of law. (2) Because, if the defendant had, in law, no such authority, yet he might, by false appearances, deceive the navy agent into a belief that he had such authority, so as to induce him to pay the drafts out of the money of the United States; and although, in such case, he might, in law, pay the same in his own wrong, and without actual authority, yet it might be a fraud upon the United States. (3) Because, although the defendant might have had authority to direct the appropriation, still he might do it in such a way as to deceive the agent, or otherwise to use such deceptive practices in regard to it, as to constitute the drafts a fraud upon the United States.

Mr. Key then prayed the court to instruct the jury, that if they believed, from the evidence, that the defendant obtained the money of the United States fraudulently, and in the manner charged in the indictments, then the circumstance of the government's having since allowed a credit to the said navy agents, Paulding and Harris, for the amounts of the drafts drawn on them by the defendant, and paid by them, does not sanction those drafts by the defendant, nor exculpate him from the offences charged in the said indictments; nor does the circumstance of the officers of the government having entered the amount of these drafts as a charge upon the defendant, exculpate him from the offences charged in the said indictments;

Which instruction THE COURT gave (THRUSTON, Circuit Judge, absent), and also the following, at the prayer of the counsel for the United States: That although the drafts mentioned in these indictments were ultimately paid by the said Harris and Paulding, respectively, at Boston and New York, still, if the defendant obtained the amount of the said drafts of the said C. S. Fowler, in the city of Washington, in the manner charged in these indictments, and procured the issuing of the requisition in the manner charged, then the said ultimate payment of the said drafts in Boston and New York, respectively, does not prevent this court from having jurisdiction to try the offences charged in the said indictments.

Mr. Coxe, in arguing to the jury, cited 2 Wils. Lect. 247, as to the right of the jury to decide the law; and Mr. Key cited, upon the same point, Add. 57.

The jury, having been out an hour, returned a verdict of "guilty" upon each indictment.

Mr. Coxe, for defendant, moved in arrest of judgment, and for a new trial.

On Thursday, August 13th, 1829, the motions were argued by Mr. Coxe, for the defendant, and by Mr. Swann, for the United States.

Mr. Coxe said it was not his wish, or intention, again to present the same views which were submitted on the former arguments; but to express his sincere conviction of the legality of the grounds for which he had before contended, and to press upon the court the great importance of them, not only to the defendant, but to the nation, and to solicit a calm review of the questions which these cases present. The government of the United States is composed of three distinct branches; executive, legislative, and judicial. They are co-ordinate; and each, in its particular sphere, independent of the others. No judicial tribunal should attempt to exercise any jurisdiction over the executive department, other than that which is conferred by positive statute. This court has, on former occasions, issued injunctions against some of the officers of the treasury department to restrain them from paying money to one party which is claimed by another. In some instances they have been obeyed, in others disregarded. But when they have been respected, it has been more out of courtesy than a belief of any obligation to do so. The present head of the treasury department, expressly disavows the authority of this court to suspend any of his official acts; and, indeed, it would be hard to conceive the extent of evil which might result, if a court of justice should be authorized by its writ issued upon the ex parte affidavit of a complainant to suspend its money payments; an act which might shake the credit of the government, and destroy all confidence in its good faith. The executive department consists, not only of the president, but of the heads of departments, and the various subordinate officers, who are all

equally shielded from the action of this court, as the president himself, and for the same reasons. The 4th auditor of the treasury is one of these functionaries. He is bound to perform the duties required of him by the act of congress which creates his office, and confers his powers. He is responsible to the president, whose officer and agent he is, and to no other authority, unless made so by some act of congress. His acts are executive acts, and cannot be judicially inquired into; still less can they be subjected to examination in a state court, or under the criminal common law of a state. He cannot be subjected to the jurisdiction of any court, unless, in the exercise of his official power, he invades the rights of an individual, and thus gives him a cause of action. If, however, under any circumstances he can be made amenable to any criminal law, it must be before a tribunal created under the authority of the same government, and administering that law which furnishes to him his rule of duty; that law which creates his office, defines its duties and its powers, and limits its responsibilities.

Mr. Coxe, here cited the case of Mostyn v. Fabrigas, Cowp. 161, and Id., 11 Harg. St. Trials, 162, in which Lord Mansfield and the court decided that the question of the powers of the governor of Minorca, under the king's letters patent, could be tried only in the king's courts in England. The authority of an officer, Mr. Coxe argued, can be measured and ascertained only by reference to the law which confers it. These indictments are framed upon the common law of Maryland. By what law are we to decide whether the accused be guilty or innocent? Must we not look to the laws of the United States, to see what powers are reposed in the 4th auditor? what acts he may do, and what he may not? Must we not look to those laws to see whether such an officer exists or not; and to ascertain his duties and his responsibilities? If he has exercised no power but what those laws confer, he has transcended no authority, he has violated no duty. Can it then be contended that a Maryland court, administering the Maryland law, is obliged to look to another law to see whether an offence has or has not been committed; and, when that fact is ascertained, to consider it a crime over which it can assume jurisdiction? This prosecution, it is now settled, is to be sustained upon the principles of the common law of Maryland alone. The only inquiry that can be made is, whether the auditor has not transcended the powers conferred upon him by the act of congress, and it seems extraordinary that the violation of an act of congress, should constitute an offence at common law, in the state of Maryland. The common law of Maryland is a unit. It contains within itself every provision that is necessary to indicate and define the offence, to provide for, and to meet every possible aspect of it, and to prescribe the punishment. It cannot look abroad into another system of law to ascertain the guilt or innocence of actions; it must find them within itself. This common law is of unlimited antiquity. It cannot now create new offences, and affix to them new punishments. How then is it conceivable, that this common law, existing in Maryland anterior to our Revolution, can contain any provision prohibiting a violation of an act of congress when that congress itself had no existence. The federal government created the office, and congress has defined the powers of the officer. He has a control over the funds of the public in the hands of the navy agent. If he has exercised that control improperly—if he has misapplied those funds—what law has he violated? Clearly, that alone which prescribed his duties. If he has no such power, then all his acts are extra-official, and he can be regarded in no other light than a private individual, whose representations, whether written or oral, to the secretary of the navy, and the navy agents, were entitled to no consideration from them, and which they were bound to disregard. If he had such a control, it was necessarily an official control only, and his improper exercise of it could be nothing but a malversation in office. Official misconduct cannot, in any case, be the subject of criminal prosecution under our constitution. Mr. Coxe here cited the opinion of the supreme court, in the case of Marbury v. Madison, 1 Cranch [5 U. S.] 165, 170. The case of Marbury v. Madison, was that of an application to the supreme court for a mandamus to be directed to the secretary of state commanding him to deliver to the relator a commission which had been made out and signed and sealed by the president. The withholding of that commission was held to be illegal, and contrary to duty; but not, therefore, unofficial. It was held to be an infringement of the vested rights of an individual, and therefore such official act was cognizable at the instance of that individual in a court of justice. But all right to examine into the official conduct of an executive officer where no private rights were violated, is expressly disclaimed. What acts can be more purely and exclusively official and executive in their character, than the control exercised by the treasury department over the public moneys? The 4th auditor is empowered to receive, adjust, and settle the accounts of persons having claims against the navy department, and to direct the disposition of the funds in the hands of the navy agents. Should he refuse to allow an item of charge in an account presented by an individual, can this court assume jurisdiction over him, and compel him to do it? This would be to make this court a comptroller. If, in controlling these public funds, the same officer should direct the pay-

ment of an account which had been improperly allowed, can this court re-examine the allowance, and decide that he was wrong? The whole matter is referred to him, to his intelligence, to his discretion, and to his integrity—and no judicial tribunal is empowered to enter his office, and inquire into the manner in which he has performed his public duties, or directed the disposition of the public money. But that this power should be derived from the Maryland common law, seems preposterous and paradoxical. The common law of Maryland is completely within the control of the legislature of that state, and if we are to refer to it as the standard by which to judge of the conduct of an officer of the general government in the discharge of his official duties, we refer to a standard which not only can furnish us with but a very uncertain rule, but one which may be changed by the caprice, or whim, or policy of the state government. If the acts now charged against the accused be violations of that law, and triable in the courts of that state, the legislature may frame a system of statutory law, creating new offences, limiting and defining the duties of every officer of the general government, making that punishable which is now allowed, prohibiting that which is now commanded, and measuring, at their will, the penalties of disobedience. If this jurisdiction is claimed in consequence of the peculiar organization of this district, or the peculiar character of this court, it has been heretofore shown, that it must refer to some other origin than that of the common law. But the assumption of this enormous power will never be acquiesced in by the people of the United States. They will never submit to see their officers subjected to this jurisdiction, of which they have never heard, and tried by a law which they know not of; a law which they never made, and whose authority they have never recognized.

Mr. Coxe then proceeded to consider the other grounds which he supposed to be good grounds for arresting the judgment. The indictment in the case for $750, contains two sets of averments, and is uncertain and multifarious. The first sets forth the manner in which the money was drawn out of the hands of the agent by the defendant; the second, the manner in which the money of the United States was placed in the hands of the agents. It is uncertain whether the offence alleged is the fraudulent obtaining of the money of the United States, from the navy agents; or that of fraudulently placing the money in their hands. It is also uncertain as to the time and place of committing the offence. The words "then and there" may refer to different times before stated in the indictment.

Upon the motion for a new trial, Mr. Coxe contended that the verdict was against the evidence in the cause.

Mr. Swann, contrà, contended that the question of jurisdiction had been already solemnly decided by the court, in this cause, and upon very solid grounds, and he replied to the objections made to the indictments.

CRANCH, Chief Judge, delivered the opinion of the court, as follows: The defendant having been convicted upon three indictments, his counsel has made a motion in arrest of judgment, and for a new trial. The first of these indictments is that which was founded upon the draft for $750 upon Mr. Paulding, the navy agent at New York, and which the court, upon the demurrer, had decided to be good. The second is upon the draft on Mr. Paulding for $300, to which a demurrer had been heretofore entered and argued, and withdrawn at the suggestion of the court. The third is a new indictment upon a transaction with Mr. Harris, the navy agent at Boston, on which a former indictment was framed which was adjudged bad on demurrer. Upon the argument on the motion in arrest of judgment, the same exception has been taken to the jurisdiction of this court which was taken and overruled upon the demurrer. In support of the exception it is said, that in deciding upon the guilt or innocence of the defendant upon these indictments, it is necessary to inquire into the extent of his powers and duties as 4th auditor of the treasury department of the United States, and that no tribunal is competent to make that inquiry judicially but a tribunal purely and exclusively national; indeed, it seemed to be denied that any judicial tribunal whatever was competent to question his official acts, unless they violated the vested right of some individual; and that, if they affected the public only, he must be left to his superior executive officer. Upon this point the court was referred to the opinion of Lord Mansfield in the case of Mostyn v. Fabrigas, Cowp. 173, 174, and to the opinion of the supreme court of the United States in the case of Marbury v. Madison, 1 Cranch. [5 U. S.] 165, 166.

In the first case, Fabrigas, a native of Minorca, brought an action of assault and battery and false imprisonment, in England, against Mostyn, who was governor of Minorca by virtue of letters patent from the king. Lord Mansfield said: "Now if every thing committed within that dominion is triable by the courts within that dominion, yet the effect or extent of the king's letters patent, which gave the authority, can only be tried in the king's courts; for no question concerning the seigniory can be tried within the seigniory itself. Therefore, where a question respecting the seigniory arises in the proprietary governments, or between two provinces of America, or in the Isle of Man, it is cognizable by the king's courts in England only, so that, emphatically, the governor must be tried in England, to see whether he has exercised the authority delegated to him by his letters patent, legally and properly; or whether he has abused it in violation of the laws of England, and the trust reposed in him." The doctrine

established by this citation is, that the extent of the powers of the officers cannot be decided by those officers themselves, but must be decided by the courts of the king who granted the authority.

The passage cited from the opinion of the supreme court of the United States in the case of Marbury v. Madison [supra] is this: "It follows, then, that the question whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend upon the nature of that act. If some acts be examinable and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule. By the constitution of the United States, the president is invested with certain important political powers, in the execution of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation—not individual rignts; and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts, he is, so far, the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others. The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But when a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

It seems, to this court, perfectly clear that these authorities, and the argument to be drawn from them, apply only to cases of exclusively official acts. In the present cases, the offences are not charged as official misdemeanors, nor is the official character of the defendant a necessary ingredient in any of them. It only afforded him the means of deceit by which he was enabled to effect the alleged fraud. The court having, in former stages of these prosecutions, expressed its opinion fully upon this point, does not deem it necessary to say more now than that it has seen no reason to change that opinion.

In the case for $750, it has been urged that two offences are charged in the same count, if the indictment in the case for $300 be good; for the only offence charged in the latter consists in the letter and draft, whereas the former charges not only a similar letter and draft, but a distinct fraud in obtaining a requisition. It will be observed, however, that in the case for $750, the letter and draft are not set forth with the same averments of the intent to deceive by the official appearance given to the letter, which accompany the charge in the case for $300, and which materially distinguish the indictment in that case from the former indictment upon the same transaction, which the court upon demurrer adjudged to be insufficient. The court, after reviewing its former opinion that the indictment for the $750, drawn from Mr. Paulding, does not contain two distinct charges of two distinct offences, has seen no cause to alter that opinion. The principal objection to the former indictment in the case for $300, noticed by the court in its opinion upon the demurrer in that case, was that it did not aver any deceitful practice by which the money was obtained; it only stated what might be evidence of deceitful pratice; it did not aver the facts which the jury might infer from the facts averred. The court stated, in substance, that fraud was an inference of law from certain facts, and that it was not sufficient to set forth that certain facts were done with a fraudulent intent, but that the facts themselves must be such as to justify the legal inference of fraud; "that there was no fact averred, in relation to the letter, or the draft, or the requisition, which showed any deceitful practice—any attempt to deceive any body, or to impose on any agent of the government. That the simple averment that the defendant wrote the letter is not the averment of any fact which might be inferred from the fact of his writing the letter. So in regard to the averments respecting the draft and the requisition, and the receipt and misapplication of the money, they do not amount to any inference which might be drawn from either of those facts, or from the combination of the whole. Whatever material inferences of fact might, in the opinion of the counsel for the United States, be drawn from those facts, ought to have been averred as facts; and, without such averment, those inferences cannot be taken into consideration by the court, for the same reason which would exclude

them in the case of a special verdict. In the present indictment, those inferences are drawn and averred as facts. It is averred "that the said letter thus written, and dated, and addressed, and sent from the said treasury department, and the office of the fourth auditor thereof, purported to be, and was fraudulently intended by the said Watkins, to appear as an official letter of said Watkins; and was so written, dated, addressed, and sent to deceive the said Paulding, by such appearance, and to induce him to pay the draft aforesaid out of the moneys of the United States in his hands; and the said Paulding was so deceived, and did, in consequence of such deceit, so pay the same out of the said moneys of the United States in his hands." It is also averred that the said letter was fraudulently intended, by the said Watkins, to appear, and did appear as an official letter of the said Watkins; and, as representing that the sum of money therein mentioned was to be paid for the public service of the United States, and that the draft therein mentioned was drawn on account of the public service of the United States, and to deceive the said Paulding by such appearance, and to induce him to pay the same out of the moneys of the United States in his hands; and that the said Paulding was so deceived, and paid the same out of the said moneys of the United States in his hands. The indictment then avers that the public service of the United States did not require the payment of the said sum of money in the letter and draft mentioned; and that the defendant well knew that the same was not so required. That he had no authority, and well knew he had no authority to draw the money, or to write the said letter of advice, on account of the public service of the United States, as an official letter; and avers that he wrote the letter and made the draft, ostensibly for the public service, but falsely and fraudulently, for his own use and benefit, and to deceive the said Paulding, and to defraud the United States; and that, by means of the said letter, so written, dated, addressed, and sent as aforesaid, he did unlawfully, fraudulently, and deceitfully obtain, to and for his own use and benefit, the said sum of $300 of the moneys of the United States, from and out of the hands of the said Paulding, navy agent, as aforesaid; to the great deceit, fraud, and damage of the United States, and against the peace and government thereof.

These averments, we think, supply the defects which, according to the former opinion of the court, rendered the former indictment, upon the same transaction, insufficient; and, consequently, we think the present indictment sufficient.

The third indictment is upon a transaction with Mr. Harris, the navy agent at Boston. The first count, after stating that the defendant was fourth auditor, &c.; that Mr. Harris was navy agent; that Mr. Southard was secretary of the navy; that there was an appropriation, by law, of $20,000, for arrearages prior to 1827; that the secretary of the navy had signed certain blank requisitions, which he left with Mr. Hay, chief clerk of the navy department, to be filled up, in the absence of the secretary, with such sum or sums of money, and payable to such person or persons, as the public service, in relation to the navy department, might require; that the secretary of the navy was absent from Washington, on the 27th of August, 1827, and continued absent until after the 6th of September in that year; charges,—"That the defendant, being fourth auditor, as aforesaid, and well knowing the premises, and devising and intending fraudulently and unjustly to acquire to himself and for his own private use, the money of the United States, with force and arms, on the 27th of August, 1827, at the county of Washington aforesaid, falsely, fraudulently, and deceitfully pretending that the sum of $2,000 was wanted for the service of the navy of the United States, for payment of arrearages prior to 1827, did then and there write and address to the secretary of the navy the following letter: 'Fourth Auditor's Office, 27th August, 1827. Sir—I will thank you to cause to be sent to Richard D. Harris, navy agent at Boston, two thousand dollars, under the head of 'Arrearages prior to 1827.' I am, sir, respectfully, your obedient servant, T. Watkins. Hon. Secretary of the Navy.' Which letter was addressed to Mr. Hay, the chief clerk; and by means of said pretence and letter, the defendant procured one of the blank requisitions to be filled up for $2,000, payable to the said Richard D. Harris, &c.; which sum was, in conformity with the said requisition, by warrant from the secretary of the treasury, drawn out of the treasury of the United States, and placed in the hands of the said Richard D. Harris, the navy agent, as aforesaid, with intent to defraud the United States of the said sum of money." And, after denying the truth of the pretences, it concludes with this averment—"But then and there intended to defraud the United States of the same, and to convert the same to his own proper use and benefit, and did thereby defraud the said United States of the said sum of money, and did apply and appropriate the same to his own proper use, to the great damage of the United States," &c. This count, in the opinion of the court, is clearly insufficient; because it does not aver the means by which the United States lost the money, or suffered any damage by the placing of the money in the hands of the navy agent, or were defrauded. The second count is not liable to this objection, as it sets out all the drafts by which the money was drawn out of the hands of Mr. Harris; and has all the other requisites which were deemed by the court sufficient to sustain the indictment upon the case for $750, in the transaction with Mr. Paulding.

The motion for a new trial is made upon the ground that the verdicts were against evidence; because, as it is said, there was no

evidence of the pretence to Mr. Southard, in regard to the requisition for the $750, nor to Mr. Hay, in relation to the requisition for the $2,000.

But THE COURT is of opinion that the deposition of Mr. Cottringer, and the letter of the 27th of August, 1827, contain evidence from which the jury might infer such a pretence in each case.

It was also said, that there was no evidence that Mr. Hay was chief clerk; but that fact was not controverted at the trial, and was argued upon by the counsel as a fact admitted, and not contradicted at the trial.

Upon the whole, therefore, THE COURT is of opinion that the judgment ought not to be arrested, nor a new trial granted in either of these cases.

Whereupon, after a pause,

Mr. Swann, the district attorney, observed that it was his duty to request the judgment of the court.

Mr. Coxe, for defendant, stated that he had nothing further to say.

The defendant was then brought into court, and sentenced—in the case for $750, that he pay a fine of $750, and be imprisoned three calendar months from this 14th of August, 1829, inclusive; in the case for $300, that he pay a fine of $300, and be imprisoned three calendar months next after the termination of his imprisonment upon the former sentence; and, in the case for $2,000, that he pay a fine of $2,000, and be imprisoned three calendar months next after the termination of the last preceding sentence,—making, in the whole a fine of $3,050, and nine months' imprisonment.

[NOTE. An application was subsequently made to the supreme court to award a writ of habeas corpus to the prisoner, which was issued, and the prisoner discharged; Justices Johnston and McLean dissenting. 7 Pet. (32 U. S.) 568. Upon retiring from the supreme court, the prisoner was again arrested upon three writs of capias ad satisfaciendum. During the March term, 1833, the defendant was brought into court, when his counsel moved to quash the writs of capias ad satisfaciendum, and to discharge defendant, which motion was granted, overruling the motion of the attorney of the United States to commit the defendant. Case No. 16,650.]

Case No. 16,650.

UNITED STATES v. WATKINS.

[4 Cranch, C. C. 271.] [1]

Circuit Court, District of Columbia. March Term, 1833.

EXECUTION AGAINST THE PERSON—SECOND ARREST.

1. It is a long-established principle of the common law that a man shall not be twice taken in execution for the same cause.

2. This principle is as applicable to the United States as to other creditors, and, under the Maryland law, is as applicable to a ca. sa. for a fine as to a ca. sa. for any other debt.

[Cited in brief in Walker v. Com., 18 Grat. 23.]

The defendant [Tobias Watkins], having been arrested upon three writs of ca. sa. at the suit of the United States, returnable on the first day of the present term, was brought into court on that day, upon the motion of the attorney of the United States for this District, and by him prayed in commitment. The defendant, at the same time, moved the court to quash the writs, and to be discharged from custody, under the following circumstances, as stated by the chief judge in delivering the opinion of the court.

On the 14th of August, 1829, the defendant having been convicted on three indictments for misdemeanor at common law, and having been in close custody for three preceding months, was sentenced by this court to three months' imprisonment from that day, on each indictment, making nine months in the whole, and to pay certain fines, amounting altogether to $3,050, being the exact amount of the money of the United States, which the jury found he had fraudulently obtained, and for which he had not accounted. [See Case 16,649.]

THE COURT, however, did not order the defendant to stand committed, until those fines and costs should be paid; it not being the general practice of the court to make such an order, unless at the request of the attorney for the United States; and also knowing that it would be in the power of the United States to issue writs of execution for those fines, if they should deem it proper so to do.

On the 23d of September, 1829, the United States sued out three writs of fieri facias upon those judgments, returnable to the then next term (December term, 1829). Those writs were duly returned "nulla bona;" and on the 16th of February, 1830, the United States sued out three writs of ca. sa. on the same judgments, returnable to the then next May term (to wit, Monday, the 3d of May, 1830). The term of imprisonment, under the sentence, expired on the 16th of May, 1830. These writs of ca. sa. were not returned by the marshal at that term, nor was he called upon to return them; and nothing further appears upon the records of the court respecting them, until the 10th of January, 1833, when the court, being in session as of November term, 1832, they were filed in the clerk's office by the late marshal, with the following indorsement thereon: "Cepi, delivered over to my successor in office." On the 14th of January, 1833, being the first day of the term of the supreme court of the United States, the defendant applied to that court for a writ of habeas corpus, and a rule was served on the attorney general of the United States, to show cause why it should not be granted; and upon that rule the whole merits of the application were fully argued. The writ of habeas corpus was issued, and the defendant was discharged, by the supreme court, from the custody

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

of the marshal. [7 Pet. (32 U. S.) 568.] On retiring from the court-room, however, he was again arrested upon three new writs of ca. sa. upon the same judgments; which writs are the same first before-mentioned, and do not purport to be issued as alias writs, nor do they in any manner refer to or notice the former writs of ca. sa. They are, in all respects, like the former writs, excepting that they include some additional costs, bear teste on the 23d of January, 1833, and are returnable to the first day of the present term, namely, the fourth Monday in March, 1833. More than a year and a day had elapsed between the teste of the former writs of ca. sa. and that of the present writs. Upon these writs the defendant is now held by the marshal in close custody.

Mr. W. L. Brent, for defendant, upon his motion to quash the writs, contended:

1. That the former arrest upon ca. sa. and discharge by the supreme court of the United States upon habeas corpus, was a satisfaction of the judgment. 2. That the new writs of ca. sa. could not lawfully be issued without a scire facias to revive the judgments, as more than a year and a day had elapsed between the teste of the former and the present writs. 3. That the fines were excessive.

Upon the first, which was the principal point argued by the counsel, he cited the following cases and authorities to show that a new ca. sa. cannot issue after arrest upon the first, unless under some statute giving the right, not even with the defendant's consent: 2 Tidd, Prac. 1068-1071; Foster v. Jackson, Hob. 59, 60; 9 Petersd. Abr. 272, M., note at the bottom of the page; Dalt. Sher. 237; 11 Vin. Abr. 32, tit. "Execution," U, a, pl. 5, 12, 13, who cites Brooke, Abr. tit. "Execution," 151, 13 Hen. VII. p. 1; Fish & Wiseman's Case, Godb. 372; 1 Saund. 35; 2 Har. Ent. 460; Cappeau's Bail v. Middleton, 1 Har. & G. 154; 11 Vin. 24, tit. "Execution," T, a, pl. 12, 17; Jaques v. Withy, 1 Term R. 559; Tanner v. Hague, 7 Term R. 420; 5 Petersd. Abr. 27, 28, c. 8, tit. "Capias ad Satisfaciendum"; 2 Petersd. Abr. 221, letter I; Line v. Lowe, 3 Smith, 267, 7 East, 330; Wright v. Kerswill, Barnes, Notes Cas. 376; 4 Com. Dig. 238, "Execution," c. 10; 1 Rolle, Abr. 901; 4 Com. Dig. 255, "Execution," H; Pearsall v. Lawrence, 3 Johns. 514; Parsons v. Loyd, 3 Wils. 346; Blackburn v. Stupart, 2 East, 243; Yates v. Van Rensselaer, 5 Johns. 364; Belchier v. Gansell, 4 Burrows, 2502; Bishop v. Powell, 6 Term R. 616; 2 Petersd. Abr. 307. The case of West's Ex'x v. Hyland, 3 Har. & J. 200, is the only case which seems to admit a contrary doctrine. But that case is not correctly reported. It was a case of escape, which is admitted to be an exception to the general rule. (A certified copy of the record in that case was produced, which shows it to have been a case of escape.) If the case were doubtful, the judgment ought to be in favor of liberty. No ca. sa. in a criminal case, was known at the common law; nor is it given in criminal cases by any English or British statute. In that country, the defendant is either committed for the fine, or if he is not present in court, the process is capias pro fine; by which the officer is to take and keep the defendant till the fine be paid. Under the Maryland statute of 1777, c. 13, which gives a ca. sa. for common-law fines, and which is in force in this county, the proceedings are required to be as in civil cases. If this proceeding would be irregular in a civil case it is irregular in a criminal case. The act of 1795, c. 74, only gives a ca. sa. in statutory fines, the statute of 1777 having given it in common-law fines.

Mr. Key, for the United States, contra.

If an arrest on ca. sa. be satisfaction, it is only a technical satisfaction; and the court will not discharge the defendant without actual satisfaction; even considering the fine as a debt. An arrest, alone, is not even technical satisfaction; it is such only so long as the arrest continues. To make it a satisfaction, there must be not only an arrest, but a discharge by consent of the plaintiff. The neglect to call upon the marshal to return the writ and bring in the body, and to pray him in commitment in execution, is not a consent by the plaintiff. A ca. sa. is only quousque, not a valuable execution. The body is only a pledge. It is only satisfaction while it is held. Blumfield's Case, 5 Coke, 86b, 88; 4 Com. Dig. 250, "Execution," H; Foster v. Jackson, Hob. 59; Vigers v. Aldrich, 5 Petersd. Abr. (Am. Ed.) 27; Nadin v. Battie, 5 East, 147; Sharpe v. Speckenagle, 3 Serg. & R. 465; Hecker v. Jarret, 3 Bin. 404; Little v. Newburyport Bank, 14 Mass. 443; Line v. Lowe, 7 East, 330. The consent of the plaintiff must be an actual assent; not an inference from a mere accident, or negligence. If Dr. Watkins had agreed to dispense with being brought into court and committed, the neglect to have him brought in is not a discharge. His consent to dispense with those matters of form may be implied from his long acquiescence. He was also in jail upon other ca. sas. in civil causes for debts due to individuals. The case of Line v. Lowe, 7 East, 330, does not apply. The arrest in that case was upon mesne process, and was superseded because he was not charged in execution within the time limited by the rules of the court. Tidd, Prac. 367-378. A plaintiff may have a ca. sa. upon a judgment in an action of debt upon a former judgment. These rules of practice were intended to prevent plaintiffs from depriving defendants of the benefit of the lord's act of 32 Geo. II., afterwards made perpetual, and other insolvent acts which only apply to debtors charged in execution. Barnes, 376, 383; Blandford v. Foot, Cowp. 72. If the rule of court did not extend to all arrests in execution on that judgment, it would not prevent the creditor from defeating the debtor of the benefit of the lord's act. Topping v. Ryan, 1

Term R. 273; Asheley v. Sutton, Barnes, Notes Cas. 380, tit. "Prisoners." The neglect to pray the defendant in commitment, was a mistake in a case of uncertain practice. It was a mutual mistake, not binding on the United States. The attorney of the United States had no authority to discharge the defendant, or to consent to his discharge. Crary v. Turner, 6 Johns. 51; Jackson v. Bartlett, 8 Johns. 361. The practice of this court is, not to have a prisoner who is in actual custody, brought into court to be committed in execution, especially when the return is, "Cepi in jail." The report of the case of West's Ex'x v. Hyland, is justified by the record. It was a second ca. sa. after arrest upon the first, upon which the defendant was not prayed in commitment. But this is really a criminal case, and the rule as to civil cases does not apply. The fine is a punishment, not a debt.

R. S. Coxe and Mr. Jones, in reply.

The opinion of the supreme court of the United States in Ex parte Watkins, at the last term [7 Pet. (32 U. S.) 568], was, that the ca. sa. must be proceeded upon throughout as in cases of personal actions; and that the omission to charge the defendant in execution was fatal, as to that execution. An arrest on ca. sa. is satisfaction, unless the defendant has escaped, or been rescued. In the case from 14 Mass. the general principle is maintained, but an exception was allowed in case of a temporary relaxation of custody and a voluntary return; and that case was upon an audita quærela, which is an equitable remedy. After an arrest upon a ca. sa. there can be no new execution upon that judgment, unless the defendant die in jail, and then a fieri facias is given by the statute of James. The case in 7 East, 330, is stronger than if the party had been charged in execution. The principle was established long before the insolvent acts of England. As the court did not decide the second and third points made by the counsel for the defendant, the argument of counsel upon those points is omitted.

CRANCH, Chief Judge, after stating the circumstances of the case, delivered the opinion of the court (nem. con.), as follows:

When the marshal, upon the return of a ca. sa., brings into court the body of the defendant, and the plaintiff prays him in commitment, the order to commit is made of course, unless cause to the contrary be shown. The counsel for the defendant, therefore, were called upon to show cause. The questions, involved in this discussion, have been fully and ably argued, and the court has attentively considered the authorities cited, and traced them to their sources, as far as the means they have had, and the intervals between the daily sessions of the court would permit.

The counsel for the defendant rested their motion to quash the writs of ca. sa. and discharge the defendant, upon three grounds: 1. That the defendant could not lawfully be arrested and held in custody upon those writs after having been taken and discharged upon the former writs. 2. That these writs ought not to have been issued without previous scire facias, more than a year and day having elapsed between the issuing of them and of the next preceding writs. 3. That the fines were excessive, and amount to a sentence of perpetual imprisonment.

The first question is the most important, as it is one which affects the right of personal liberty; and is that which seems to have been mainly relied upon in the argument. The general principle is, that no man shall be arrested again for the same cause. This principle has been so long and so well established as to have become a maxim in law. "Nemo debet bis vexari pro eâdem causâ." This rule, according to the English practice, is extended to mesne process as well as to execution. Thus, after holding the defendant to bail, the plaintiff shall not discontinue his action because he does not like the bail, and again hold the defendant to bail for the same cause. Belchier v. Gansell, 4 Burrows, 2502. So in the case of Imlay v. Ellefsen, 3 East, 309, it was held, that one who was discharged out of custody upon an arrest in a former action, for default of the plaintiff in not declaring against him in time, cannot be holden to special bail under a second writ for the same cause, although the form of action be changed. The language of the judges, in that case, is not inapplicable to the present. Lord Ellenborough said, "It is likely enough that if the defendant, being a foreigner and not residing in this country, be discharged on filing common bail, the plaintiff will lose his debt; but that ought not to warp our judgment in applying the law to the facts disclosed to us. There are many cases in the books, where the plaintiff has been suffered to hold the defendant to bail a second time for the same cause of action; as where he has erroneously commenced his action, or mistaken his remedy, and has discontinued it in due time, without oppression or laches. But here the full time elapsed which the law allows for his detaining the defendant in custody upon the first arrest; and after his discharge he arrested him a second time, and requires the court to aid the former defect in his proceedings or proof, by continuing the defendant in custody for a further period for the same cause of action, which must be sustained by the same proof, and even something more than would have sufficed in the former action. It is harsh enough to deprive men of their liberty as a security for debt in the first instance; but after having continued the defendant in custody until the plaintiff lost the benefit of it by his own default, I should require a very strong case to induce me to consent to a further imprisonment." Mr. Justice Grose declared himself of the same opinion. Mr. Justice Lawrence said, "However ill the defendant may have behaved, we are not to punish

him by confining him in prison upon a second arrest for the same cause as before." Mr. Justice Le Blanc said, "The rule would be nugatory that a party should not be holden to bail a second time for the same cause of action, if, after the first arrest on which the defendant was detained in custody as long as the rules of law would admit, and from which he was discharged on account of the delay of the plaintiff in not declaring against him in time, the defendant should be again liable to suffer, by being holden to bail again in a second action for the same cause." So in the case of Blackburn v. Stupart, 2 East, 243, Mr. Justice Grose said, that "it would be very dangerous to permit the law to be unsettled in this respect; which is, that a person cannot be taken in execution twice on the same judgment, whether he had so agreed or not; and therefore, although the defendant's conduct had been very scandalous, yet the rule must be made absolute to set aside the execution, although the defendant had agreed to be taken again if he did not pay in a given time." So in Wright v. Kerswill, Barnes, Notes Cas. 376, if the defendant be superseded after judgment for want of being charged in execution within two terms after judgment obtained, his person cannot afterwards be taken in execution. The same point is decided in Line v. Lowe, 7 East, 330; in Blandford v. Foot, Cowp. 72; and in Topping v. Ryan, 1 Term R. 227, 273. So in Da Costa v. Davis, 1 Bos. & P. 242, it was held that the condition of a bond to surrender the defendant in execution after he has been once discharged, is void. So, also, in Vigers v. Aldrich, 4 Burrows, 2482, it was decided that a discharge of the defendant out of custody on a ca. sa. by consent of the plaintiff, upon a new agreement, not fulfilled, was a satisfaction of the judgment, so that it would not support an action of debt. So in Jaques v. Withy, 1 Term R. 557, it was held that the discharge of a debtor from a ca. sa. with the consent of the plaintiff on a new agreement founded on a consideration which failed by reason of informality in the security given, was so far a discharge of the judgment that it could not be set off in a cross suit brought by that debtor against his creditor. Whether the particular decision in that case would now be considered as law, is immaterial; the principle, so far as a discharge of the person of the debtor is concerned, has never been denied, and is in accordance with this whole class of cases. Mr. Justice Ashhurst said, "But at all events the discharge from execution is certainly a discharge at law. I know of only one case where a debtor in execution who obtains his liberty, may afterwards be taken again for the same debt; and that is where he has escaped; but the reason of that is, that he is not legally out of custody. But where a prisoner obtains his discharge with the consent of the party who put him in execution, he cannot be retaken." Mr. Justice Buller, after observing that the security was good at the time it was taken, but that it afterwards became void, said, "That, however, arose from the neglect of the defendant himself in not complying with the directions of the statute." "And the debt, having been once extinguished, cannot be revived again. This is not a new question. The case of Vigers v. Aldrich, goes the whole length of this; for it shows that if the defendant has been once discharged out of execution upon terms which are not afterwards complied with, the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution. So here, if the plaintiff has neglected to avail himself of the advantage of the security, it is his own fault, and he must take the consequences."

The same rule of law is also recognized in Basset v. Salter, 2 Mod. 136; Thompson v. Bristow, Barnes, Notes Cas. 205; and Clarke v. Clement, 6 Term R. 525, where it is also decided that a discharge of one joint defendant from execution is a discharge of the others; and Lord Kenyon, in delivering the opinion of the court, recognizes the authority of the case of Foster v. Jackson, Hob. 52, in which it was decided before St. 21 Jac. c. 24, that if the debtor died in execution the judgment could not be revived against his executors. So in Tanner v. Hague, 7 Term R. 420, where the defendant had been discharged from execution, upon his undertaking to pay the debt at a future day; on nonpayment of which the plaintiff sued out a fieri facias against him. Upon a rule to show cause why the writ of fi. fa. and the proceedings under it, should not be set aside, it was contended by Erskine for the plaintiff that the release of the defendant was conditional; and that as the condition was not performed the plaintiff had a right to sue out another writ of execution. The counsel on the other side, relied on the cases of Vigers v. Aldrich, Jaques v. Withy, and Clarke v. Clement; and contended, "that there is only one case, in which the plaintiff can retake a defendant who has been once in execution; namely, the case of an escape." "The court said that the cases cited proceeded on this ground, that it was considered that the plaintiff received a satisfaction in law by having his debtor once in custody in execution; and on the authority of those cases, they made the rule absolute." So in Walker v. Alder, Style, 117 (Trin. 24, Car. B. R. 1671). With the plaintiff's consent, the defendant, who was in execution, came to the plaintiff out of the prison, thinking to make some agreement with him; but no agreement being made, the defendant was taken again, on the same execution. The defendant brought his audita querela, and "adjudged by the court to be well brought for the execution was discharged by the prisoner's going at large; and therefore he could not again be taken upon it." So in Price v. Goodrick, Style, 387,

Mich. 1653, Banc. Sup. "It was said by Roll, C. J., if there be a judgment against three, and one of them is taken in execution and be afterwards set at large by the plaintiff's consent; if any of the other two be afterwards taken in execution upon the same judgment, he may have an audita querela." So also in Fish's Case, Godb. 372 (3 Car. Anno 1627). Mr. Justice Dodridge said, "If the execution be lawful, and upon lawful process, and the party be delivered out of execution, then he shall not be taken again in execution. But if he be taken upon an erroneous process, and he be delivered out, he may be taken again in execution, for the first execution is erroneous, and is no record, being reversed." So in the Year Book, 8 Hen. VII. 9, 10 (Brooke, Abr. "Execution," pl. 92; Anno 1491). "Error was brought in the rendition of judgment in a writ of debt, and of the proclamation of outlawry therein; and he found main-pernors, but he did not keep his day, and the plaintiff in the debt, prayed a capias for execution. Mordant: He was in execution by the mainprize, and therefore he shall have no other execution. The Court: He was not in execution, for the recognizance was only to the king. Quod nota," says the reporter, "And here it appears, once executed, executed forever" ("unfoits exec' 6 pro imperpetuo"), "for he shall not have execution again." So in the Book of Assizes (Liber Assisarum; Anno 1372) fol. 22, pl. 43, Brooke, Abr. "Execution," pl. 79. "In trespass, note that if a man have judgment against another for debt or damages, and take his body in execution the plaintiff shall not have elegit, nor fieri facias; quod nota, for the taking of the body, at his suit or prayer, is full execution. And see elsewhere, that if he die or escape the plaintiff shall not have other execution." (There are several of these old cases in which it is said that if the defendant escape the plaintiff shall not have other execution, and such was the law held to be in those days, but it is now settled that escape is an exception to the general rule.) So also in 33 Hen. VI. 47 (Anno 1455; Brooke, Abr. "Execution," pl. 8). "In debt it was conceded in argument that if a man take the body in execution by ca. sa. and the party die in prison he shall not have other execution; but if he escape, the party shall have an action of account against the warden" (that is, the warden of the Fleet Prison), "per prisot et per davers." And in 13 Hen. VII. 1 (Anno 1497) Brooke, Abr. "Execution," 151, it is said by Keble, J., "If the sheriff return cepi corpus upon a ca. sa. the plaintiff shall not have other execution." And again, in Shaw v. Cutteris, Cro. Eliz. 850 (Mich. 43, Eliz. B. R. Anno 1601). "It was moved, whether the party in execution dying before satisfaction made, the plaintiff may now have a new execution of this judgment" (against the administrator), "and all the court held that he could not; for although it were said that he had his body in execution only as a pledge for his debt, and the party dying, the debt is never a whit the more satisfied; and if two be taken in execution, and one of them dies, the other shall remain in execution, for the debt is not satisfied by his death; as 33 Hen. VI. 48 is; and it was so cited to be adjudged (26 Eliz.) in the common bench betwixt Johns v. Wilcocks; yet they held that, in regard the plaintiff hath elected this execution (which is the highest execution), and the defendant died therein, the law will adjudge it as a satisfaction, when there is but one taken. But where two be condemned, the taking of one in execution is no discharge for the other." The same point came before the king's bench again in a more formal manner, and was expressly adjudged in the case of Williams v. Cutteris, Cro. Jac. 136, 143 (4 Jac. Anno 1606). It was scire facias against an executor to show cause why the plaintiff should not have execution of a judgment against his testator. The defendant pleaded that his testator died in execution upon a ca. sa. issued upon the same judgment. To this plea the plaintiff demurred, because that execution was not satisfaction; "and it was prayed, inasmuch as he did not plead that satisfaction was given, therefore execution might be awarded. But Tanfield and Yelverton (the other judges being absent) held that the bar was good; for when the body of the party is taken in execution, although it be not, in itself satisfaction, yet, as to him, there cannot be any other execution. But if two had been condemned, although the one of them dies in execution, that is not any discharge for the other, because the execution is against both, and it is not satisfaction until the condemnation is satisfied. Yet when execution is against one only, the judgment being against one only, when he dies, no other execution can be against his goods or lands than was in his lifetime; wherefore they held the bar to be good. But because it was a new case, and had not formerly been adjudged, they would be advised," and they took time till the next term to consider. At Hillary term, the same year (Cro. Jac. 143), the case was moved again, "and Popham, Williams, and Tanfield, held that the plea was good; for when execution is awarded against one person only, and by a ca. sa. his body is taken in execution, and is returned, it is an absolute and perfect execution against him, and no other execution can be had against him, his lands, or goods; and although the law saith that it is no satisfaction in itself, yet it is so high that there cannot be any other execution; and when he dies the execution is determined as to him; and there cannot be any other execution of his goods or lands; and not like the case where two are condemned, and the one is taken in execution and dies, yet execution may be against the other; because it is not any satisfaction, and process

is not determined against the other; but where the one only is in execution and dies, the executor is discharged, and there cannot be any new execution. Yelverton doubted thereof, because it is clear that his body is but a pledge for his debt, and is not any satisfaction in itself; wherefore he said it is not reasonable that the party plaintiff should be deprived of all his remedy by his death. But, notwithstanding, it was adjudged for the defendant." The same point was afterwards decided by the court of common pleas, in 12 Jac. (Anno 1614), in Forster's Case, Moore, 857. That was also a scire facias against executors, to revive a judgment against their testator. The defendants pleaded, in bar, that their testator died in execution upon the same judgment; upon which plea, issue was joined, and the jury found a special verdict, which the court adjudged for the defendant. The third question argued, was, "Whether the death of the defendant in execution is a discharge of the execution;" or, as it is stated by Chief Justice Hobart, in his Reports, p. 56, "Whether a man taken in execution, for debt, and dying in execution, the debt be absolutely discharged by his death, as against him." "And all the justices argued the case; and they all agreed, except Winch, that this was a discharge. And they cited a judgment in point, between Williams and Cutteris, Cro. Jac. 136, 43 Eliz. rot. 88, contrary to Blumfield's Case, in 5 Coke, wherefore judgment was given against the plaintiff. Note. Pasch. 43 Eliz. in R. R. rot. 88, in Williams and Catheridge's Case, it was adjudged a full execution by the death, &c." The opinion of Lord Hobart is given, at full length, in his Reports (pages 52 to 62), where, speaking of executions that have effect, in part, he says (page 59), "But, if a capias be executed, that is in law sufficient for the whole debt, for corpus humanum non recipit æstimationem, so that, if you take it at all, you must take it for the whole debt. And again, I hold that a capias ad satisfaciendum is against that party, as not only an execution, but a full satisfaction by force, and act, and judgment of law; so as, against him, he can have no other, nor against his heir or executor, for these make but one person in law." Such was the law previous to the 21st of James, notwithstanding the dictum of Lord Coke, in Blumfield's Case, that in an action in the common pleas, between Jones and Williams [1 Rolle, Abr. 903], "it was resolved by the whole court, that, if the defendant in debt dies in execution, the plaintiff may have a new execution by elegit, or fieri facias." For that was the case of two men condemned in debt, and one was taken, and died in execution, and yet it was held that the taking of the other was lawful; and such, also, was Blumfield's Case. Neither of them, nor any other of the cases cited by Lord Coke, supports his dictum, as a general proposition, "that, if the defendant in debt dies in execution, the plaintiff may have a new execution by elegit or fieri facias." And in Sir Edward Coke's own case, the great case of prerogative (Godb. 294), Chief Baron Tanfield said, "If a common person arrest the body in execution, he shall not resort to the lands; contrary to Blumfield's Case, 5 Coke." So, also, in Foster and Jackson's Case, Hob. 60, Lord C. J. Hobart says, "It is a prerogative of the king to have execution of the body, lands, and goods not communicated to the subject but in case of statute-merchant and staple, and recognizance of that nature, which is by the statute law; and therefore the case put in Blumfield's, that, where a party was taken in execution upon a statute, and died, and yet execution was had against goods and lands, after, is nothing in this case, for they were all due, at the first, and therefore might be taken at once, or severally." So, also, in Cave v. Fleetwood, Lit. 325, 5 Car. Anno 1629, the plaintiff's counsel having cited Blumfield's Case, to prove, that, if the defendant die in execution, the plaintiff may have elegit; and that it is satisfaction that the law regards, "Hutton, J., said that Blumfield's Case is not law; for, if the party die in execution upon capias, the plaintiff had his execution, and shall not have any execution again; and so was Jackson's Case adjudged in this court; and the making of the statute of 21 Jac. shows, that so the law was held." So universal was the rule held to be, that the plaintiff should not take the body of the defendant twice in execution, for the same cause, that it was even doubted whether a member of parliament, discharged temporarily, by writ of privilege, could be taken again for the same debt. Thus, the preamble to the statute 1 Jac. c. 13 (Anno 1604), recites: "Forasmuch as, heretofore, doubt hath been made if any person, being arrested in execution, and by privilege of either of the houses of parliament set at liberty, whether the party at whose suit execution was pursued, be forever after barred and disabled to sue forth a new writ of execution in that case; for, avoiding all doubt and trouble, which, in like cases, may hereafter ensue, be it enacted, &c., that the party at whose suit, &c., after such time as the privilege of that session of parliament, in which such privilege shall be so granted, shall cease, may sue forth and execute a new writ or writs of execution in such manner and form as, by the laws of this realm, he or they might have done if no such former execution had been taken forth or served." So, also, the preamble of the 21 Jac. c. 24 (Anno 1623), says: "Forasmuch as, heretofore, it hath been much doubted and questioned if any person, being in prison, and charged in execution, by reason of any judgment against him, should happen to die in execution, whether the party at whose suit, or to whom such person stood charged in execution, at

the time of his death, be forever after concluded and barred to have execution of the lands and goods of the person so dying; and, forasmuch as daily experience doth manifest that divers persons of sufficiency of real and personal estate, minding to deceive others of their just debts, for which they stood charged in execution, have obstinately and wilfully chosen rather to live and die in prison than make any satisfaction according to their abilities, to prevent which deceit, and for the avoiding of such doubts and questions hereafter, be it declared, explained, and enacted," &c., "that the party or parties at whose suit, or to whom any person shall stand charged in execution, may, after the death of the said person so charged and dying in execution, lawfully sue forth and have new execution against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form, to all intents and purposes, as he, or they, or any of them might have had by the laws and statutes of this realm, if such person, so deceased, had never been taken or charged in execution." Thus stood the law in relation to execution by capias, when the charter of Maryland was granted, on the 20th of June, 8 Car. (Anno 1642). The emigrants, under that charter, brought that law with them, together with all such other rights of English subjects as they could enjoy in their new situation. These rights were expressly guarantied to them by their charter, and were, at the revolution, confirmed to their descendants, by the constitution and bill of rights of the state of Maryland. When this part of the district was separated from Maryland, that law, and those rights were expressly continued in force here by the act of congress of the 27th of February, 1801 (2 Stat. 103), and as modified by the statutes of Maryland, prior to that date, and by acts of congress since, now constitute the law of this part of the district.

Maryland continued to adopt, from time to time, such of the statutes of England as were applicable to her situation, up to the time of the Revolution, and kept pace with the judicial tribunals of England, in their modification and extension of the rules of the common law. Hence, the decisions of those tribunals have been considered as authority in the cases to which they are applicable. The law of execution by capias, therefore, as it existed in England, at the time of the Revolution, was the law of Maryland on the 27th of February, 1801, unless altered by the statutes of that state. We are not aware of any such alteration as can affect the present case. The general principle remains as it was at the time of the charter, to wit, that no person shall be twice taken in execution upon the same judgment. The case of escape is the only exception recognized by the common law; and the reason of that exception is stated by Mr. Justice Ashhurst, in 1 Term R. 557, to be, that the defendant is not legally out of custody; and even that exception was, for a long time, denied or doubted; and even as late as 8 & 9 Wm. III. (Anno 1697), it was thought necessary to pass an act (8 & 9 Wm. III. c. 27, § 7), authorizing the plaintiff to retake the prisoner by a new capias, or to sue forth any other kind of execution on the judgment, as if the body of such prisoner had never been taken. A discharge under the insolvent law is no exception to the rule; for, the body of the debtor, once discharged by an insolvent law, from execution, cannot be lawfully taken upon a new capias. The case of privilege of parliament, which is provided for by the statute of 1 Jac. c. 13, does not apply to this country. The case of West's Ex'x v. Hyland, 3 Har. & J. 200, as there reported, seemed to have recognized a new exception to the general rule. The marginal note of that case is thus: "Where a ca. sa. is returned cepi, and the plaintiff does not proceed to enforce the writ by having the defendant committed, defaulting the sheriff, or having it entered 'not called,' it does not preclude the plaintiff from taking out a new ca. sa." We have been furnished with a transcript of the record of that case, from the court of appeals; and although every thing stated in the marginal note is true, yet the printed report of the case does not state the fact that the defendant had escaped, and that, therefore, the court refused to quash the second ca. sa. and discharge the defendant. By the transcript of the record, it appears that, upon the return of the first ca. sa. (which was returned cepi), the sheriff of Somerset had not the defendant in court, having suffered him to go at large. That the sheriff left the court two days before the close of the session; and that, on the day after the sheriff had left the court, the defendant, for the first time, came in, but there was then no sheriff there to whom he could be committed; so that the defendant did not appear at the court, in the custody of the sheriff, as stated in the report. This was clearly an escape; for, in the case of Koones v. Maddox, 2 Har. & G. 106, it was decided by the court of appeals of Maryland, "that an action of debt will lie against a sheriff, who, having arrested a defendant on a ca. sa., permitted him to go at large until the return-day of the writ, although the sheriff then brought the defendant into court." The case of West's Ex'x v. Hyland, therefore, instead of furnishing a new exception to the general rule, is a strong confirmation of it, and shows that the only exception, at common law, is the case of an escape. No man knew the law or practice of Maryland better than Luther Martin, who had been in full practice nearly half a century, and who was the counsel of the plaintiff, in that case; and his affidavit, which was filed in the cause, upon the motion of the defendant's counsel, to set aside the second

ca. sa., shows that, in his opinion, the return of "cepi" upon the first, without further proceeding, operated as a discharge of the defendant, unless the plaintiff could show that it was a case of escape. His reply, therefore, to the motion of the defendant's counsel, was as appears by the record, that the defendant, before the last ca. sa. was issued against him, and after the first had been served upon him, escaped from the custody of the said sheriff. The fact of the escape having been proved by the affidavit of Mr. Martin and Mr. Polk, the court refused to set aside the writ, and to discharge the defendant; and the record then proceeds thus:—"And the said Lambert Hyland, being called, appears, and it being demanded of him whether he be the same person taken in execution at the suit of the said Hannah West, executrix as aforesaid, confesses that he is, and that he hath not the money to satisfy to the said Hannah West, executrix as aforesaid, the debt, damages, costs, and charges aforesaid; whereupon, on the prayer of the said Hannah West, executrix as aforesaid, by her attorneys aforesaid, the said Lambert Hyland is, by the court, now here committed to the custody of the sheriff of Somerset county aforesaid, in execution for the debt, damages, costs, and charges aforesaid, at the suit of the said Hannah West, executrix as aforesaid, there to remain until," &c., "and the said sheriff being here present, takes charge of the said Lambert Hyland accordingly, &c." The court of appeals sat at Easton, in Talbot county. The ca. sa. was directed to and returned by the sheriff of Somerset county. This record is also proof of the practice in Maryland, to require the defendant who has been arrested upon a ca. sa. to be brought before the court upon the return day of the writ, and committed in execution as a justification of the sheriff for holding the defendant in custody after that day. That the general rule, as modified by the statutes of 1 & 21 Jac. and 8 & 9 Wm. III., with the single exception of escape, remains as it was at common law, appears in Tidd, Prac. (Troubat's Ed.) 196, 1033, 1034, 1068, 1069, and 1 Saund. (Williams's Ed.) 35. That it prevails also in other states than Maryland, appears in the case of Yates v. Van Rensselaer, 5 Johns. 364, where the court said, "Though we may say, in the language of Justice Grose (2 East, 244), that the attempt, on the part of the defendants, to get discharged of the debts, is scandalous, yet the rule of law is settled." And in Freeman v. Ruston, 4 Dall. [4 U. S.] 217, where the court observed, "The case appears so clear to us, that we do not wish another moment for consideration. The law is settled in England, that a ca. sa. operates as a satisfaction of the debt; as an extinguishment of the lien of the judgment. We have no other rule prescribed to us in Pennsylvania, nor can we perceive that there would be any policy or justice in departing from it." Such, therefore, being the general principle, so long and so well established, it is incumbent upon the United States to show, either that they are not bound by the general rule, or that they are within some exception to it. In the first place, it is said that the rule only applies to civil cases, and that this is a criminal case, and therefore not within the rule. The answer to this objection is, that the United States are only authorized to issue a ca. sa. for a fine by the law of Maryland which they have adopted for this part of the district, and which, in giving the writ, expressly requires that "such proceeding should be had thereon as in cases where similar writs are issued on judgments obtained in personal suits." The United States must take it as it is given; and when they do take it, they must proceed civiliter, and not criminaliter. The nature of the proceeding is changed; and the state of Maryland, by giving the civil remedy, has, in effect, agreed that she will so far waive any prerogative attached to her criminal jurisdiction. The United States, by adopting the same remedy, must do the same. This point, we think, was decided by the supreme court of the United States, in Ex parte Watkins (at the last term) 7 Pet. [32 U. S.] 568, when they admitted that the United States were bound by the Maryland practice in regard to excution by ca. sa. in civil causes. But if the United States are bound by the general rule, it is said that the general rule is confined to the case of a discharge with the consent of the plaintiff. This position is not supported by the authorities cited. Blumfield's Case, 5 Coke, 86b, is the strongest; but the authority of that case is denied in several subsequent cases; and in some, the dicta which appear to give some countenance to the position assumed, on the part of the United States, are expressly overruled, as has been before noticed. There is no pretence that the defendant escaped. On the contrary, he was discharged by the supreme court of the United States, upon habeas corpus, because the marshal had not, according to the exigency of the writ, and the practice of Maryland in like cases, any authority to detain him beyond the return term of the writ, unless under a commitment by the court at the prayer of the plaintiff; and in that case the United States did not pray him in commitment. The United States might have had the full benefit of their judgment and execution, but did not avail themselves of it. To this, however, it is objected that it was either the neglect of the marshal in not bringing in the defendant, or of the attorney of the United States in not calling on the marshal to bring him in; and that the United States are not bound by the neglect of their officers. This objection, we think, is also answered by the judgment of the supreme court, in the case Ex parte Watkins [supra], at the last term. For the objection was as valid then as it is now; and if the United States were not bound by the neglect of the marshal to bring in the defendant

at the return of the first ca. sa.; and of the attorney of the United States to pray him in commitment, then the case would have stood before the supreme court, as a case in which the marshal had brought in the defendant at the return of the writ, and as if the attorney of the United States had prayed him in commitment; and then that court could not have discharged him on the ground they did; for the only ground, upon which he was discharged by that court, was that the United States had neglected to have the defendant brought into court at the return day of the writ, and prayed in commitment. The same answer may be made to the supposition that the omission to have the defendant committed was caused by the mistake of the officers of the United States as to the law or the practice of the court. The objection was as valid in the case before the supreme court as it is here. But if it were not so, the United States having, by taking the writ of ca. sa. under the law of Maryland, placed themselves, so far as the proceedings are to be carried on under that writ, upon the ground of an individual in a personal suit, are equally liable to lose the benefit of the writ by the neglect of their officers to pursue it to its full effect. It may be proper to notice some expressions in some of the cases cited on the part of the United States, which, from their generality, may be supposed to favor the construction given to the general rule by the counsel of the United States. It may be observed of the cases in which it is said that the taking of the body is good execution, but is not satisfaction, that they are cases where there was judgment against two or more defendants, and one of them taken in execution. In those cases, the taking of one was not satisfaction as to the others. Such was the case, 29 Hen. VIII., Brooke, Abr. "Execution," pl. 132; and Blumfield's Case, 5 Coke, 86b; and the Anonymous Case in Moore, 29, c. 96; and Cowley v. Lydeot, 2 Bulst. 97; and Whiteacres v. Hamkinson, Cro. Car. 75; and Rosser v. Welch, Godb. 208; Shaw v. Cutteris, Cro. Eliz. 850; Williams v. Cutteris, Cro. Jac. 136, 143; Price v. Goodrick, Style, 387; and Clarke v. Clement, 6 Term R. 525.

The language of Mr. Justice Baldwin in delivering the opinion of the supreme court of the United States in the case of Tayloe v. Thompson, 5 Pet. [30 U. S.] 370, has been cited to show, that in every case of the discharge of a defendant from execution upon a ca. sa., without actual payment of the debt, or the consent of the plaintiff, he may have a new ca. sa., and arrest the defendant again upon the same judgment. The only point decided in that case, in relation to the question in this, was, that the arrest and escape of Glover upon a ca. sa. did not destroy the lien of the judgment upon Glover's lands; and that was the whole extent to which it was necessary, in that case, to lay down the law as to the effect of a commitment of the body in execution. The language of the opinion, however, is:—"The greatest effect which the law gives to a commitment on a ca. sa., is a suspension of the other remedies on the judgment during its continuance; whenever it terminates, without the consent of the creditor, the plaintiff is restored to them all, as fully as if he had never made use of any." Whether the negligence of the creditor, in not pursuing his remedy, whereby he lost the benefit of the arrest, would be considered as evidence of his consent to the termination of the commitment, might be doubtful; but it cannot be admitted that the court would have decided, that if the plaintiff has once had the body of his debtor in execution, and by his own negligence loses the full benefit thereof, without any fault on the part of the defendant, he may have a new ca. sa., and again take the body in execution on the same judgment. Lord C. J. Hobart, in Foster v. Jackson, Hob. 57, says, "Neither can the body be taken for a time, or for part, as in a fieri facias, but it must be totally and finally during his life." And, in page 59, he says, that "if a capias be executed, that is, in law, sufficient for the whole debt, for the value of the human body, cannot be estimated." It is but just and fair, in construing the language of a judicial opinion, to consider it in reference to the point of the case, and to understand the court as not intending to extend the doctrine advanced beyond the limit necessary to support the decision. All beyond that, must be considered as dictum, and of no greater weight than that of the authorities by which it is supported. The case of Codwise v. Gelston, 10 Johns. 517, has also been mentioned; but in that case the debtor was never charged in execution; and because he had not been so charged, Chancellor Kent decided that the surrender of him by his bail, to the sheriff, after judgment, and his release from the custody of the sheriff, by the order of the plaintiff, without taking him in execution, did not discharge the lien of the judgment upon the lands of the defendant. These dicta are wholly insufficient to unsettle the long established principle of the common law, that a man shall not be twice taken in execution for the same cause.

Being of the opinion that the United States, when proceeding under the adopted law of Maryland, are bound by that principle; and that, in the present case, they do not come within any known and established exception to that rule; and it being also apparent that the defendant has been twice taken in execution upon the same judgment, and is now held in custody under the second execution, without any fault on his part that can deprive him of the benefit of the rule, we deem it our duty to order him to be discharged.

This opinion renders it unnecessary to express any opinion upon the other two points made in the argument. The motion of the attorney of the United States to commit the defendant upon these writs is overruled, and the writs are ordered to be quashed, and the

defendant to be discharged from the custody of the marshal. See, also, Franklyn v. Thomas, 3 Mer. 225.

Case No. 16,650a.

UNITED STATES ex rel. RUSH v. WATSON.

[2 Hayw. & H. 226.] [1]

Circuit Court, District of Columbia. Oct. Term, 1856.

NAVY—ENLISTMENT OF MINORS.

Under the act of congress of March 2, 1837, § 1 [5 Stat. 153], a minor of the age of 18 can enlist in the navy without the consent of his parents or guardian.

This was a habeas corpus issued by Judge Dunlop [on the application of John Rush], and directed to an officer [B. T. Watson], commanding him to have the body of John H. Rush before him on a certain day, at 12 o'clock m. The officer returned to the writ that he held Rush as a deserter from the ship Pennsylvania, and for no other cause. The enlistment of Rush was made under the 1st section of the act of congress approved March 2d, 1837.

Mr. Giberson, for petitioner, claimed his discharge upon the ground that the government had no right to enlist Rush under the act, not having the consent of his mother to enlist him for the term for which he was enlisted.

The act of congress authorizes the government to enlist boys not being under 13, nor over 18 years of age, with the consent of their parents or guardians, until 21 years of age, and to employ other persons for a term not exceeding 5 years.

Mr. Key, for the United States, maintained that the government had a right, by the words "other persons," to enlist boys under 13 or over 18 years of age without the consent of their parents or guardians; that the contract between Rush and the government was made when Rush was 18 years old, and was a valid contract.

MORSELL and MERRICK, Circuit Judges, were of this opinion, and DUNLOP, Chief Judge, dissented.

After hearing the counsel on both sides, the following order was thereupon issued: That the petitioner be remanded to the custody of B. T. Watson, subject to the order of the navy department, and that the writ of habeas corpus be quashed.

Case No. 16,651.

UNITED STATES v. WATSON et al.

[3 Ben. 1; [2] 1 Am. Law T. Rep. U. S. Cts. 131; 8 Int. Rev. Rec. 170.]

District Court, S. D. New York. Nov., 1868.

CRIMINAL LAW — WHAT JUSTIFIES WITHDRAWING A JUROR—MINUTES OF THE COURT.

1. A court of the United States has authority, in a criminal case, to discharge a jury from giving a verdict, whenever, taking all the circumstances into consideration, there is a manifest necessity for the act, or where the ends of public justice would otherwise be defeated; and it may do this without the consent of the defendant.

2. Where, after a jury had been empanelled in a criminal case, the trial was postponed to another day by reason of the illness of the district attorney of the United States, and of the absence of witnesses for the prosecution, and, on the adjourned day, an application was made by the assistant district attorney that the cause go off for the term, on the same grounds as before, and thereupon the court directed a juror to be withdrawn, which was done, and the trial was postponed (the minutes of the court not showing that the defendants consented to this course), and, when the indictment was again called, the defendants objected that such proceedings were equivalent to an acquittal: *Held*, that the question must be disposed of as it would have been when the application was made to put the cause off for the term, if the defendants had then expressed their dissent from such a course.

3. The minutes of the court must be the guide to the court as to what took place on that motion.

4. As it did not appear by the minutes that the defendants consented to the postponement, it must be held that they did not consent;

5. As it did not appear by the minutes that the illness of the district attorney occurred after the jury was sworn, or that it was impossible for the assistant district attorney to conduct the trial, such illness did not show a manifest necessity for withdrawing a jury;

6. As the minutes did not show that the absence of witnesses was first made known to the law officers of the government after the jury was sworn, or that it occurred under such circumstances as to create a manifest necessity for withdrawing a juror, the position of the case entitled the defendants to a verdict of acquittal, when the motion to put the cause off was made;

7. The proceedings on the former trial were equivalent to an acquittal, and the defendants and their bail were entitled to be discharged from all further liability in respect of the indictment.

[Cited in Hawes v. State, 88 Ala. 37, 7 South. 310.]

This was an indictment found under the 45th section of the internal revenue act of July 13, 1866 [14 Stat. 163], and charged the defendants [Ethan L. Watson and others], in substance, with aiding and abetting in the concealment of thirteen barrels of distilled spirits, which had been removed from a distillery to a rectifying establishment which was not a bonded warehouse. The punishment for the offence was a fine of not less than $200 nor more than $1,000, or imprisonment for not less than three nor more than twelve months. The minutes of the court showed that, the indictment being pending therein, a trial of the indictment was, on the 10th of June, 1868, ordered on the motion of the district attorney; that on that day twelve jurors, whose names were set forth in the minutes, were sworn in the case; that the case was then adjourned to the next day; that on the next day, June 11th, the cause was called, and that, by reason of the illness of the district attorney, and the absence of witnesses for the United States, the trial was adjourned, and the jurors em-

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

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

panelled therein were continued until the 19th of June following; that on the 23d of June following, the trial being resumed, the assistant district attorney moved that the trial go off for the term, owing to the illness of the district attorney and the absence of witnesses for the prosecution; and that the court thereupon directed a juror to be withdrawn, and the trial was accordingly postponed for the term. The indictment being called up again for trial, the defendants objected to any further or second trial, and moved for the discharge of the defendants and of their bail, on the ground that the above proceedings, set forth in the minutes of the court, were equivalent in law to an acquittal of the defendants on a trial of the indictment. The motion was made on the minutes of the court.

Samuel G. Courtney, U. S. Dist. Atty., and Joseph Bell, U. S. Asst. Dist. Atty.

Henry L. Clinton and Clarence A. Seward, for defendants.

BLATCHFORD, District Judge. There can be no doubt that a court of the United States has authority, in a criminal case, to discharge a jury from giving a verdict whenever, in its opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or when the ends of public justice would otherwise be defeated, and it may do this without the consent of the defendants; but the court is to exercise a sound discretion on the subject, and to use the power with the greatest caution, under urgent circumstances, and for very plain and obvious causes. U. S. v. Perez, 9 Wheat. [22 U. S.] 579. If the court may exercise this authority in a criminal case, without the consent of the defendant, in a case of manifest necessity, it may do so with the consent of the defendant, in a case which falls short of being one of manifest necessity. In the present case, the minutes of the court show that the reason for postponing the case from the 11th to the 19th of June was the same as that for postponing the case in definitely on the 23d of June, and for directing a juror to be withdrawn—to wit, the illness of the district attorney and the absence of witnesses for the United States. The minutes do not show any assent by the defendants to the withdrawal of the juror or any dissent from that course. I am satisfied that I must have understood the defendants, by their counsel, as consenting to the course that was pursued. Otherwise, the question of the effect of their not consenting would have been presented at the time; and they would have insisted then and there upon their right to a verdict of acquittal. No such verdict was asked for, nor was the question presented to the court as to what effect the want of consent by the defendants to the withdrawing of a juror would have as to a future trial. Although the counsel for the defendants may have urged their desire to proceed with the trial, and have dwelt on the hardship of the postponement, still I regarded them, and doubtless the district attorney did, in the absence of any motion on their part for the entry at the time of a verdict of acquittal, as in effect consenting to the withdrawal of a juror. If the district attorney did not choose to proceed with the trial after the jury were sworn and empanelled, the defendants had a right then and there to ask for a verdict of acquittal. If they had asked for such a verdict, the district attorney might, in preference, have gone on with the trial. Still the defendants were not bound to ask at the time for such a verdict. They have a right now to claim that what took place was in effect such a verdict. The fact that the court and the district attorney regarded the defendants as consenting to the course that was taken, ought not, in the absence from the minutes of the court of any statement that they consented, to conclude them. If the court, acting at the time on its understanding that the defendants in effect consented, had proposed to make in the minutes of the court an entry of such consent, it may very well be that the counsel for the defendants would have at once insisted on the right of the defendants to a verdict of acquittal. Then the court would have been called upon to pass on the sufficiency of the reasons assigned in the minutes for withdrawing a juror—the illness of the district attorney and the absence of witnesses for the prosecution. The court must be governed as to the facts in this matter by its minutes. They were made by the clerk in the usual course of the business of the court, without the special attention of the court having been called to them, and without any motion, having been made by the district attorney, at the time, to enter as a part of them that the defendants consented to the withdrawal of the juror. It would be very unsafe, and lead to endless disputes and probable injustice, for the court, in matters of this kind, to act on its own recollection, or on the affidavits of witnesses, especially after a lapse of time. If the parties to any suit or proceeding find that the minutes of the proceedings of the court kept by the clerk, and which are always open to inspection, are erroneous, the proper way is to move to correct them promptly, to comport with the facts. It must, therefore, be assumed, for the purposes of the present application, that there was no consent by the defendants to the withdrawal of the juror. The question then recurs whether the reasons assigned in the minutes of the court for withdrawing a juror show a manifest necessity for doing so, or that the ends of public justice would otherwise have been defeated. The question must be disposed of now as it would have been disposed of at the time the motion was made that the trial go off for the term, if the defendants had then expressed their dissent from such action. The illness of the district attorney, it not appearing by the minutes that such illness occurred after the jury was sworn, or that it was impossible for the assistant district attorney to conduct the trial, and the motion to put off

the case for the term being made by such assistant, cannot be regarded as creating a manifest necessity for withdrawing a juror. So, too, as to the absence of witnesses for the prosecution, it does not appear by the minutes that such absence was first made known to the law officers of the government after the jury was sworn, or that it occurred under such circumstances as to create a plain and manifest necessity justifying the withdrawing of a juror. The mere illness of the district attorney, or the mere absence of witnesses for the prosecution, under the circumstances disclosed by the record in this case, is no ground upon which, in the exercise of a sound discretion, a court can, on the trial of an indictment, properly discharge a jury, without the consent of the defendant, after the jury has been sworn and the trial has thus commenced. To admit the propriety of the exercise of the discretion on such grounds would be to throw open the door for the indulgence of caprice and partiality by the court, to the possible and probable prejudice of the defendants. When the trial of an indictment has been commenced by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him, unless he consents to the discharging of the jury without giving a verdict, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper. Whart. Cr. Law (Ed. 1852) p. 213. It is impossible, within this definition, to lay down any inflexible rule as to what causes would, and what causes would not, be sufficient to warrant the exercise of the discretion which the court possesses. It is sufficient to say, that in no case to be found in the books has any such reason as is spread upon the record in this case been admitted, in the absence of the consent of the defendant, to be a proper ground for discharging a jury after they have been sworn and empanelled to try an indictment. To hold now that the record of the proceedings of the court on the former trial amounts to a verdict of acquittal, is to do just what the court would have done at that time on the facts stated in the record. If I had any doubt as to the propriety of this course, I should resolve it in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion. But the weight of all the authorities on the subject is, that the position of this case, as it stood when the juror was withdrawn, entitled the defendants, in the absence of their express consent to any other course, to a verdict of acquittal, and therefore entitles them to the action of the court, at this time, on their application to the same effect. An order will, therefore, be entered, declaring that the proceedings on the former trial are held to be equivalent to a verdict of not guilty, and discharging the defendants and their bail from further liability in respect of the indictment.

[Subsequently the district attorney moved for leave to enter a nolle prosequi on this indictment, which motion was granted. Case No. 16,652.]

Case No. 16,652.

UNITED STATES v. WATSON et al.

[7 Blatchf. 60.] [1]

Circuit Court, S. D. New York. Nov. 25, 1869.

CRIMINAL LAW—NOLLE PROSEQUI.

A motion by the district attorney, made before verdict, for leave to enter a nolle prosequi on an indictment, must be granted, as a matter of right, although, in a proper case, the court might decline to grant the motion until the government should have had sufficient time to protect itself against collusion.

This was a motion by the district attorney for leave to enter a nolle prosequi on the indictment in this case, which was one for the violation of provisions of the internal revenue laws relating to distilled spirits. [See Case No. 16,651.]

Edwards Pierrepont, U. S. Dist. Atty.
William C. Barrett, for defendants.

BENEDICT, District Judge. I have had occasion to examine into the question as to the right of the district attorney, representing the government, to have the motion made by him in this case granted. The subject was before the court of queen's bench, in England, in the case of Reg. v. Allen, 5 Law T. Rep. [N. S.] 636, and it was there held that such a motion, when made, must be granted. While I have no doubt that, in a case calling for such action, the court might decline to grant the motion until the government should have had sufficient time to protect itself against collusion, yet, aside from this, I am of opinion that the motion, when made before verdict, must be granted, as a matter of right. The motion now made is, therefore, granted.

UNITED STATES (WATT v.). See Case No. 17,292.

Case No. 16,653.

UNITED STATES v. WATTS.

[1 Bond, 580; [2] 1 Int. Rev. Rec. 17.]

Circuit Court, S. D. Ohio. Feb. Term, 1865.

LEGACY TAX — CONVERTED REAL ESTATE — CONSTRUCTION OF STATUTES.

1. An executor was directed to sell certain designated parcels of real estate belonging to the testatrix "and convert the same into cash," and "out of the proceeds thereof to pay any debts I may have, and the above-named legacies," and in pursuance of such provision of the will, the executor sold the property referred

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

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

to. *Held*, that such legacies are not subject to the tax or duty imposed by section 111 of the internal revenue act of July 1, 1862 [12 Stat. 485], upon legacies arising from personal property.

2. In limiting the scope of the law to legacies arising from personal property, the inference is irresistible that it was intended to exempt such as were payable from the proceeds of real estate.

3. The courts of the United States are not at liberty by construction or legal fiction to include subjects of taxation not within the terms of the law.

[Cited in State v. Pullman's Palace Car Co., 64 Wis. 101, 23 N. W. 873.]

At law.

Flamen Ball, U. S. Dist. Atty.

H. C. Whitman, for defendant.

LEAVITT, District Judge. This is an action of debt, prosecuted by the United States to recover the amount of a tax or duty claimed as due from the defendant [David Watts], as executor of Susan Hoard, deceased, on certain legacies in her will. The claim is based on section 111 of the internal revenue act of July 1, 1862 (12 Stat. 489). The amount of the duty charged against the executor on said legacies, and demanded in this action, is $323.75. The executor, not being satisfied that the legacies were legally chargeable with the tax or duty claimed, has refused to pay it until the right of the government is settled by the judgment of this court. He has therefore appeared by counsel to the present action, and filed his plea to the effect that he does not owe the sum claimed; and this presents the issue now to be decided by the court.

The facts which it is material to notice are that Mrs. Hoard, by her last will and testament, executed on December 21, 1863, and which has been duly admitted to probate, made certain specific pecuniary legacies to certain churches, family relations, and other persons. She died possessed of a number of houses and lots in the city of Cincinnati, and by section 9 of her will she directed the executor to sell certain designated parcels of her real estate, "and convert the same into cash," and "out of the proceeds thereof to pay any debts I may have, and the above-named legacies." And in pursuance of this provision of the will, the executor has sold the property referred to.

In behalf of the United States, it is insisted by the district attorney that these legacies are chargeable with a tax or duty in accordance with the provisions and specifications of section 111 of the act before referred to. This section provides in its designation of legacies subject to the tax or duty, "that any person or persons having in charge or trust as administrator, executor, or trustee of any legacies or any distributive shares arising from personal property of any kind whatsoever, where the whole amount of such personal property as aforesaid shall exceed the sum of one thousand dollars in actual value, shall be subject to a tax or duty on such legacies or distributive shares" at certain specified rates, varied as the legatees may stand related or be strangers to the testator.

The only question for the decision of the court is whether these legacies are subject to the tax or duty imposed by the statute as "arising from personal property." It is contended by the district attorney that by an equitable construction of the statute, they are within the scope of the words used in the law, although by the terms of the will of Mrs. Hoard, they are payable out of the proceeds of the real estate directed to be sold for that purpose. On the other hand, it is insisted by the counsel for the defendant, that the statute can not be constructively extended so as to embrace a legacy arising from real estate, and must be understood in a sense consistent with the plain and natural import of the words used. This is the first case in which this question has been presented to this court for its decision; and the court is informed that it has not been before any other court in this country for consideration. The statute is comparatively recent in its origin, and in giving it a construction it is not to be expected that the court will be aided or enlightened by any authorities or precedents derived from the action of our own court.

The first remark which is to be made is, that there is no ambiguity or obscurity in the terms used in the clause of the statute referred to. It declares, in plain language, that the tax or duty is chargeable only on legacies arising from personal property. The distinction between such legacies, and those arising from the proceeds of real estate, is so obvious that it can not be presumed the framers of the law intended wholly to ignore it. If it had been their intention that all legacies, whether derivable from real or personal property, should be subject to the tax or duty, that intention would doubtless have been made known by the use of clear and appropriate terms. But in limiting the scope of the law to legacies arising from personal property, the inference is irresistible that it was intended to exempt such as were payable from the proceeds of real estate. Such would seem to be the fair construction of the language used by the legislature in the clause under consideration.

It is clear to the court that this is not a case in which the court can constructively hold that the legacies in question are to be regarded as arising from personal property, though in fact derived from realty. It is true that courts of equity, in some cases, for the purpose of carrying out the intention of a testator and subserving the ends of justice, resort to a fiction by which realty is treated as personalty. But this principal has no application to the construction of a statutory enactment, which is clear and explicit in its language. The statute in question abounds in penalties for its violation. The defendant in

this action is subject to a penalty for refusing payment of the duty or tax claimed on these legacies, if such duty or tax is legally chargeable. In accordance with the well-settled rules of construction, statutes of this character can not be so construed as to extend their meaning beyond the clear import of the words used. It is the duty of the courts of the Union undoubtedly, so far as they are invested with any agency in carrying out the financial purposes of the government, fairly to enforce the revenue laws of the country, and see that they are not fraudulently evaded. But they are not at liberty, by construction or legal fiction, to enlarge their scope to include subjects of taxation not within the terms of the law. It belongs exclusively to the legislative department of the government to define and declare upon what subjects taxes shall be imposed, and to provide the agencies by which they shall be assessed and collected. And however expedient it may seem, under certain circumstances, to invade the proper domain of legislation by judicial construction, it is clearly in conflict with the theory of the government.

The district attorney, in his brief, has referred the court to a case in the English court of exchequer, which he thinks sustains the construction of the clause of the statute under consideration, as insisted on by him. The case cited for this purpose is reported in 1 Price, 426. It was an information under a clause of the act of 48 Geo. III. c. 149. That clause, as appears from the report, imposed a duty or tax on all moneys arising from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument, etc. A preceding clause of the same schedule in the statute referred to, imposed a tax or duty on all legacies payable out of or arising from the "personal or movable estate" of the testator. The counsel for the government has referred to the case in Price's Reports as having arisen under this latter provision of the English statute. But this is clearly a misconception of that case, and it has therefore no bearing upon or application to the case before the court. The clause last cited is substantially the same as section 111 of our statute, laying a tax or duty on legacies arising from personal estate. And if the English court of exchequer had decided that legacies payable out of real estate were by construction to be regarded as legacies from personal property, the decision would be in point. Though I am by no means prepared to say that if such had been the ruling of the English court, that I should feel justified in receiving it as an authority in giving a construction to our statute. But the report referred to shows clearly that the decision was based on another clause of the English statute. The facts were, substantially, that a testator, being the owner of certain freehold estate, directed it to be sold by his executors, and that from the proceeds, after payment of his debts, a legacy of £5,000 should be paid. The personal estate of the testator was more than sufficient to pay his debts and discharge the legacy, without selling the real estate as provided for in the will. The legatee, by some arrangement between the parties, took the real estate from which the legacy was to be paid. And the court held that the legatee could not evade the payment of the tax or duty, but was liable therefor, though the legacy was not in fact paid in money. But, as before remarked, this decision was made under the clause of the English statute imposing a tax or duty on legacies derived from real estate. And under that clause, the court was probably right in holding, that as the property was directed to be sold unconditionally for the satisfaction of the legacy, and the legatee was the recipient of the benefit of the legacy, they would consider that done which the will had directed to be done.

But a more recent case in the English courts is referred to by the counsel for the defendant in the case before the court, which applies to this question, and is a direct authority against the right of the government to claim a tax or duty on the legacies referred to, in the will of Mrs. Hoard. This case is noted in the recent work of Edwards on the Stamp Act of the United States (page 198), and the reference by the author is to the report in 9 Jur. 486, and 4 Hare, 315. These reports are not accessible to me, and I have not therefore read them. As stated by Edwards, the question was, whether real estate purchased with partnership assets, and used for partnership purposes, was liable to probate duty under the English statute on the death of a partner. The particular clause of the statute under which the tax or duty was claimed, is not stated in the abstract of the case as given by Edwards. Without taking the trouble to set forth the facts of the case, it will be sufficient to refer to the opinion of the court, as copied by Edwards (page 202). The court says: "In the simple case I have put, of land directed to be converted into money, I think the answer to the claim of the crown would be that the property in question was in fact real estate at the death of the testator, and as such not liable to probate duty, and that equity would not alter the actual nature of the property for the purpose only of subjecting it to fiscal claims to which at law it was not liable in its existing state, and certainly not intended to be made liable by the stamp act." And the court hold further, that the fact that the property in question was the property of a partnership made no difference in respect to its liability to probate duty.

This case clearly establishes the doctrine that by no construction of law can property be regarded within the scope and operation of our revenue law, as different from its real character. As a necessary result, in the absence of any statutory provision imposing a tax or duty on legacies arising out of real es-

tate, there is no authority for the doctrine that such a legacy shall be treated as arising from personalty.

But, without stating other views pertinent to the question before the court, leading to the conclusion which has been indicated, I am fully satisfied that by no construction of the statute can the defendant, as executor of Mrs. Hoard, be adjudged liable to pay a tax or duty on the legacies in question. The statute in its terms is too clear to admit of doubt as to its construction. If congress think it expedient to legislate further on this subject, and declare that legacies arising from real estate shall be subject to a tax or duty, they will doubtless do so, in plain and intelligible terms. As the statute now stands, such an intention is clearly negatived. Judgment will therefore be entered for the defendant.

Case No. 16,654.

UNITED STATES v. WAYNE.

[Wall, Sr. 134.] [1]

Circuit Court, D. Pennsylvania. May 25, 1801.

ATTACHMENTS IN CIVIL SUITS—CIVIL AND CRIMINAL PROCEEDINGS.

Motions and affidavits for attachments in civil suits, are proceedings on the civil side of the court, until the attachments issue, and are to be entitled with the names of the parties: but as soon as the attachments issue, the proceedings are on the criminal side.—Rule to show cause set aside, because mis-entitled.

[Cited in U. S. v. Anon., 21 Fed. 768.]

On Saturday last, the 23d May, Mr. Dallas, after reading the affidavit of one M'Knulty, proving that he purchased the gazette annexed to it, at the office of the defendant, moved for a rule upon the defendant to show cause, on this day, why an attachment should not issue against him for a contempt of the court in publishing in his gazette a paper reflecting upon William Duane, in a cause between Duane and Levi Hollingsworth; the said cause then, and yet pending in this court. [For reports of proceedings in the original case of Hollingsworth v. Duane, see Cases Nos. 6,614, 6,615, and 6,618. For contempt proceedings, growing out of the case, see Id., 6,616, 6,617, and 14,997.]

The rule being granted, Mr. Dallas, this morning, opened the prosecution, by reading an entry of the rule taken on Saturday, which was entitled, "The United States against Caleb P. Wayne;" and an affidavit of one James Humphreys, entitled in the same manner, proving the service of the rule upon Wayne. He said that he had to regret the necessity of this measure; but deeming the publication a contempt of the court, and calculated, if allowed to pass unnoticed, to affect the course of justice as it respected Mr. Duane, and generally to vitiate the purity and impartiality of proceedings at law, he felt himself bound, at the request of his client, to bring the matter to a public investigation. He hoped the time would shortly arrive, when every good man, sensible of the evil, would unite with him and each other to restore the press to its proper use; when the possession or command of a few types would no longer give to the proprietor a lawless power over the feelings, reputation, and dearest interests of private citizens. He was proceeding, when

Mr. Chauncey moved that the defendant might be discharged from the rule to show cause. He stated this to be a rule calling on Mr. Wayne to show cause, as against the United States, whereas no such suit or prosecution is depending in this court. The motion was by Duane, the party in a civil suit, to obtain an attachment. Until that is ordered, the whole proceeding is on the civil side, and the rule and affidavits should be entitled with the names of the parties. The attachment when ordered, goes in the name of the United States, and all proceedings, afterwards, are between them and the party offending, and must be entitled accordingly. He cited Tidd, Prac. 142; 3 Term R. 253; 7 Term R. 439. Another objection to the proceedings equally fatal, is, that the affidavit upon which the rule is founded, is not entitled at all; of course the court cannot take any notice of it, even if we did not object. The rule must therefore fall. 2 Term R. 643, 644; 6 Term R. 640.

Mr. Dallas, in answer, said that though the rule was entitled "The United States against Wayne," yet in the body, it was to show cause why an attachment should not issue for publishing, &c. a paper pending the "suit between Hollingsworth and Duane, reflecting," &c. He said that the parties in the civil action being referred to in the rule, if there was any thing in the objection, this might be taken as the title, and the other rejected as surplusage; and thus the motion considered as in the civil cause. He thought the objection merely formal, and did not know that the practice had been settled in this state in conformity with the cases cited.

Mr. Dickerson, on the same side, considered it as optional to proceed on the first motion ex parte United States. Mr. Dallas might, ex officio, take notice of the publication as a contempt of the court; and it was competent for the court, on receiving information of it, to order the rule to show cause as between the United States and the publisher. Had a motion been for an attachment in the first instance, the proceedings would have been on the criminal side: and why, on a rule to show cause, may not the prosecutor, under the order of the court, entitle it as on the part of the United States? If the court can punish for contempts, they can and ought to proceed in the name of the United States. He admitted that the rule and proceedings might be entitled on the civil side until the attachment, if the

[1] [Reported by John B. Wallace, Esq.]

party in the cause chose to be the prosecutor. But as this might be considered, ab origine, an official proceeding in a summary way, by the attorney of the United States, under the order of the court; the rule to show cause was properly entitled. At most, he thought it a mere informality and might be overlooked.

Mr. Wallace, for defendant. We are called here to show cause in a case of the United States against Wayne. We have come in on this notice, and it appears there was no prosecution or action of the United States against us at the taking of the rule. The rule is, therefore, irregular, and must fall to the ground. The law is perfectly settled and conformable to common sense, that where, in the course of a civil suit, either party would bring the other, or some third person, into contempt, he must entitle his proceedings according to the civil suit until the court adjudge the party in contempt, and order process of attachment. Then it assumes a criminal aspect, a contempt being an offence; and the process is, of course, in the name of the United States. The gentlemen consider this as merely informal, and sufficient as a notice of the accusation against the defendant; more especially as the rule, in the body of it, specifies the particular ground of the proceeding. Our name for it, is "irregularity." The adjudged cases consider this mode of proceeding to be substantially erroneous. And if soft names for irregular proceedings against the citizen are to legitimate them, the law and the practice of it, will soon become a mere jargon of shapeless and incongruous ingredients. No rules will remain. This proceeding against the defendant is, in its nature, summary, in its consequences, may be very penal; and therefore the defendant is more especially entitled to be treated according to the due course of law in such cases.

Mr. Dickerson's distinction between a rule taken in a civil cause, to bring one into contempt by the party, or by the officer of the court, ex officio, as optional, has no legal foundation. But in this case, the fact is not with Mr. Dickerson. The rule was not taken at the instance of the court, nor, ex officio, by Mr. Dallas, the district attorney; but moved for by Mr. Dallas, as counsel for, and at the instance of Duane. The prosecutor is reduced to a dilemma: if this be a rule taken in a cause between the United States and Wayne, then it is void, for there is no such cause in court: if between Hollingsworth and Duane, then it is mis-entitled on the minutes of the court, on the rule to show cause, and on the affidavit of service. The mover, therefore, should take nothing by his motion. He cited 4 Bl. Comm. 285; 2 Leach's Hawk. P. C. 217.

Before TILGHMAN, Chief Judge, and GRIFFITH, Circuit Judge.

GRIFFITH, Circuit Judge. The motion was made on Saturday last, and, on proving the publication, the rule taken, rather as of course. Neither the court, nor any officer of the court, directed the application, or dictated the title of it. It was moved and entered by the counsel for Duane at their peril; and if an irregular proceeding, the defendant must be discharged. On this point I have no hesitation. The law is, and so is the practice and reason of the thing, that proceedings against a party or some third person for a supposed contempt in the course of a cause, must be entitled as in the civil cause: for until the rule is made absolute, or an attachment is issued, there is no suit between the United States and the person charged with a contempt. When the court have adjudged the party in contempt, they direct an attachment, and the future steps are all on the criminal side. Independent of the general propriety of this method, there is a special reason why the procedure should be as between the parties, until the contempt is established; namely, that the party charged may have his costs, if the motion is rejected or the rule refused. Were the United States made the prosecutor in the first instance, the vexation would be unredressed.

I consider the cases cited, as fully settling the point, and on the best reason. There is a rule, and we must adhere to it, and were it now to be first settled, we could not make a better. The proceedings, therefore, in this case being mis-entitled, the party coming in under them, may avail himself of the irregularity, and I think, ought to be discharged.

TILGHMAN, Chief Judge. I look upon the law as stated by the defendant's counsel, to be settled. The rule is taken by a party in a civil cause, and by him proceeded on with a view to obtain an attachment out of this court, by undertaking to prove that the person he proceeds against, has committed a contempt. The person taking the rule must entitle it as a proceeding in the cause, in the prosecution or pending of which the contempt is alleged. Until the attachment issues, the proceedings must be entitled on the civil side.—Let the defendant be discharged from the rule with costs.

BASSETT, Circuit Judge, was absent.

Mr. Dallas then moved for another rule to show cause to-morrow, which was ordered.

Case No. 16,655.

UNITED STATES v. WEBB.

[8 Ben. 343.] [1]

District Court, S. D. New York. Jan., 1876.

MINISTER OF THE UNITED STATES—PAYMENT—RATIFICATION—ANSWER TO INTERROGATORIES—CONTEMPT.

W., who was minister of the United States at Brazil, received from the government of Brazil a sum of money in settlement of a private claim, and, having paid over a less sum to the United States, a suit was brought against him by the United States to recover the difference. W. set up, as a defence, that the difference had been paid by him to parties in Brazil by agreement of the party interested, and that such action of his in the matter had been communicated by him to the United States, through the then secretary of state, and ratified by the United States. Interrogatories were put to W., as to the persons to whom such payment was made, and he having answered that such payment was made to "certain Brazilians," a motion was made, by proceedings for contempt, to compel fuller answers which should disclose the names of the Brazilians. *Held*, that, as the defendant's answer to the complaint did not disclose the names, and as the defence set up in such answer was based upon alleged communications between him and the department of state, in which the names of the Brazilians referred to were not disclosed, the disclosure of their names was irrelevant to the issue, not important to the defence, if any, of the defendant, and not material to the cause of action set forth by the plaintiffs.

This case came before the court on a motion in behalf of the plaintiffs to punish the defendant [James Watson Webb] for contempt in not answering certain interrogatories, which, by an order made on the 20th of November, 1875, he had been ordered to answer, or to strike out the answer which had been interposed to the complaint. The complaint in the action alleged that the defendant was, in 1867, minister of the United States in Brazil, and, as such, received from the government of Brazil, for the United States, the sum of £14,252; and that he did not account to the United States therefor except for the sum of £5,000; and the action was brought to recover the difference. The answer set up that the £14,252 was paid by the government of Brazil in settlement of a private claim of one Lemuel Wells against that government; that, before the payment of the money, Wells agreed that all the money which should be received in settlement of the claim over and above £5,000, should be by the defendant paid to certain parties in Brazil; that the payment by defendant of the excess of the amount received above the £5,000 was made to such parties in Brazil in pursuance of such agreement, and that the action of the defendant in the matter was duly communicated by him to the United States, through the then secretary of state, and was ratified and approved. Interrogatories were then put to the defendant, by which, among other things, he was asked as to the persons in Brazil to whom such payment was made. Answers to such interrogatories were filed; and thereon an order was made, that he file further answers to such interrogatories, or show cause why he should not be punished as for a contempt, or why his answer to the complaint should not be stricken out.

George Bliss, U. S. Dist. Atty.

John E. Parsons, for defendant.

BLATCHFORD, District Judge. The defendant, in his answer to the complaint in this suit, sets up, as a defence, that, before the settlement of the claim by Brazil, Wells entered into an arrangement that the excess to be obtained over £5,000 sterling should be paid over to "certain parties in Brazil," and that £5,000 sterling should be remitted to the United States, to be paid over to Wells; that the fact of the making of such arrangement, and that it was proposed to be acted upon in carrying out the settlement and paying over the proceeds, was, before such settlement was attempted, communicated to and assented to, and subsequently approved by, the plaintiffs, and that, in execution of such arrangement, the defendant paid £9,252 sterling to "such parties in Brazil" and remitted £5,000 sterling to the plaintiffs, to be paid to Wells; and that the action of the defendant in carrying through the settlement of the claim under such arrangement, and in paying over the excess over the £5,000 sterling to "such parties in Brazil," was communicated to the plaintiffs and by them ratified and approved. This answer has been accepted by the plaintiffs, as sufficient in form. The persons to whom it is alleged that the sum of £9,252 sterling was paid are not named by name in the answer, or designated therein otherwise than as "certain parties in Brazil." It is not alleged in the answer that their names were ever communicated to the plaintiffs, or that, in what was communicated to, and approved and ratified by, the plaintiffs, such persons were designated otherwise than as "certain parties in Brazil."

In his replies to the interrogatories put to him, the defendant says that he paid over the £9,252 sterling to "certain Brazilians," not naming them. The plaintiffs having obtained an order that the defendant answer further to such interrogatories, by disclosing the names of the Brazilians referred to, or show cause why he should not be punished as for a contempt or imprisoned until he shall so answer, or why his answer to the complaint should not be stricken out, or why such other steps should not be taken as to the court may seem meet, to punish him for contempt or compel him to so answer, and the defendant not having disclosed such names, the parties have been heard on the question as to whether the defendant ought to be punished for a contempt, or have any penalty inflicted, for not disclosing such names.

In his replies to the interrogatories, the defendant refers to a correspondence between himself and the department of state, contained

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

in a printed volume, printed by the authority of the United States. It does not appear by that correspondence, nor is it alleged in the replies of the defendant to the interrogatories, that he ever communicated to the department of state the names of the Brazilians referred to, or that whatever approval or ratification there was by the department of state, or by the plaintiffs through that department, of the payment alleged to have been made of the £9,252 sterling, was an approval or ratification of anything except of a payment of the money to persons who were not named, and who were not designated otherwise than as "influential Brazilians." In such volume, at page 142, the persons referred to are designated by the defendant as "influential Brazilians;" at page 145 as "one of the most influential of the opposition" and as "the party with whom I treated" and as "the purchasers of the claim," and as "the leaders of the two parties;" and at page 161 as "the party who took the matter in charge."

As the defence set up in the answer is based upon alleged communications and approvals in which the names of the Brazilians referred to were not disclosed, and as the answer does not disclose the names, I think it must be held that a disclosure of the names by the defendant is irrelevant to the issue, not important to the defence, if any, of the defendant, and not material to the cause of action set forth by the plaintiffs. So much, therefore, of the order of November 20, 1875, as requires the defendant to answer further to interrogatories 3, 4, 5, 6, 8, and 10, is vacated.

Case No. 16,656.

UNITED STATES v. WEBBER.

[1 Gall. 392.] [1]

Circuit Court, D. Massachusetts. May Term, 1813.

COLLECTION LAWS—REPORTING ARRIVAL OF VESSEL—PORTS OF REFUGE.

The provisions of the 30th section of the act of March 2, 1799, c. 128 [1 Story's Laws, 598; 1 Stat. 649, c. 22], apply to all vessels arriving at a port, whether the arrival be voluntary or by stress of weather, or the port be the intended port of discharge or not.

[Cited in Walsh v. U. S., Case No. 17,116.]

[Error to the district court of the United States for the district of Massachusetts.]

The original action [against Ignatius Webber, Jr.] was debt for $1,000, the penalty provided by the 30th section of the collection law [of March 2, 1799 (1 Story's Laws, 598; 1 Stat. 649)], for not making the report required thereby within twenty-four hours after arrival of any vessel from a foreign port.

G. Blake, for the United States.

William Prescott, for defendant.

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

STORY, Circuit Justice. The single question arising out of the bill of exceptions in this case depends upon the true construction of the 30th section of the act of March 2, 1799, c. 128 [1 Story's Laws, 598; 1 Stat. 649, c. 22]. The district judge, in effect, held that the provisions of this section did not apply to any vessel arriving from a foreign port at a port of the United States, where the arrival was from necessity, and not of choice; and there was no intention to make such port a port of delivery of any part of the cargo. [Case unreported.] The attorney for the United States contends, that this opinion is erroneous. It is admitted, that the language of the section is sufficiently comprehensive to embrace cases of involuntary, as well as of voluntary arrival. And, unless a more limited construction arise from the context and purview of the act, it is the duty of the court to give full effect to the language. Whatever may be the hardship or inconvenience of the decision, it cannot authorize the court to interpose limitations, where the legislature have shown no such intention; and it will be for the wisdom of the legislature to relax the rigors of the law, if public or private mischief grow out of its extensive applicability.

I have examined with care and deliberation all the sections of the act, which have been cited in the argument to illustrate the section under consideration; and the result of my judgment is, that there is nothing to extract the present case from its operation. I have no doubt that the section was designed to apply to every case of the arrival of a vessel from a foreign port at any port of the United States, where the original destination was to the United States. By recurring to the preceding sections, particularly the 25th and 26th sections, it will be found, that when the legislature designed to apply any provision to cases only, where the arrival should be at the port of destination and discharge, the language expressly so limits it. Thus, the second manifest, to be produced to the officers of the customs, is limited to the vessel's "arrival within the limits of any district of the United States, in which the cargo, or any part thereof, is intended to be discharged or landed." The 27th section prohibits the voluntary unlading of any goods, unless duly authorized by the proper officer of the customs, after the arrival of any vessel within a district of the United States. The 29th section prohibits the departure of any vessel after her arrival within a district of the United States, unless to proceed on her way to some more interior district, before report and entry shall be made to the collector of some district of the United States. There can be no doubt, that these sections are applicable to all arrivals, be they from choice or from necessity. Then comes the 30th section, in no part of which can I discern an intention to except the case of an arrival at a port, which is not the port of destination or delivery, or which is sought from necessity and not

from choice. The objection seems to be, to limit the times, within which the reports shall be made to the officers of the customs, in order to ensure the security and execution of the revenue system. If the vessel remain twenty-four hours, the first report is to be made; and if she remain forty-eight hours, the second report is to be made, in the manner prescribed by the act.

If the construction contended for by the defendant's counsel be adopted, it will follow, that the 30th section can never apply to any arrival, except of a vessel destined for the particular port at which she arrives. It cannot apply to any vessel having an ulterior destination of her whole cargo, however long she may remain in another port. How can we reconcile this construction with the provisions of the 32d, 33d, and 34th sections? These sections are equally as applicable to cases, where the whole cargo is to be exported to another port, whether foreign or domestic, as to cases of a partial exportation. The language of the 34th section is exceedingly strong. It provides, that before any ship or vessel shall depart from the district, in which she shall first arrive, for another district, provided such departure be not within forty-eight hours after her arrival within such district, with goods, wares and merchandize brought in such ship or vessel from a foreign port or place, the duties whereof shall not have been paid or secured, the master, &c. shall obtain from the collector of the district a copy of the report and manifest made by such master, &c. certified by the collector. What report and manifest are here referred to? Plainly the report and manifest required to be made within forty-eight hours by the 30th section. And the form of the certificate, addressing itself to the case of an ulterior destination of the whole cargo, states, "that no part of the said cargo, as expressed in such manifest, hath been unladen or landed at this port."

It is argued, that the 30th section does not apply to cases of necessity, because there is another section (the 60th section), which provides for such cases. But I am well satisfied, that the 30th section applies only to vessels originally bound to the United States, and that the 60th section applies only to vessels originally bound to foreign countries. This construction, if it requires support, is demonstrated by the 32d section and particularly by the proviso of that section. And so far from forming an exception to the provisions of the 30th section the 60th section evidently requires the same report to the collector within forty-eight hours, in cases of arrival from necessity or from stress of weather, as is required by the act in other cases.

It is further argued, that this construction of the 30th section is unreasonable, because it will prevent vessels in many cases from sailing with the first favorable wind, when the collectors reside at a distance from the port, at which the vessels arrive. Admitting the hardship to exist, it certainly forms no solid objection to the construction of the act, however proper it might be, if addressed to the discretion of the legislature.

It has been urged with quite as much force, that the construction of the defendant's counsel would open a door to the grossest frauds upon the United States. Vessels might come into a port under the cover of necessity, and remain there as long as they pleased, without any adequate means of detecting illegal traffic, or ensuring a faithful payment of duties.

On the whole, as I cannot perceive any sufficient ground, or which to rest an exception, in the face of the positive language of the act, I am of opinion that the section equally applies, whether the arrival be from necessity or from choice, and whether the port be or be not the port of destination or delivery of the whole or any part of the cargo. The consequence is, that the judgment of the district court must be reversed; and conformably to our opinion in the case of U. S. v. Sawyer [Case No. 16,227], a new trial must be had at the bar of this court.

I confess that I have come to this conclusion with some reluctance, from the great respect, which I entertain for the learned judge, who presides in the district court, and also from having been of counsel against the United States in several causes of a similar nature, where I felt the full force of the embarrassments, to which this rigorous construction will in some instances unavoidably lead. Judgment reversed.

Case No. 16,657.

UNITED STATES v. WEBER.

[Hoff. Land Cas. 126.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANT—VALIDITY.

The validity of this claim established by the ruling of the supreme court in Fremont v. U. S. [17 How. (58 U. S.) 542].

[This was a claim by Charles M. Weber for Campo de los Franceses. Claim filed May 31, 1852, confirmed by the commission April 17, 1855.]

S. W. Inge, U. S. Atty.

Volney E. Howard, for appellee.

HOFFMAN, District Judge. The claim in this case was confirmed by the board of commissioners. An appeal to this court has been taken on the part of the United States; but no objections to the claim have been stated, nor has any error in the decision of the board in matters of law or fact been suggested for our consideration. No additional testimony has been taken in this court, and the case has been submitted without argument, except a printed copy of the brief filed by the counsel

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

for the claimants when the cause was pending before the commissioners. I have, however, as has been my practice, examined the voluminous transcript in the case, but have not discovered any reason for reversing the decision of the board. On the fourteenth of July, 1843, Guillermo Gulnac petitioned Governor Micheltorena for a tract of land eleven leagues in extent, for the benefit of himself and eleven other families, who were to assist him in forming a settlement upon the land. The secretary, Jimeno, to whom the governor made the usual reference for information, reported on the twenty-eighth of November, 1843, that although Gulnac's petition was entitled to favorable consideration, yet it should be ascertained whether the petitioners desired the land for the formation of a colony; and that in that case the names of the persons who were to form it should be mentioned, in order that it might be expressed in the title that the grant was for their common benefit; but if the land was solicited for the personal benefit of the petitioner, that its extent was large, and others, following his example, might obtain similar grants, so that no public land would be left. In conformity with this report, the governor ordered that the petitioner should say whether the grant was asked for a colony, and that in that case the names of the families should be stated in the title; but if he desired it for himself individually, that he should ask for it within reasonable limits. This order was made on the first of January, 1844; but on the thirteenth the governor seems to have made his concession to the petitioner individually, and to the whole extent of land asked for. The concession, it is true, recites that the grant is for the benefit of Gulnac and his family and that of eleven other families; but their names are not mentioned, as previously suggested by the secretary, and it may be presumed that the governor finally determined to grant the land to Gulnac alone, leaving him to make such arrangements with the families who were to settle upon the land as he might see fit.

The foregoing facts appear from the expediente on file in the archives, a copy of which is contained in the transcript. The original title delivered to the party is also produced by the claimant, and the genuineness of the signatures fully proved. It also appears from the certificate attached to the original grant that the grant was approved by the departmental assembly on the fifteenth of June, 1846. By virtue of this approval the title of the petitioner became "definitively valid," and the legal estate in fee vested in the grantee. Whether in such a case this court has any right to inquire into a breach of the conditions subsequent annexed to the grant, for the purpose of enforcing any forfeiture for conditions broken which may have accrued, it is unnecessary to consider; for the evidence in this case abundantly shows that the grantee and the present claimant, who derives title from him, made every possible exertion to fulfill the conditions of the grant, and that though embarrassed by unforeseen obstacles, they effected an extensive settlement upon the land before the country was ceded to the United States by the treaty. The excuses for nonperformance of conditions within the time limited are at least as valid as those which were in the case of Fremont v. U. S. [17 How. (58 U. S.) 542] held sufficient under a grant not approved by the assembly, and in this case it appears in addition that the conditions were fully performed, and in fact a future city founded before the formal acquisition of the country. No objections having been made on the part of the United States, I do not deem it necessary to refer particularly to the evidence by which the existence of unforeseen obstacles to an immediate settlement is established, nor to that which proves the extensive improvement, occupation and cultivation which ensued, and which exist to the present day. The boundaries of the grant are indicated with apparent precision in the grant and map which accompanies it, and its extent is limited to eleven leagues. A decree of confirmation for land to that extent, within the boundaries set forth in the grant and accompanying diseño, must therefore be entered.

[For hearing upon objections to survey, see Case No. 17,329. A new survey was made and confirmed. Id. 17,328.]

UNITED STATES v. WEBER. See Cases Nos. 17,327–17,329.

Case No. 16,658.

UNITED STATES v. WEBSTER.

[2 Ware (Dav. 38) 46.] [1]

District Court, D. Maine. June Term, 1840.[2]

ARMY QUARTERMASTER—DUTIES AND AUTHORITY—SETTLEMENT OF CLAIMS—SEMINOLE WAR—COMMISSIONS ON DISBURSEMENTS — INTERPRETATION OF STATUTES—PREAMBLE.

1. The duty of a quartermaster is to provide supplies and necessaries for the army. Under the general laws relating to the service and the army regulations, his authority is restricted to furnishing supplies of a particular description, and if he furnishes other articles than such as are allowed by law and usage, he cannot charge the United States with them.

2. The laws and usages of the service restrict him as to the nature of the claims against the United States, arising out of the service, which he may settle and allow, and if he settles and pays such as he is not authorized to pay, such payment will not be a legal set-off in an action by the United States against him.

3. It is the duty of the quartermaster to provide quarters, hospitals, provisions, etc., for the army, and when obtained by contract he may pay for them. But when taken by impressment, whether he is authorized to settle and pay for them, by law and the common usage of the army—quære.

[1] [Reported by Edward H. Daveis, Esq.]

[2] [Affirmed by circuit court. Case unreported.]

4. But such claims against the United States, arising during the Florida war, he had authority to adjust and settle by the act of May 28, 1836, c. 82 [5 Stat. 33].

5. The preamble of a statute cannot control the enacting part of the law when the meaning is clear; but when the language is ambiguous and may admit a larger or more restricted interpretation, the preamble may be referred to, to determine which sense was intended by the legislature.

6. The reason of this rule of interpretation is, that it states the reasons and objects of the law.

7. If the reasons and objects of the law are made known by any other document equally authentic and certain, these may for the same reason be referred to, to aid in the interpretation of doubtful or ambiguous language in the law.

8. The intention of the act of May 28, 1836, was, to authorize the quartermaster to adjust and pay such claims, against the United States, as he was not authorized to settle and pay under the general laws and usages of the service.

9. Under this act, the quartermaster was authorized to settle and pay for articles taken for the use of the United States, with the consent of the owners, without contract, or impressed; whether such as are consumable, as provisions; or not, as horses, carriages, arms, etc., and are lost by the accidents of the war. The common principle of the law of letting and hiring, by which, in a loan for use, the lender runs the risk of loss by extraordinary accidents, does not apply to such a case.

10. But the law did not authorize him to pay for special damage to a house and grounds, occupied for quarters for the officers and for an encampment.

11. Under the order of the war department of May 18, 1833, repeated in that of 1835, and making the 56th article in the Digest of December, 1836, the defendant is not entitled to charge commissions on his disbursements.

This was a suit brought by the United States against Captain Webster, a disbursing officer in the quartermaster's department of the army, to recover a balance of money alleged to be remaining in his hands, and for which he had not accounted. The jury to whom the case was submitted returned a special verdict, stating the general balance claimed, viz., $8,481.47, and enumerating the particular credits claimed by the defendant, and referring to the decision of the court, as matter of law, whether he was entitled to the credits which he claimed, or any part of them. The facts found by the verdict are, that the defendant was duly appointed an acting assistant quartermaster of the left wing of the army, in active service in the war against the Seminole Indians, on the 15th of February, 1836, and continued to act as such till March 1, 1837, during which period the disbursements were made; that in that time he received the sum of $143,595.04; that during the whole time he held the commission of a first lieutenant in the line of the army, and received the pay and emoluments attached to that office, and no other; that he claimed the commission of 2½ per cent for disbursing part of said sum, amounting to $2,652.46, which was disallowed by the accounting officer of the treasury department, and that this percentage, if by law any may be allowed, is a reasonable compensation for said service, and ought to be deducted from the balance claimed to be due. The jury also found, that the disbursements were made for expenses incurred and supplies furnished, on account of the militia received into the service of the United States, in Florida, prior to the 28th of May, 1836. And they further found, that of the moneys then received and disbursed by the defendant, he paid,—First, for property impressed into the service of the United States and lost in their service, $325. Secondly, for property not purchased, but received into the service of the United States for their use, with the consent of the owners, viz.: horses and vehicles for transportation, and horses and military equipments, used by the militia in said service, and lost and destroyed, the sum of $5,144.15. Thirdly, for special damages done to a house occupied as quarters, and to ground occupied as an encampment, in said service, $130. Fourthly, for articles purchased and used in the service, $300.40. All these credits had been presented to the accounting department of the government, and disallowed; and are to be allowed to the defendant in offset, all, if, in the opinion of the court, they were paid and disbursed agreeably to law. And if, in the opinion of the court, the defendant is, by law, entitled to all the credits he has claimed, including the percentage, then the jury find that the defendant never promised; and if, in the opinion of the court, the defendant is not entitled to the whole, but is entitled to any part of said credits, then such part as he is by law entitled to, is to be deducted from the said sum of $8,481.47, and the jury find that he did promise for the residue.

Mr. Howard, Dist. Atty., for the United States.

Mr. Hobbs, for defendant.

WARE, District Judge. The question which the jury, by their verdict, have referred to the opinion of the court, is, whether the defendant is by law entitled to all or any part of the credits which he claims. If he is; they find that to that extent they are to be allowed and deducted, as offsets from the general balance demanded by the plaintiffs. So far as these consist of charges for disbursements, it was not denied at the hearing that they were actually made by him, under color of his authority as an acting quartermaster, and that the articles paid for were actually received and consumed by the troops or lost. The ground on which the allowance of them is contested is, that the disbursements were made in satisfaction of claims against the United States, which, however just and valid they may be, he, in his quality of acting quartermaster, was not authorized to settle and pay.

1. The jury have distributed these credits into four classes, distinguished from each

other by the different circumstances, under which the several claims against the United States originated. The first class is constituted of articles impressed and lost in the public service. It is not denied, as it cannot be, that the owners are justly entitled to a compensation for their property thus taken without their consent, and appropriated to the public use; but it is said that it does not fall within the ordinary duty of the quartermaster's department, to adjust and settle claims of this description; these claims having, as it is contended, always been settled by a different tribunal. It is the peculiar and appropriate duty of the quartermaster's department, to provide for the troops such supplies and necessaries, and to procure such services to be performed, as the exigencies of the public service require for the subsistence, the comfort, and the efficient action of the army, whether in movement or position. But the general laws, the army regulations, and the ordinary usages of the service, restrict the quartermaster, in furnishing these supplies, to articles of particular descriptions. He has not an unlimited authority to furnish the troops, at his discretion, with any articles, which, in his judgment, may be necessary or convenient for them, or conducive to their health or comfort. If, therefore, he purchases for their use articles which are not authorized by the regulations and usages of the service, he cannot charge them to the United States. Being an agent acting under a limited authority, he cannot charge his principal, when he exceeds his authority. The same regulations and usages may undoubtedly restrict the quartermaster, as to the nature of the claims which he is allowed to adjust and settle, although they may be immediately connected with the subsistence and operations of the army, and indispensable to the service; and if he undertakes to pay such claims, he cannot, by the accounting officer, be credited for such payments, and it may at least be questionable whether they can be allowed by the court, as a legal or equitable set-off, in an action against him for a balance unaccounted for. Such a payment may constitute a just claim against the United States, and he may be equitably subrogated to the rights of the creditor whose demand he has satisfied, but he will be turned over to the same remedies, for obtaining his remuneration, which would be open to the original creditor.

If these accounts of Captain Webster were to be settled and adjusted under the general laws, providing for this branch of the public service, and the regulations and established usages, which constitute the complement of the law, it would be desirable to have some more satisfactory evidence of what those usages are. No part of the army rules and regulations, which has been quoted at the bar, speaks at all of the forcible impressment of articles for the public service, nor, of course, of the mode of settling and paying for them. They neither affirm nor deny the authority of the quartermaster in this particular. I am not aware that, from the silence of the regulations, any argument can be drawn either in favor or against his authority. It is made the duty of the quartermaster, to provide quarters, hospitals, provisions, fuel, forage, means of transportation, and other necessaries of the service. Ordinarily, they will be obtained by contract; but if they cannot be so obtained, the necessity of the case, and the usages of war, authorize the taking them by force. But as private property cannot be taken for the public use, without a just compensation (Const. Amend. U. S. art. 5), the authority of an officer to take, would seem to involve that of paying the fair value when taken. But it is said, that though the officer has the right, in a case of necessity, to take by impressment, his authority to pay the price of what he has taken, is negatived by the established and uniform usage of the service. A number of acts of congress were referred to, providing specially for the payment of impressed property, and they have been insisted upon as proving, that it has been the invariable practice of the government to provide for the settlement of such claims by special laws. Now these laws prove affirmatively, that such claims have in many cases been provided for, by special laws; but they do not prove negatively, that no claims of this description may be, or ever have been settled, and adjusted, under the general laws and usages applicable to this branch of the public service. The acts referred to were not laws providing for the current expenses of the army, but for the settlement of old claims, which may have been omitted to be adjusted and paid at the times, from other causes than the incompetency of the quartermaster to settle them. But in point of fact, the decision, of this part of the case, does not turn principally on the general laws, providing for the military service, nor upon the common and ordinary usages of the army. All the payments of Captain Webster, which are now in controversy, were made under the authority of an act, specially providing for the expenses of the Florida war. This act provides, "That the secretary of war be, and he hereby is, directed to cause to be paid the expenses that have been incurred, and the supplies which have been furnished, in the states of South Carolina, Georgia, Alabama, Louisiana, and the territory of Florida, on account of the militia and volunteers received into the service of the United States, in defence of Florida; provided, that the accounts, for these claims, shall be examined and audited at the treasury, as in other cases." Act May 28, 1836, c. 82, § 1. The question therefore is, whether Capt. Webster was authorized, as an acting quartermaster, to settle and pay the claims, which form the subject-matter of this controversy, under this law. The law provides for the payment of expenses incurred and supplies furnished. These are terms of very general import, and there is nothing in the language of the act limiting them to ex-

penses and supplies of any particular description; nor is there anything, which authorizes us to give them a more extensive operation, than they have in the general laws, relating to the same subject, that is, to the military service. Looking at the words of the act alone, therefore, it is difficult to derive from them an authority for the payment of any other claims, than such as the quartermaster is authorized to settle, by the general laws and military usage. But there is a paper, among the public documents of that session of congress, which may, like the preamble of a statute, serve to fix and give a more precise and definite meaning to these general terms, by showing the cause and purposes for which the act was passed. Executive Documents (1st Sess. 24th Cong.) Doc. 231. It is a paper which was prepared by the war department, submitted to the house of representatives, and by their order printed before the passage of the law. It contains an abstract of the various claims, which were, or would be, preferred against the United States, growing out of the Florida war, for the payment of which there was no authority under the existing laws, and which must therefore be ultimately rejected, unless provision were made for their settlement by a special act.

It is a rule in the construction of a statute, that recourse may be had to the preamble, though it is in strictness no part of the law, as one element for opening and expounding the meaning and intention of the legislature, although it cannot control the enacting part of the law, when the words are clear and explicit, and are manifestly more comprehensive than the preamble. Perkins v. Sewell, 1 W. Bl. 654; Pattison v. Bankes, Cowp. 543. But when the words of the enacting part are ambiguous, or may fairly admit a larger or more restricted signification, then reference may be made to the preamble, to determine which sense is intended by the legislature. The reason is, that the preamble states the grounds and objects of the law. And when the reasons and grounds of the law are made known, in any other manner equally certain and authentic, they are entitled to have the same influence, in the construction of a statute, as the preamble, if the meaning of the words is doubtful, because every law ought to be carried into effect according to the intention of the law-maker, when the intention can be certainly known. Com. Dig. "Parliament," R. 11. It appears to me that a document, prepared and published as this was, and preserved among the public archives of the country, stating the nature of the claims to be provided for, and the necessity of a special act for that purpose, and which was before the legislature, at the time when the law was passed, may be fairly invoked in aid of the exposition of the statute; not to control the meaning of the legislature clearly and explicitly expressed, but to give a precise and determinate meaning to words which are ambiguous, or expressions which may be taken with a greater or less latitude of signification. If it does not bring before the court the objects and intentions of the law-maker, in so solemn and authentic a form as when these intentions are set forth in a preamble, at least it affords a medium of exegesis, against which the court cannot shut its eyes, without excluding, from its consideration, what would have an influence upon every mind studious of ascertaining the real intent of the law-maker. It appears from this paper, on the sudden breaking out of the war in Florida, the promiscuous massacre of the people, and the wasting of the country by a savage foe, that the militia and volunteers, of the territory and of the neighboring states, turned out with great promptness and alacrity, for the defense of the distressed inhabitants. In this hasty and tumultuary assembling of the military force, there were, as might be expected, great irregularities committed, and a variety of expenses incurred, some from necessity and some through ignorance, which are not authorized in the regular and ordinary course of the military service. The troops were collected, or rather assembled, with strong hands and willing hearts, overflowing with zeal and patriotism, but with little knowledge or familiarity with the details of military duty, and without military arms and accoutrements, provisions, or necessary camp equipage; and these appear to have been taken with great promptitude, and little ceremony, wherever they could befound. "Furor arma ministrat." In the state of South Carolina, it is stated in a letter from the governor to the secretary of war, that horses were impressed and appraised, by warrants from the colonels of regiments, under the belief that they would be paid for, at that valuation. The remark of the war department is, that there is no law which authorizes the payment for horses under such circumstances. A letter of Col. Gadson, quartermaster-general of Florida, states that volunteers are rushing in from all quarters, and making or converting every private storehouse into a public depository, from which is taken anything that may be wanted, upon the simple receipts of even unauthorized agents. Volunteers, he says, were considered as entitled to anything they wanted, and, from private storehouses, the drafts have been large for blankets and a variety of articles not issued under the regulations. Property was seized and appropriated to the public use, with a degree of irregularity and illegality rarely witnessed. It is hard, he adds, that those who yielded to the press should not be indemnified, and he proposes that all these claims should be settled on principles of equity. The war department, upon this, remarks that there is no law which authorizes the payment of claims on equitable principles merely, or which, if paid, would release the disbursing or paying officers, from the operation of the laws and rules of the treasury, on the settlement of their accounts. There appears to be no remedy but legislation. All this irregularity is not a matter

which should occasion surprise. It is what might, under the peculiar and distressing circumstances of the case, naturally be expected. The unprotected inhabitants, after a long period of peace and tranquillity, were aroused from their dreams of security by the sudden onslaught of a barbarous and merciless foe. "Dimicandum est pro aris et focis." They were girding themselves for battle, in defense of their altars and houses, of their wives and children.

It was upon statements like these, that the law of 1836 was made, providing specially for the payment of the expenses incurred and the supplies furnished. If the expenses had been such as the disbursing officers were authorized to pay, under the existing laws and ordinary usages of the army, no special act would have been required. It was because they were not of this character, that a special act was necessary to provide for them, and the natural presumption is, that it was intended to meet all the cases described in the abstract, provided they come within the words of the law in their natural and ordinary signification. It appears to me that it is not straining the meaning of language to hold, that the payment for articles thus irregularly taken and appropriated to the public use, is included in the term, expenses incurred. It is certain that somebody must be liable for them, and against whom can they equitably be charged, unless against the party for whose benefit they were taken and to whose use they were applied? Now among the expenses particularly described, and which the disbursing officers were not authorized to pay, were articles irregularly impressed and appropriated to the use of the army. It appears to me that the natural and just conclusion is, that one of the objects of the law was, to supply that authority. My opinion, therefore, is, that the defendant is entitled to the credits claimed under this part of the finding of the jury.

2. The second class of credits claimed, as they are arranged by the verdict, consists of payments, for articles received into the service of the United States, with the consent of the owners, and lost or destroyed while in their service. It appears, from the vouchers, that some of the articles included in this class, were such as are consumed by use, as provisions for the troops and forage for horses. If we may recur to the abstract which has been mentioned, to aid us in interpreting the law, there does not appear to me to be any substantial reason for doubting whether such expenses were or were not intended to be provided for by the act, and of course whether Capt. Webster had authority to settle and pay them, provided the articles were in fact consumed by the army, although they may have been irregularly taken. If goods, which are consumed by use, are loaned in this way, the contract by which they are transferred is what is technically called "mutuum," or a loan for consumption. It is of the essence of this contract, that the right of property, in the thing loaned, shall pass from the lender to the borrower, and he, by receiving it, becomes bound to return, not the same individual thing, but one of the same species, equal in amount and quality, or if he fails to do so, to pay its value. Pothier, Pret de Consomption, No. 4, 13, 39. The proprietary interest in the thing being transferred to the borrower, if it is lost, or destroyed, the loss falls on him. "Res perit domino." With respect to other articles, as horses and wagons for transportation, and horses and military equipments for the use of the soldiers, there is, at the first view, upon the general principles of the law, more room for doubt. If they were received into the service without being purchased, and with the consent of the owners, it must have been either by a gratuitous loan, or by a contract of hiring. In either case, the limitation of the responsibility of the borrower, or hirer, is well settled, by the general principles of law. He is not liable for a loss occasioned by inevitable accident, or in the language of the common law, by the act of God or the public enemy, unless the loss has been preceded by some fault on his part, without which it would not or might not have happened. Story, Bailm. §§ 240, 408; Pothier, Pret a Usage, No. 55, 56. The jury have not found, by what accidents these losses were occasioned, but by recurring to the vouchers, to which by the agreement reference may be made, it appears that many of them were occasioned majore casu, or by that class of accidents for which the hirer, or borrower, is not ordinarily responsible; and as they were avowedly hired for the use of the army, while actively engaged in war, it cannot be imputed to the plaintiffs as a fault, that they were exposed to destruction by the public enemy. In these cases, the general principles of law place the loss on the owners, and of course the United States would not be liable. If the decision of the present case turned entirely on general principles, the difficulty, which I should feel in this part of it, would be in applying this rule of the common law to a loan, made to the public under such circumstances, unless it appeared by the terms of the contract, that the lender expressly took the risks of war upon himself. But waiving this question, by recurring to the abstract, we shall find, that the settlement, for property received into the public service, in this way, and lost, fairly comes within the purview of the act of 1836. In Georgia, for instance, cannon, rifles, muskets, and other articles, were taken from the state arsenal and furnished to the troops, for which somebody must account to the state. The payment, for articles thus taken and lost by the casualties of war, was then one of the claims which were before congress when the law was passed. They were supplies furnished to the militia and volunteers, and, if lost,

the indemnity due to the owners was an expense incurred, which could not be allowed by the accounting officers of the treasury department, under the existing laws; but which, under the pressing exigencies of this case, no one will deny ought to be paid by the United States. It was to meet cases of this kind that the law was made. My opinion therefore is, that these payments are authorized by the law, and that the defendant is entitled to the credits classed under this head.

3. In the third class, are placed special damages done to a house occupied for quarters, and to grounds occupied by the troops for an encampment. No claims of this kind were brought to the view of the legislature, by the document to which reference has so often been made. They are claims which are entirely of a different character from all those enumerated in the abstract, and therefore this document furnishes no reason for supposing that they were within the contemplation of the legislature, when the act was passed. It appears to me, therefore, that the allowance of this credit must be determined by the general laws and usages of the service. It is made the duty of the quartermaster to provide quarrers for the army. He must therefore have the authority to agree for the rent and other expenses, necessarily arising out of the execution of his power, and as a disbursing officer, to pay them. This authority seems to be naturally, if not necessarily, incidental to the power of providing quarters, for without it the power cannot be executed. The ordinary deterioration of the property will be taken into consideration, and provided for by the rent. But extraordinary damage, as the destruction of the tenement by fire, or other unusual and unanticipated damages, will not be. The settlement, for damages of this kind, does not appear to me to be necessarily incidental to the general power of providing quarters. A further observation may be made under this head, that the officers in the purchasing department of the army are presumed to be selected with a view to their qualifications for this duty. They may be very competent judges of the value of articles which they are required to purchase, and wholly incompetent to estimate the necessary cost of repairing special damages done to the house, or the injury done to a plantation by cutting down trees, destroying fences, and interrupting the labors of husbandry. My opinion therefore is, that the defendant, in order to entitle himself to these credits, must show, that the settlement of such claims is within the ordinary range of the authority of a quartermaster, under the existing laws, the army regulations, and the established usages of the service; and as no such authority is shown, these credits cannot be allowed.

4. In the fourth class, the jury have placed articles purchased for the army, and consumed or lost in the service. There does not appear to be any objection to the allowance of these credits.

5. The only question arising out of the verdict, which remains to be disposed of, is that of the right of the defendant to charge commissions on his disbursements. The facts found are, that, during the time when he made these disbursements, he was an officer in the line, and that he received only the pay and emoluments attached to his rank as an officer in the line. Whether he performed the duties of quartermaster in addition, or as a substitute, to his other duties, the juries do not find, there having been no evidence upon this point offered on either side.

It is contended that he is not entitled to any such commission, first, because, as an officer under the rules and regulations of the army, by the conditions of his engagement, he was liable to be put upon other duties and services, besides the ordinary duties attached to the office which he held, whenever required by his superiors; and as the occasional performance of extra duties was originally contemplated, under the appointment, no extra compensation for them can, upon general principles, be claimed for such services. There appears to me to be more of logical exactness, than of substantial justice, in this reasoning. It is true that such being the condition attached to the tenure of his office, if extra duties are required, he is bound to perform them, however onerous, or whatever responsibility they may involve. But that in point of equity and good conscience, he can claim no extra compensation for such services, is to my mind by no means so clear. Nor does the law, in other cases, follow out the logical consequences of a contract, with so much rigor, at the expense of general equity and substantial justice. The mate of a vessel, by the very conditions of his engagement, is liable to have devolved upon him the duties and responsibilities of a master. This liability is contemplated in his contract. In case of the master's death, during the voyage, or his being otherwise incapacitated from performing the duties of his office, the mate succeeds, as hæres necessarius, to his employment, with all the duties and responsibilities belonging to it. Yet it has never been doubted, although the possibility of all this is contemplated in his original engagement, that he is entitled to an extra compensation, for these extra services and responsibilities. Now what is just and equitable in the transaction of business between man and man, cannot, one would suppose, be considered inequitable or unreasonable, ordinarily, between an individual and the public. The responsibility of disbursing so large a sum of money, in adjusting and paying a great number of miscellaneous accounts, amidst all the confusion created by a perilous and destructive war, is certainly worth something. But I need not dwell upon this. The present suit

shows, that by mere error of judgment, while acting with the most perfect integrity and best intentions, he might become involved in pecuniary difficulties, extremely embarrassing and even ruinous to his fortunes. My opinion, therefore, would be upon general principles, even unsupported by authorities, that the defendant was entitled to an extra compensation, for the responsibility attendant on this extra duty. And it appears to me that the reasoning of the court in the cases of U. S. v. McDaniel, 7 Pet. [32 U. S.] 1; U. S. v. Fillebrown, Id. 28; and U. S. v. Ripley, Id. 18,—fully authorize this conclusion. But whatever equitable claim the defendant may have, for an extra compensation, on general principles, it is said that every allowance of this kind, whether in the form of extra pay, or commissions for disbursements, is prohibited by the act of March 3, 1835 [4 Stat. 753]. The title of the act is, "Act making additional appropriations for the Delaware breakwater, for certain harbors, and removing obstructions in and at the mouth of certain rivers, for the year 1835," c. 26. At the end of the act there is this proviso: "That no officer of the army shall receive any per cent, or additional pay, extra allowance, or compensation, in any form whatever, on account of his disbursing any public money, appropriated during the present session, for fortifications, executions of surveys, works of internal improvement, building of arsenals, purchase of public supplies of any description, or for any other service or duty whatever, unless authorized by law." It is contended that this proviso is general in its operation and applies to all future appropriations for the military service, as well as to those specially enumerated. Now the first objection that occurs to this interpretation of the law is, that this is not the obvious or natural, nor the grammatical meaning of the words. The proviso is, in its terms, restricted in its operation to the disbursing of moneys appropriated during the then present session of congress. Nor do I see how a more extended sense can be given to the law, consistently with the rules of grammar, without either doing violence to the meaning of the language, or interpolating into the act words not used by the legislature. And this the court has no authority to do when the language has a plain and sensible meaning as it stands. In the second place there is nothing in the character of the act, which would lead one to suppose that the legislature had anything in view beyond the current year. The law is in its nature temporary, making provision for the public service for the current year, and of course spending itself within the year. It is not in such a law that we should naturally be led to look for provisions of a permanent character.

Another objection is made to the allowance of commissions, upon which I have found much more difficulty in arriving at a conclusion satisfactory to my own mind. The general regulations for the army, prescribed by the war department, under the sanction of the president, have been appealed to by both parties as having the force of law. It will not be pretended that these regulations can control or annul an act of the legislature, and when it is said that they have the force of law, nothing more is meant than that they have that virtue, when they are consistent with the laws established by the legislature. It is observed by Mr. Justice McLean, in delivering the opinion of the court, in the case of U. S. v. McDaniel [supra], that "a practical knowledge of the action of any one of the great departments of the government, must convince any person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law, but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. While the great outline of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established, in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits, and no change of those usages can have a retrospective effect, but must be limited to the future." U. S. v. McDaniel, 7 Pet. [32 U. S.] 14.

These remarks apply with as much force, at least, to the department of war, as to any other branch of the administration. A moment's reflection will satisfy any one that it is quite impossible that any statute should go into all the detail of regulation required to maintain the police and discipline of the army, and still more so, that it should anticipate and provide for all the exigencies demanded for the prompt and effective action of the military force, amidst the vicissitudes and casualties occurring to an army, engaged in the active duties of a campaign. A great deal must unavoidably be left to the judgment and discretion of the officers in command, and much, also, to the head of the department who has the general superintendence of that service. The great outlines of their powers and duties may be fixed by law, but within these landmarks, there is a wide field of detail and contingencies, which no human sagacity can foresee, and which, of course, cannot be provided for by general laws. These are necessarily left to the judgment and discretion of those who have the immediate superintendence of the service, and although no such or-

der can be valid, when it is repugnant to an act of congress, a great many orders, in matters of detail, may be, and are, issued which are not inconsistent with the general law, although not expressly authorized by it. Such orders, emanating from a superior, and especially from the war department, the subordinate officers are bound to obey. In this way, customs and usages become established which constitute a sort of common law of the service. The same authority which establishes the usage may change it, for customary law is abrogated by the establishment of a contrary custom. But while it remains unchanged, it is binding. And such customs and usages in the military service may be proved by the same kind of evidence as is competent to prove a custom in other cases. But the highest evidence will be the regulations of the army, printed and promulgated by the war department; for these regulations, if I have a correct view of the subject, are nothing more than an authoritative digest of these customs. These usages and customs, the gradual product of time and circumstances, constitute a sort of complement of the statute-law upon the subject; and they may affect the rights and obligations of those who are subject to them in various ways. They may regulate and define their privileges and immunities, the nature of the services which may be required of them, and the kind or amount of extra compensation to which they may be entitled, for the performance of services superadded to the ordinary duties attached to their office. But all this must be consistent with the will of the legislature, expressed in the public laws, and not in opposition to it. Now as to the right of the defendant to an additional compensation, for the performance of extra services beyond those ordinarily attached to his office, the statute law is silent. No other act of congress has been relied upon, except the proviso in the act of 1835, before mentioned; and this case cannot, in my opinion, be brought within the provisions of that act, without the interpolation of words which the legislature have not seen fit to use; and this the court has no authority to do, when the words, as they stand, have a plain and sensible meaning. This would be to make, and not to interpret, the law.

The title of the defendant to a commission on disbursements, then, being neither prohibited nor allowed by any act of the legislature, depends on general principles and the custom and usages of this particular service. By the general principles of the common law, he would be entitled to an extra compensation for this extra service and responsibility. It would be no valid objection to the claim, that by the condition of his engagement he was liable to have extra duties and responsibilities devolved upon him; because it would be presumed, that the compensation agreed upon was fixed in reference solely to such services as were in the direct contemplation of the parties when the engagement was made, and not with a reference to services which rested only upon remote and uncertain contingencies. But the officers of the army are all liable to be put upon extra services, not falling directly in the line of their ordinary routine of duty, some more and some less onerous, some of greater and some of less responsibility; and these requisitions are so common that they may reasonably be presumed to come within the contemplation of the parties when the engagement is made, not merely as a possible but a probable contingency. A great variety of cases may, therefore, be expected to arise, in some of which it may be reasonable to allow an extra compensation, and in others not. The executive department of the government, which has the immediate direction and superintendence of this branch of the public service, has the best means of judging when such an allowance ought, and when it ought not, to be made. Should the department reject a claim which is authorized by an act of congress, there is no doubt that it ought to be allowed by the court; because no order or requisition, of an executive officer, can annul an act of the legislature, or defeat a right which has become vested under a positive law. Or if the department should disallow a claim which is sanctioned by established usage, such usage having the power of law, an order of the department cannot have a retroactive effect to defeat a right already vested. This appears to me to be the clear doctrine of the cases before referred to. But when a claim is presented, not sanctioned by any act of the legislature, nor confirmed by any well-known or established custom, but standing merely upon the general principles of equity, the decision of an executive department, confirmed by the president, if not absolutely conclusive, deserves to be very gravely considered, before it is overruled by the court. Such is the case with this claim for commissions. It is admitted that it is not directly authorized by any act of congress, and no evidence has been produced of a usage to allow commission in such cases. The claim, therefore, stands upon its own naked and general equity.

Now there is, in the general regulations of the army published in 1835, an article precisely applicable to this case. It is the 56th article, on the 23d page of the printed volume, having for its rubrick, "Restrictions as to Extra Allowances," and is in these words: "In all cases where an officer of the army is required, by the direction of the war department, to perform duties or to make disbursements, for which compensation is not specially provided by law, and where the instructions directing such duties to be done or disbursements to be made, make no provision for additional compensation, no allowance therefor will be made to such officer. It will then be considered that, in the opinion of the war department, the services

so required are within the proper sphere of his duty as an officer of the army." The date of the approval of this digest is December 31, 1836, subsequent to the time when this claim, or at least the principal part of it, arose, and could not have the effect of defeating rights already vested. But this article is a mere transcript of a general order, bearing the date of May 18, 1833, and was, therefore, in force during the whole period when this service was performed. This order is confirmed by another of March 14, 1835, which enumerates in detail the cases in which extra compensation had been formerly allowed, and which would be disallowed for the future. Among them are, "Monthly allowance, or percentage, to officers of the line temporarily performing staff duties,—and percentage to officers for disbursing funds not properly appertaining to their department." This order is professedly founded upon a construction of the proviso in the act of 1835, before mentioned, and, therefore, it may be said, that if the court overrules the construction put upon the law by the department, the order founded upon that act, and professedly intending to carry it into effect, ought to be overruled also. But the order of 1833 was anterior to the act, and, therefore, could have no reference to it, and that is equally decisive against the claim set up in this case; nor do I see how it can be overcome but by a direct denial of the authority of the department to establish any such rule, with respect to extra allowances, by general regulations and orders. It appears to me, that it is fairly within the authority of the war department, under the sanction of the president, to establish general rules upon this subject, which, when duly promulgated, will be binding on the rights of the officers. It is not contended that an order of the executive can control an act of the legislature, or deprive a party of a right acquired under the law. But, as has been remarked, the legislation of congress can never go into all the minute detail of regulation, involved in the complicated service of the army. Much must unavoidably be left to the discretion of the high officers, who superintend that branch of the public service; and as these matters of detail are left to the regulation of the department, it seems to me reasonable, when officers are required to perform services which do not fall within the range of their ordinary duties, that it is properly within the discretion of the department to determine what, and whether any, extra compensation should be allowed for such extra service, taking care that the rule be uniform, and applying in the same way to all similar cases. An authority of this kind seems to me to be clearly implied, in the reasoning of the court in the cases which have been before mentioned. "The amount of compensation," says Mr. Justice McLean, "in the military service, may depend in some degree upon the regulations of the war department; but such regulations must be uniform, and applicable to all officers under the same circumstances." U. S. v. Ripley, 7 Pet. [32 U. S.] 25. And in still broader terms he says, in the opinion before quoted, "Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within respective limits; and no change of those usages can have a retrospective effect, but must be limited to the future." [U. S. v. McDaniel] Id. 15. If usage is to govern, in what manner does usage become established? Obviously in no other way than by the practice of the department. Apply the remark to the case now in judgment. A usage of allowing extra pay, for extra services of any particular kind, is established, by its being charged in various instances and allowed and ordered to be paid, by the department. It is obvious, therefore, that no usage can be established but by the concurrence of the department; for no number of charges, however numerous, on the part of the officers, can ever constitute a usage, under which any right can be claimed, unless they have been allowed. It is the allowance which constitutes the usage. The existence of the usage necessarily implies the right of the department to make the allowance; and if it have the right to allow, it must have the right to disallow. The regulation of 1833 was in force when these disbursements were made; and it expressly denies any allowance, for disbursements made by an officer, where none is provided by law, and when the order directing them to be made, makes no provision for an additional compensation. This case falls precisely within the words of the regulation, and on this ground, my opinion is, that the claim for compensation cannot be allowed. The verdict must be made to conform to this opinion. From the gross sum of $4,981.47, are to be deducted the sum of $325, paid for articles impressed and lost in the service of the United States, $5,144.15, paid for articles received into their service by the consent of the owners, and lost, and $300.40, for articles purchased, amounting in the whole to $5,769.55, leaving a balance of $2,711.92.

This case was carried to the circuit court by writ of error, but did not come to a hearing until after the decision in the case. U. S. v. Eliason, 16 Pet. [41 U. S.] 291, made in 1842. It was then affirmed without argument, upon the authority of that decision. [Case unreported.]

Case No. 16,659.

UNITED STATES v. WEISE.

[2 Wall. Jr. 72; [1] 14 Law Rep. 260; 4 Am. Law J. (N. S.) 88.]

Circuit Court, E. D. Pennsylvania. July 25, 1851.

STATE TAXATION—PROPERTY OF UNITED STATES—CONSTRUCTION OF STATUTES.

1. An act of a state legislature laying a tax on all real estate, to wit, on various sorts of real estate specified by the act, and as such shown to be private property, does not include property of any sort of the United States within its territory.

[Cited in Van Brocklin v. Anderson, 117 U. S. 176, 6 Sup. Ct. 684.]

[Cited in brief in Finley v. Philadelphia, 32 Pa. St. 382; Mintzer v. Montgomery Co., 54 Pa. St. 140.]

2. Any general words are controlled by the specifications.

3. Whether or not a state has power to tax such property, and granting that it has, it cannot enforce the tax by levy and seizure.

[4. Cited in U. S. v. Griswold, Case No. 15,266, to the point that the general words of a statute do not include the government or affect its rights, unless such purpose be clear and indisputable on the face of the act.]

In 1844, the legislature of Pennsylvania passed a tax law, by which they enacted that "all real estate, to wit: houses, lands, lots of ground and groundrents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar-houses, malt-houses, breweries, tan-yards, fisheries and ferries, wharves, and all other real estate not exempt by law from taxation," should be valued and assessed and subject to taxation for "state and county" purposes.

This act did not differ essentially in its enumeration of subjects of taxation from a prior one of 1834, under which taxes had been laid in Pennsylvania, though somewhat more particular in specifying them, and more searching in a process by levy and sale prescribed for obtaining payment.

Under this act of 1844, Weise, a collector of state and county taxes for Cumberland county, Pennsylvania, presented to the officers of the United States garrison or barracks at Carlisle in that county a bill for "county and state taxes" assessed for 1851 against the said "United States garrison;" and payment being refused, proceeded in the form prescribed by the act for ordinary cases, to levy and seize upon certain property of the government and of the officers then occupying the garrison, intending to sell it to pay the tax. An application by consent for a perpetual injunction, restraining him "as well from further proceeding in the levy already made, as from making any levy upon any other property of the United States or any officer or other individual in their service, from the payment of said taxes,"—having been made against him, the following questions were propounded to the court by Mr. Ashmead, D. A. U. S., for the United States, and Mr. Penrose, for the collector:

I. Has a state power to tax the forts, navy-yards, custom-house, mint, garrisons, or other property of the United States used for the necessary purposes and operations of government?

II. Granting the state has such power or right, can it be enforced by levying and seizing the personal property of the United States and their officers and servants?

III. Has the state of Pennsylvania authorized the assessment of taxes on such property?

GRIER, Circuit Justice. The first question has been the subject of much discussion of late. It has been twice argued before the supreme court of the United States, but remains undecided: and as the present case can be decided without expressing my opinion upon this point, I prefer to remain uncommitted by any public expression of it, till it shall again be brought before the supreme court and fully argued there.

It has been more than once decided, "that state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers." M'Cullough v. Maryland, 4 Wheat. [17 U. S.] 316; Weston v. City Council of Charleston, 2 Pet. [27 U. S.] 449. That the mint, navy-yards, arsenals, &c. are "means or instruments" of this description, cannot be denied. It follows necessarily that a tax imposed upon these instruments or means, as such, by a state would be illegal. But it may be contended that although a state cannot tax a "mint or navy-yard" of the United States, eo nomine, yet that where the jurisdiction over the land on which they are erected has not been ceded, it still remains subject to all the duties and burdens to which it is liable in the hands of individuals or private corporations. However this may be, it does not follow as a necessary consequence that where a state has legally imposed a tax on lands used for forts, &c., that the payment of such tax may be enforced by distress or seizure of the personal property of the United States government or its officers.

2nd. "The government of the Union is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be executed directly on them and for their benefit." "And this government, though limited in its powers, is supreme within its sphere of action." If the several powers intrusted to, and exercised by, the United States and state governments, were executed by one sovereign or government, it would be an absurdity to tax the public property or means used to execute one of its powers or functions to support another. What would be gained by taxing a mint or fortification built and sustained by public taxes, in order to build a court-house or other public

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

building or institution, erected and sustained by the same means? Is it more reasonable that such a conflict of taxation should exist, where the people have distributed these sovereign powers to two distinct governments? But suppose it to exist, could it be tolerated that either of these sovereigns to whom these powers were intrusted should treat the other as a mere private corporation? That one should seize, distrain or levy on the public property in possession and used by the other? That the United States should tax the state-house at Harrisburgh, and seize the furniture of it while in use by the legislature of Pennsylvania? Or that a county or township tax collector should levy on the cannon in a fort, the bullion in the mint, or the soldiers' horse and arms? What an absurd conflict would thus be exhibited, where one arm of power exercised for the benefit of the people, should thus be employed to paralyse another.

Whatever, therefore, may be the power and right of a state to tax all land within her territory and make it contribute to the burdens of the state, it cannot enforce the payment of them from the United States by seizing the personal property or means used by the general government in performance of the duties and in execution of the powers intrusted to it. To the extent of the powers granted, the United States are sovereign, and cannot be treated by the states as a mere corporation, a citizen, or a stranger, and subjected to distress and execution for claims real or pretended, by every county and township officer. If the state of Pennsylvania has any just demand against the government of the United States for the use of her soil, recourse may be had to congress, to whom an appeal for justice can always be successfully made, especially when the appellant is a state of the Union. There is no necessity for this humiliating spectacle of petty officers of a state distraining or levying on the public property of the general government and treating it as a petty corporation, or an insolvent or absconding debtor.

For this reason alone, the court would feel justified in decreeing the injunction in this case to be made perpetual; but we deem it proper to vindicate the state of Pensylvania from the charge of having authorized any of her officers to assume the powers which the respondent claims a right to execute.

3rd. The fact that the legislature of Pennsylvania ever intended to authorize the taxation of the few acres of ground occupied and used by the government of the United States for mint, custom-house, navy-yard, arsenal, and barracks, has heretofore at different times been assumed, but to my mind, has not been satisfactorily proved.

The act of 1834 for laying county rates and levies, and that of 1844 which makes provision for a state tax, do not differ very materially in their enumeration of the subjects of taxation. But as the latter is evidently intended to be the most stringent and comprehensive it will be sufficient if we can show that it does not, on a proper construction of its language, necessarily include lands used by the United States for the public benefit and as means of executing the powers intrusted to them by the people.

Referring to its language, it cannot be denied that the mint, the navy-yard, garrison, &c., are "real estate," and that the word "land" in its widest legal acceptation might include them. But I need not cite cases to show the injustice and absurdity that would often arise from construing every word of a statute in its absolute or largest sense; or that the preamble, the subject-matter, the object, aim, policy and spirit of the whole act should be sought for, and the letter of any particular section or sentence made subservient to them. It is among the earliest rules of construction that "when statutes are made, there are some things which are exempted or foreprized out of the provisions thereof, though not expressly mentioned." Reniger v. Fogossa, Plow. 13b.

When general terms are used and the statute enumerates, as the statute of 1844 does, the particulars under a videlicit, it shows the intention of the legislator to limit the comprehensiveness of the general phraseology to the particulars enumerated, and those ejusdem generis. Thus we find that the whole purview, policy and aim of this act, is to raise a revenue from private property. No mode is pointed out whereby a tax can be collected from public squares, court houses, poor houses, forts, arsenals, &c. The terms "all other real estate," should therefore be construed to mean, all other real estate ejusdem generis of that enumerated. I need not repeat the enumeration to show that every article in it is private property. The property referred to as exempted by law, is "grave yards, churches, charitable and literary corporations," all private property. Things in the service of the people or public are never specially mentioned or excepted in any act imposing taxes, because the absurdity of such an application of their terms could never be anticipated. Can the assessor of the county in which they are, demand a county, poor or road tax on the public buildings at Harrisburgh? Have the public squares in Philadelphia been taxed for state, city or county purposes? Do the county jails and court-houses pay taxes for the support of the boroughs within which they are situated? Yet these are all included in the comprehensive term "real estate;" but "they are exempted or foreprized from the provisions of the statute by the law of reason," and because it would be absurd to suppose that an act to raise revenue from private property for public purposes, should be construed to embrace property already dedicated to public use, or purchased or paid for by public money.

Pennsylvania cases (Piper v. Singer, 4 Serg. & R. 354; President, etc., v. Frailey, 13 Serg. & R. 422) show that these general terms in the tax laws refer only to private property; things enumerated "et alia similia;" and that courthouses and bridges are not subjects of taxation though not specially exempted. The people of Pennsylvania are also citizens of the United States. The government of the United States is no alien here. It cannot be ignored, or treated as a mere corporation. The mint, the navy-yard, &c., are means to advance the prosperity, and defend the property and persons of the people of Pennsylvania, and may truly be called public property. State laws laying taxes on private property for public uses should not, from mere general or vague phraseology, be construed to include the property of the United States. A state ought not to be presumed to intend the exercise of a doubtful right, unless such intention is plainly set forth. When an officer claims a right under state authority to arrest the armaments or troops of the United States, to seize the horses and arms of her officers and soldiers (as in this case), he should be sure that he has the authority of the state for so doing.

The court is pleased to find that the legislation of Pennsylvania has not enumerated either the mint, navy-yard, arsenal, forts, or any other property held for the public benefit by the United States, and has therefore not intimated an intention to authorize her officers to interfere with the general government in the exercise of its constitutional powers. If it is the will of the people of Pennsylvania to insist upon the still doubtful right of taxing the few acres of land used by the general government for the public benefit, it will be easy for their legislature to express such intention in plain language, which cannot be misconstrued: and when the question of power is fairly raised, it will have to be decided. In the meantime, county, city and township assessors and collectors should refrain from making demands which they have no clear right to make, and certainly none to enforce in the manner attempted by the respondent in this case.

The people of Pennsylvania feel that the location of the mint, navy-yard, &c. within their territory, is a benefit and not a burthen. A power to tax is a power to destroy. For all that can be gained by the exercise of this power, it will hardly be worth while to contest the right, or insist on a demand which implies a power, if not a wish, to expel these institutions from her borders.

Let a perpetual injunction issue.

NOTE. There was nothing shown in this case, nor anything shown in the pleadings, as to whether or not these barracks had been purchased by the United States, by consent of the legislature of Pennsylvania. In cases of such purchases the legislature of that state may perhaps be considered as having itself declared that it does not consider that it has any power either to impose or authorize a tax. The question came before it in 1834. The assessors of taxes for Alleghany county, acting under the advice of counsel at Pittsburg, in Pennsylvania, laid a tax on an arsenal of the United States near that city. The land on which the arsenal stood had been bought by the United States from a private individual, and the legislature, by an act of March 19, 1816, enacted, "that the consent of the legislature of the commonwealth of Pennsylvania is hereby granted to a purchase, &c., lately made." Providing, that this shall not be so construed as to "impede or prevent the execution of any process, civil or criminal, under the authority of this state." Payment of the tax having been refused, the late Colonel Bomford, colonel of ordnance, transmitted the matter to the secretary of war of the United States, who addressed himself to the governor of Pennsylvania. After saying that the power claimed is "certainly very doubtful, and that the attempt to exercise it might lead to a troublesome litigation, or to an abandonment of the position," the secretary states that he is directed by the president to request the governor "to submit the subject to the consideration of the legislature of Pennsylvania, in the hope that a declaratory act will be passed expressly exempting this property from taxation." The governor referred the matter to the legislature, whose action was determined by the following report, which appears on their Journal: "Mr. Wallace, from the committee on the judiciary system, to whom was referred the message of the governor, &c., made the following report, viz: That in the opinion of the committee, it is perfectly clear that the commissioners of Alleghany county have no authority to impose any tax upon the property in question. By an act passed on the 19th March, 1816, the legislature of Pennsylvania gave its consent to the purchase by the United States of this property. By the constitution of the United States, it is provided that congress shall have power to exercise exclusive legislation in all cases whatever over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. The commonwealth of Pennsylvania, then, can exercise no legislation over the property in question. The legislature could not impose a tax upon it; nor can she authorize the county authorities to do it. But the committee do not recommend any legislative action on the subject. To declare the construction of the constitution belongs to the judiciary, not to the legislature. To now pass an act in terms exempting the property from taxation, would imply that it was not heretofore exempt; which in the opinion of the committee it most certainly was. They submit the following resolution, viz: Resolved, that the committee be discharged from the further consideration of the subject."

Case No. 16,660.

UNITED STATES v. WELD.

[This is a state case reported in 1 Kan. 597.]

Case No. 16,661.

UNITED STATES v. WELLS.

[2 Cranch, C. C. 43.] [1]

Circuit Court, District of Columbia. June Term, 1812.

GAMING—INDICTMENT FOR CHEATING—"MONEY."

Bank notes are not money [within the meaning of an indictment charging defendant with cheating another of his "money" at cards].

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

Indictment for cheating one Hollingshead of 80 dollars of his money at cards, (faro.) The evidence was that banknotes were won. Verdict, guilty. Motion for a new trial.

C. Lee and Mr. Morsell, for defendant, contended that banknotes are not money, and cited Grigby v. Oakes, 2 Bos. & P. 526; U. S. v. Morgan [Case No. 15,808], in this court; East, Crown Law, 597-599.

Mr. Jones, contra, cited Miller v. Race, 1 Burrows, 457; Rumball v. Murray, 3 Term R. 298; Wright v. Reed, Id. 554; Cousins v. Thompson, 6 Term R. 335.

THE COURT (nem. con.) was of opinion, that on an indictment, evidence of banknotes is no evidence of money. No case has been shown in which it has been admitted. In the cases cited the question was what was the general understanding of the word in common acceptation; but in an indictment the words are to be construed according to their strict legal meaning.

[Cited in U. S. v. Holly, Case No. 15,381.]

Case No. 16,662.

UNITED STATES v. WELLS.

[2 Cranch, C. C. 45.] [1]

Circuit Court, District of Columbia. June Term, 1812.

GAMING—MARYLAND STATUTES—GEORGETOWN BY-LAWS.

The by-law of Georgetown, prescribing a penalty for keeping a public gaming-table, does not supersede, nor repeal the Maryland act of 1797, c. 110, prescribing a penalty for keeping a faro-table in a house occupied by a tavern-keeper.

[Cited in U. S. v. Holly, Case No. 15,381.]

[Cited in Town of Van Buren v. Wells, 53 Ark. 368, 14 S. W. 40.]

Indictment under the act of assembly of Maryland of 1797, c. 110, for keeping a faro-table in a house occupied by a tavern-keeper.

There was a verdict for the defendant, at the last term, and a motion for a new trial, upon a question of law reserved, namely, whether the defendant was liable to the fine of £50 imposed by the act of assembly, he having been fined by a justice of the peace 20 dollars under the by-law of the corporation of Georgetown, of March 7, 1806, which enacts that any person who shall keep any public gaming-table or device for common gaming, within the corporation, shall "for every offense of gaming at such table or device for gaming, forfeit and pay the sum of twenty dollars." The offense for which he was thus fined was one of the acts of gaming at the faro-table for the keeping of which, in a house occupied by a tavern-keeper, the present indictment was found. The charter of the corporation of Georgetown gave them power "to restrain or prohibit gambling;" and authority to pass all laws not inconsistent with the laws of the United States, which may be necessary to carry into effect all the powers vested in the corporation.

THE COURT (FITZHUGH, Circuit Judge, absent) was of opinion that the payment of the fine under the by-law did not prevent the operation of the general law (Act 1797, c. 110), and ordered judgment to be entered up for the penalty of £50.

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

Case No. 16,663.

UNITED STATES v. WELLS.

[2 Wash. C. C. 161.] [1]

Circuit Court, D. Pennsylvania. April, 1808.

SET-OFF AGAINST UNITED STATES—UNLIQUIDATED DAMAGES.

1. When the claim which is asserted as a set-off, depends for its validity on the generosity of the government, it cannot be enforced by this court, against a legal demand upon the defendant by the United States.

[Cited in Smith v. Woodman, 28 N. H. 532.]

2. Damages which have not been ascertained, and are uncertain in their nature, cannot be made a matter of set-off.

This action was brought to recover a balance due from the defendant, as a collector of the excise duties. The defendant was an active officer, in resisting the opposers of the excise law, in the western counties of Pennsylvania, and in consequence of his activity, had his house burnt by the insurgents, and suffered other injuries to his property. By an act of congress, passed in 1795, [1 Stat. 423], upwards of eight thousand dollars was placed at the disposal of the president, to aid such of the officers of government, and citizens, who had suffered losses in their property, by the insurgents, as in his opinion stood in need of immediate assistance. The president appointed commissioners to view and value these losses, who reported that the defendant, amongst others, had suffered to the amount of —— dollars. The defendant received seven or eight hundred dollars, much less than the sum mentioned in the report. The subject of full compensation was afterwards brought before congress, and a favourable report made by the secretary of the treasury, to whom the subject was referred, which was rejected by the committee of claims. The defendant claims the difference between the estimated value of his losses, and the sum

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

received, to be considered by the court and jury, as so much paid by him to the United States, in part of what is now demanded of him; and of course to be credited to him in this action. The defendant informed against delinquents, under the excise law, and prosecutions were instituted against the defaulters by the government; but as connected with the general amnesty, granted to these people after the insurrection was quelled, the prosecutions were discontinued by order of the government. The informer being entitled to one half of the penalty on conviction, the defendant claims a credit for his half of all the penalties, in the cases where he was an informer; upon the ground that the government could not, by the act of its officers, deprive him of the rights which had once vested in him to these penalties. This was the second point in the cause.

Mr. Dallas, for plaintiff.
Morgan and Ingersoll, for defendant.

WASHINGTON, Circuit Justice. Neither of these claims, on the part of the defendant, can be supported. The first is made upon the generosity of the government, which might be very proper if presented to the legislative branch of the government, in its real character of an imperfect obligation. But the attempt to enforce it, in a court of justice, cannot possibly succeed. It could not be countenanced, even against an individual; let the defendant's counsel call it by what name they please, it is nothing more or less, than to offset a claim of damages sustained by a public officer, against the government. An appeal has been made to the liberality, and we think the justice, of the proper department, which did not succeed. It is impossible for us to assist the defendant.

The claim of the penalties is quite as unfounded. It is immaterial whether the United States, by discontinuing the prosecutions, could legally defeat the defendant of his half of the penalties, or not. If they could not, then the defendant was not injured by this act of the government. He might still have proceeded for his part; if he could, then, had the act been that of an individual, (the most favourable point in which to view the case for the defendant,) his claim would be for damages sustained; which might be more or less, according to circumstances; such as his ability to have supported the prosecutions, and that of the person prosecuted, to pay in cases of conviction. But the damages, being unliquidated, could not be offset.

The parties then agreed to withdraw a juror, and to refer the claims of the defendant to the officers of the treasury department.

Case No. 16,664.

UNITED STATES v. WELLS.

[3 Wash. C. C. 245.] [1]

Circuit Court, D. Pennsylvania. April Term, 1814.

STAY OF EXECUTION—RULE TO SHOW CAUSE.

1. Motion for a rule to show cause why execution shall not be stayed—the defendant claiming that he is entitled to further credits from the United States, which will reduce the amount of the judgment confessed in their favour.

2. The court will not even grant a rule to show cause why the motion shall not be granted, unless upon affidavit, stating precisely what credits are claimed, and the nature of them.

Judgment having been confessed in this case at a former term, the district attorney agreeing to stay execution, in order to give the defendant an opportunity to obtain such credits as the comptroller and auditor of the treasury (to whom the subject was by this agreement referred) might think the defendant entitled. Those officers did not act in the business; and the defendant now moved for a rule to show cause why execution should not be stayed, and the defendant permitted by some means to show credits against the judgment.

BY THE COURT. The reference, in this case, was agreed to merely as an indulgence to the defendant, who had no credits to offer, which could avail him at the trial. Unless he comes forward with a special affidavit, stating precisely what are the credits he claims, and the nature of them, the court will not even grant the rule.

Case No. 16,665.

UNITED STATES v. WELLS.

[15 Int. Rev. Rec. 56; 11 Am. Law Reg. (N. S.) 424; 4 Chi. Leg. News, 113; 7 Am. Law Rev. 366.]

District Court, D. Minnesota. Jan., 1872.

OFFENCES UNDER STATE AND UNITED STATES LAWS—CONCURRENT JURISDICTION OF STATE AND FEDERAL COURTS—AUTHORITY OF MARSHAL.

1. The same offence may be made punishable both under the laws of a state and of the United States, and over such offences the state and federal courts have concurrent jurisdiction.

2. In cases of concurrent jurisdiction the court that first gets control of the subject matter will continue to exercise jurisdiction until judgment, without molestation or interference from the other; this is the proper course to pursue in criminal as well as in civil cases.

3. The marshal exceeded his authority in taking the prisoner from the custody of the sheriff; he should have made return of the fact that the sheriff held the prisoner in custody for a violation of state laws.

4. The court, after citing various conflicting authorities, holds the indictment good, but believing the state exercised jurisdiction in good

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

faith, turns the prisoner over to be dealt with by the state authorities.

The prisoner [C. P. Wells] was indicted at this term of the court for passing counterfeit treasury notes. A plea in abatement was interposed, alleging that an indictment had been found against him at a regular term of the district court of the state of Minnesota, held in and for the county of Fillmore, on the 16th day of May, 1871, charging him with the very same crime of felony, as contrary to the statute and against the peace and dignity of the state of Minnesota; that subsequently, on the 15th of November, 1871, the prisoner was arrested by the sheriff on a bench warrant issued by the state court, was arraigned, pleaded not guilty, and the cause was continued until the next regular term of the court, and the prisoner committed to the custody of the sheriff in default of bail; that while the prisoner was held as aforesaid, he was taken out of the custody of the sheriff by the marshal of the United States, and is now held by him without authority of law. A demurrer is filed by the United States district attorney.

C. K. Davis, U. S. Dist. Atty.
Thomas Wilson, contra.

NELSON, District Judge. The question presented by the plea in abatement is an interesting one, and although I am not able to give it at this time the careful consideration which its importance demands, I think I am safe in announcing the conclusions arrived at upon the examination of such authorities as have been within my reach, at least, so far as to lay down a rule of comity which must exist between the federal and the state courts in cases of this character, whether they arise in the exercise of criminal or civil jurisdiction. The point involved, though interesting, is not entirely a new one. It has engaged the attention of both the state and federal courts, and the result in nearly every instance has been to recognize the right of both courts to punish, in the proper exercise of their authority, "when the same act [U. S. v. Marigold, 9 How. (50 U. S.) 570] might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the state and federal governments." The court in this case, regarded this doctrine as distinctly enunciated in the case of Fox v. Ohio, 5 How. [46 U. S.] 410, and adopted it as sound. In the latter case, the point raised was whether the statute of the state of Ohio, which provided for the punishment of passing counterfeit coin, was consistent with, or in contravention of the constitution of the United States, or any law enacted in pursuance of the constitution. After a full and exhaustive argument, the supreme court of the United States decided, Mr. Justice McLean alone dissenting, that the state possessed the power; but Mr. Justice Daniel, who delivered the opinion, said: "It is almost certain that in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one, would not be subject, a second time, to punishment by the other, for acts essentially the same, unless public safety demanded it."

A very great variety of opinions existed previous to these decisions, as is shown by the authorities cited by the learned counsel for the defence. My attention has been called to the case of Houston v. Moore, 5 Wheat. [18 U. S.] 1, in which Judge Washington says, "That if the jurisdiction be concurrent, the sentence of either court, either of conviction or acquittal, may be pleaded in bar of the prosecution before the other." The defendant's counsel insists that by a parity of reasoning the plea in abatement must be held good in the case at bar, and the indictment dismissed, as it is undeniable that the state court first obtained jurisdiction of the person of the offender. I feel the force of the reasons argued, but cannot assent to the opinion above expressed. Justice Johnson, who delivered a separate opinion in the case, appears to have announced the doctrine which has subsequently governed the court in cases involving similar questions of jurisdiction. He says, "Why may not the same offence be made punishable both under the laws of the state and of the United States? Every citizen owes a double allegiance; he enjoys the protection and participates in the government of both the state and the United States. * * * When the United States has not assumed this exclusive exercise of power, I cannot imagine a reason why the states may not also, if they feel themselves injured by the same offence, assert their right of inflicting punishment also." This opinion also dissents from the view maintained, that there might be embarrassment in the general administration of justice, and, I think, fairly indicates that rule of comity which should control the courts. Some able legal minds at that time, among the number Chancellor Kent, took the same view of the case as did the court in 5th Wheaton; others, Justices Story and McLean, have considered state laws similar to this one as repugnant to the constitution of the United States, and that they must necessarily yield; if not, then delinquents or offenders are liable to be twice put in jeopardy and be twice subjected to punishment, "against the manifest intent of the act of congress, the principles of the common law, and the genius of our free government." They also deny that after the federal congress have provided for the trial and punishment of an offence manifestly within their constitutional authority, a state law, creating and defining a like offence, could confer jurisdiction upon a state court to try it, without the consent of congress. Others, not exactly concurring in the reasons announced above, have doubted the authority of the state governments to enact any law which might make one act an offence against both governments. A very ingenious view is cited by Ioynes, Judge, in

the case of Jett v. Com., 18 Gratt. 946. Speaking of the decisions upon the question that a person could not by one act commit an offence against both the state and federal governments, he says: "An able writer advocated this view of the question, upon the ground that an offence against one state ought to be considered as merged in an offence against all the states." Some state courts adopted, at first, the dissenting opinion of Justice McLean in Fox v. Ohio, holding to the repugnancy of the state law to the federal constitution, and that there would be double punishment for one offence. I have not time to allude to the views taken by the courts in all of the cases cited by counsel, but they show conflict of opinion upon the subject. The principle involved again came before the supreme court of the United States in the case of Moore v. Illinois, 14 How. [55 U. S.] 13. In this case the plaintiff had been convicted under a statute of Illinois for "harboring and secreting a slave." It was strenuously urged that this law was in conflict with the constitution of the United States and the acts of congress on the subject of fugitives from labor. I will extract a portion of the opinion of the court by Mr. Justice Greer, which sets at rest the point raised by the counsel in regard to the effect of a plea in bar: "It has been urged that this act is void, as it subjects the delinquent to a double punishment for a single offence. * * * An offence, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offence. Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, assault, or murder, and subject the same person to punishment under the state laws for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, can not be doubted. Yet it can not be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently this court has decided in the case of Fox v. The State of Ohio, that a state court may punish the offence of uttering and passing false coin as a cheat or fraud practiced on its citizens, and in the case of the U. S. v. Marigold, that congress in the proper exercise of its authority, may punish the same act as an offense against the United States." That distinguished jurist, the late Chief Justice Taney, subsequently gave his sanction to the decision in this case, but he accompanied it with these remarks: "In all civilized communities it is recognized as a fundamental principle of justice that a man ought not to be punished twice for the same offence." In the case before him he intimated that, if the state court had inflicted punishment, he would have suspended sentence, to permit executive interference by pardon. See opinion of Reves, J., 16 Grat. 942.

These views, so manifestly humane, commend themselves to my sense of justice; but the concurrent jurisdiction must be regarded as settled. The state and federal courts both having jurisdiction, the question then naturally arises, How can a conflict be avoided? In the case before me, there was no process issued by this court that could reach the person of the prisoner. U. S. v. Van Fossen [Case No. 16,607], and note. The marshal exceeded his authority in taking him from the custody of the sheriff. He should have made a return of the fact, that the officer held the prisoner in custody for a violation of state laws. Had this course been pursued, no apparent conflict would exist. The marshal having arrested the prisoner and brought him before the court, it is for me to adopt a rule which suggests itself as sound, and which has been distinctly announced by the supreme court of the United States in several instances. Freeman v. Howe, 24 How. [65 U. S.] 583; Buck v. Colbroth, 3 Wall. [70 U. S.] 334. It is true these cases were not of a criminal nature, but I can see no distinction in principle. The point to be considered was, how to avoid embarrassment by a conflict of jurisdiction between the two courts. The court in substance say that the one which first has control of the subject matter shall continue to exercise jurisdiction until judgment, without molestation or interference from the other. This, it seems to me, is not only the prudent and wise course to pursue in criminal as well as civil cases, but is due to that common courtesy and comity which must exist between courts, and under a complex system like ours. I shall sustain the indictment in this case, but believing that the state exercised jurisdiction in good faith, leave the state court to deal with the offender. The federal authorities can take such steps as they may be advised of in the future.

Case No. 16,666.

UNITED STATES v. WENDELL et al.

UNITED STATES v. SAME.

[2 Cliff. 340.] [1]

Circuit Court, D. New Hampshire. Oct. Term, 1864.

NAVY AGENTS — MAXIMUM COMPENSATION — COMMISSIONS ON DISBURSEMENTS—RULE OF COMPUTATION—FORFEITURE OF COMMISSIONS.

1. The appointment of navy agents was first authorized by the act of March 3, 1855 [10 Stat. 676]. By that act the maximum compensation of such officers is fixed at three thousand dollars per annum.

2. Such maximum compensation is in terms based on the period of one year, to be derived from commissions on disbursements, but cannot exceed three thousand dollars, even though the legal rate of commissions on sums actually disbursed, would amount to more than that sum.

3. The amount disbursed does not determine the maximum, but only the proportion of the maximum to which the officer is entitled when his commissions do not reach the maximum amount; and the excess of one year cannot aid the deficiency of another.

4. Annual compensation is the rule of decision, not per quarter nor for any subdivision of a year.

5. Yearly disbursements, as ascertained by the monthly accounts, furnish the means of computing the yearly compensation of the navy agent, with the limitation that the compensation cannot exceed three thousand dollars.

6. Time of service and the amount disbursed furnish the data for computing the amount of compensation for any fractional part of a year, because the maximum being based on an entire calendar year, the proportion due the officer, can only be ascertained by calculating the proportion of the year which may have elapsed.

7. Where an officer of the United States, accountable for public money, refuses to pay into the treasury the sum or balance reported to be due upon the adjustment of his account, under the act of 3d of March, 1797 [1 Stat. 512], the accounting officers of the treasury are authorized to add to such sum only the commissions due the officer on such unsettled account. The statute does not contemplate the forfeiture of all commissions paid such officer upon settled accounts during the whole term of his previous service.

Debt on the official bonds of the defendant as navy agent for the port of Portsmouth, in this district. The declaration in each case was in the usual form as at common law. The bond in the first suit was dated the 25th of August, 1857, and in the second the 24th of May, 1858. The suits were against [Henry F.] Wendell as principal, and the others [Daniel Marcy, Richard Jenness, Thomas E. Oliver, and Albert E. Blaisdell] as sureties in said bonds. The cases were submitted upon facts agreed. The principal defendant was first appointed navy agent on the 1st of September, 1857, in the recess of the senate, and he continued to hold the office and to discharge the duties thereof under the appointment, until the 24th of May, 1858, when he was regularly nominated and appointed to the office by and with the advice and consent of the senate, for the term of four years. Under the last appointment he continued to discharge the duties of the office until the 10th of May, 1861, when he was suspended, and another appointed in his stead. The defendants, among other things, pleaded performance. The replication alleged that the principal defendant while in office received large sums of public money, to wit, $12,073.77, and that he had neglected and refused to pay the same into the treasury of the United States. In the rejoinder the defendants alleged that the principal obligor had fully accounted for all sums received by him, and that he had paid over the whole amount, and tendered an issue, which was duly joined by the plaintiffs.

The chief question presented for decision was whether the principal defendant had retained larger sums than he was entitled to receive as compensation during the period he held the office of navy agent. He charged as commissions for the month of September, 1857, the sum of $351.91; but the department holding that his maximum compensation was only at the rate of $3,000 per annum, refused to allow more than $250 for that month. The balance of the account was accordingly disallowed, and he was directed to debit himself with the difference in his next account, and the agreed statement showed that he complied with the direction. The agreed statement also showed that his disbursements constantly exceeded $2,000 per quarter, so that under the rule adopted by the department he was entitled to the admitted maximum rate of compensation. Conforming to that rule, the incumbent subsequently, as it appeared, stated his accounts with the department at the end of each quarter of the calendar year, claiming $750 for the quarter until the first quarter of the year 1861; and the accounts as rendered and settled showed that he was allowed that sum quarter yearly as compensation up to that time. When he rendered his account for the first quarter of the year 1861, he presented a claim for $2,000 as commissions, instead of $750, as previously charged, but the department rejected the excess and allowed only the last-mentioned amount. From the 1st of April, 1861, to the 10th of May, same year, when the defendant was suspended from office, he disbursed the sum of $6,320.81, for which he charged nothing in his account rendered to the department. The accounting officers of the treasury, however, allowed him therefor, in the adjustment of his accounts, two per cent, amounting to $126.46, as commissions. The amounts so allowed, to wit, $750 and $126.40, were deducted from the $2,000, as charged in his account, and the balance was disallowed. The adjustment as made left the defendant the debtor of the United States to the amount of $1,123.60, and at the close of his term of service the accounting officers of the treasury reported that sum

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

as due from him to the United States. Pursuant to that adjustment, the fourth auditor of the treasury, on the 13th of August, 1861, notified the defendant of the amount so found to be due. This notice was substantially repeated on the 16th of April, 1862, and on both occasions he was directed to pay the amount into the treasury as part and parcel of the public money. Neither of the demands having been complied with, the department added interest to the sum reported to be due, amounting to $73.77. The primary claim of the plaintiffs was for those two sums, amounting in the aggregate to $1,197.37, at the time when the adjustment was made. The commissions allowed and actually paid the defendant while he was in office amounted to $10,876.40, exclusive of the sum which was disallowed in his last account renderd to the department. Payment of the sum reported as due having been refused by the defendant, the accounting officers of the treasury recharged to him the whole amount of the commissions received by him while he was in office, and the plaintiffs claimed to recover that amount, in addition to the sum and interest thereon reported to be due in the adjustment of the last account. On the other hand, it was claimed that the principal defendant was entitled to retain the whole sum reported to be due, in addition to what he had previously received, and it was denied that the plaintiffs had any pretence of right to recharge him with the commissions which had been properly adjusted, allowed, and paid by the authorized agents of the government.

C. W. Rand, U. S. Dist. Atty.

The statute of March 3, 1855 (10 Stat. 676), virtually makes the office of navy agent a salaried one, and a pro rata allowance for the portion of the year he holds the office is all that he can legally claim. Hoyt v. U. S., 10 How. [51 U. S.] 109. It is so with collectors and officers of the customs. 9 Stat. 3, § 1. The language of the statute is plain. Navy agents receive a certain per cent commission on the amount disbursed until compensation reaches $3,000 per annum, not until it reaches $2,000 for six months, or $3,000 for eight months and ten days, as defendants claim, but clearly only until the amount retained gives the officer a compensation at the rate of $3,000 a year. U. S. v. Dickson, 15 Pet. [40 U. S.] 141, and U. S. v. Pearce [Case No. 16,021] are founded on statutes different in their language and scope from the one under consideration. The latter case bears more directly upon the case now at bar, and by the statute of May 7, 1822 (3 Stat. 693, 694), upon which that case was based, congress evidently did not contemplate the construction put upon it by the court, whether its language warranted that construction or not, for they corrected that construction and virtually reversed the decision of the court by the statute of February 11, 1846 (9 Stat. § 1, p. 3.) The acquiescence of Mr. Wendell in the mode of accounting adopted by the treasury department, which is actually required by the statute of February 11, 1846, in the case of collectors and other officers of the customs, is an implied admission against him, and against the position he now assumes. 1 Greenl. Ev. § 197; Allen v. McKeen [Case No. 229]; Peele v. Merchants' Ins. Co. [Id. 10,905].

J. S. H. Frink, for defendants.

The act of March 3, 1855, graduates the compensation of these officers to the amount of labor performed and the responsibilities incurred by them. The only limitation is, that they shall not receive more than a fixed sum "per annum" (during the year), as we translate it. Until their commissions reach the sum of $3,000, they are entitled to calculate them at the rate prescribed by law, and to retain them for their own use, so far as their disbursements will justify it. They have performed the labor and incurred the responsibility for which congress intended to compensate them at a determined rate; and the reward becomes theirs as soon as thus earned. It is the quantity of the service, and not its period which the law contemplates, subject only to the limitations suggested. U. S. v. Dickson, 15 Pet. [40 U. S.] 165; U. S. v. Pearce [Case No. 16,021]; U. S. v. Edwards [Id. 15,026]; U. S. v. McCarty [Id. 15,657]. On estimating the amount of commissions, to be allowed navy agents "per annum," the better rule seems to be that they are to be calculated by the official, and not the fiscal or calendar year. Now in applying these well-considered opinions of the court to the case at bar, we submit, that Mr. Wendell has held twice the office of navy agent, between the 1st of September, 1857, and the 10th of May, 1861, under entirely distinct appointments. His first commission, under the presidential appointment, during the recess of the senate, continued until the next session of the senate; his subsequent nomination to the senate, and appointment with their assent and confirmation, continued until he was superseded in 1861. See McAffee v. Russell, 29 Miss. 84; U. S. v. Le Baron, 19 How. [60 U. S.] 74; Mullikin v. State, 7 Blackf. 77. We submit, then, that Mr. Wendell is entitled to compute his commissions for any period of a year, according to the amount of his disbursements; that these commissions become his, as soon as the disbursements are made; that the established method of computing his disbursements is for the official year; that he is to estimate his disbursements for two terms of office; that his disbursements have been sufficiently large to cover the sum now sought to be recovered, as part of his commissions, in addition to that already received; and that he has not waived any right, thus to compute his commissions. If, however, we concede the position of the plaintiffs, that these dis-

bursements are to be reckoned by the calendar or fiscal year, but still adhere to the decided cases, that Mr. Wendell's compensation is to be determined up to a certain sum, solely by the amount of his disbursements, and not by the time occupied in making them, when the computation is more favorable to us.

The plaintiffs further claim that if any sum is found due by the court from defendant, it works a forfeiture of his previously acquired commissions during the entire term of his service. 1 Stat. 512, § 1. To this the following suggestions are made: It is a penal act, and should be construed strictly. The construction now sought to be put upon it would not effect the intentions of its authors. It was intended as a penalty for wilful detention of a balance due, and not as a check to a judicial determination of the rights of receivers of public moneys; otherwise it would prevent judicial inquiry, in all cases raising a doubt as to the right to retain a sum reported to be due, because the risk of forfeiture would be so disproportionate to the claim that a public officer could ill afford to litigate his rights. The whole object of a penal statute is to punish some wrongful act, wilfully committed. And in another view, the construction given this act by the plaintiffs would work great injustice. Suppose a large balance to be reported as due from an officer to the United States by the auditor of a department. The officer, believing that he is authorized in so doing, retains it after demand, and it is litigated. It is adjudged that the greater portion of the sum has been lawfully retained, but judgment is recovered by the United States against such officer for a small sum in excess of the sum he had the right to withhold. If the theory of the plaintiffs is true, he has forfeited by his partially successful attempt to establish his right, the whole of his commissions for the service of years. Under the rule governing the construction of penal statutes, it ought not to receive so unjust an interpretation as this. And if the court should be of the opinion that there can be any forfeiture under the circumstances of the case at bar, we pray its consideration as to whether there can be any forfeiture, unless the full balance reported to be due is recovered by the plaintiffs; because if a partial recovery is had, the right and wrong of the matter is equally balanced. Both parties are right and both wrong. The defendant could not have paid over the entire sum reported to be due, without relinquishing a portion of his salary beyond all recovery. We respectfully invite the court to consider whether the commissions referred to in the statute, do not mean the commissions upon the sum retained only. Such a rule would be more consistent with the equities between the parties than the one sought to be established by the plaintiffs, and the language of the law would seem to justify it. The language of the act is substantially that the commissions and interest shall be forfeited. It is not contended that the interest is upon any other sum than the one detained; and in fact any other view of it would be nonsensical. The commissions forfeited are to be upon the same sum as the interest, and we submit that the forfeiture of both commissions and interest is limited to those accruing on the sum detained.

CLIFFORD, Circuit Justice. This controversy has arisen from a difference of opinion as to what was the measure of compensation to which the principal defendant was entitled. The condition of the respective bonds is that the incumbent in the office shall faithfully discharge all his duties as navy agent for the port where he was appointed. A doubt cannot be entertained that the officer, under that condition, was obliged to account for and pay over all public money which came to his hands, except what he was entitled to retain as compensation for his services. The question presented, therefore, cannot be satisfactorily solved, without first ascertaining what sum the incumbent was lawfully entitled to retain as compensation.

Navy agents were first authorized to be appointed by the third section of the act of the 3d of March, 1809; and the same section provides that their compensation shall not in any instance exceed that allowed to the purveyor of public supplies. 2 Stat. 536; Browne v. U. S. [Case No. 2,036]. They are described in the section authorizing their appointment, not in terms as navy agents, but as agents appointed either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement, in any other manner, of moneys for the use of the navy of the United States. U. S. v. Cutter [Id. 14,911.] Such agents receive and disburse large sums of money, and they are required by law to make monthly returns, in such form as may be prescribed by the treasury department, of the moneys received and expended during the preceding month, and of the unexpended balance in their hands. 2 Stat. 536. Their term of office is for four years, removable at pleasure; and such appointments are required to be submitted to the senate for confirmation. 3 Stat. 582; 5 Stat. 703. The provision for their compensation as originally enacted, remained unchanged until the 3d of March, 1855, when the act was passed which gives rise to the present controversy. 10 Stat. 676. An express provision is made by that act, that in lieu of $2,000 per annum, the maximum compensation now allowed by law to navy agents, there shall be allowed two per centum commission on the first $100,000, or under, dis-

bursed by them, and one per centum on every succeeding $100,000 disbursed by them, until the compensation reaches $3,000 per annum, which amount shall be the maximum compensation for such agents. Certain provisos are also annexed to the section, which it is not important to notice at the present time. Statutory regulations can hardly be clearer or more explicit than is the language of the section upon the subject under consideration. The compensation of the officers named cannot exceed the sum of $3,000 for the services of one year. Attention to the language employed will show, that the maximum is in terms based on the period of one year, and in point of fact upon nothing else, because, let the amount be ever so great, the compensation of the officer cannot exceed the yearly sum of $3,000. The amount disbursed does not determine the maximum, but only the proportion of the maximum to which the officer is entitled, as is evident from the fact that the excess of one year cannot aid the deficiency of another. The maximum compensation is fixed by law at $3,000 per annum, and the reference undoubtedly is to the calendar year, as is obvious from the fact that the allowance of the per centum, that is, the one per centum or two per centum, as the case may be, is continued until the compensation reaches the sum of $3,000. The compensation per annum, therefore, is the rule of decision, and not per quarter, nor for any other legal subdivision of the year. Yearly disbursements, as ascertained by the monthly accounts, furnish the means of computing the yearly compensation of the officer, and of determining what proportion of the maximum he is entitled to receive for that period of time, subject to two important limitations prescribed by law; that is to say, that the compensation cannot exceed $3,000, and, that the act prescribing the maximum shall not be so construed as to reduce the salary to which any navy agent was entitled under previous laws.

The time of service and the amount disbursed, are the data for computing the amount of the compensation for any fractional portion of the year, because the maximum being based on an entire calendar year, the proportion of it due to the officer, if earned, can only be determined by ascertaining the proportion of the year which has elapsed. Where officers of the United States, entitled to a yearly compensation are superseded within the year, the general rule is that they are entitled to a pro rata compensation. Reference is made by the defendants to the case of U. S. v. Dickson, 15 Pet. [40 U. S.] 141, where a different rule was applied, but in the judgment of this court, the rule there prescribed is not applicable in this case. Hoyt v. U. S., 10 How. [51 U. S.] 143. The contrary rule is the correct one in the settlement of accounts with collectors and all other revenue officers, and with ambassadors and ministers plenipotentiary, and perhaps, at the present day, with all other persons holding office under the federal government. 9 Stat. 3; 11 Stat. 52. The act of the 11th of February, 1846, provides that collectors and all other officers of the customs, serving for a less period than one year, shall not be paid for the entire year, but shall be allowed in no case more than a pro rata of the maximum compensation of said officers respectively, for the time only which they actually serve as such collectors or other officers, whether the same be under one or more appointments, or before or after confirmation. A special reference is also made by the defendants to the case of U. S. v. Pearce [Case No. 16,021]; but it is a sufficient answer to that case, to say that the act of congress first referred to, passed since the date of that decision, establishes a different rule.

The conclusion, therefore, upon this branch of the case, is that the accounts of the principal defendant, so far as respects the balance of $1,123.60, reported to be due, and which on the 30th of August, 1861, he was directed to deposit to the credit of the treasury, were correctly adjusted by the accounting officers of the department, and that the plaintiffs are entitled to recover for that amount, together with interest on the same from the date of settlement.

The second proposition of the plaintiffs is that the principal defendant having refused to deposit the balance reported to be due, as directed by the proper officer of the department, they, the plaintiffs, were authorized to recharge the whole amount of the commissions previously allowed to him during the whole period of his service in that office. The claim is based upon the first section of the act of the 3d of March, 1797, which in effect provides that when a person accountable for public money shall neglect or refuse to pay into the treasury the sum or balance reported to be due, upon the adjustment of his account, it shall be the duty of the comptroller to institute suit for the recovery of the same, adding to the sum stated to be due, the commissions of the delinquent; and the act declares that the same shall be forfeited in every instance where suit is commenced and judgment is obtained thereon. 1 Stat. 512. But the proposition cannot be sustained, because the whole amount recharged had been lawfully and conclusively adjusted and allowed to the defendant. The "commissions of the delinquent" are only such as are pending, and are not such as have been paid to the officer, under a final adjustment of his accounts. Where suit is commenced under the circumstances described in the provision, all un-

settled and pending commissions are to be adjudged forfeited in case judgment is obtained in favor of the United States. Addition may be made to the sum reported to be due of the unsettled commissions in the hands of the delinquent, but it is not the purpose of the act to reopen accounts fairly and conclusively adjusted and settled. Instances may be found where the same person has held a particular office for forty years, and if the proposition be correct, a dispute in the settlement of his account for the last quarter of the fortieth year would open the accounts for the entire period he held the office. Such a construction of the act of congress cannot be adopted, and the proposition is accordingly overruled. Referring to the agreed statement, it will be seen that the whole amount reported to be due from the principal defendant accrued under the bond declared on in the second suit. The plaintiffs are entitled to judgment in the second suit, but in the first suit judgment must be entered for the defendants. Costs are allowed in the second suit but the United States are never liable to costs.

UNITED STATES (WENTWORTH v.). See Case No. 17,414.

Case No. 16,667.

UNITED STATES v. WEST.

[5 Cranch, C. C. 35.] [1]

Circuit Court, District of Columbia. Nov. Term, 1836.

SLAVERY—PRESUMPTION FROM COLOR—EVIDENCE TO REBUT.

Evidence that a colored person has resided in the county and city of Washington for a year and more, going at large as a free person, and claiming to be free, in the absence of all contradictory evidence, except color, is sufficient to rebut the presumption of slavery, arising from color.

A colored woman was offered as a witness for the United States.

W. L. Brent, for defendant [the negress Priscilla West] objected that prima facie she was a slave.

Mr. Eckloff testified that she had lived in his family as a free woman; that he had known her about twelve months; and that she was generally reputed to be, and passed as a free woman.

D. Waters, a constable, testified that he had known her about a year, and that she was generally reputed to be a free woman. That she had acted openly as such, and everybody believed her to be free.

THE COURT (nem. con.) said this evidence was sufficient to rebut the presumption arising from color, and to throw the burden of proof on the defendant.

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

Case No. 16,668.

UNITED STATES v. WESTERVELT.

[5 Blatchf. 30.] [1]

Circuit Court, S. D. New York. Nov. 13, 1861.

SLAVE TRADE — RECEIVING NEGROES ON BOARD—CRIMINALITY OF SUBORDINATES—CONSTRAINT AS EXCUSE.

1. Under the fourth section of the act of May 15, 1820 (3 Stat. 600), in regard to the slave trade, the offences prohibited may be committed by any citizen of the United States, on board of any vessel, whether foreign or American.

2. Under that section, it is an offence to receive negroes on board of a vessel, from persons who have seized them and brought them to the vessel's side, in violation of the law; and any person of the vessel's company, on board of the vessel, who is competent to commit a crime, commits such offence by voluntarily receiving, or actually participating in the reception of, the negroes on the vessel, with the intent to make them slaves.

3. Facts and circumstances stated which would amount to a restraint, so as to deprive the acts of a voluntary character, in the case of the subordinates of a vessel.

This was an indictment founded on the fourth and fifth sections of the act of congress of May 15, 1820 (3 Stat. 600), entitled "An act to continue in force 'An act to protect the commerce of the United States and punish the crime of piracy,' and also to make further provisions for punishing the crime of piracy." The defendant [Minthorne Westervelt], at the time of the commission of the offence charged, was the third mate of the ship Nightingale.

E. Delafield Smith, U. S., Dist. Atty.

Charles O'Conor and John McKeon, for defendant.

Before NELSON, Circuit Justice, and SHIPMAN, District Judge.

NELSON, Circuit Justice (charging jury). This indictment is founded upon the fourth and fifth sections of the act of congress of May 15, 1820 (3 Stat. 600). The fourth section is as follows: "If any citizen of the United States, being of the crew or ship's company of any foreign vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned in the whole or part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land from any such ship or vessel, and, on any foreign shore, seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring, or carry, or shall receive, such negro or mulatto on board any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate, and, on conviction thereof before the circuit court of the United States for the district

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

wherein he may be brought or found, shall suffer death." The fifth section annexes the same penalty against any citizen or foreigner who shall, under the circumstances stated in the previous section, forcibly confine or detain any negro or mulatto on such vessel, with the intent to make him a slave, or aid and abet in thus confining and detaining him. The third count of the indictment charges that the prisoner, a citizen of the United States, of the ship's company of the ship Nightingale, a foreign vessel, engaged in the slave trade, did, piratically and feloniously, receive eight hundred negroes on board of such vessel, with the intent to make them slaves. The seventh count charges the prisoner, a citizen of the United States, with aiding and abetting in the forcible confinement and detention of the negroes, with intent to make them slaves. This is made an offence under the fifth section of the act. We lay this count out of the case, inasmuch as, if the prisoner is guilty at all, he is guilty as principal. Indeed, though there are several counts set forth in the indictment, we do not think it necessary to call your attention to any other than the third.

The prisoner at the bar is a citizen of the United States; and hence it will not be material to trouble you with any observations upon the point, as to whether the ship Nightingale, at the time of the alleged crime, was an American vessel, or owned, in whole or in part, by American citizens. The prisoner being a citizen, the offence may be committed by him on board of any vessel, whether foreign or American. We have, therefore, confined the application of the evidence in the case to the third count in the indictment, which lays the offence against the prisoner as a citizen of the United States, and charges that he did, piratically and feloniously, receive the negroes on board of the ship Nightingale, with the intent to make them slaves.

A question has been made, whether or not some force does not enter as an element into the crime, under this clause of the statute. There are four descriptions of the offence, to be found in this section: (1) Landing and seizing the negroes; (2) forcibly bringing and carrying them on board; (3) decoying them; (4) receiving them on board of the vessel. The first two comprehend the use of force as a necessary element; the last two, decoying or receiving on board, do not. The question here is under the last clause of the statute. We instruct you, that receiving the negroes on board, from persons who had seized and brought them to the ship's side, in violation of the law, may constitute this offence, under the statute.

It has been urged, that the offence under this section can be committed only by some person who has an interest in the negroes, or, at least, by some person who has the power upon the ship to receive or reject them. But this, we think, is too narrow a construction of the act. Our view of it is, that any person of the ship's company, on board of the ship, who is competent to commit a crime, is capable of committing the offence under the statute, by voluntarily, freely, and willingly receiving the negroes upon the ship, with the intent to make them slaves, or by actually participating in such reception, with the like intent, which makes him a principal in the offence. The statute excludes any such distinction, in our judgment, as is set up by the counsel for the prisoner. Any citizen, being of the crew or ship's company of the vessel, may be charged with the offence. This is the only limit as to the condition of the persons exposed to the crime. We agree, that a person may engage or participate in the reception of the negroes on board, and still not be guilty of the offence. He may be acting under compulsion, physical or moral. The act may be done against his will. He may be beguiled into it by the arts or power of others, until it is too late for him to extricate himself. The hands and subordinates of the ship may be deceived by the master and others engaged and interested in the crime, under pretext that the vessel is engaged, or is to be engaged, in a lawful trade, and may not be undeceived until they are in such a situation, on a semi-barbarous coast, as to be in a degree helpless, and obliged, or apparently obliged, to go on in the performance of their duty on the ship. Undoubtedly, in such cases, and under such circumstances, a court and jury should look very deliberately and astutely into the facts and circumstances, and, before a conviction is had, should be satisfied that the prisoners acted freely, voluntarily, willingly, and without any restraint from the facts and circumstances surrounding them. These are considerations that will always enter into the deliberations of the court and jury, in the case of the trial of subordinates of the crew of the vessel, and are fit and proper to influence the jury in passing upon the guilt or innocence or the prisoner. They apply exclusively to the subordinates of a vessel, who are obliged to obey the orders of their superiors. We do not mean that an unlawful order is to be obeyed. We refer to the general condition of the subordinate, when he has not the power to disobey. The considerations referred to have no application to the master of a vessel, or to the owner of negroes, who engages in the slave trade.

Now, with these views of the law, it will be for you to look into the evidence in the case, and examine and weigh it, and determine whether or not the prisoner voluntarily, freely, and willingly, without any restraint from the facts and circumstances surrounding him, participated in receiving the negroes on board of the vessel at the time mentioned, with the intent to make them slaves. The first inquiry naturally arising

out of the facts in the case is, whether the prisoner had knowledge, at Liverpool, that the vessel was intended to engage in the slave trade; for, if he had, then undoubtedly this fact would have considerable influence upon your views of his subsequent acts on board. On this point, no witness has brought home to the prisoner this knowledge; and the question rests, therefore, upon the character of the cargo and the fitting out of the vessel for her voyage to the African coast. In explanation of this part of the case, evidence has been given that the cargo and fitting out of the vessel corresponded with cargoes for a lawful trade on that coast. The cargo of the vessel, therefore, as to the intent and purpose of the voyage, is equivocal, and, of itself, may as well lead to the conclusion of a lawful as of an unlawful trade; and, if the evidence is equipoised, as to its effect in this respect, its bearing upon the case is very much qualified, and perhaps neutralized. If you should find that the prisoner had no knowledge, at Liverpool, of the intention of the master of the vessel to engage in the slave trade, then your inquiry will be as to the time when he is chargeable with this knowledge, and whether, after that, he was in a condition to extricate himself from the vessel; or, in other words, whether or not you will hold him responsible, under his condition and the attending circumstances, for not escaping from the vessel, so as to avoid any participation in the offence. These are considerations which belong to you, and upon which it is your province to pass. The evidence before you, bearing upon this part of the case, has been very fully examined and discussed, and we are very sure that the whole of it is familiar to you, and shall not take up your time in going over it. The question you have to determine is, whether or not the prisoner did participate in the reception of the negroes, on board of the Nightingale, from persons who had seized them on the land, and brought them by force to the vessel, freely, voluntarily, and willingly, without any restraint from the facts and circumstances surrounding him at the time, and with the intent to make them slaves. If you come to the conclusion that he did, then he is guilty; if not, then he is not.

Evidence has been given of the good character of the prisoner previous to this charge. This is always admissible in behalf of the prisoner; and, though it will not overcome satisfactory proof of guilt, yet it is entitled to weight in a case which is left open to explanation on the evidence. With these remarks, we submit the case for your consideration.

The jury did not agree on a verdict.

UNITED STATES (WESTON v.). See Case No. 17,457.

Case No. 16,669.

UNITED STATES v. WHALAN et al.

[7 Int. Rev. Rec. 161; 1 Am. Law T. Rep. U. S. Cts. 63.]

District Court, D. Massachusetts. 1868.

CONSPIRACY TO DEFRAUD THE UNITED STATES.

[In the act of March 2, 1867 [14 Stat. 471], which defines the misdemeanor of conspiring to defraud the United States, the word "conspiracy" is used in a somewhat more comprehensive meaning than that which it has at common law, and it is immaterial whether the fraud contemplated has been declared a crime by statute or not.]

This was an indictment founded upon the thirtieth section of the act of March 2, 1867, by which two or more parties conspiring together to defraud the government are deemed guilty of a misdemeanor, and, on conviction, are held liable to a penalty of not less than one thousand nor more than ten thousand dollars, and to imprisonment not exceeding two years. A joint indictment was found against James Whalan, William A. Wright, Joseph Boyden, Edward H. Maxwell, W. Howard Hathaway, N. Porter Cleaves, John E. Cassidy, and Robert L. Davis, who were charged with conspiring together to defraud the government of taxes upon spirits stored in the bonded warehouse of W. H. Hathaway and N. Porter Cleaves. The spirits were taken out upon fraudulent bonds, either for rectification or transportation, for exportation to Eastport, Me. A vessel was bought, a cellar hired, and water was substituted for the spirits and put on board of the vessel, which was afterwards seized. The government discontinued as to four of the defendants,—Maxwell, Hathaway, Cassidy, and Davis,—who were discharged. Wright pleaded nolo contendere, and appeared upon the stand as a witness, confessing the whole scheme, and the case proceeded only against two,—Boyden and Cleaves. [See Case No. 14,632.]

G. S. Hillard, H. D. Hyde, and G. M. Reed, for the Government.

H. W. Paine and R. M. Moore, Jr., for Boyden.

L. S. Dubney, for Cleaves.

LOWELL, District Judge (charging jury). The statute under which this indictment is framed was passed March 2, 1867, and in the 30th section of the 169th chapter of the acts for that year. The act relates to various matters connected with the internal revenue department, and the various taxes to be assessed. There is, among others, this general provision of law, which has a wide application, and covers all frauds which human ingenuity can devise. "If two or more persons conspire either to commit any offence against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties * * * shall be deemed

guilty of a misdemeanor," etc. Conspiracy is an agreement by two or more persons to commit an unlawful act or acts. It is sometimes defined to be an agreement to commit an act in itself unlawful, or to do an act lawful in itself by unlawful means. Either the final result or the means are to be unlawful. There is no special force in this division, inasmuch as something unlawful is to be done. This is the common-law definition independent of statute, and if the statute spoke simply of a conspiracy, it ought perhaps to be construed with reference to the common-law definition. But in this statute the word has a more comprehensive meaning, because it includes defrauding the United States in any manner whatever, whether the fraud had been declared a crime by any statute or not. It is therefore immaterial to consider whether the acts were a crime independent of the statute, if there is shown a conspiracy to defraud the government.

The indictment sets forth that the United States had under its control in the Third district, in two bonded warehouses, those of Cleaves and Hathaway, certain distilled spirits, distilled in the United States, the property of certain persons to the jury unknown; that the persons mentioned in the indictment, of which the defendants are two, conspired to defraud the United States of a tax which would be due upon being taken out for consumption. The law for the regulation of the department shows that owners of spirits were allowed to keep them in a warehouse approved by the government under the charge of two persons, one a proprietor, and the other a storekeeper, who has a separate lock and key. It is the duty of the latter to see to it, that the goods were not delivered out except upon special permits. Those permits might be granted under certain circumstances, as might be convenient for the owners. If the owners of the spirits required them to be purified by rectification, they might take them out temporarily, giving a bond with sureties for their return within a specified time, less three per cent. as an average loss in going through the process. (2) The spirits might be taken out for sale, and then the tax was paid. (3) Or for transportation to another warehouse in any district in the United States. A bond in this latter case is given that the spirits will be transported to the district and warehoused, and a certificate is to be sent that they have been so warehoused. (4) Or they may be taken out for exportation, when the tax need not be paid, as they are allowed to be exported free from duty; the government in this case presuming that it will get an equivalent in the increase of commerce. In this fourth case the method is somewhat complicated. Bonded warehouses exist all over the country, in inland as well as seaport towns. That the goods may be exported they must be at a port. It is contemplated in the law that the goods may be taken to a seaport town for exportation.

This complicated system of warehousing gives the opportunity for fraud by persons disposed to avail themselves of it; and it is said by the government that it was availed of in this case. The indictment sets forth the manner in which the government charge that the person undertook to commit the fraud. No argument has been addressed to the court in relation to the indictment. The act charged is stated in various ways, to be adapted to the various phases of the case which might be developed by the evidence. In some of the counts the charge is stated very generally. In others the particular practices to be put into execution are set forth,—in one by changing the marks; in another by giving worthless bonds; in one or more by a fraudulent pretence that the goods were intended for exportation; in all, some act or acts are alleged to have been done to carry out the conspiracy. It is not necessary that the jury should discriminate between them. If any count is good, it will support a general verdict. It is not denied that some of the persons charged were guilty of a corrupt agreement to obtain the goods, with the intent to defraud the government by some of the means alleged. It is not denied that some of those who were first charged were not guilty. The question for the jury is whether either or both of the defendants have been proved beyond all reasonable doubt to be partakers in this agreement to defraud the government.

One of the witnesses produced for the government stands before you in a peculiar position. He comes here stating that he was one of the parties to the fraud, one of the chief actors. He undertakes to tell the jury how the fraud was conceived, and how it was to be carried out. It is a rule of practice for judges in the exercise of their duty to say to juries that a person who declares himself on the stand to be guilty of the crime charged stands in such a relation to the case as to render it unsafe to convict upon his testimony alone, unless confirmed upon material points by evidence to which no suspicion attaches. This is no doubt a wise and proper rule of practice. It is sometimes necessary to call such witnesses, but they stand before a jury under a strong bias and confessing their own infamy. It is a rule of practice as old as the other one that a person who thus testifies will not be punished unless he tells an entirely different story on the stand from what he has told out of court. When a number of parties have been arrested, there is always a strong temptation to throw the blame on each other, and to buy immunity by evidence; and the stronger the suspicions are against one, the greater is the temptation, because he has less chance of escape in any other way. So that the juries look for corroboration from independent witnesses who testify to material facts in the case; and these facts must tend not only to show his own knowledge of the crime, which he admits, but the complicity of the others.

The evidence has been before the jury. The whole subject has been gone into with great detail. The government say that they have produced independent testimony of acts which show the truth of the story given by Wright, and to give him a credit which his own circumstances would not justify. His story is that this scheme was first started in New York, in a conversation between him and Boyden. It was first proposed to carry out the plan in Brooklyn, but this was abandoned as impracticable. He came back to Boston in March. It was then agreed that the scheme be carried out in Boston, and he was asked to look about for a vessel. He went to Salem and bought a vessel, agreeing to pay $200 down and the rest in a short time. The price was $3,000. He received all the money from Boyden. Boyden and he agreed that they had better hire a cellar, to which the spirits should be taken, and from which they should be taken out for sale. The schooner was to be loaded with barrels containing water. Wright having refused to be principal in the bonds, Boyden asked him to procure persons to be principals, and sureties who should be worthless. He procured men by the names of Whalan and Eaton to appear as principals. He went to Thatcher & Co., and bought some alcohol of one Bray, in Whalan's name, and paid for it with a check given by Boyden. Goods were obtained in other ways. Boyden furnishing the money, and agreeing to give him one-fourth of the profits. This is Wright's story.

The government say that it is corroborated by other facts proved by the witnesses. There is evidence tending to show that Boyden owned and dealt with a considerable part of the liquor. He sold 100 barrels of them to Mr. Graves; he had 195 more carted to his own warehouse; still others were found with marks which are said to show that they were part of the spirits taken out of bond. Mr. Mead's evidence tends to show that he carted 96 or 97 barrels of something which the government say was water, and which they say belonged to Boyden, from Cleaves' warehouse to the vessel or cellar; 105 barrels from Cassidy's to the same place; that on the 18th of April, he carted 100 barrels from Hathaway's, which were on the next day carried to Mr. Graves; that on the 23d he carted 195 barrels from Hathaway's to Russia wharf, and on the 24th, 195 barrels to Boyden's. The government contend that the 97 barrels from Cleaves' were filled with water, and also the 195 from Hathaway's. On the 19th of April, the witness Holt saw barrels which the government say contained water carried to the vessel from Cassidy's. They have not traced all the barrels taken out. So far as the 97 barrels are concerned, there was evidence that they were taken directly to the wharf, and were seen to be put on board the vessel. They say they have traced the barrels from that time till they were taken from the vessel and emptied. They ask the jury to conclude that they must have been filled with water.

Against this is the testimony of the defendant's witnesses. Mr. Graves, the deputy storekeeper says, that he allowed them to go out for cooperage. It is said by Gen. McCartney that Graves at the time denied all knowledge of them. He now, however, says that he allowed them to go out for cooperage, and that Mr. Cleaves ordered him to do so. He says that they came back as they went out, that he tasted as many as three of them, and found spirits in them. There is some opportunity that persons giving such evidence may be mistaken. One lot may be confounded with another. It is for the jury to say whether the goods were the same that afterwards came back. These 97 barrels play an important part in this case. They were the property of Boyden & Co., and on the 15th of April, Boyden was at Cleaves' warehouse having some business in relation to them, and taking them out for cooperage; on the 13th, Cleaves had given orders that they should be brought down from up stairs. On the 9th of April, Wright hired the cellar at Russia wharf. On the 10th, Rennick thought water was being freely used in the cellar. On the 17th Whalen applied for a license as a rectifier. Now, the argument of the government is, that it is proved beyond a reasonable doubt, that the 97 barrels when taken out to be coopered, were not returned as taken out, and that other barrels were substituted with similar brands, and that it must be inferred that it was done by Boyden, or caused to be done by him. They further argue that it is a circumstance connecting Cleaves with the scheme, as he would not be likely to induce a storekeeper to do an illegal act except for some reasons of his own.

The next point in which the government say that there is a corroboration, is upon the ownership by Boyden, that all the liquors traced were his, except the 54 barrels found at Maxwell's. The next fact relied upon is that Boyden had some connection with getting goods out of the warehouse. He certified on the back of one of the bonds that the principals and sureties appeared before him, and on another that the principals appeared and made oath to their sufficiency, and they argue that he must have known that the certificate was false. They say that a letter in his handwriting has a tendency to show the same thing. The letter requests Wright to bring the parties to him to be sworn, and says, that he (Boyden) had made certain arrangements about the bonds, and they argue that this letter shows that Boyden took an interest in it. He is to see Sanderson and make arrangements

about making a general bond, that this shows a connection not altogether innocent. They produce also a paper in his handwriting containing a list of the different lots taken out of the warehouse, with the proper marks and the number correct in every respect as they say. They see no reason why such a list should be made out except because he was principal in the transaction. These are the principal facts in the case for the government. There is, however, the additional fact that the schooner was reported at Boyden's office. But Wright's office was in the same building. Then Boyden went down to Russia wharf in a carriage and went to see Wright after his arrest at an unusual hour. Besides these facts, there is another fact alluded to in the argument for the government, that the handwriting of the body of some of the bonds, and that in a paper in the handwriting of Boyden will be found to be the same. Upon this last point you ought to be very careful, because it was not alluded to until the final agreement, and there has been no opportunity to meet it.

In the case of Cleaves, there is no evidence of Wright's to connect him with the transaction. The evidence tends to show that certain goods were taken out for rectification, and never returned. Cleaves certified that they were afterwards inspected at his warehouse. The government say that they were not there, and were never inspected. They argue that these facts show that he was connected with the scheme. The other principal fact against Cleaves besides the matter of the 97 barrels already referred to, is, that being the owner of certain spirits they got out of the warehouse, the permit being in the name of Joseph E. Eaton. I do not understand it to be a part of the duty of an inspector to certify that the goods are in the warehouse. The fact that Cleaves was a warehouse keeper has nothing to do with it. The government officers had no right to rely upon the statements of Cleaves that the goods were there. They should have had the certificate of the storekeeper. But, at the same time, if the jury are satisfied that Cleaves said they were at his warehouse, it is a circumstance to be considered by them.

On the part of the defence it is said, that Boyden had been intimate with Wright for many years, and had been in the habit of leaving him money; that the nature of their connection was such, that Wright would have every opportunity to deceive Boyden while deceiving others; that if Wright should come to Boyden and ask for even so large a sum as $3,000, it would not excite his suspicion. It would be natural and expected, they say, that Boyden would be apparently engaged in any business in which Wright was engaged. If the connection of Boyden was only as a buyer, or seller, or a lender, he must be acquitted. Harrington says that he bought some of the goods of Mr. Andrews, and sold them again to Mr. Graves. Goods were sold to Whalan and paid for by him. The defendants say further that any justice of the peace is liable to be imposed upon, especially by his friends, who say that persons sworn upon bonds before him are sufficient; that by that view the letter is more naturally explained than by the other; and that the other paper said to be in the handwriting of Boyden, was left by the evidence in so unsatisfactory a state, that Boyden had no opportunity to meet it. So they say that the facts are consistent with the theory, that Boyden was only trying to make a good bargain, and that although the goods were sold cheap, all the facts are consistent with his innocence. The question is for the jury to decide. It devolves upon the government to prove the charge beyond a reasonable doubt.

On the part of Cleaves the explanation is this: "True, I did not inspect the liquors; did not warehouse them; but for certain purposes of convenience I had months before allowed Davis to use my stencil plate, he making returns to me as agent. It was not contended that the act was, strictly speaking, illegal. They were inspected by Davis, who certified the fact to me. The goods existed at Russia wharf; Davis certified to me that they were inspected; I certified that they were in my warehouse, as I have done before. I do not think it makes any difference whether this mode of warehousing constructing was done in the case of spirits or oils, as the same regulations apply to both." This explanation involves the assumption that Cleaves knew that the goods were to be transported somewhere. So far as he was able, he authorized the fraud to be committed, but says that he did not do it knowingly. No harm would be done, he thought, to the government. The explanation is substantially the same as to the 97 barrels, and all the others except 18, which he took for debt, and says that he sold as soon as he had a chance. As to the 97 barrels there is the additional evidence that they were returned in the same state as they went, except that they were coopered.

The case is for the consideration of the jury. They are to weigh it candidly. They are not to be influenced by any considerations of policy, nor by the fact that the revenue may have suffered extensively. The case is to rest upon the evidence. One of the defendants is proved to have been of good character heretofore, and the other is presumed to have been so. If the defendants were allowed to testify, they might explain some facts which are especially applicable to Wright. For this and other reasons the law requires the government to

make out their case to the satisfaction of 12 reasonable men beyond a reasonable doubt.

The charge of Lowell, District Judge, having been concluded, the case was given to the jury, who returned a verdict finding both the defendants, Boyden and Cleaves, guilty.

UNITED STATES (WHEATON v.). See Case No. 17,487.

Case No. 16,670.

UNITED STATES v. WHIDDEN.

[3 Ware, 269.] [1]

District Court, D. Maine. Feb., 1861.

CUSTOMS DUTIES—RE-EXPORTATION BONDS—CONSTRUCTION OF REVENUE LAWS.

1. When goods entered in debenture for re-exportation, have been exported, passed through a foreign custom-house and are subject to a retail trade, they are mixed with the common merchandise of the country, and may be again imported into this country.

2. The interpretation of doubtful and ambiguous words in a particular law, are, in revenue laws, to be explained in subservience to the common policy of the country.

At law.

Mr. Shepley, U. S. Dist. Atty.

Mr. Rand, for respondent.

WARE, District Judge. This is a suit on a debenture bond in a penalty of $400. The condition of the bond is that the penalty shall not be due if the goods named, 230 ship's knees, shall not be relanded at any port or place within the limits of the United States, and the certificates required of their delivery at Newport, N. S., or at any other port or place out of the United States shall be produced within one year to the collector of the customs of Portland.

The agreed facts of the case are, that the knees in question were imported from Nova Scotia a few days before the reciprocity treaty with Great Britain went into operation, and entered in bond. Immediately after, they were exported to Nova Scotia under the act of congress, March 3, 1845 [5 Stat. 750], there landed and duly entered at that custom-house. A short time after such entry and landing, they were taken on board the same vessel, brought to this port and duly offered for entry, being then duty-free under the treaty.

On the facts stated, it is evident that no deception was practiced or intended on the officers of the United States, and from all the circumstances, we may believe that no hardship by commencing a suit on the bond was intended to the defendants. The facts present a naked question of law, whether goods entered from a foreign country in bond, and duly exported, and all the requirements of the United States' laws complied with, may be again imported into the United States. These require them to be landed in a foreign port, and to pass through a foreign custom-house, and thus be mixed in the common mass of merchandise in that country.

Of the general question of right, it seems to me that no doubts can be entertained unless there be a statute expressly forbidding it. There is no general law of the United States prohibiting it, the United States have no interest in preventing it, nor do I see, if the property in a foreign country has gone into the general mass of consumable commodities, how it then is to be executed. When this merchandise is mixed by retail trade with the common mass, it carries with it from hand to hand, no ear-mark by which it is to be distinguished from other merchandise of the same character. But it is agreed on the part of the United States, that this is expressly forbidden in the law of 1845, which authorized this exportation. That act in its 9th section, provides, "that no goods or merchandise exported according to the provisions of this act, shall be voluntarily landed or brought into the United States," and on being so, every person concerned in the act shall be liable to a penalty of $400. The language of this statute is express, and if no qualification of it is to be admitted, I do not see how this case is to be extracted from it. Whether the act complained of in this suit is prohibited by this act, depends on the meaning of these words—no goods. These, in their ordinary sense, include all goods, and this is the sense in which they must be received, provided in a just interpretation of the act a narrower meaning ought not to be admitted. After some reflection on the subject, I have come to the conclusion that they are used in this act in a more restricted sense. When goods entered in debenture are re-exported, have passed through a foreign custom-house, are landed and have gone into the general mass of property, and like that, subject to be consumed, and bought and sold by retail, they are no longer in the sense of this statute the same goods. They have become foreign goods and are liable, like any other merchandise, to be imported again into this country. It is admitted that this is rather a strained meaning of the words, but it is consonant to the general policy of all debenture laws, and to the whole policy of our government on this subject.

All drawbacks have their foundation mainly on one principle, that of favoring the carrying trade. To engage in this requires no outlay of capital beyond furnishing the vehicle in which the goods are carried, and a large part of the profit of transportation is for the payment of labor. Besides this consideration, every nation that has considerable trade has an interest in training up to the labor of the seas a hardy and brave race of men for their naval service. So intimately connected with national prowess and defence is this, that all nations, inhabiting the sea coast with a share of trade, have, in a greater or less degree, en-

[1] [Reported by George F. Emery, Esq.]

couraged their poorer and more laborious population to engage in the fisheries, by which, they are inured to the dangers and anxieties of this element, by relieving that trade of all unnecessary burdens, as well as by direct bounties. When the products of foreign countries are imported for the purpose of being consumed in this country, they are burthened with duties, which are remitted on re-exportation, or so much is retained only as is necessary to pay the expense of landing and re-delivering them. The whole protective policy of the government is to prevent their being re-landed furtively and going into the consumption of the country. When this is effected, the whole of the general object of the government is satisfied. That such is the policy of this government, is, I think, sufficiently proved by our whole legislation on this subject. Our country early went into the policy of favoring the carrying trade, and the general system of drawbacks on re-exportation was carefully digested in the general revenue act of 1799, §§ 75–82 (1 Stat. 680, etc.). The whole object of this law, so far as it is protective, is to prevent goods thus re-exported, from being brought back and going into the consumption of the country. In the construction of all laws, this general policy ought to be kept in view. In the interpretation of all arbitrary laws, and those granting drawbacks are eminently such, the whole system is to be taken together; the general object to be obtained; and when the policy is apparent, if there be in the law itself, or in any subsequent regulation words of doubtful or ambiguous meaning, this is the key to unlock them; because the legislature can never, by particular regulation, be desirous of counteracting their general policy. Even in the plainest language, courts have sometimes come to the conclusion, that the legislators have said, but did not mean what they apparently did. But when such terms are used that they are not to be mistaken, we have nothing to do but to carry the law into execution, for the courts are not the ultimate judges of the policy of the law. But all, or almost any language may be ambiguous or doubtful, and may be more or less, in its sense, restrained or extended by the circumstances in which it is used, by the intent of law, and the general object which the legislature had in view. This is an imperfection in all terms that express moral or metaphysical ideas, and necessarily arises from the fact that these ideas are in their nature, a little vague. There is not, as in mathematical definitions, any archetype in nature to which they can be compared, but they lie with a little uncertainty in every mind. My opinion is, that, however express and general the words of the statute are, we may be justified in confining their sense, and that these goods, when they have been entered a foreign custom-house, and landed, have entered into the general mass of merchandise, are no longer, in a mercantile sense, the same goods.

The result is that the suit must be dismissed, but, as the words of the statute are express, no costs will be given.

Case No. 16,671.

UNITED STATES v. WHISKEY.

[27 Leg. Int. 84;[1] 11 Int. Rev. Rec. 109; 7 Phila. 603; 17 Pittsb. Leg. J. 91.]

District Court, E. D. Pennsylvania. March 15, 1870.

INTERNAL REVENUE—ILLICIT DISTILLING—INFORMATION OF FORFEITURE—AMENDMENT.

1. On the trial, under an information upon the 48th section of the internal revenue act of 1864 [13 Stat. 223], as amended by the 9th section of the act of 1866 [14 Stat. 98], of a case involving a question of the forfeiture of a still and other apparatus fit to be used for distillation, and other personal property on the premises of the distiller—where no dutiable spirits out of the bonded warehouse, nor any raw materials to be used in the business of distillation, were found at the time of seizure—an amendment of the information, adding counts on the 44th section of the act of 1868 [15 Stat. 142], was allowed.

2. Under an information thus amended a forfeiture incurred before the seizure may be enforceable independently of the state of things existing on the premises at the time of seizure.

[Cited in U. S. v. Cigars, 18 Fed. 150.]

The 48th section of the internal revenue act of 1864, as amended by the act of 1866, provides that all articles on which taxes are imposed, found in the possession or control of any person for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of the taxes, may be seized by designated officials, and shall be forfeited; and also all raw materials found in possession of any person intending to manufacture them into articles of a kind subject to tax, for the purpose of fraudulently selling them or with design to evade the payment of the tax; and also all tools, implements, instruments, and personal property whatever, in the place or building, or within any yard or enclosure where such articles or such raw materials are kept. The 44th section of the act of July 20, 1868, enacts that any person who shall carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall be fined, and all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation of spirits, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery, or in any building, room, yard or enclosure connected therewith, and used with, or constituting part of, the premises, shall be forfeited. The information in this case was drawn with reference to the enactments prior to the act of

[1] [Reprinted from 27 Leg. Int. 84, by permission.]

1868; but the transactions in proof were subsequent to its enactment.

When the evidence on both sides had been closed, the claimant's counsel asked the court to charge the jury: (1) That as the distilled spirits, at the time laid in the libel, was in a bonded warehouse of the United States, the same, by intendment of law, could not be in the possession of the claimant, in fraud of the act of congress, as alleged in said libel. (2) That as no distilled spirits or other dutiable article was in the possession of the claimant at the time laid in the libel, or raw materials for the purpose of producing distilled spirits, on the premises, the verdict must be for the claimant.

THE COURT (CADWALADER, District Judge), said: If any one count of an information in rem is good in form, and applicable to the case proved, objections to other counts are disregarded. [Locke v. U. S.] 7 Cranch [11 U. S.] 344. If the record is to stand in its present form, I may probably give the instructions requested. But I will not refuse to hear an application to amend by adding a count on the 44th section of the act of July 20, 1868. This section was apparently intended to prevent immaterial questions from interfering with a trial of the merits of cases like the present. On the part of the prosecution, it is alleged orally that the stills, and the other apparatus fit to be used for the distillation of spirits, were owned by a person who carried on the business of a distiller with intent to defraud the United States of the tax on a part of the spirits distilled by him, and were found in his distillery, and that the other articles were found there, and in the enclosure connected therewith, and used with and constituting a part of the premises. If this allegation, which I state in language of the 44th section of the act of 1868, suffices, without any specification of what was done by him in pursuance and execution of such intent, the present information may perhaps be sustainable upon the combined effect of the former statutes and this act, though it were not sustainable upon the former statutes without such aid. But I do not think that a specification of what is alleged to have been done, in execution of the intent, can be dispensed with under the act of 1868, though it might be under the former acts. It is orally specified that in the entries and returns required by the statutes, this distiller falsely represented the quantities of materials used, and of spirits produced, in the business, to be less than the respective actual quantities, knowing them to be less. If this were specifically alleged of record, in a less condensed form of expression, the implied requirements of the 44th section of the act of 1868 might have been fulfilled. But the record contains no such specific allegation.

If I were to let the record stand in its present form, an expensive dilatory litigation, with no useful result, might ensue. If the present informations were sustained, the delay and expense to the United States would nevertheless have been incurred. If the decisions were the other way, the claimant would probably gain nothing, because the very decision would or might show that the proceeding had been misconceived, and that a new information should be filed, or an amendment of the present information allowed.

The question upon the present information is, at least, doubtful. If an application for an amendment is made, it cannot be allowed without giving to the claimant the option of a continuance. But upon the question, whether an amendment should be allowed on this condition, I will hear counsel, if the application is made.

The counsel for the United States applying for leave to amend, and the counsel for the claimant opposing the application, THE COURT said:

The merits of the controversy do not depend upon the state of things existing at the time of the detention or seizure, but upon the question whether a forfeiture had previously been incurred. If it had been incurred, the title of the United States will have relation to the time when it was incurred; and the causes of forfeiture supposed by the seizing officer to have existed are, in that case, immaterial, if any sufficient cause alleged in the information is established by the evidence. The supreme court have often said, in effect, that in such cases the property is not forfeitable because it has been seized, but is seized because it was previously forfeited. In Wood v. U. S., 16 Pet. [41 U. S.] 362, and Taylor v. U. S., 3 How. [44 U. S.] 197, goods imported at New York, where they passed in regular form through the custom house, on valuations there approved by the public appraisers, were seized long afterward, in the latter case at Philadelphia, in the former at Baltimore, in the hands of agents of the respective importers. The goods, in each case, were condemned as forfeitable for fraudulent undervaluation in the invoices upon which they had been entered. In the former case the court said that the success of the fraud, in evading the vigilance of the public officers, so that it is not discovered until after the goods have passed from their custody, does not purge away the forfeiture, although it may render the detection of the offence more difficult and more uncertain. In the latter case (Taylor v. U. S., 3 How. [44 U. S.] 197), the court said: "At the common law any person may, at his peril, seize for a forfeiture to the government; and, if the government adopt his seizure, and institute proceedings to enforce the forfeiture, and

the property is condemned, he will be completely justified; so that it is wholly immaterial, in such a case, who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause. This doctrine was fully recognized by this court in Gelston v. Hoyt, 3 Wheat. [16 U. S.] 247." This rule has been thus enforced in the English court of exchequer. It is nothing more than the rule familiarly applied in the case of a distress. Lord Kenyon said: "I never understood a man was obliged to justify a distress for the cause he happened to assign at the time it was made; if he had a legal justification for what he did, it is sufficient. A man may distrain for rent, and avow for heriot service." 7 Term R. 657, 658.

Leave is given to amend, on condition that the claimant has the privilege to continue the case, or, at his option, to let the trial proceed.

New counts were then added to the information, by way of amendment, which were adapted to the enactments of the 44th section of the act of 1868, or were intended so to be.

The claimant, not asking a continuance, pleaded issuably to the information as amended.

His counsel then further requested the judge to charge the jury: (1) That there is no evidence that distilled spirits were removed to evade the payment of the tax. (2) That, so far as the evidence in this case suggests causes of forfeiture, they did not arise at the time which is propounded in the information, and that the verdict must be for the claimant. (3) That, as no cause of forfeiture are specified in the information, the same cannot be supplied by evidence, and the verdict must be for the claimant. (4) That, if the claimant had notified the assessor that he would close his distillery, and at said time of seizure, which is laid as the time the forfeiture accrued, there were no materials on the premises to be thereafter used in the distillation of spirits, the verdict must be for the claimant.

On which points the court instructed the jury as follows: (1) I cannot give this instruction. There is no evidence tending directly to prove such removal. But if the jury find that the entries in the distiller's book falsely represented the quantity of materials used and of spirits produced to be less than the respective actual quantities, and were known by him, or by those conducting his business, to be so, this is evidence from which the fact of the removal to evade the payment of the tax may be found, if the jury believe the fact to be so. (2) If the causes of forfeiture are truly alleged in the information, the forfeiture was incurred when the acts constituting such causes were committed, provided they were committed after the claimant became the distiller, on or after May, 1869, and before the seizure. Unless they occurred in this interval the verdict should be for the claimant. But the time stated in the information is not otherwise material. (3) The prosecution cannot be maintained, except for the substantial causes which the information specified; and these cannot be supplied by evidence defining or adding to the specification of them in the information. On this third point I give the instruction requested, except that I cannot say "no causes of forfeiture are specified in the information." (4) I give the instruction requested, with the qualification that, if there were on the premises a still and other apparatus fit and intended for the distillation of spirits, the absence of materials to be used in such distillation does not, in itself alone, as matter of law, entitle the claimant to a verdict.

Case No. 16,672.

UNITED STATES v. WHITAKER.

[6 McLean, 342.] [1]

Circuit Court, D. Ohio. April Term, 1855.

POSTOFFICE—ABSTRACTION OF LETTER BY POSTMASTER—EVIDENCE.

1. Where a post-master is charged with abstracting a letter from the mail, containing money, to fix the charge it is usually necessary to examine the post-masters and assistant post-masters, between the office where the letter was deposited to be mailed, and the office to which it was directed.

2. And at such office the clerks or persons who received and opened the mail should be examined. This testimony is especially necessary on the part of the prosecution, where the accused proved an exemplary character during his whole life.

[Cited in State v. Northrup, 48 Iowa, 585.]

Mr. Morton, U. S. Dist. Atty.

Mr. Joliffe, for defendant.

McLEAN, Circuit Justice. This is an indictment against the defendant [James Whitaker], who acted as assistant post-master at —— post-office, for stealing a letter from the mail containing ninety-three dollars. The letter was proved to have been mailed at Withamsville, the money being counted and handed to the defendant to be enclosed in a letter and directed to Stephen Clark, Cincinnati, but was never received, as proved by Mr. Clark, nor did it appear to have been received by the account of mails received at the Cincinnati office. The defendant, sometime after the deposit of the money, called one or more witnesses to notice the fact that he enclosed the money in the letter, sealed it, but no one swears to the fact that it was mailed, but such were their impressions, as

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

at the time of enclosing the money he was putting up the mail. A proposition was made to the defendant, if he would pay, or secure the payment of the money to Mr. Clark, the matter would not be prosecuted, which the defendant refused. The persons who usually opened the mail in the Cincinnati office were examined, but all the persons through whose hands the letters passed were not examined. In the defense it was shown that letters directed to Cincinnati, on the same route, west of the defendant's office had miscarried, and also, that letters directed to the Cincinnati office on other routes had never been received. It was proposed to prove that the assistant post-master at Mount Washington, the next office to the Witham office, on the route to Cincinnati, was suspected, and that at one time he had been charged with passing counterfeit money. But the court overruled the testimony, on the ground that the person had not been examined as a witness, and that his general character could not be assailed. Some ten or twelve witnesses were then called, who proved the good character of the defendant. In the cross examination of one or two of the witnesses to the good character of the defendant, they were asked whether the defendant had not, at one time, been charged with passing counterfeit money. This was not objected to by the defendant, and was explained by showing of whom he had received the bank note, as good, on which the charge was founded. This circumstance, it was proved, had not in the least affected the fair character of the defendant in his neighborhood.

The court remarked to the jury that the exemplary character of the defendant, as proved, should have weight in their deliberations. That before the letter reached Cincinnati it passed through the office at Mount Washington, and one or two other offices before it reached Cincinnati, and at that office it passed through the hands of clerks, and there were others who had access to it. The defendant admitted the letter and the money were deposited in the office, to be forwarded in the mail. Upon the whole, the court remarked, unless you come to the conclusion that the defendant is guilty, beyond reasonable doubt, you will acquit him.

The jury found the defendant not guilty.

Case No. 16,673.

UNITED STATES v. WHITE.

[1 Cal. Law J. 275.]

District Court, N. D. California. Aug. 19, 1862.[1]

MEXICAN LAND GRANTS—PROCEEDINGS FOR CONFIRMATION—GENUINENESS OF PAPERS—EVIDENCE.

[The only documentary evidence of a grant was produced from the claimant's possession, and consisted of a sheet of paper containing a petition to the governor, dated in 1840, a marginal order of reference, an informe, and a decree of concession, together with a map of the land. There was no trace of the existence of the grant in the archives, but strong presumptive evidence against it, in records of subsequent dates, showing that the authorities considered the land as still open to grant, and that petitioners for neighboring lands knew nothing of the grantee's claim. The genuineness of the papers produced rested on the testimony of witnesses known to have been connected with previous frauds, similar to that alleged in this case; and the testimony of the only witness who attempted to account for the map was manifestly false in many particulars. The date of one of the title papers had been altered, and no explanation thereof was suggested consistent with the bona fides of the transaction. The grantee neglected for three years from the date of the alleged grant to take any steps to perfect his title, as required by the colonization laws, and then left the country, under circumstances suggesting an intention to abandon his right. He had never himself occupied the land, but it was in possession of a relative. He claimed that this possession was in his behalf, but the relative repudiated the claim, and afterwards sought a grant of the land for himself, and his right was recognized by the adjoining landowners in apparent ignorance of the alleged grant to the present claimant. *Held*, that upon this evidence the claim must be rejected. U. S. v. Noe, 23 How. (64 U. S.) 312, and U. S. v. Alviso, Id. 318, distinguished.]

"Charles White, claimant for Arroyo de San Antonio, in Sonoma county, granted August 10, 1840, by Juan B. Alvarado to Antonio Ortega, claim filed February 7, 1853, confirmed by the commission June 26, 1855, by the district court August 17, 1857, decree reversed by the supreme court, and record remitted for further proceedings. [U. S. v. White] 23 How. [64 U. S.] 249."

[Motion made by the heirs of Juan Miranda to be allowed to intervene was denied. Case No. 16,680.]

HOFFMAN, District Judge. The claim in this case having been confirmed by the board, and by this court, at a session held by the circuit judge [case unreported], an appeal to the supreme court was taken, the decree of this court reversed, and the cause remanded for further proofs. In their final or supplementary opinion the supreme court, after ordering the decree of this court to be reversed and set aside, said: "We do this that the district court may not be trammeled in their future consideration of this cause on all its merits, but without intimating any opinion as to the validity of the grant to Antonio Ortega. It is due to the attorney general to say that on the argument of this case he challenged the grant as fraudulent, and it is because we do not think the whole evidence on that point was fully developed on the former trial that this order is made." U. S. v. White, 23 How. [64 U. S.] 255. The cause has thus been remanded to be considered "de novo" on all its merits by this court, untrammeled by the decision of the supreme court as to either the validity or the genuineness of the grant. I shall, therefore, examine into its merits precisely as if it were now for the first time submitted for decision.

[1] [Affirmed in 1 Wall. (68 U. S.) 660.]

The documentary title, on which the claimant relies, consists of a sheet of paper containing a petition to the governor, a marginal order of reference, an informe, and a decree of concession. He also produces a map of the land solicited. The petition is in the name of Antonio Ortega, and is dated June 12, 1840. The marginal order is in the handwriting of, and signed by, Alvarado, and dated June 30, 1840. The informe is signed by M. G. Vallejo, and dated July 30, 1840. The decree of concession is dated August 10, 1840, and is as follows: "In conformity with the information given by the military commander of the frontier of Sonoma, and in virtue of the faculties with which I am invested, I grant to Don Antonio Ortega the land petitioned for, with the understanding that, in order to obtain the issuance of the respective titulo, and to regularly make up the necessary expediente, by which the boundaries should be marked, and the necessary proceedings be taken, he shall make a map, as required by law, which he shall present without delay, together with this instancia, which shall serve him as security during the further proceedings indicated."

These documents are produced, together with a map, which will hereafter be noticed, from the custody of the claimant. It is not pretended that they were at any time on file in the public archives. On the contrary, it is urged that, from their own nature, and by the terms of the order that they be returned to the interested party, they could not properly have been archived. The records, therefore, fail to afford any confirmation whatever of the genuineness of the grant, or, indeed, any trace of its existence. Of the evidence from the archives, relied on by the United States to disprove its genuineness, we will speak hereafter. It will be observed that the document above transcribed purports, on its face, to be a kind of preliminary or provisional concession, intended to serve as security to the party while the necessary proceedings required by the colonization laws were in progress. It contemplates and requires that a map shall be presented, in order that the expediente shall be framed, by which the boundaries are to be designated, and which is to pass through the proper channels of business ("correr los limites necessarios," Seoane's Neuman & Baretti's Sp. Dic., by Velasquez, ap. verb. "correr"), in order that the grant, "titulo," may issue.

It is plain from the language of this decree that the governor intended that the title should be perfected in the usual manner, and the concession returned to the party "for his security" was in no manner meant to operate as a final grant of the land. The case thus bears a close analogy to those of U. S. v. Noe, 23 How. [64 U. S.] 315, and of U. S. v. Alviso, Id. 318. In the former case, which is nearly identical with the case at bar, the claim was rejected, on the ground that the grantee had wholly neglected to take any steps towards the completion of his title, or the fulfillment, by occupation and authorization, of the obligations it imposed.

In the case of Alviso, the claim was confirmed, it appearing that, though the claimant had only a permission to occupy while the proceedings for the perfection of his title were pending, yet that he had improved and cultivated the land, and had resided upon it with his family since 1840, and that since that year he had been recognized as its proprietor. On the occupation of the country by the United States forces, he or his representatives were found in the undisputed possession of the rancho. As was observed by the court, "no imputation was made against the integrity of his documentary evidence, and no suspicion exists unfavorable to the bona fides of his petition, or the continuity of his possession and claim."

Under the authority of these two cases, which, so far as the documentary evidence of title is concerned, closely resemble the case at bar, the decision of the latter must depend upon whether the genuineness of the title papers has been satisfactorily established; and, if so, whether the inchoate right thus obtained has been, by a long continued occupation and cultivation, and the recognition of the claimant's rights, ripened into an equitable title, which the United States are bound to respect. These two inquiries, though in their nature distinct, it will, nevertheless, be found most convenient to prosecute simultaneously.

It has already been observed that no trace of the alleged grant is found in the archives. The proofs of its genuineness consist in the production of the grant itself, aided by the depositions of Juan B. Alvarado, Antonio Ortega, the grantee, William Richardson, Jose de la Rosa, and M. G. Vallejo.

Ortega testifies to the genuineness of his own and of Alvarado's and Vallejo's signatures. He states that, after the making of the decree, and during the same year, he applied to Governor Alvarado for a full and formal title; but it was during a recess of the departmental assembly, and he could not obtain it. He further states that he did not occupy the land in person, but that his father-in-law, Miranda, occupied it for him in 1840. That Miranda placed his son there, who remained six years, having a hut there and fifty cows; that he applied to the governor, with the paper before mentioned, and presented a map. He then went to Oregon, leaving his papers with the governor. He subsequently states that he went to Oregon in 1843, and remained there four years; that, on his return, he found Theodore Miranda was occupying the land, which he continued to do until 1848. He then went to the governor, and obtained the papers which had been left with him. He further states that he demanded the possession of the widow of Miranda, but she replied that the land belonged to her, and that she had a paper from Murphy and Leese, the alcalde of Sonoma.

William Richardson testifies that the land was granted to Ortega in 1840, but that it was not occupied by him in person. It was occupied by the family of Juan Miranda by virtue of a contract between him and Ortega, but shortly afterwards all the family left, except Theodore, who continued to occupy it when he (the witness) was last there (1850). That he understood Miranda occupied for Ortega from the statements of both of them.

Alvarado testifies twice before the board. In his first deposition he merely states that his signatures are genuine, and written at their dates. In the second deposition he identifies the map produced by the claimant as the one presented to him in 1840 or 1841, and left with the petition and decree of concession in his hands for safe-keeping until 1848, when he delivered them up to Ortega. In a third deposition, taken since the case was remanded, Alvarado states that Ortega presented himself to him only twice, and that on the second occasion, which was after an interval of six months or a year, he brought the petition and map, which he left with him. But in this statement he is evidently in error, for the marginal order for an informe is dated at Monterey, June 20, 1840. The informe of Vallejo is dated at Sonoma, July 30, 1840, and the decree of concession is dated at Monterey, August 10, 1840. This latter shows that the map had not then been presented. It is evident that the petition must have been twice presented to the governor without the map, and the latter was afterwards added to it, at some time subsequent to the date of its second presentation. The circumstance is of some importance, in connection with other facts relative to the map, hereafter to be noticed.

M. G. Vallejo testifies that in 1838 or 1839 Ortega applied to him for permission to occupy the rancho; that he gave the permission, and immediately afterwards Ortega moved on to the land, taking with him his father-in-law, Juan Miranda, and his family; that he built a house and corral, and stocked the place with horses and cattle; that he (witness) furnished the stock, and Ortega went on to cultivate the land. He afterwards obtained a grant from Alvarado about 1840. This evidence, it will be observed, conflicts, in its most important statements, with that of Richardson and Ortega himself. Both of the latter assert that Ortega never occupied the land in person, that the cattle belonged to Miranda, and that the occupation did not commence until after the grant. Ortega makes no mention of any permission to occupy obtained from Vallejo. No such permission is produced, though it was usually, if not invariably in writing, nor does any witness pretend to have seen such a document; and, what is still more decisive, the petition of Ortega to the governor is wholly silent as to the fact that such a permission had been obtained from the director of colonization of the northern frontier, the mention of which would have strongly enforced his application, and, in all probability, obviated the necessity of referring the petition to the same Vallejo for his informe. In his report to the governor, Vallejo in like manner omits all mention of the circumstance that he had already given permission to the applicant to occupy the land, and of the equally important facts that Ortega had already built a house upon it, stocked it, and was residing on it with his family. We may safely conclude that if Ortega, at the date of his petition, had already obtained a permission to occupy from the director of colonization, if he had "built a house and corral upon it, stocked the place with horses and cattle, and had gone on to cultivate a portion of it," his petition and the report of Vallejo would have contained some allusion to the circumstances.

Jose de la Rosa testifies that in 1844 Miranda applied to him to draw up a petition to the governor (Micheltorena) for a grant of the place called "San Antonio"; that he wrote the petition, and presented it for Miranda to the governor, who postponed making the grant, being otherwise occupied; that a grant was written out in the secretary's office, but not signed, on account of the outbreak of civil disturbances. De la Rosa also states that in 1839 Ortega applied to him in Sonoma to make a map of the place called "San Antonio," as he wished to apply to General Vallejo for leave to occupy it; that he accordingly made the map for him, which is the one produced by the claimant. Afterwards, in 1840, Ortega procured him to write a petition to the governor for the same land, and this map was presented to the governor with the petition; that Ortega obtained the permission from Vallejo in 1839 to occupy the land, and he did occupy it, and was in the occupation of it when he presented his petition to Alvarado for the grant; that Governor Alvarado granted the land; he (witness) saw the grant a short time after the petition was presented, in the house of Ortega, on the rancho; that Ortega left his family and Juan Miranda on the land when he went to Oregon, in order that he might not lose his right to it.

It is unnecessary to refer at length to the character of this witness, as disclosed by his own avowal that in 1844, he was endeavoring to obtain for Miranda a grant of lands which he knew had already been granted in 1840 to Ortega; or, as established in the case of Luco v. U. S. [Case No. 8,594] and other cases, in which the unreliability of his statements, and those of several other of the claimant's witnesses, have been judicially declared by the supreme court. It is enough to say that nearly every line of his deposition in this case contains a falsehood. He asserts that he wrote the petition of Miranda in 1844. The petition is in the archives, and is not in his handwriting. He asserts that he prepared a map for Ortega in 1839, which was presented, with his petition, in 1840. The claimant's own title papers prove the contrary.

He swears that Ortega obtained a permission from Vallejo to occupy the land, and that he did occupy it. In these statements he is contradicted by Richardson and Ortega himself. He asserts that he saw the grant in Ortega's house on the rancho. Ortega asserts that he never occupied the land in person, and that the house was Miranda's. He states that Ortega left his family on the land when he went to Oregon, in order to preserve his rights to it.

The evidence is conclusive that Ortega abandoned his wife on account of her infidelity, that he has never lived with her since, and that, on his departure, she went to her father's house to live. The map referred to by that witness is that produced by the claimant, and stated by Alvarado to have been handed to him, as required by the decree. In the expediente of Juan Miranda, found in the archives, and of undoubted authenticity, a map is found, nearly a fac simile of the one produced by the claimant. The two were evidently made by the same person, and at the same time.

The theory of the claimant is that Miranda, in 1844, obtained a copy of Ortega's map, and presented it with his petition. But Ortega's map was then, as the claimant alleges, in Alvarado's private custody, and was not accessible to Miranda, and, besides, the two maps bear unmistakable evidence of having been prepared at the same time. There must, therefore, have been prepared, if the claimant's theory be true, two maps for Ortega, in 1840, one of which was presented to the governor, and the other subsequently passed into the hands of Miranda. If this be so, how happens it that De la Rosa speaks of having prepared only one map? He would hardly have forgotten the circumstance that, when he presented Miranda's petition to the governor, he also presented one of the maps prepared by him for Ortega five years previously. The character of this witness, and the nature of his testimony, is such that it is a waste of time to consider it, but (he is the claimant's witness) it is just to observe that his evidence is, on the point last referred to, inconsistent with the claimant's own theory of the case.

The above are all the witnesses on the part of the claimant who testify directly, and of their own knowledge, to the execution of the grant. I shall hereafter advert to other proofs adduced to corroborate and confirm these statements.

The United States have produced from the archives various expedientes, relied on to show that the government, long after the date of the alleged grant to Ortega, treated the land as public, and subject to grant, and that it was by all his neighbors considered to belong to Juan Miranda. These documents are: First—The expediente of Juan Miranda. This expediente is found in the archives duly numbered and entered on Jimeno's Index. Its authenticity is unquestionable. It consists of—(1) A petition of Miranda, dated February 21, 1844. (2) A certificate by Jacob P. Leese, alcalde of Sonoma, that the land had been occupied several years, and that it did not belong to any pueblo or corporation, dated February 20, 1844. (3) A report by Jimeno, dated May 2, 1844, that the land had been occupied for four years by the party interested, by cultivation and by having a house thereon, with all his goods, and that it does not belong to any one in particular. (4) An order that the title issue, signed by the governor, and dated May 30, 1844. (5) A decree of concession, dated October 8, 1844, declaring Juan Miranda owner of the place called "Arroyo de San Antonio," and directing the corresponding title to be made out and entered in the respective book, and the expediente to be sent to the departmental assembly for its approval. (6) Two copies of the formal grant or titulo, dated October 8, 1844, but unsigned. These were evidently made out in pursuance of the governor's order,—one to be delivered to the party, and the other to be retained, as was customary, in the office, and attached to the expediente.

It is not contended that the grant to Miranda was consummated by the delivery of the title paper. What was the cause of its non-delivery cannot be ascertained with certainty. The claimant supposes that the proceedings were suspended by the governor because the previously acquired rights of Ortega were brought to his notice, but of this there is no proof; and, admitting that Ortega had obtained in 1840 the concession now produced by the claimant, it is highly improbable that that fact was known to the governor, or had any effect to stay the issuance of the title to Miranda. The papers of Ortega were not in the archives. Those records contained no trace of any title to the land acquired by him. He had left the country, abandoning his wife and family under circumstances rendering his speedy return improbable. Miranda was reported both by Leese and Jimeno to have been in occupation of the land for several years. He was considered its owner by all his neighbors, as will be presently shown by other expedientes from the archives.

Alvarado, with whom Ortega's papers were deposited, makes no mention of having apprised Micheltorena of their existence. The alcalde of the district was ignorant of them, and it is not easy to conjecture by whom the information could have been furnished to the governor, or from what quarter a demonstration against the grant to Miranda could have come. But it may safely be assumed that if such remonstrance had been made, we should have found it among the papers in the expediente. The fact that the proceedings had been suspended for that reason would not have been unknown to Jimeno, and yet that officer includes this expediente in his list as of the number of those "concedidos" or granted.

The reason given by Francisca Miranda, the wife of Ortega, for her father's not obtain-

ing the grant is that he was taken sick, and could not attend to it.

Jose de la Rosa, the claimant's witness, distinctly avows that Micheltorena made no objection to granting the land, on the ground that it had already been granted to Ortega; and he states that it was not signed on account of the outbreak of civil disturbances. It is a matter of history that the revolution which terminated in the overthrow of Micheltorena commenced in the fall of 1844. It is proved in this case that Miranda died in 1845. It may well be, therefore, that the disordered state of public affairs, and the death of Miranda shortly after the commencement of the troubles, may have been the reason why the grant was not obtained. But, at all events, the proceeding advanced far enough to show that the governor was willing to grant the land, and that he, Leese, the alcalde, and Jimeno, the secretary, acted in total ignorance or entire disregard of the alleged rights of Ortega.

But the Miranda expediente seems to disclose another fact of some importance with relation to the occupation of the rancho. Miranda states in his petition that "for more than four years he has been in possession of a sitio on the Arroyo de San Antonio, which was provisionally granted to him by Senor Don Guadalupe Vallejo, the papers in relation to which concession, it seems, have been mislaid; that, although he has endeavored to recover them, they have not been found, for which reason he represents anew, saying that on the said place are maintained the regular number of flocks and herds, and the requisite cultivation."

We have already seen that Vallejo and De la Rosa swear that the provisional concession or permission to occupy was given to Ortega. But Ortega makes no mention of it, nor does his petition, when it would hardly have been omitted. If it be true, it is extraordinary that Miranda should have ventured to assert to the governor that the concession had been made to him, and it is still more extraordinary that Leese, the alcalde of Sonoma, and residing in the same village with Vallejo, should have failed to correct the misstatement, and have certified that the tract had been occupied several years by the interested party. Jimeno, too, appears either to have adopted without suspicion the statements of the petition, or else to have reported on his own knowledge, for he certifies that "the interested party has occupied the land he claims for four years by cultivation, and by having a house thereon, with all his goods,"—facts which he could not have derived merely from the certificate of Leese. That the rancho was originally occupied by Miranda under a provisional concession or permission by Vallejo is positively sworn to by Martin, the grantee of the neighboring rancho of Novato, and by Ramon Mesa, who says that he occupied it by putting about 300 head of cattle upon it, about 30 wild mares, and some tame horses, and by building a house, a corral, etc. On his cross-examination, he states that he saw these cattle delivered to Miranda by Salvador Vallejo, and branded by Miranda with a brand he had made at a blacksmith's shop. It is true that the facts testified to by this witness occurred at a time when he was only 12 or 13 years old, but he is in some degree corroborated by Peter T. Sherrebeck, who swears that in 1843 there was produced to him, as inspector of hides at San Francisco, hides from the Miranda Rancho, branded "J. M.,"—the Miranda sign.

Jose Santos Berreyesa, who lived in Sonoma from 1837 to 1849, states that, during all that time, he never knew the rancho claimed by anybody but Juan Miranda, or occupied by any one but him and his family. He also swears that he certainly occupied the rancho before the year 1840. To the testimony of these witnesses must be added that of Francisca Miranda and that of G. A. Nye, the first of whom testifies that her father and brother first obtained their right to the rancho from Vallejo for the purpose of procuring a title from the government, and the second that Miranda was living in 1838 on his rancho, and that he saw in his possession a document signed, he thinks, by General Vallejo.

To the proofs thus afforded by the expediente of Miranda, the statements and the silence of Ortega, and the evidence of these numerous witnesses, the claimant opposes the unsupported declaration of Mariano G. Vallejo and of Jose de la Rosa. The preponderance, both of proofs and probabilities, is thus clearly in favor of the truth of the statements contained in Miranda's petition, and we are compelled to conclude that the permission to occupy was given to him, and not to Ortega, and that, under it, he entered on the land, and stocked and cultivated it as his own.

We have heretofore referred to the fact that the map found in the Miranda expediente and that produced by the claimant were evidently prepared by the same person, at the same time, and various reasons were adduced for supposing that Ortega could not have presented to the governor in 1840 the map now produced by the claimant. The petition of Miranda affords an important corroboration of this view. The petition of Ortega describes the land as "bounded on the south by the rancho of Camilo, on the north by the Roblar de la Miseria, on the east by the Estero de Petaluma, and on the west by the Laguna de San Antonio." On the map alleged to have been presented by Ortega to indicate this tract, neither the "Roblar de la Miseria," nor the "Rancho de Camilo," are laid down,—at least those names nowhere appear upon it, as would have been most natural if it had been drawn subsequently, and so as to conform to the description in the petition. On the other hand, the description of boundaries in the Miranda concession entirely conforms to the map, and is evidently taken

from it. The nonconformity between the description in Ortega's petition and the map he alleges he presented to indicate the land solicited thus affords a strong argument against the truth of his and Alvarado's statement that the identical map now produced was presented in 1840, in obedience to the governor's order in the decree of concession.

The United States have also produced a grant to B. Bojorquez with the expediente. Both in the petition dated August, 1844, and the grant dated November, '45, the "lands of Juan Miranda" are mentioned as one of the lands solicited. They also produce the expediente of J. N. Padilla, another colindante. In his petition, dated November, 1844, and the map that accompanied it, the "lands of Juan Miranda" are mentioned as a boundary; and Vallejo himself, to whom the petition was referred, reports: "The subscriber believes that the boundaries, with the rest of the rancho, are the same as those mentioned in the petition." If Vallejo knew that he had made provisional concession to Ortega of the lands described in the petition as those of Juan Miranda, that Ortega had subsequently obtained a grant for them, and that Miranda was occupying them as his tenant, it is strange that he did not correct the misdescription in Padilla's petition.

In the diseño of the rancho of Olimpali the same lands are again laid down as those of Juan Miranda. The evidence afforded by these expedientes may not be sufficient to demonstrate that Miranda obtained a grant, nor perhaps conclusively to show that he was not occupying the land for Ortega; but they establish beyond question that his neighbors on all sides regarded him as the owner of the land, and occupying it in his own right. If Ortega's present pretension be true, it is strange that no one of the colindantes was sufficiently informed of the facts to describe the land as his, and not Miranda's. On the other hand, the claimant has shown that the papers produced by him were in existence at least as early as 1839, when they were transferred to Father Brouillet, from whom the claimant derives title. He has also proved that in 1845 and 1846, while in Oregon, Ortega frequently spoke to Father Accolti and others of owning a rancho in California, a portion of which he desired to give to the father, in consideration of which his children should be educated. It appears, too, that Father Brouillet, before taking the conveyance from Ortega, was informed by Alvarado and Vallejo that the papers were genuine and the title valid. But these declarations have no importance, except so far as we may suppose Alvarado and Vallejo unwilling to practice a fraud upon a priest of their own church. How far they would have been affected by that consideration it is not easy to determine.

The claimant has also produced as witnesses Juan Bojorquez and John Walker. The first of these swears that he knew of Ortega's owning the rancho as early as 1841, and that he was in possession of it in 1839, when he had a small house on it. But in this last statement he is unfortunately contradicted by Ortega himself, who states that he did not occupy the land in person, but that Miranda occupied it for him in 1840. And if, in 1841, Juan Bojorquez knew that Ortega owned the rancho, it is strange that his father, Bartolome Bojorquez, in 1844, described it in his petition and map as the land of Juan Miranda. John Walker testifies that Ortega told him, in 1843, that he owned the rancho, and that it was generally reported in Sonoma to belong to him. He "never heard it denied or contradicted." But against this statement we have the fact that three colindantes, who would naturally be best informed as to the ownership of lands adjoining their own, describe the land as that of Miranda, in apparent ignorance of any rights of Ortega, and Leese, the alcalde of Sonoma, gives his certificate of vacancy, in 1844, to Miranda, when the latter applied for the land.

Some reliance is placed by the claimant on the fact that Theodore Miranda was present, and made no opposition, when Ortega in 1849 put Father Brouillet in possession; but this circumstance seems unimportant. Theodore Miranda had no title papers to the land; his father, as before explained, having failed to obtain any. He seems to have been discontented with, though not to have actually opposed, Ortega's proceedings, and the inference that he recognized Ortega's title seems conclusively rebutted by Ortega's own statement that on his return from Oregon he demanded the possession of the land from Theodore Miranda's mother, which the latter refused, claiming that the rancho was her own.

To meet the evidence furnished by the expedientes which have been referred to, the claimant has produced the record of judicial possession of the neighboring rancho of Novato, in which the name of Ortega occurs amongst others, who are spoken of as "colindantes and circunvecinos." But it does not appear from this record whether Ortega was, as spoken of, a "colindante" or a "circunvecino." If as a "circunvecino," he was only called a resident of the neighborhood,—a term which might have been applied to him if he was residing in Sonoma, or been a "vecino de esta jurisdiccion." That he could not have been a "colindante" or coterminous proprietor is evident, just from the fact that he was appointed as a measurer of the Novato Rancho, a duty not legally or usually assigned to neighbors directly interested in the question of boundary; and, secondly, from the fact that the Rancho del Arroyo de San Antonio, claimed by Ortega, is not colindante with the Novato Rancho, for the Olimpali lies between them.

The claimant has also referred to a pas-

sage in the work of Duflot de Maufras, a French traveler, who, in the years 1840, 1841, and 1842, visited this country, and in 1844 published at Paris an account of his explorations. In his description of the country to the north of the Bay of San Francisco, he enumerates various ranchos, and, among others, those of "Ortega, Martin, Petaluma, the Vallejos," etc. It, of course, does not appear from whom De Maufras obtained his information. His statements may, perhaps, be accepted as proof that he was told by some one he thought reliable that Ortega owned a rancho in that vicinity. But such information, obtained and repeated by a traveler, can hardly be received as proof of the fact; especially when we have the incontrovertible evidence furnished by the expedientes of Miranda and of three other adjoining ranch owners that the lands were designated and treated by them and the government as those of Miranda, and not Ortega.

The title papers of Ortega, produced by the claimant, present, in some respects, a suspicious appearance.

I pass over, as too inconclusive to merit attention, the observations which have been made on the supposed difference between the handwriting of Vallejo and Alvarado, as it appears on these papers, and other writings of theirs, at the time they are dated; but it is evident that the date of the marginal order of Alvarado was originally 1841, and has been altered to 1840. This alteration has apparently been made with ink of the same color as that with which the decree of concession was written. It is difficult to account for this circumstance. It is highly improbable that it was merely a clerical mistake, for it can hardly be supposed that a document would be dated a year in advance by mistake. Besides, if such a mistake did occur, it would scarcely have escaped notice at the time. But the correction, in this instance, is made with ink of another color, and apparently at a time subsequent to that at which the marginal order was written. It is said that there could have been no motive for the alteration, for the papers would have been as good if dated in 1841 as in 1840. But the fact remains that the marginal order for Vallejo's report was originally dated subsequently to the report itself, and the concession purporting to be founded on the latter.

A possible explanation of the alteration may be found by supposing the petition to have been drawn in 1840, the marginal order made in 1841, and the proceedings then to have stopped. On Ortega's return from Oregon, he may have procured from Vallejo an antedated report, and from the governor an antedated decree of concession. These may have been dated 1840, to conform to the petition dated in that year, and without observing that the marginal order was dated 1841. On noticing the discrepancy, the date of the marginal order may have been altered so as to correspond with that of the other documents, or the date of the order may have been altered to 1840, under the idea that Ortega had gone to Oregon in 1841,—an erroneous impression, which Alvarado appears to have entertained, as is shown by his deposition.

This explanation is, of course, merely conjectural, but the claimant has been wholly at a loss to offer any, except the extremely improbable one that Alvarado, when writing the order, in 1840, wrote the date 1841 by mistake, and that the mistake escaped notice at the time, and was corrected subsequently, as appears by the difference in the color of the ink. But if the explanation I have suggested be received, there will then be afforded that slight basis of fact upon which fraudulent pretensions have usually been erected; for it rarely happens that parties are audacious enough to manufacture title papers, so to speak, "out of whole cloth," and where the pretended grantee has never had any connection with the land, or taken a single step towards obtaining a title to it. The explanation will also serve to reconcile the theory of the United States with the statements of De Maufras and of Ortega in Oregon; for the latter, knowing he had applied for the land, and that an order for an informe had been made, might not, unnaturally, have considered himself as having obtained some right to it, and he, or some other, may have so stated to De Maufras. It is possible that Miranda, after obtaining permission to occupy from Vallejo, may have agreed that Ortega should apply for the land, to be held for their joint benefit, and thus the idea may have been suggested that Miranda was merely the tenant of Ortega.

In the foregoing view of the evidence, every important fact and consideration has, I believe, been noticed. It is evident that the circumstances of the case differ widely from that of U. S. v. Alviso [supra]. Not only is there no trace of the existence of this grant in the archives, but those records furnish strong presumptive evidence against its genuineness. The title papers are produced from the claimant's own custody, and their genuineness sought to be established by the testimony of witnesses known to have been connected with previous frauds, similar to that alleged in this case, whom the supreme court has declared unworthy of belief, and every one of whom, except Richardson, has been a party to the crime. The only witness who pretends to account for the map, and who, from the fact that the petition is in his handwriting, must have had some connection with the matter, gives on that and on other subjects testimony the falsehood of which is apparent; and the proofs in the cause show that this important docu-

ment was a copy of that presented by Miranda four years after it is alleged to have been presented by Ortega.

We find that another of the title papers has been altered as to the date, that no explanation of this circumstance is afforded, nor can any be suggested consistently with the bona fides of the transaction, except one almost too improbable to be supposed. In the case of Alviso, the supreme court, when considering the equities of the claimants, observe that "no imputation has been made on the integrity of his documentary evidence." In the case at bar, not only has such an imputation been made, but the proofs are such as to cause serious doubts as to the genuineness of the title papers. But the cases differ in another respect. In Alviso's Case "no suspicions were raised unfavorable to the continuity of the claimant's possession and claim." In this case it is not pretended that the claimant ever occupied the land in person. He alleges that another person occupied it for him. But the parol testimony by which he seeks to establish the fact is not only unreliable, from the character of the witnesses, but their statements are inconsistent with the evidence furnished by the archives, so far as we could expect those records to furnish any evidence upon the subject. The supposed occupation by Miranda, as the agent or tenant of Ortega, appears to have been unknown to any of the persons owning adjoining ranchos, and the government itself, acting on the report of the alcalde of the district and of the secretary, directed a title to issue to Miranda for the land as public, and liable to grants. The permission to occupy, alleged to have been given by Vallejo to Ortega, was apparently unknown to the latter when he made his deposition; at least he fails to make any allusion to it, while the Miranda expediente and other proofs render it highly probable that it was, in fact, given to the latter.

We find that by Ortega's own account he neglected, during the whole period from the date of the concession (1840) until 1843, when he went to Oregon, to take any steps to perfect his title, as required by the colonization laws and expressly enjoined in the concession itself. In 1843 he departs to a foreign country, under circumstances from which an intention to abandon his own might well be inferred, and returns to the governor all the evidence of his title. Whether, then, we consider the doubtful and unsatisfactory evidence of the genuineness of the title papers, or the absence of all proofs of an ancient and generally recognized possession and the right of ownership, the claim in this case seems destitute of merit.

A decree rejecting the claim must be entered.

NOTE. Since the foregoing opinion was written, I have been reminded of the fact that the sessions of the district court at which the cause was first heard was held by both judges, before whom an elaborate argument was had. The papers were taken, however, by the circuit judge, by whom the case was investigated, and who prepared and delivered the opinion of the court. It is therefore inaccurate to say that the claim was originally confirmed at a term of the court held by the circuit judge. The fact that the cause was investigated and the opinion delivered by the circuit judge, and that I concurred in the decision, without giving to the case that thorough personal examination which I otherwise should have done, left me under the impression that, as stated in my recent opinion, the cause was decided, in form, as well as in fact, by the circuit judge alone.

[The decree rejecting the claim was affirmed by the supreme court. 1 Wall. (68 U. S.) 660.]

Case No. 16,674.

UNITED STATES v. WHITE.

[2 Cin. Law Bul. 27.]

District Court, S. D. Ohio. 1877.

INDICTMENT FOR STATUTORY OFFENSES — CHARGING IN WORDS OF STATUTE—OFFENCES UNDER ELECTION LAWS.

[1. Where the offense is purely statutory, having no relation to the common law, it is, as a general rule, sufficient in the indictment to charge it in the words of the statute.]

[2. In an indictment, under Rev. St. § 5511, for offenses against the elective franchise, it is sufficient to charge the offense in the words of the statute.]

[This was an indictment against James White upon the charge of violating section 5511 of the Revised Statutes.]

W. M. Bateman, Dist. Atty., Channing Richards, and R. Dyer, for plaintiff.

Col. O. J. Dodds, for defendant.

SWING, District Judge. The indictment in this case is under section 5511 of the laws of the United States, which, among other provisions, makes it an offense for any person, at an election for a representative to congress, to vote more than once for a candidate for the same office, or to vote at a place where he had no right to vote; and for any person to aid, counsel, procure, or advise a voter to do so. The indictment contains ten counts, in part of which it is alleged that the defendant "did then and there procure certain persons to vote more than once," and in others that "he did then and there counsel certain persons to vote more than once, and in places where they had no legal right to vote." In all the counts, the election at which, the time when, the place where, and the person who was procured and counseled, is described with particularity and certainty. The defendant demurs to each of the counts in the indictment, for the reason that it is not sufficient to allege that the defendant "did procure" or "did counsel"; but that the acts which constitute the procuring and counseling, must be set forth in the indictment.

The question has been pressed with much

earnestness in the argument, and we have been referred to a recent decision of the supreme court of the United States (U. S. v. Cruikshank, 92 U. S. 542), in support of the demurrer. From the confidence of counsel, and the general language of the court in that case, I have made as careful an examination of it as my limited time would permit. The first and ninth counts stated the intent of the defendants to have been to hinder and prevent the citizens named, in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States, for a peaceful and lawful purpose." These counts do not set out the purpose of the meeting which the defendants intended to prevent, and therefore, the court could not tell whether it was one of the rights which was guaranteed by the United States. The right specified in the second and tenth counts was that of "bearing arms." This is a right not given by the constitution. The right specified in the third and eleventh counts was that of "life and liberty of person." This is a charge to falsely imprison for murder, and the power to punish for this rests in the state, not the United States. The fourth and twelfth counts charge substantially that the defendants conspired to prevent certain citizens of the United States, being within the state of Louisiana, from enjoying equal protection of the laws of the state and the United States. The duty of protection was originally assumed by the state, and it still remains there, and these counts do not aver that the wrong contemplated against these citizens was on account of their race or color, and is not, therefore, brought under the civil rights act of 1866. The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent and colored, of the exercise of their right to vote at any election to be held, etc. The right to vote is not derived from the constitution, but from the state,—but the prohibition against discrimination in its enjoyment is derived from the United States,—but these counts do not allege that the intent to prevent them from voting was on account of their race or color, and is, therefore, not within the constitution. The seventh and fifteenth counts charge the intent to have been to put the parties in fear of bodily harm, etc. because they had voted at an election held in the state of Louisiana, etc. These counts do not state that the elections were any thing but state elections, or that the conspiracy against them was on account of their race, and is not, therefore, within the constitution and the laws of the United States. "And as to all these counts, for the reasons given herein, the judge says they do not contain charges of a criminal nature, made indictable under the laws of the United States, and that consequently they are not good and sufficient in law." The fifth and thirteenth counts charged the intent to hinder and prevent the parties in their free exercise and enjoyment of the rights, privileges, immunities and protection granted and secured them as citizens of the United States and Louisiana, for the reason that they were persons of African descent and race, and persons of color; and in the eighth and sixteenth, the intent charged is to hinder and prevent them in their free exercise and enjoyment of every, each, all and singular, their several rights and privileges granted and secured to them by the constitution and laws of the United States.

There is no particular right, privilege, or immunity specified in these counts, the exercise and enjoyment of which was to be hindered and prevented. "Rights," "privileges" and "immunities" are generic terms, and it is not sufficient to charge the offense in these generic terms; but you must state the species, to wit, what kind, character or class of rights they were to be deprived of. It is a crime to steal goods, but the indictment must describe the goods stolen. So it is a crime to deprive a man of his rights, but the indictment must describe the rights he was deprived of. So an indictment to cheat and defraud a man out of his property must set out the means to be used, because it is only where a particular mode pointed out by the statute is used that the cheating and defrauding becomes criminal. And so, where a statute makes it an offense to conspire to commit any crime punishable by imprisonment in the state prison, an indictment would not be good which charged a conspiracy to commit each, every, and all the crimes so made punishable. All the crimes are not so punishable, and therefore the particular crime must be clearly and definitely set forth; but not the means by which it was to be accomplished, unless the particular means is made a part of the offense. "So here the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, and not by the prosecutor." And so we might analyze all that is said by the learned judge in relation to the last four counts, and it would only the more clearly appear that the grounds upon which these counts were held bad were because they described any particular right, privilege, or immunity that the persons were intended to be hindered and prevented in the enjoyment of, and not that they did not set out specifically and definitely the means which were to be made use of to accomplish that purpose. Such being the case, all the general principles in regard to

criminal pleading laid down by the court must be considered by us as applied by it to the defects in the indictment for which the court held it bad. I think it is very clear, therefore, that this decision does not support the position of the defendant. The question is not new. The question has frequently been decided by the supreme and circuit courts of the United States.

Mr. Bishop, in his Criminal Procedure (volume 1, §§ 359, 360), says: "Where the offense is merely statutory, having no relation to the common law,—where, in other words, the statute specifically sets out what acts shall constitute the offense,—it is, as a general rule, sufficient to charge in the indictment with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter." Mr. Wharton, in his American Criminal Law (volume 1, p. 365), says: "It is a well settled general rule that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute, and if, in any case, the defendant insists upon a greater particularity, it is for him to show that from the obvious intention of the legislature or the known principles of law, the case falls within same exception to the general rule. But few exceptions to this rule are recognized." Mr. Archibold, in volume 1 of his Criminal Practice, p. 285, would seem to hold the same general doctrine. The question has been directly passed upon by the supreme and circuit courts of the United States in the following cases: The first one before the supreme court of the United States is that of U. S. v. Gooding, 12 Wheat. [25 U. S.] 460. This was an indictment under the slave trade act. This act provided, among other things, that every person building, fitting out, etc., with intent to employ such ship, etc. The first count in the indictment alleged that the defendant did fit out, etc., and it was objected to for insufficiency. And upon a certificate of division of opinion, the case went to the supreme court. The court say: "The fourth instruction respects the sufficiency of the first count, and it is contended that there ought to have been a specification of the particulars of the fitting out, and that it is not sufficient to allege the act itself without them. The indictment in this respect follows the language of the statute and is as certain as that is. We can not see any good reason for holding the government to any greater certainty in the averments of the indictment." The second case is that of U. S. v. Mills, 7 Pet. [32 U. S.] 138. This was an indictment for violation of the post office laws, and the first and second counts charged "that the defendant did procure, advise, and assist Joseph I. Straughtan to secrete," etc. The defendant was convicted, and it was moved in arrest "that the indictment was uncertain, insufficient, informal, and defective," and upon this motion a certificate of division of opinion brought the case in the supreme court, and the court held the indictment sufficient. "The general rule is, that in an indictment for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute." In the case of U. S. v. Staats, 8 How. [49 U. S.] 41, the defendant was indicted under the act of March 3, 1823 [3 Stat. 771], for frauds committed on the government of the United States. This indictment substantially charged the defendant with transmitting, causing and procuring to be transmitted to the commissioner of pensions a certain false writing as true, in support of a claim for pension. The defendant was found guilty, and a motion in arrest of judgment was made for the reason, among others, that the indictment did not charge the act to have been done with a felonious intent; and the judges being opposed in opinion, the case was certified to the supreme court; and the court held the indictment good for the reason that it followed the words of the statute creating the offense.

U. S. v. The Neuvea, 19 How. [60 U. S.] 92, was a proceeding for condemnation of the vessel for violation of the passenger laws of the United States. The information was demurred to for insufficiency in the description of the offense, and in the court below the demurrer was sustained and the bill dismissed—upon appeal to the supreme court, the decree was reversed. Justice Grier, delivering the opinion of the court, says: "An information for forfeiture of a vessel need not be more technical in its language or specific in its description of the offense than an indictment. As a general rule, an indictment for a statutory offense is sufficient, if it describe the offense in the very words of the statute." Among other cases arising in the circuit courts of the United States holding the doctrine, are the following: U. S. v. Lancaster [Case No. 15,556], was an indictment under the act of March 3, 1825 [4 Stat. 102], to punish offenses against the post office regulations, which, among other things, provided that if any person, employed in any of the departments of the post office establishment, shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters with which he or they shall be entrusted, or which shall have come to his or her possession, and which are intended to be conveyed by post, containing any bank note or bank bill, * * * such person shall, on conviction for any such offense, be imprisoned not less than ten years nor more than twenty-one years. The second count in the indictment charged, that within the district aforesaid the said Charles Lancaster did then and there secrete and embezzle one letter, which came to his possession, and was intended to be conveyed by post, containing divers bank notes for the payment of money, he, the said Charles Lancaster, being at the time of said secreting and embezzling as aforesaid then employed in one of the departments of the post office establishment,

to wit, a postmaster at Canalton, in the county of Greene, in the state of Ohio. It was objected that this count was insufficient; but Justice McLean held it sufficient, deciding that the offense was a misdemeanor and not a felony, and that it was sufficient to charge the offense in the words of the statute.

U. S. v. La Coste [Case No. 15,548], was an indictment under the second and third sections of the act of April 20, 1818 [3 Stat. 450], against the slave trade. The indictment was for causing a certain vessel to sail from the port of New York for the purpose of procuring negroes, etc., from Africa, to be transported, and held, sold, and disposed of as slaves. A verdict of guilty was returned, and motions for a new trial and in arrest were made, and among other reasons, it was claimed that it was not stated in the indictment that the negroes and persons of color mentioned in the indictment were to be transported to any place in the United States, or the territories thereof, nor that they were free and not bound to service. In disposing of this and other objections, Justice Story says: It is a sufficient answer to all these objections that the indictment in these respects follows the language of the statute, and no more certainty is in general required in cases of this sort. U. S. v. Pond [Case No. 16,067], was an indictment under the 22d section of the act of March 3, 1825, for the government of the post office department. The indictment charged substantially that the defendant opened a certain letter directed to one Ebenezer H. Currier, which had been deposited in a post office of the United States, at Hollistan, Massachusetts, before it had been delivered to the said Currier, to whom it was directed, and did so open said letter with design to obstruct the correspondence and to pry into the business or society of another, namely, the said Currier. A motion was made to quash the indictment for insufficiency in its statements in a number of respects; but Justice Curtis overruled the motion, saying: "In examining it [the indictment], it must be remembered that this is an indictment for a misdemeanor created by statute; and that in general it is sufficient to describe such an offense in the words of the statute. It is sufficient, therefore, unless the words of the statute embrace cases which it was not the intention of the legislature to include within the law." U. S. v. Henry [Case No. 15,350], was an indictment under the 42d section of the internal revenue act of July 13, 1866 [14 Stat. 162], which provides that any person who shall execute any fraudulent bond required by law or regulation, or who shall fraudulently procure the same to be executed, or who shall connive at the execution thereof, by which the payment of any internal revenue tax shall be evaded, etc., on conviction thereof, shall be imprisoned, etc.

The first count in the indictment alleged that the defendant, at a time and place named, unlawfully, knowingly, and willfully did execute and fraudulently procure to be executed, and connive at the execution of a certain bond, etc.; which said bond so executed as aforesaid was then and there fraudulent, and by which said fraudulent bond the payment of a certain internal revenue tax., etc., was evaded, and attempted to be evaded then and there, with intent to defraud the United States. A verdict of guilty was returned, and a motion in arrest of judgment was urged on the ground that the indictment was defective in not setting forth in what particulars the bond was fraudulent, and how the payment of the internal revenue tax was evaded and attempted to be evaded, and how the defendant procured to be executed and connived at the execution of the bond. Judge Blatchford denied the motion, saying: "The offense specified in the statute was one created by the statute. It was not an offense at the common law. The general rule is well settled that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute, and that if the defendant insists upon a greater particularity, it is for him to show that from the obvious intention of the legislature, or the known principles of the law, the case falls within some exception to the general rule, but few exceptions to the rule being recognized." U. S. v. Quinn [Case No. 16,110], was an indictment under the same law under which the present indictment was returned, and the indictment was objected to as insufficient; but Judge Woodruff overruled the objection, holding that, the indictment being in the words of the statute, it was sufficient. U. S. v. Ballard [Id. 14,506], was an indictment for violation of the internal revenue laws. It was objected that the indictment did not sufficiently describe the offense, but Judge Longyear held, that in as much as it described the offense in the words of the statute, it was sufficient. This general doctrine is also supported by an almost unbroken current of decisions by the highest courts of the states, but it is unnecessary to cite them. Many of them are collected by Mr. Wharton in his American Criminal Law, and by Mr. Bishop in his Criminal Procedure, before referred to. The weight of authority, I think, most clearly establishes the doctrine that in indictments for offenses created by statute, it is, as a general rule, sufficient to charge the offense in the words of the statute, and my apology for the extended examination and citation of authorities is the fact that a large number of persons have been tried upon similar indictments, to all of which the same objections have been urged, and all of which I have overruled. The offense in this case is purely statutory; it has no relation to the common law; it does not come within

any of the exceptions to the general rule, and the indictment charges it in the words of the statute. The demurrer must, therefore, be overruled.

Case No. 16,675.

UNITED STATES v. WHITE.

[5 Cranch, C. C. 38.] [1]

Circuit Court, District of Columbia. Nov. Term, 1836.

QUASHING INDICTMENT—LIMITATION OF TIME—SEPARATION OF WITNESSES—COMPETENCY—RELIGIOUS BELIEF—IMPEACHMENT—EVIDENCE OF ACCOMPLICES—DECLARATIONS.

1. The court will not quash an indictment because it appears upon the record that the indictment was not found within two years after the offence committed, for that would deprive the United States of the right to reply that the defendant was a person fleeing from justice; or to show it in evidence on the trial. The defendant may avail himself of the limitation either by special plea or by evidence upon the general issue.

[Cited in U. S. v. Cook, 17 Wall. (84 U. S.) 180.]

2. The court, at the suggestion of either party, will order some of the witnesses to be taken out of court, and kept by the marshal, while other witnesses are under examination; but will not order them to be kept apart from each other.

3. When a witness is objected to on the ground of his disbelief of a God, and of a future state of rewards and punishments, he is not to be examined on oath respecting his religious sentiments, but will be permitted to explain them; and if he then declares that he believes in a future state of existence, and of a Supreme Being who will punish him, either in this world or the next, for his evil deeds, and if it appears in evidence that he has so declared, before the trial, and that he sent his children to the Sunday-school, and his wife and children regularly to church, the court will permit him to be examined as a witness, leaving his credibility to the jury.

4. The court will not permit the declarations of another defendant, charged with the same offence in a separate indictment, to be given in evidence against this defendant, such declarations having been made after the supposed accomplishment of the common purpose.

[Cited in U. S. v. Gardiner, Case No. 15,186a.]

5. If a witness be cross-examined upon a collateral matter, evidence will not be admitted to disprove that matter, in order to discredit the witness.

6. The only question as to the character of a witness, proper to be asked, is, "Are you acquainted with the general reputation of the witness as to veracity? And from your knowledge of that general reputation, would you believe him upon his oath?"

[Cited in Fletcher v. State, 49 Ind. 133.]

7. Evidence of the general bad character of the witness will not be permitted to be given to impeach his credibility.

8. A person may flee from justice although no process was issued against him.

9. The statute of limitations runs in favor of the offender, although it was not known to the United States or any of their officers of justice, that he was the person who committed the offence.

10. The departure of the offender from the vicinity of the place wherein the offence was committed, to his usual residence in another part of the United States, for the purpose of avoiding punishment for that, or any other offence, is a fleeing from justice, and the statute of limitations is no bar to the prosecution, unless, within two years, he returned to the place wherein the offence was committed, and his return was so open and public, and under such circumstances, that opportunity was afforded, by the use of ordinary diligence and due means, to have arrested him, and that two years and more have elapsed since that period to the time of finding the indictment. Quære?

11. According to the practice of this court, when a new trial is granted, the cause is not to be tried again at the same term, unless by consent of parties and leave of the court; but this rule does not apply to cases where the jury has been discharged because they could not agree upon a verdict.

12. If the defendant was not present, nor aiding or abetting the act, although he was concerned in the design to commit the offence, he is only liable as accessory before the fact.

13. A verdict finding the defendant "not guilty, upon the plea of limitations, more than two years having elapsed from the committing of the offence to the finding of the indictment," is argumentative, and therefore bad.

This was an indictment against Richard H. White for burning the treasury buildings of the United States.

The indictment contained three counts. The first charged that the defendant, at, etc., on the 30th of March, 1833, with force and arms, "a certain public building, called the treasury office of the United States, situate in the city of Washington, in the county and district aforesaid, one of the cities of the District of Columbia, being one of the public buildings in the said city of said District, belonging to the United States, did maliciously and wilfully burn; against the form of the statute," etc. The second count charged, that the defendant, on the day and year aforesaid, at, &c., with force and arms, "on the night of the said day, a certain house called the treasury office of the United States, in which certain persons, the clerks and watchmen in the employment of the United States, did reside and lodge, belonging to the United States, situate in the said county and district, feloniously, wilfully, and maliciously, did set fire to, and burn and consume, against the peace and government of the United States." The third count charged, that the defendant, on the day and year aforesaid, at, &c., with force and arms, "on the site of a certain needful building belonging to the United States, being the treasury office of the United States, the site whereof was ceded to the United States, and under their jurisdiction, being in the county and district aforesaid, a certain dwelling-house, wilfully and maliciously did burn, against the form of the statute," etc. The indictment was not found until the 30th of March, 1836. The first count was upon the act of congress of the 2d of March, 1831 (4 Stat. 448), "for the punishment of crimes

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

in the District of Columbia," the first section of which enacts that every person who shall be convicted, in any court in the District of Columbia, of any of the offences therein named, one of which is "arson," shall be sentenced to suffer imprisonment and labor, for the time and times thereinafter prescribed in the penitentiary of the District of Columbia. And by the third section it is enacted, that every person duly convicted of the crime "of maliciously, wilfully, or fraudulently burning any dwelling-house," "or of maliciously and wilfully burning any of the public buildings in the cities, towns, or counties of the District of Columbia, belonging to the United States," "shall be sentenced to suffer imprisonment and labor, for a period of not less than one nor more than ten years, for the first offence." The second count was at common law. The third count was upon the first section of the act of congress of March 3, 1825, c. 67 (4 Stat. 115).

W. L. Brent, for defendant, moved the court to quash the indictment, because it appeared upon the record that more than two years had elapsed between the committing of the offence and the finding of the indictment. And by the act of congress of the 30th of April, 1790 (1 Stat. 112), "for the punishment of certain crimes against the United States," it is enacted "that no person or persons shall be prosecuted, tried, or punished, for treason, or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason, or capital offence aforesaid, shall be done or committed; nor shall any person be prosecuted, tried, or punished, for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid: Provided, that nothing herein contained shall extend to any person or persons fleeing from justice."

THE COURT (nem. con.) refused to quash the indictment; because, until the facts shall appear upon the trial, it cannot appear that the defendant was not a person fleeing from justice, and therefore not entitled to the benefit of the limitation of time; and if he is entitled to its benefit he may have it upon plea, or upon evidence under the general issue.

Mr. Brent then moved that sundry witnesses on the part of the United States should be taken out of court, and kept separate from each other during the examination of the others.

THE COURT (nem. con.) ordered the marshal to keep them out of court, but refused to order them to be kept separate from each other.

Mr. Brent then objected to one William Hicks, as a witness, upon the ground that he does not believe in the existence of a God, and a future state of rewards and punishments, and cited Rosc. Ev. (Am. Ed.) 96, 97, to show that the witness cannot himself be examined as to his belief.

Mr. Key, U. S. Atty., cited Starkie, Ev. pt. 2, p. 123, and Rosc. Ev. 97, 98.

Mrs. Harker was then called by the defendant's counsel, and testified that some years ago she had several conversations with Hicks, at her boarding-house in New York, in which he said he did not believe in the existence of a God, nor of a future state of punishment.

THE COURT (nem. con.) permitted Hicks to state what his opinions were. He then stated that he always had believed in the existence of a Supreme Being, and that he will punish him, in this world or the next, for his evil deeds; that he does now believe in a future state of existence; that he sends his children regularly to the Sunday-school, and his wife and children to church. Upon being asked whether he had disclosed these sentiments to any of the witnesses, he said that he did not know that he had.

Mr. Merritt, a police officer of New York, testified, that having heard that Hicks' testimony would be objected to on account of his religious opinions, without disclosing his object to Hicks, he asked him his opinion, when Hicks stated that he believed in the existence of a God, and a future state of punishment.

THE COURT permitted him to be sworn.

J. R. Key, for the United States, offered in evidence against the defendant Richard H. White, the admissions of Henry H. White, who stands charged with the same offence, in a separate indictment, evidence having been offered tending to prove that both were in the city of Washington the day preceding the burning of the treasury building, that both went away together in the evening, and that the defendant had told Henry to say nothing of burning the treasury.

Mr. Key cited Starkie, Ev. pt. 4, p. 1302.

Mr. Brent, for the defendant, denied that the doctrine of Starkie applied to declarations made after the thing was done, but only to declarations made in prosecution of the common purpose, in fieri, as part of the res gestæ. Rosc. Ev. 306; Starkie, Ev. pt. 2, p. 46–48.

THE COURT (THRUSTON, Circuit Judge, contrà) refused to permit the declarations of Henry H. White, made after the supposed accomplishment of the common purpose, to be given in evidence against Richard (the defendant,) in this trial, they having been indicted separately, and not charged with a conspiracy.

The witness, Fisk, having, upon cross-examination by Mr. Brent, denied that upon the trial of one Drew in Pennsylvania, he had sworn that he did not know Finch, Mr. Brent now called a witness (Mr. Blaney) to prove that Fisk did so testify on that trial, in order to discredit him by this contradiction or falsehood.

J. R. Key, for the United States, objected that the cross-examination was upon a col-

lateral matter, and that it is not competent for the party thus cross-examining a witness, to bring other witnesses to contradict him on such collateral matter. Starkie, Ev. pt. 2, pp. 134, 138, 140, 141, 144, 145; 1 Chit. Cr. Law, 622; Harris v. Tippett, 2 Camp. 637.

Mr. Brent, contrà, cited Starkie, Ev. pt. 2, p. 145.

THE COURT (THRUSTON, Circuit Judge, absent) refused to permit the defendant's counsel to bring evidence to prove that Fisk perjured himself on the trial of Drew by swearing that he did not know Finch; and to contradict his assertion, upon cross-examination in this cause, that he did not at that time know him; it being a collateral matter brought out by the cross-examination.

THE COURT also said that the only question as to the character of the witness, proper to be asked, is, "Are you acquainted with the general reputation of the witness as to veracity; and from your knowledge of that general reputation would you believe him upon his oath?"

THE COURT refused to permit evidence to be given of the general bad character of the witness.

R. J. Brent, for the defendant, prayed the court to instruct the jury "that there is no evidence before the jury that the defendant fled from justice; or that if the court should be of opinion that there is some evidence of that fact, then to charge the jury that if they should be of opinion from the evidence that the defendant did not flee from the United States, or conceal himself to avoid process, he is entitled to the benefit of the limitation of the statute." The defendant's counsel contended that "fleeing from justice" meant fleeing from process. That no person can be said to flee from justice until process has been issued against him; and that such is the meaning of the constitution of the United States (article 4, § 2), and of the act of congress of the 12th of February, 1793 (1 Stat. 302), and of the act of March 3, 1801, § 6 (2 Stat. 115). He might have been arrested as well in one district of the United States as another; so that mere removal from one district to another cannot be called fleeing from justice, unless it be done with intent to evade process. Act Cong. Sept. 24, 1789, § 33 (1 Stat. 91). Besides, he appeared openly and publicly in this city in March, 1834. Fowler v. Hunt, 10 Johns. 464. It is not necessary that the United States should have known that the defendant committed the offence, to entitle him to the benefit of the limitation.

Mr. Key, contra, contended that the defendant could not avail himself of the limitation unless the United States knew that he had committed the offence, or had the means of knowing it, as in Watkins' Case [Case No. 16,649], where the means of knowing the fraud were in the treasury department. If the defendant once fled from justice he is forever barred of the benefit of the statute. Hysinger v. Baltzell, 3 Gill & J. 158.

Mr. Brent, in reply, contended, that although he might have fled at first, if he afterwards returned and appeared so publicly in Washington that he might have been arrested, the statute began to run in his favor from the time of such return. Faw v. Roberdeau, 3 Cranch [7 U. S.] 176.

THE COURT refused to give the instruction as prayed, but instructed them that if they "believe from the evidence that the departure, from this district, by the traverser, on the evening of the 30th of March, 1833, or at any time afterwards within two years thereafter, was for the purpose or with the view to avoid punishment for the offence of burning the treasury building, or for any other offence, this was fleeing from justice, and the statute of limitations is no bar; unless the jury should also believe the said prisoner afterwards returned to the county of Washington, and that his return was so open and public, and under such circumstances, that opportunity was afforded by the use of ordinary diligence and due means, to have arrested him; and that two years and more have elapsed from that period to the time of finding of the indictment in this case."

THRUSTON, Circuit Judge, dissented; and his reasons were understood to be, that if the defendant once fled from justice, no subsequent return would enable him to avail himself of the limitation; and that he could in no event avail himself of the limitation unless the United States knew that he had committed the offence. He was also understood to be of opinion, that there was not sufficient evidence of the defendant's return, &c., to justify an instruction upon that point.

CRANCH, Chief Judge, said that if the defendant (as his counsel had intimated) was willing to agree to the instruction, he should not object to it; but he was not entirely satisfied with it. He said there were two modes of fleeing from justice, namely, departing from the jurisdiction of the offended government, and concealing himself within it. The removing from one place to another in the same jurisdiction, unless clandestinely, or with intent to escape from justice, would not be a fleeing from justice; nor would his return to Washington be necessary to enable him to avail himself of the limitation, if he had not concealed himself, but appeared openly in New York, his usual place of residence. The offence was against the government of the United States, and the offender was as liable for arrest in New York as in Washington. However, as the defendant's counsel had agreed to the instruction as it was drawn up, he should not object to it. He observed also, that he did not think it necessary that the United States should have known that the defend-

ant had committed the offence, in order to his availing himself of the bar, by limitation of time.

Mr. Brent, for the defendant, then prayed the court to instruct the jury, "that if they believe, from the evidence, that the traverser was not personally present at the time of applying the fire to the treasury building, or not sufficiently near, at the time, to be aiding and abetting in the applying of the fire, although the jury should believe that he was concerned in the design of burning said building, then the traverser is but an accessory before the fact, and is entitled to be acquitted under the present indictment."

This instruction did not seem to be opposed by the attorney for the United States, who said that he should contend that if the defendant was near enough to aid the person who applied the fire, by keeping others off, or by facilitating his escape, etc., he would be considered as a principal. To this suggestion the counsel for the defendant assented, and the court gave the instruction as prayed.

THRUSTON, Circuit Judge, dissented, and his reason was understood to be, that there was no evidence that the defendant was not present at the burning.

The jury retired on Saturday, December 24th, at 3 o'clock, p. m., and were kept in their room until Tuesday, the 27th, at 2 o'clock, p. m., when they were discharged by consent of the parties, as they could not agree.

On the 6th of January, Mr. Brent, for the defendant, moved the court to continue the cause to the next term, upon the defendant's affidavit that Willard Carpenter, of Troy, would testify that the general character of Mrs. Baldwin, and of William Hicks, is such that they cannot be believed on oath, and that he has used due diligence, &c.

Mr. Key, for the United States, admitted that Mr. Carpenter would testify as stated in the affidavit.

As this cause stood upon the docket before that of Henry H. White, the court ordered it to be first tried, although Henry requested to be tried first, and offered himself ready, but refused to be tried with Richard.

Mr. Brent, for the defendant, Henry H. White, contended that according to the practice of this court, a cause, once tried, cannot be tried again at the same term, unless by consent; and must be put at the end of the docket.

CRANCH, Chief Judge, said that that rule was applicable only to causes which had been tried, and a verdict found, and a new trial granted. This cause cannot be said to have been tried until a verdict shall have been found. The jury was discharged by consent because they could not agree; so that no verdict has yet been found in this cause.

The cause came on again for trial on the 6th of January, 1837.

The objection was again taken to the admission of William Hicks as a witness; but as THRUSTON, Circuit Judge, was absent, and CRANCH, Chief Judge, was in favor of admitting the witness, it did not prevail, and the witness (Hicks) was sworn and examined.

Mr. Key, for the United States, offered to read Hicks' affidavit, made as a foundation for the arrest of the defendant, in corroboration of Hicks' testimony, which had been impeached by showing that he had made contradictory statements; and to show that there was no combination with Mrs. Baldwin, one of the witnesses for the United States.

Mr. Brent, contrà, cited 1 Starkie, 148, and 3 Starkie, pt. 4, p. 1758.

THE COURT (THRUSTON, Circuit Judge, contrà, or doubting) rejected the affidavit.

THE COURT (THRUSTON, Circuit Judge, contrà) again gave the instruction respecting the defendant's being an accessory only, unless present, aiding, and abetting, &c.

THE COURT also gave the same instruction to the jury which they had before given respecting the limitation of time, and the fleeing from justice.

THRUSTON, Circuit Judge, contrà, delivered the following opinion:

The question presented for the consideration of the court is on the following prayer (omitted). My opinion, at the former trial of the traverser, was different from that of a majority of the court; having assented only to the first branch of the instruction prayed, and dissented most explicitly from the last; that is to say, I was of opinion that if the jury should believe, from the evidence, that the traverser was guilty of having burnt the treasury building and fled from justice, that his return within this district afterwards (in the manner, and under the circumstances proved by the witnesses), conferred no right on him to claim the benefit of the limitation provided in the latter part of the thirty-first section of the act of congress, entitled "An act for the punishment of certain crimes against the United States." I was of opinion, and still am, that this benign indulgence in favor of the accused, of exemption from prosecution after a lapse of two years from the commission of the offence to the time of finding a presentment or indictment against him, admitted of no latitude or extension of construction in favor of the accused, from any supposed analogy between criminal and civil prosecutions. That if, in civil cases a return into the state, or jurisdiction of the court, or into the place where the cause of action accrued, of the debtor or party liable to the action, after having absented himself therefrom, rendered it incumbent on the party having the cause of action against

him, to bring his suit within the period provided by law after such return, or be liable to be barred by the act of limitation; that this was so ordained by positive enactment of law, namely, Laws Md. 1765, c. 12, § 8, or even without any positive statutory enactment, the court should have given this free construction to the law of limitation in civil cases, yet that it could not warrant any such construction of the clause of limitation in the aforesaid act of congress. In civil cases a cause of action cannot exist or at least it is difficult to conceive a case where the person liable to the action is unknown to the plaintiff. If it be a matter of contract, he must be known to the plaintiff; if of tort, he must be almost equally so. In all cases, however, I hold it clear that the return must be such as to afford the plaintiff or creditor reasonable means of arresting the defendant, otherwise laches may be imputed, and he shall not be excused if he do not avail himself of such occasion to pursue the party liable to him. I should hold, even in a civil case, that a bare passage through the country, or county, or place where he ought to be arrested, unless such transit be known to the creditor, or party having cause of action against him, and the means of arresting him be given, would afford no just grounds to limit the right of action. And the words of the Maryland statute clearly bear me out, I think, in this position. See Act 1716, c. 23, § 4, which provides, "that no person absenting himself out of this province, or that shall remove from county to county, after any debt contracted, whereby the creditor may be of uncertainty of finding out such person, shall have any benefit by this limitation in this act specified." Now is it not clear that the reason such wandering debtor shall have no benefit of the limitation is, that the creditor is uncertain where to find him: how uncertain? Because he may not actually know where he is—where to find him. If, then, the debtor returns into the country or place where his creditor should arrest him, and such return be unknown to the creditor, or if the return be not so public, and the stay of the debtor in the place not so long as that the creditor by ordinary diligence might have arrested him, there is the same uncertainty, and in such case the statute of limitation shall not bar him. It is true Act 1765, c. 12, § 3, says that the party having cause of action shall commence the same "after the presence, in this province," of the person liable thereto, within the time limited by the act aforesaid, of 1715; but surely such presence must be known to the party having cause of action, or should be so public, and of such duration as that by reasonable diligence the party having cause of action might know of such presence, or the uncertainty on his part is just as great as if the party liable were absent from the state, or jurisdiction of the court. If these views be correct, let us examine then what this uncertainty in civil cases is on the part of the creditor, which the statute speaks of, which protects him against the plea of limitation. It can be only, as in the words of the statute, the uncertainty where to find his debtor. Whenever this uncertainty exists, no matter whether the debtor returns into the place where the creditor may arrest him, or keeps away, as it is the same thing, unless he be there long enough and openly enough, that the creditor, by reasonable vigilance, might arrest him; in such case the uncertainty no longer exists. The words of the act are, "whereby the creditor may be at uncertainty where to find the debtor;" the only uncertainty that can well exist between debtor and creditor. Whenever this uncertainty exists, the creditor shall be excused if he does not arrest the debtor. Now, for argument's sake, let us admit, that although the clause of limitation in the act of congress aforesaid has no such provision as to the return of the offender within the state or territory where the offence was committed; yet that by equitable construction it should be considered as if it had such provision. Then, how should it be interpreted? Say to the same extent as the Maryland statutes have been interpreted in civil cases. Then should not the return be such that the government may be at no uncertainty where to find the offender? If it be so, should not the traverser, in order to avail himself of the clause of limitation, make it appear that no uncertainty where to find him, did exist? But this uncertainty can be disproved or removed by only two facts; first, actual knowledge on the part of the government that he was within this district, or a presumed knowledge from the duration or publicity of his stay, that he was here; and secondly, that he was known to the government to have been the offender. For, admitting that he was known to have been here, it is the same thing as if he had not been here, if it was not known to the government that he was the offender, or at least, that they had no just grounds of suspicion that he was the offender. If, then, I had been of opinion that the limitation proviso in the act of congress admitted of the latitude of construction that the return of the traverser to this district relieved him from the penalty of having fled (which, however, I cannot agree to), surely such return ought to have been under circumstances which removed from the government all uncertainty as to where he was to be found, and uncertainty as to his identity; for, let it be remarked, that of all uncertainties, those of knowing the perpetrator of a heinous crime, is perhaps the greatest; the very purpose of the criminal is to create this uncertainty; secrecy is his shield; now this cannot be between creditor and debtor; and the only uncertainty in such case is as to the place where the debtor may be found; and if

such uncertainty is caused by any act of his, it shall not avail him against the creditor. I say, then, that if I had concurred in any such construction of the limitation clause in the act of congress aforesaid, I should have required the jury to have been satisfied that the traverser was known to the government to have been the perpetrator of the crime with which he is charged; and that his stay, moreover, in this district, was so public, and of such duration, that the government either actually knew of it, or might be presumed, with reasonable diligence, to have known of it.

But I view this clause of limitation differently from my brothers. The exemption from liability or prosecution, after a lapse of two years, is a free and spontaneous and generous privilege, accorded to offenders by the bounty of the legislature; it is a mere act of grace, growing out of no meritorious or equitable claim on the part of the transgressor, but from the characteristic benignity of our laws; it can be forfeited but in one way, by fleeing from justice; if he flees, he forfeits the privilege; it is a penalty which, once incurred, cannot be relieved against; we have no equitable jurisdiction over it. It cannot be in the power of the offender, by any act of his, to restore himself to the situation he was in before fleeing. The language of the proviso is certain, positive, and absolute; exhibiting no doubt as to its interpretation; affording no ground for an equitable extension. I, therefore, do not agree with the majority of the court in giving this instruction to the jury.

As to the second instruction, that if the jury believe, from the evidence, that the traverser was not present at the burning of the treasury, aiding and assisting therein, but was at a distance therefrom, however guilty he may have been of procuring others to do the deed, that he is an accessory only, and they must acquit him on this indictment. I question much the propriety of giving this instruction; instructions not warranted by the law and the evidence are mischievous, as having a tendency to perplex the jury, and to divert their minds from the true objects of their consideration. This instruction would be a very proper one, if the facts proved by the evidence afforded any just grounds for granting it. Unless the evidence furnishes matter to warrant the instruction, it is irrelevant to the inquiry; a mere abstract proposition, having no connection with the facts in the case. Now there is not a particle of evidence, either of living witnesses, or of circumstances, which involves any other human being in the transaction, than the traverser and his brother; no evidence of the slightest character which furnishes a suspicion even, that the agency of any other than the traverser and his brother was concerned in it; and if they did it not, nobody did it, for de non apparentibus et non existentibus eadem ratio est; the traverser's counsel might as well have prayed an instruction that if the jury believed, from the evidence, that the treasury building was fired by lightning, that they must acquit the traverser; would the court grant such an instruction in the absence of the slightest evidence of such a phenomenon? Every instruction of a court to a jury must be warranted by, and presupposes some evidence, for they always begin with an hypothesis, as, if the jury believe from the evidence, etc. Now if there be no just grounds for the hypothesis there is none for the instruction; for the instruction follows, and cannot take place but on the hypothesis; there must be evidence to justify the hypothetical form of the instruction. Of what avail is it to instruct the jury that they must find so and so, if there be not evidence on which the jury may find according to the instruction? Now whether there be any evidence at all of any supposed statement or case is for the court to say, and if there be none in their opinion they will not grant an instruction, which can only be granted on the fact of there having been such evidence. Now either the traverser and his brother both burnt the treasury together, both acting together as principals, or nobody burnt it; not a glance of suspicion falls from the evidence on any other; no other human being has been talked of, heard of, or to whom even suspicion could attach, but the Whites. If, however, it be contended that Henry alone burnt the treasury, and although instigated or incited by Richard to do the deed, Richard was not present, this would justify the instruction if there was the slightest evidence of the fact; but the evidence proves the contrary; for they both left Washington together in the same gig, and remained together during the whole night, and continued together until ten o'clock the next day, when they reached Baltimore; therefore Henry could not have burnt the treasury alone; all this is proved by the traverser's own and only witness to these facts; therefore as no other person is charged to have done the deed, or had a share in it, as there is not an atom of evidence inculpating any other, or creating a suspicion of the agency of any other, from which any inference could be drawn by the jury implicating any other; as there is no proof that the Whites were separated after they got into the gig at Washington, before the building was burnt, and until they arrived at Baltimore after the building was burnt, Henry alone could not have done it; but if they burnt the building Richard must have been present acting and participating in it, or they neither of them were concerned in it.

The traverser, then, must have been a principal, or he is innocent of the crime. There is no evidence whatever that he could have stood in the relation of an accessory. It ought to be proved against him. The whole evidence in the case negatives the possibility of his having been an accessory. I have too often seen these kind of lures thrown out like

a tub to the whale, to draw the jury's attention from the main object of their inquiry, and have regretted that such a practice has so frequently obtained indulgence; but the utter despair of being able to correct the evil, and the heat and contest likely to ensue from such an effort on my part, has deterred me frequently from interference, though often prompted to interpose. I should, for these reasons, refuse this instruction also; for if the traverser is permitted to escape conviction by irrelevant instructions and needless perplexing law points, calculated to embarrass a jury not being skilled in the science, nor possessing that professional tact and discrimination which can alone be acquired by long study and familiarity with the principles and nice technicalities of the law, where every word has weight, and often a peculiar technical sense, I should deservedly incur the penalty of the sentence which runs in these words, "Dum reus absolvitur, judex damnatur."[2]

MORSELL, Circuit Judge, thought there was evidence enough to justify the prayer of the defendant's counsel for the instruction as to the question of principal or accessory.

CRANCH, Chief Judge, said, that the absence of evidence that the defendant was present at the burning, was sufficient to justify the prayer.

The jury retired to consider of their verdict a little after 12 o'clock, on Thursday, the 12th of January, and having been out all night, came into court on the morning of the 13th, and said they found the defendant guilty of burning the treasury building, but acquitted him on the plea of limitations. This not being a formal verdict, it was agreed that the district attorney, and the counsel for the defendant, should each submit to the jury such form of a verdict as he supposed would be conformable to the intention of the jury, and that they should retire and bring in their verdict in that form which they found correct. After retiring, the jury returned and delivered the verdict in the form prepared by the defendant's counsel, as follows: "We of the jury are of opinion that the offence as charged was committed by the prisoner; and find him not guilty upon the plea of limitations, more than two years having elapsed, from the committing of the offence to the finding of the indictment."

This verdict was recorded; and on 18th of January, 1837, J. R. Key, for the United States, moved for a venire de novo, and the defendant's counsel moved for judgment in favor of the defendant, upon the verdict.

In support of the motion for a venire de novo, J. R. Key contended that the verdict was argumentative, and imperfect, in not finding the matter in issue, which, if the limitation of time had been specially pleaded, and the pleadings made up at full length, would have been, either whether the defendant fled from justice, or whether, after fleeing, he returned, etc., so that he might have been arrested. Upon this point he cited the opinion of this court in Watkins' Case, July 29, 1829 [Case No. 16,649]; Co. Litt. 227a; U. S. v. Patterson, 2 Wheat. [15 U. S.] 221, 225.

MORSELL, Circuit Judge, suggested a query whether the finding of the defendant not guilty upon the plea of limitations, if it stood alone, would not be a sufficient finding of the issue joined upon the plea of limitations; and if so, whether the words "more than two years having elapsed," &c. might not be considered and rejected as surplusage.

THRUSTON, Circuit Judge, thought that if an issue had been joined upon the plea of limitations, it would have been upon the fleeing from justice; or upon the return of the defendant within two years.

J. R. Key. If the issue before the jury had been whether he fled, or returned, etc., some of the jurors may have been of one opinion, and some of another, upon those points, but all may have agreed that the two years had expired, &c., for that fact was not disputed. It is like the case upon the issue of solvit ad diem, cited in 8 Wheel. 312, from 6 N. H. 104. Mr. Key also cited Rowe v. Huntington, Vaughan, 75, 76; 5 Burrows, 2662; Evans' Harris, Entries, 335; Coffin v. Jones, 11 Pick. 45; Triplett v. Micou, 1 Rand. (Va.) 269.

R. J. Brent, for defendant, contra. This is not an argumentative verdict, the words "more than two years having elapsed," &c., may be rejected as surplusage. The jury have found that more than two years had elapsed, etc., which is a bar; and the pleadings do not show that the fleeing from justice was in issue; nor that the United States would have so replied. It was incumbent upon the United States to show that the offence was committed within two years next before the finding of the indictment. Ld. Raym. 1521. The jury are not bound to find a negative in any case. 1 Wils. 57. By finding for the defendant on the plea of limitations, they have in effect found that he did not flee from justice, or that there was no evidence of it. In pleading a statute, it is not necessary to show that the defendant is not within the proviso. The verdict, therefore, is not imperfect. Every thing not found in favor of the plaintiff is negatived. 2 Ld. Raym. 1585; 1 Wils. 55, 56; 1 Term R. 141; Worford v. Isbel, 1 Bibb, 250; 2 Burrows, 698; Hob. 54. Verdicts are to be favored. 3 Term R. 659; Garland v. Bugg, 1 Hen. & M. 377. The jury could not have found the defendant not guilty on the plea of limitations, if the United States had proved the fleeing from justice. Surplusage does not vitiate. Com. Dig. 252, "Pleader," § 28; 2 Com. Dig. 258, § 41; Thompson v. Button, 14 Johns. 86. Even if the clause of

[2] See note B at end of case.

limitation had been specially pleaded, and the pleadings had run on to the issue whether the defendant openly returned after fleeing from justice, and the verdict had been that they find for the defendant upon the plea of limitations, it would, in effect, have been a finding of the issue for the defendant.

The defendant's counsel offered to read the affidavits of some of the jurors as to their intention in finding the verdict, but THE COURT (nem. con.) refused to hear them. See Woodfall's Case, 5 Burrows, 2665.

F. S. Key, in reply. The issue upon the plea of limitation would have been, whether the defendant fled or returned, etc. The verdict does not find the fact one way or the other, but has found a fact not in issue. It is therefore imperfect; and it gives a reason for that finding; it is therefore argumentative and void. The United States were not bound to aver, in the indictment, that the offence was committed within the two years; but the defendant must plead, or allege it affirmatively, namely, that more than two years had elapsed, etc. Com. Dig. "Pleader," § 22; Hob. 54, note 2, to the American edition.

THE COURT (CRANCH, Chief Judge, contra), awarded a venire de novo.

MORSELL, Circuit Judge, was of opinion that the verdict was argumentative, and therefore bad.

CRANCH, Chief Judge, delivered the following opinion:

This is an indictment against Richard H. White, for burning the treasury building on the 30th of March, 1833. The indictment was not found until the 30th of March, 1836. In a criminal case the defendant is permitted to avail himself of the limitation of the statute of April 30, 1790, upon the general issue, and the United States may rebut it by evidence that the defendant was a person fleeing from justice; and if the United States can show that at any time during the two years he fled, the defendant (according to the opinion of the court given upon the trial) may rebut this by evidence that he appeared publicly and notoriously, so that by reasonable diligence he might have been arrested. Such was the course in the present case, and the jury found the following verdict: "We, the jury, are of opinion, that the offence as charged was committed by the prisoner, but find him not guilty upon the plea of limitations; more than two years having elapsed from the committing of the offence to the finding of the indictment." Upon this verdict the defendant has moved for judgment in his favor; and the attorney for the United States, has moved for a venire de novo, upon the ground that the verdict is imperfect.

In criminal cases, the pleadings subsequent to the indictment are generally considered as ore tenus. If they had, in this case, been reduced to writing, so far as they relate to the limitation of time, the defendant would have pleaded in substance that the indictment was not found within two years from the time of committing the supposed offence; to this the United States would have replied that the defendant was a person "fleeing from justice;" to this replication the defendant might have put in a general rejoinder, upon which an issue might have been joined; or he might have replied (according to the opinion of the court given on the trial) that, after so fleeing, he returned, and appeared openly, publicly, and notoriously in this district, or elsewhere in the United States, so that with reasonable diligence he might have been arrested; to which the United States would have put in a general surrejoinder, upon which the issue might have been joined, so that the plea of limitations would have resulted in an issue upon the fact of flight, or the fact of return, etc. There would then have been two issues for the jury to try: (1) The general issue of not guilty; and (2) the issue raised upon the plea of limitations. If the jury had found either issue for the defendant, it would have been sufficient for judgment in his favor. If the jury had said that upon the first issue they find the defendant guilty, and upon the second they find for the defendant, their verdict would, in such a state of the pleadings, have been good. I think this case must be considered as if such had been the pleadings upon the record, and such the verdict. A verdict is not subject to the nice criticisms which may be applied to special pleadings. If the issues are substantially, though informally found, the court may work it into form. Hawks v. Crofton, 2 Burrows, 699.

As to the first issue the jury say, they "are of opinion that the offence, as charged, was committed by the prisoner." This seems to be a clear finding the defendant guilty upon the general issue. As to the second issue, they "find him not guilty upon the plea of limitations." This, I think, is substantially a finding of the issue upon the plea of limitations, for the defendant. It is perhaps informal to say that they find the defendant not guilty on the plea of limitations, but I have no doubt that their meaning was that they found the issue, upon that plea, for the defendant. And the issue upon that plea, according to the conduct and argument of the parties before the jury, and the instructions given by the court, was either, whether the defendant was a person fleeing from justice, or whether, after fleeing, he returned openly, etc., so that with reasonable diligence he might have been arrested. This, certainly, is not a special verdict purporting to state all the facts proved to the satisfaction of the jury, and referring the matter of law to the court: nor is it a partial verdict, finding the defendant guilty of part, and acquitting him of the residue of the charge; nor do I think it an imperfect verdict, for it answers substantially to the

whole issue, or issues in the case. And I think that the latter words, "more than two years having elapsed," etc., may be rejected as surplusage. They only state a fact admitted by the pleadings if made up in form, and do not purport to be the only fact upon which their finding is founded. They create no repugnancy in the verdict; and "if the jury find the point in issue, and also another matter out of the issue, the latter finding," says Mr. Justice Story in the case of Stearns v. Barrett [Case No. 13,337], "is void and may be rejected as surplusage." The fact, that two years had elapsed, was a matter out of the issue, for it was admitted in the pleading. So if they find a matter within the issue, if it be not contradictory, it may be rejected as surplusage. Sufficient is found to enable the court to collect the point in issue out of the verdict; and if so, the same learned judge, in the same case, says, "it will be sufficient." I think the verdict is "expressed substantially in the terms of the issue," and is therefore sufficient ground of a final judgment for the defendant.

THE COURT, however, is of a different opinion, and a venire de novo is awarded.

[See Cases Nos. 16,677–16,679; also, 16,676.]

NOTE A. It was also said that the verdict is argumentative, and Com. Dig. "Pleader," § 22, was cited. "So in all cases, a general verdict which finds the point in issue by way of argument, is void, though the argument or inference is necessary." Vaughan, 75. This is a dictum of Vaughan, in arguing the case of Rowe v. Huntington, upon a special verdict, and is an inference which he draws from a case which he cites from 2 Rolle, Abr. 693. Barry v. Phillips, N. 30 (meaning Baugh v. Phillips, 30). The case in Rolle is this, "In an action of debt for £20, if the defendant plead quod solvit le £20, and the issue is an solvit ceo ou nemy, and the verdict is quod debet le £20, this is not good, because it is only by argument. M. 13 Jac. B. R. inter Baugh and Phillips, adjudged on writ of error." Same case, 1 Rolle, 257. Here the issue was not directly found, and the fact in issue (namely, whether the defendant had paid the £20) could only be inferred by the finding that the defendant owes it. But if the jury had expressly found that the defendant had not paid the £20, and added, "he still owing it to the plaintiff," the matter in issue would not have been found by inference only, but directly. The fact that he had not paid it, would be no more an inference only, but directly. The fact that he had not paid it, would be no more an inference from the fact that he owed it, than the fact that he owed it would be an inference from the fact that he had not paid it. The doctrine of Vaughan cannot be extended beyond the case from which it was drawn. It does not apply to a case where the matter in issue is expressly and positively found, although the jury find something more which was not in issue. In the present case, the jury have, in effect, found the issue upon the plea of limitations, for the defendant, and there is no necessity of resorting to inference to support it, as there was in the case cited by Vaughan. I, therefore, do not think it an argumentative verdict, within the meaning of that case. See, also, Com. Dig. "Pleader," 18, 26, 28; Hob. 54.

NOTE B. On a subsequent day, Judge Thruston read in court the following paper:

In the following remarks I am furnished with an occasion of noticing certain charges which have been exhibited against me of arguing to the jury on matters of fact, charges founded either in malice or want of a due understanding of the true lines of demarcation between matters of law and matters of fact. This instruction affords, I say, a fair occasion to give my views of the distinction between matters of law and matters of fact, because it is one of my main objections to the instruction that it involves both matters of law and matters of fact. I take matters of fact to be, in a legal sense, such as by competent testimony, either written, oral, or circumstantial, go to prove the allegations or averments, in any plea, on which an issue is made to be tried by a jury. I take matters of law to be the judgment of the law upon those facts, if proved to the satisfaction of the jury. If a court give an instruction to a jury, or charge a jury, such instruction or charge must necessarily be hypothetical, because the court cannot assert any fact to be true, or proved by the evidence, but must leave such truth or proof to be judged of exclusively by the jury; but they may inform the jury what the rule or principle of law is, if they shall be satisfied of the truth of the facts attempted to be proved; therefore, an instruction by a court to a jury is always in this hypothetical form: "If the jury believe from the evidence so or so, then the law is so or so," and so must be a charge by the court to the jury.

Of all nice questions, and among those the least understood, is that of what is matter of law and what is matter of fact. I cannot, perhaps, illustrate this question better, than by taking for example the instruction given by the court to the jury in Richard White's case, transcribed below, on which I think it will be made apparent, to any intelligent mind, possessing the faculty of rational discrimination, that in that memorable instruction the court did so confound law and fact, that in the hypothetical part of the instruction matter of law is stated as matter of fact, and that on the legal inference or rule of law, as laid down by the court, drawn from the supposed matter of fact, they have based the rule upon both matters of law and matters of fact. As no objection was made to the instruction on this ground, it seems clear, that the attorney for the United States did not discern this valid objection to the instruction, or was deceived by the want of clear perceptions of the distinction between matter of law and matter of fact. The instruction was in these words, namely: "If the jury believe from the evidence that the departure from this district by the traverser, on the evening of the 30th of March, 1833, or at any time afterwards within two years, was, for the purpose or with a view to avoid punishment for the offence of burning the treasury building, or for any other offence, this was a fleeing from justice, and the statute of limitations is no bar; unless the jury should also believe that the said prisoner afterwards returned to the county of Washington, and that his return was so open and public, and under such circumstances, that opportunity was afforded by the use of ordinary diligence and due means to have arrested him; and that two years and more have elapsed from that period to the time of finding the indictment in this case." Now the court heard all the evidence which the jury did, relating to the traverser's return, and of its openness and publicity, and all the circumstances attending such return, and what was that evidence? as follows:

The traverser came to this city on Sunday evening in the stage, as he said, from Baltimore, and lodged at Mrs. Howard's, a boarding-house in rather a retired part of the city, where he breakfasted the next morning, and after breakfast walked, in company with Mr. Howard, to the capitol, congress being then in session, and went into the congress library there, and left this city before dinner the same day, to go (as he said) to Leesburg, in Virginia. This was all the evidence of the openness and pub-

licity of the traverser's return and the circumstances attending it, except that the circumstances, as proved by the prosecutor's witnesses, very much impaired the force of the circumstances, as bearing in favor of the traverser; because competent evidence was offered to the jury that the traverser was, at the time of such return, travelling under a feigned name; and moreover the testimony of another witness, Mr. Eaton, rendered it questionable whether the traverser did actually return, as stated by Howard and wife, at the time alleged by them; but that some other person, by the name of White, and not the traverser, was the person supposed to be the traverser by said Howard and wife.

I have thus stated all the evidence as to the traverser's return, and the circumstances attending it, upon which, and which alone, the court ought to have instructed the jury as to the inferences of law upon those facts; but what did they do? They left the jury to draw inferences of law themselves, from those facts; and then, upon the jury's first being satisfied with the truth of those facts, and drawing such inferences of law from those facts as the instruction declares, they were then to be governed by the court's inferences of law, from the jury's inferences of law, drawn from the facts. When the court inform the jury that the statute of limitations is a bar, if the jury believe from the evidence that the traverser's return and the circumstances attending it were "*so open and public, and under such circumstances, that opportunity was afforded by the use of ordinary diligence and due means, to have arrested him,*" let me ask if these underscored words are any part of the evidence, or facts in the case; or are they not rather matters of law arising out of the facts? The facts are stated in full above, all which the court heard, and every circumstance connected with the traverser's return, as fully as the jury. Is it not upon those facts only that the instruction of the court should have been given, and not upon the jury's opinion of the legal inferences from those facts? Why should the court, possessed as they were of every word of the evidence, leave it to the jury to say what constituted openness and publicity? Surely they were as competent to judge of this as the jury? Is it the exclusive province of the jury to say how much exposure of one's person, in this or that place, and for what length of time, amounts, in the eye of the law, to openness and publicity? But this is not all; the jury are empowered also to determine other more clear questions of law, as inferences from the facts of which evidence was offered by the witnesses; they are to say that the traverser's return, etc., was not only open and public, but under such circumstances that opportunity was afforded, by the use of ordinary diligence and due means, to have arrested him. Arrested! by whom? Opportunity also was to be inferred from the facts stated in evidence; of this opportunity the jury were to be the exclusive judges. Now, opportunity means "suitableness of circumstances to any end;" then opportunity, in the instruction, means that the traverser was in circumstances suitable to be arrested, for that was the end contemplated in the instruction, of which the jury were to be satisfied, and of which they were to be the judges. But this opportunity to be arrested, or being in circumstances suitable to be arrested, comprises things of which there was not a particle of evidence; there was no evidence that the government, or any of its officers, or any other person whatever, had the least knowledge that the traverser was the incendiary of the treasury building, or, if possessed of this knowledge, that he was at that time within the county of Washington. How was it possible, then, that the short stay of the traverser in the county of Washington afforded an opportunity or circumstances suitable to the end of arresting him? Here, then, it was left to the jury to say that there was such an opportunity, when it is evident that it was a moral impossibility to have arrested him, and an utter lack of evidence to warrant an inference of such opportunity. Was it not, then, entirely a question of law whether the evidence could authorize such inference by the jury? Was it not agitated between the judges as a question of law, and did not Judge Thruston, although overruled by the court, state it as his opinion, that to authorize such an instruction at all, the jury must be satisfied that the traverser was known to have been the incendiary, and known to those legally authorized to have arrested him to have been in the county of Washington; or, under such strong suspicions to have been so, as to have justified his arrest? It is true, the other two judges did verbally tell the jury that such knowledge or suspicion was not necessary to have been proved; then it ought to have been made part of the instruction, before it should have been left to the jury to determine what circumstances afforded an opportunity to have arrested the traverser. Without appearing on the face of the instruction itself, it makes the instruction, or rather the important word "opportunity," a perfect solecism, a most inopportune word. An instruction should contain on the face of it every thing material to warrant its being granted; and should not be patched up with verbal supplements. If, then, opportunity to arrest an offender is a compound idea, involving a question of law, as it clearly did in this case, because involving, according to the opinion of one of the judges, a knowledge on the part of the government that the traverser was the offender; and this law question was settled by the court overruling, by a majority, the judgment of one of the judges, what was this but leaving an inference of law to be drawn by the jury from the facts in the case; and as to the point contested by the judges, without any evidence whatever? Again, if there be doubt on this point, there seems to be none that the other parts of the instruction are questions of law. The jury are left to determine that opportunity was afforded, by the use of ordinary diligence and due means, to have arrested the traverser. Here the jury are to determine what ordinary diligence is; that is to say, that the government were or were not guilty of laches; for ordinary diligence is the opposite of crassa negligentia, or gross laches. Is laches a question of fact, or an inference of law from facts to be judged of by the court and not the jury? When the court hear all the facts, is it not their province to say whether they impute, in the eye of the law, laches or not? and, if asked to instruct the jury whether the facts proved by the evidence imply laches or not, shall a court adjudge that it is the province of the jury, and not theirs, to determine this point? Again, the jury are left to judge of the use of due means. Is this a question of law or fact? Clearly the first, it seems to me; "due means" imply "lawful means." Now what are lawful means, is a question involving constitutional law, as well as common law. The fifth article of the amendments to the constitution of the United States declares, "that no person shall be deprived of life, liberty, or property, without due process of law;" and the fourth article says, "No warrant shall issue to seize the person but upon probable cause, supported by oath or affirmation, describing the person to be seized." Now, although the court had judicial notice that the government were utterly ignorant of the traverser's having been the incendiary of the treasury building; or, at least, that there was an absence of the least evidence that any knowledge of his having been such incendiary could have been imputed to them, or to any other person, or that he was in the county of Washington; and that it was impossible, pursuant to the said fourth article of the constitution, to describe the person, so as to have authorized a constitutional warrant to have been issued to arrest him, or to have enabled the government to have used "due means" to arrest

him, yet they leave it to the jury to determine and adjudge that these "due means" were in the power of the government. But to say nothing of this ignorance of the traverser's having been the incendiary, on the part of the government, and that he was in the county of Washington, are not "ordinary diligence" and "due means" pure questions of law growing out of the facts as proved by the evidence, to be determined by the court and not the jury? What is "ordinary diligence?" Does it mean "reasonable diligence?" Then if the jury find that the government was afforded an opportunity, by "ordinary diligence," to have arrested the traverser, and did not do so, they were guilty of "laches," and so they, and not the court, are to adjudge what degree of negligence amounts, in a legal sense, to "laches." Again, "due means" involve matters of fundamental as well as common law, as I have shown, from the fourth and fifth articles of the constitution. Did the jury know that "due means," otherwise "lawful means," required an oath to be made by a competent witness, charging the traverser as the incendiary? that a warrant must be awarded and issued by a magistrate? that this warrant must be put into the hands of, and executed by, a sworn officer? Are not all these points of sheer law? Did the jury know, or were they informed, that "due means" comprised all these processes? or did the evidence which I have stated fully above, admitting the jury to have been competent to judge of these nice points of law, authorize the court to leave it to the jury to infer any such "due means?" Thus the court, on the aforesaid instruction, first left it to the jury to say whether or not they believed that the traverser did return to the county of Washington, in the manner and under the circumstances as stated by the traverser's witnesses. This was certainly very proper. Although there was contradictory and pretty strong evidence on the side of the prosecutor, it was proper for the jury to weigh the evidence, and to judge according to their impressions of it. These are mere facts; but the court leave it to the jury to say whether or not it was so open and public as, etc. This part of the instruction is at best questionable; it is questionable, as the court heard all the evidence, whether they, and not the jury, should not have adjudged it to have been so "open" and "public" as to have warranted the residue of the instruction. Then they leave it to the jury to say that it was sufficiently "open" and "public" to have afforded an "opportunity," by "ordinary diligence" and "due means," to have arrested the traverser. I have endeavored to show that the court erred in this part of the instruction; for if the jury were permitted to say whether the government had used "ordinary diligence" or not, it was leaving to them to draw an inference of "laches" on the part of the government, which seems to me to be a question of law. They were also permitted to infer, that the government did not use due means to arrest the traverser; and I have endeavored to show that "due means," which are the same as "legal means," involve questions of fundamental, as well as common law. I will now present this question in other aspects. Suppose Howard, the only witness to White's public exposure of himself, for he was the only witness who testified that White was in the streets of Washington, or in the capitol and library there; I say, suppose Howard had been asked this question, do you think White's exposure of his person in Washington, when he walked from your boarding-house to the capitol, etc., was so open and public, and under such circumstances, that opportunity was afforded, by ordinary diligence and due means, to have arrested him? would he not, if a man of reasonable understanding, say that he could not answer that question? He would very properly object that ordinary diligence was a matter of law; that he could not say how much was to be done before the government could be prepared to arrest him; that due means was still more perplexing to him, for he was not lawyer enough to know what due means, or legal means were; but the court would not have permitted such a question to be put to the witness, as involving mere matters of opinion on points of law.

Let us now take a view of this instruction in another aspect. Let us suppose the evidence of Howard and wife to have been given, stating all the circumstances of the traverser's return to this district as it was given to the jury by the said witnesses, and the attorney for the United States had demurred to the evidence, it would in that case have been the exclusive province of the court to have judged of the sufficiency of such evidence, as affording an available defence for the traverser. Would the court have ventured to pronounce that such return, under the circumstances, as proved by Howard and wife, was so open and public, and under such circumstances, that opportunity was afforded, by the use of ordinary diligence and due means, to have arrested him? If the court would not and could not have drawn such inferences, then it should not have been left to the jury to have drawn them. I say the court could not, or at any rate ought not to have drawn such inferences. Let it be observed, that the act of congress "for punishing certain crimes against the United States," has given to offenders the benefit of the two years' limitation, upon the sole condition of not fleeing from justice; that if the condition be broken the offender has forfeited this benign indulgence; that the court, notwithstanding, have extended this privilege beyond the letter, and adjudged that, although the offender, having forfeited the privilege, may be restored to it by returning to the district, and exposing his person to arrest. This is clearly, if any thing, an equitable extension of the terms on which the offender may claim the benefit of the limitation. There is no such provision in the law. If the court will thus stretch the law to embrace what they suppose to be an equitable construction of it, should they not at least pay some regard to fairness and equal justice? and not cause such equitable construction (if it can be so called) to bear altogether on one side? Now, although it may be admitted, that if two years elapse from the commission of the offence to the finding of the indictment, that the offender is absolved, by the clause of limitation, from liability to punishment, although the government remained in perfect ignorance of his having been the offender, yet very different ought the construction to be when the court undertake to add new terms to the law, and adjudge that if the offender having once fled, and thus forfeited the benefit of the two years' limitation, that he may be restored to it by returning to the district, and remaining therein half a day, the government being entirely ignorant that he was the incendiary, or that he was there. What kind of equity is this? It was morally impossible that the government could have arrested him, even had his stay here been ever so long or ever so public, unless such knowledge can be forced upon them. Let it be understood, that by the government I mean those executive officers representing the government, whose especial duty it is to arrest and bring to punishment violators of the law. If, with such knowledge that the traverser was the offender, and that he was here, in reach of legal process, the government neglected for two years to have here arrested him, then indeed laches might reasonably be imputed to them, and there would have been something like reciprocity and fairness in such construction of the statute.

I have been utterly in the dark, as to the grounds upon which the aforesaid instruction was given to the jury, inasmuch as the court have assigned no reasons for having given it. It cannot be from any analogy drawn from the statutes of limitation in civil cases, because it is an express provision of the statute, that if the debtor returns to the county after abscond-

ing, that the creditor must sue him within the time mentioned in the law after such return, or the debtor shall have the benefit of the limitation; if he do not so sue, there would be laches without excuse, because the debtor is not only in such case within reach of process, but is known to his creditor, and the law expressly declares that the time limited for bringing suit shall commence from the date of the debtor's return. But the government did not know that the traverser was the offender, and therefore it was morally impossible to have arrested him. Here the analogy fails. It fails also in this: the law of Maryland expressly gives the benefit of the limitation to the returning debtor, and dates the commencement of the running of the time from the period of the debtor's return. But the act of congress dates the commencement of the two years from the time of the commission of the offence; but the court have amended the statute, and declared that the time for the commencement of the running of the two years shall be that of the return of the offender to this district. Here also the analogy fails. Such new date of the beginning of the time of limitation was fixed in Maryland by express statutory provision; here it was fixed by a judicial supplement to the act of congress.

Again; admitting for argument's sake that the court were right in annexing this supplement to the act of congress, and in leaving also to the jury to draw the questionable inferences above descanted on from this supplementary extension of the act, yet is it not a rigorous and severe construction of this supplement, to subject the government to the penalties consequent upon laches, for having omitted one occasion only of arresting the offender, where the time of his stay in this county was so short, and his exposure of his person so limited, that it would have been an uncommon accident if he should have been seen by any of those executive officers of the government whose peculiar province it is to arrest offenders, and would have required uncommon industry to have obtained the due means of arresting him? Some one must be found to charge the offender on oath. It cannot be presumed, that he could have been known to everybody either to have been the offender or that he was in the county. Suppose he was known to the president and cabinet to have been the offender. Did any of them see him, or know that he was here? Suppose the marshal had this knowledge; did he see him, or know that he was here? Did any deputy marshal or constable see him, or know that he was here? Did any of these officers, admitting that Richard White was known to have been the incendiary, know his person? Now by the court's instruction the government had two years from the time of White's return as aforesaid to have arrested him; is it not a hard, and a rigorous, severe, and unequal interpretation of the court's own supplement to the law, to subject them to the forfeiture of their right to prosecute and punish the transgressor, because they did not seize one single and questionable chance of arresting him, only within the possibility of their having done so, within the whole two years?

Let us again take another view of this instruction. After having been given to the jury, they withdraw to their room; the foreman takes up the instruction and reads it to the jury: suppose, then, one of the jury rises, (and it is a matter of surprise to me that it did not so happen,) and says: "Mr. Foreman, if I understand this instruction, we are authorized to say, that if ordinary diligence, and due means were used, White might have been arrested. Now, Mr. Foreman, I do not know what due means are, I am not lawyer enough to know this. I therefore cannot say, unless I know what these due means are, that are to be used, whether White's stay here was long enough to have provided them. I therefore cannot judge whether by ordinary diligence, he could have been arrested or not." Now here is matter of sheer law, that ought to have puzzled any jury, (and that they were not so puzzled is matter of surprise,) which the court permitted the jury to pass upon, not as facts to be found by them, as the basis of the court's inference of law, but as inferences of law to be drawn by themselves from the facts as detailed by the witnesses. Well, let us suppose the foreman, (and no improbable supposition,) no better lawyer than the juryman who applied to him for information of what due means were, in the contemplation of law? how could they get on? The next step would have been, to come into court to ask for explanation of those terms of fine legal import. Suppose them in court; the foreman says: "May it please your honors, we are at a stand. We do not know what due means signify according to law. It seems to us that the court have devolved upon us the duty of drawing inferences of law from facts, and we believe that our province is to find facts, and leave to the court to draw inferences of law. But if we are bound to draw these inferences, we beg your honors to tell us, what those due means, mentioned in the instruction, are; for we are not learned in the law, and believe that some ceremonies are necessary before an American citizen can be subject to be seized in his person, and we do not know what those ceremonies are." The court, to satisfy these inquiries of the jury, would say to them: "Gentlemen, it is very true, that what constitutes a legal or due arrest of a citizen, is matter of law, and often of nice law. The fourth and fifth articles of the amendments to the constitution of the United States, will teach you what is to be done, to justify the seizure of a citizen's person. There must have been an oath made, by some competent witness, that White was the incendiary, and was in this county: this oath to be made before a magistrate. He must then work out his warrant directed for the apprehension of White; then this warrant must be put into the hands of some sworn officer, to execute; and then he must find out White in order to arrest him; these are the due means, or legal means meant by the instruction. But the foreman would very naturally reply: "May it please your honors, we did not know all this law. Had the court stated specifically in the instruction what was necessary to be done under the terms, due means, we might, perhaps, have saved the court the trouble. We humbly conceive, all these processes of law should have been specially set forth in the instruction."

Again, as to this word opportunity. It was leaving to the jury to say that there was opportunity to have arrested White, when by the very terms of the verbal part of the instruction, it is manifest there was no opportunity for executing such purpose; for there was no evidence that the government, or those representing the government, and whose peculiar duty it is to arrest offenders, did know that White was the offender, or that he was even in this county at the time alluded to in the instruction; it was morally impossible, if even there was a physical possibility to have arrested him, to have done so, and yet the court leave it to the jury to say that there was such opportunity, and at the same time inform them, that it was not material to constitute this opportunity, that White should have been known to have been the offender. Now is not this knowledge indispensably necessary to create the opportunity? The word opportunity, therefore, was too broad and comprehensive a term to have been used in the instruction; the evidence did not justify it; to have presented this opportunity, knowledge of the offender was required. It is one of the natural elements or ingredients of opportunity, one of those suitable and indispensable to the end of arresting White; for without it, it was not possible to have attained that end. It was a contradiction in terms, to leave it to the jury to say there was such opportunity, and at the same time tell them that one of the essential elements or ingredients of this opportunity need

not be or exist; it therefore seems to me that what the court should have said was, that if White's appearance in this county, was in their estimation sufficiently open and public, that then they might judge and say if they so thought, that there was time enough and not opportunity afforded thereby, by the duration of his stay in this county, to have arrested him; but to leave it to the jury, by the written part of the instruction, to say that there was this opportunity, when by the verbal part of the instruction, informing them that knowledge of White's being the incendiary was not necessary, for want of which it was morally impossible to have arrested him, was leaving to the jury to find that a thing impossible to be done, might nevertheless be done. In fact, taking the whole of the instruction together, the verbal part, and the written part, the whole was rendered a felo de se. The word opportunity, then, should not have been in the instruction; but it seems to me that to have made it conformable with the true meaning of the court, it should have run thus: "Unless the jury should also believe that the traverser afterwards returned to this county, and his return was so open and public, and under such circumstances that (had the government known that he was the incendiary) they ought to have known that he was in this county, and that his stay here was long enough, by the use of ordinary diligence and due means, to have arrested him." This form of instruction would have left to the jury to find precisely what the court meant to have left to them; namely, that the traverser was here so openly and publicly, and under such circumstances, that the government might, by ordinary diligence and due means, have discovered that he was here, and had time enough, with such knowledge, to have arrested him. This was certainly all that the court did mean to leave to the jury; but to leave to the jury to say that there was opportunity to have arrested him, was leaving them to find, that which the very terms of the instruction, taking the verbal and written parts together, was what was impossible to have been found.

Case No. 16,676.

UNITED STATES v. WHITE.

[5 Cranch, C. C. 73.] [1]

Circuit Court, District of Columbia. Nov. Term, 1836.

ARSON — PEREMPTORY CHALLENGES — CHANGE OF VENUE—EVIDENCE—ACCESSORIES—LIMITATION—CROSS-EXAMINATION OF WITNESSES—ARREST OF JUDGMENT—DEMURRER—PLEADING ORE TENUS—VERDICT.

1. Arson is not a capital offence in the District of Columbia, and therefore the defendant is not entitled to a peremptory challenge, in the county of Washington.

2. When the defendant, in a criminal prosecution, has offered himself ready, and pressed for trial in the county of Washington, the court will not afterwards, when the cause is called for trial, change the venue upon the motion and affidavit of the defendant, suggesting that a fair and impartial trial cannot be had in the county of Washington. Under such circumstances it is a motion to the discretion of the court.

3. In an indictment for burning the treasury building of the United States, the prosecutor was not permitted to prove that another person than the defendant confessed that he burnt it, in order thus to prove that the fire was not accidental.

4. In misdemeanors there are no accessories; all are principals.

5. In misdemeanors the limitation is two years.

6. If a statute punishes that, as a misdemeanor, which, at common law, was a felony, the limitation of a prosecution, under that statute, is that of misdemeanor, and not that of felony.

7. The limitation is applicable to misdemeanors created by statute subsequent to the act of limitation.

8. The defendant is not entitled to the benefit of the limitation, if within the two years he left any place, or concealed himself, to avoid detection or punishment for any offence; but it is not necessary that the United States should have known that he was the offender.

9. A party, in cross-examining a witness, has not a right to ask him any question tending to degrade him, unless it be in relation to a fact in issue in the record.

10. It is not sufficient ground of arrest of judgment, that it appears, upon the face of the indictment and the record, that the indictment was not found within the time of limitation.

11. It is not universally true that what would be fatal upon demurrer would be equally fatal in arrest of judgment. Upon demurrer the court decides upon the whole record as it then appears; but upon a motion in arrest of judgment the court decides upon the whole record as it then appears.

[Cited in U. S. v. White, Case No. 16,677.]

12. There may be a prima facie cause of demurrer which may be removed by the subsequent pleadings.

13. Where the pleadings, in a criminal cause, are ore tenus, the judgment of the court must be the same as if they were in writing, and spread upon the record.

14. After a general verdict, the court is bound to presume that the parties respectively availed themselves of their rights, and that every thing was alleged and proved which they had a right to allege and could prove under that issue.

15. Limitation may be given in evidence by the defendant under the general issue in a criminal cause; and the United States may give in evidence the fact that the defendant fled from justice, and therefore was not entitled to the benefit of the limitation.

[Cited in U. S. v. Six Fermenting Tubs, Case No. 16,296.]

16. The court, upon a motion in arrest of judgment, is bound to presume that every thing which was necessary to support the verdict, and which could be proved under the issue, was proved to the satisfaction of the jury.

Indictment for burning the treasury building of the United States. The first count charged that the defendant [Henry H. White], on the 30th of March, 1833, "with force and arms, at the county aforesaid, a certain public building called the treasury office of the United States, situate in the city of Washington, in the county and district aforesaid, one of the cities of the District of Columbia, being one of the public buildings in the said city of said district, belonging to the United States, did maliciously and wilfully burn, against the form of the statute, in such case made and provided, and against the peace and government of the United States." The second count charged that the defendant, "on the day and year aforesaid, at the county aforesaid, with force and arms, on the night

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

of the said day, a certain house, called the treasury office of the United States, in which certain persons and the clerks and watchmen in the employment of the United States, did reside and lodge, belonging to the United States, situate in the said county and district, feloniously, wilfully, and maliciously did set fire to, and burn, and consume, against the peace and government of the United States." The third count is in these words: "And so the jurors aforesaid, upon their oath aforesaid, further present that the said Henry H. White, on the day and year aforesaid, at the county aforesaid, with force and arms, on the site of a certain needful building belonging to the United States, being the treasury office of the United States, the site whereof was ceded to the United States, and under their jurisdiction, being in the county and district aforesaid, a certain dwelling-house, wilfully and maliciously did burn, against the form of the statute in such case made and provided, and against the peace and government of the United States."

By the third section of the act of congress of the 2d of March, 1831 (4 Stat. 448), entitled "An act for the punishment of crimes in the District of Columbia," it is enacted, "that every person duly convicted of the crime of maliciously, wilfully, and fraudulently burning any dwelling-house, or any other house, barn, or stable adjoining thereto, or any store, barn, or outhouse having goods, tobacco, hay, or grain therein, although the same shall not be adjoining to any dwelling-house; or of maliciously and wilfully burning any of the public buildings, in the cities, towns, or counties of the District of Columbia, belonging to the United States, or the said cities, towns, or counties," &c., "or as being accessory thereto, shall be sentenced to suffer imprisonment and labor, for a period of not less than one, nor more than ten years, for the first offence," &c. By the act of congress of the 3d of March, 1825, c. 65 (4 Stat. 115), entitled "An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," section 1, it is enacted, "that if any person or persons within any fort, dockyard, navy-yard, arsenal, armory, or magazine, the site whereof is ceded to and under the jurisdiction of the United States; or on the site of any light-house or other needful building belonging to the United States, the site whereof is ceded to them and under their jurisdiction as aforesaid, shall wilfully and maliciously burn any dwelling-house, or mansion-house or any store, barn, stable, or other building, parcel of any dwelling-house, or mansion-house, every person so offending, his or her counsellors, aiders, and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, suffer death." And by the second section it is enacted, "that if any person or persons, in any of the places aforesaid, shall wilfully and maliciously set fire to or burn any arsenal," &c., "or any other building not mentioned in the first section of this act, or any ship or vessel," &c. &c., "every person so offending, his or her counsellors, aiders, and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and by imprisonment and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence."

The first count is under the act of congress of the 2d of March, 1831, usually called the "Penitentiary Act." The second and third counts seem to have been framed under the first and second sections of the act of the 3d of March, 1825, c. 67.

W. L. Brent, upon the affidavit of the defendant "that a fair and impartial trial cannot be had in Washington county," moved the court to transfer the cause to the county of Alexandria for trial.

F. S. Key, for the United States, objected that the defendant about a week ago offered himself ready, and pressed for a trial, but as the case of Richard H. White, for the same offence, stood before it upon the docket, and this defendant refused to be tried at the same time, the court then ordered the jury to be sworn in Richard H. White's case, which has occupied the whole of the intermediate time. The witnesses are all here. The jury in Richard's case have not yet returned a verdict. It is an application to the discretion of the court.

Mr. Brent, in reply, suggested that the trial of Richard White had prejudiced the public mind.

THE COURT (nem. con.) refused to change the venue.

Mr. Brent then moved for a continuance of the cause to the next term, upon affidavit of the defendant that he did not know that Knott would be a witness; and that he would swear that he saw Richard H. White in Washington on the morning after the fire. The affidavit further stated that he could prove by the landlady of a tavern between Rossburgh and Baltimore that the defendant was in her house about eight o'clock of the morning of the fire; and by the keeper of a tavern in Baltimore that he arrived there in the forenoon, and staid there till Tuesday morning.

THE COURT (nem. con.) refused to continue the cause, as these witnesses were known to the defendant at the time of his arrest; and he had already summoned witnesses to prove an alibi, and the others could only corroborate.

Mr. Brent, in cross-examining Hicks, a witness, asked him whether he was arrested for counterfeiting money.

MORSELL, Circuit Judge, said he thought the question ought not to be put.

CRANCH, Chief Judge, said he had some doubt upon that point.

THRUSTON, Circuit Judge, said he should like to hear the authorities.

Mr. Brent cited Starkie, pt. 2, pp. 138-145;

Rosc. Ev. 135; Holding's Case, at the Old Bailey in 1821.

Mr. Key, contra, cited Rosc. Ev. 132, 140; De Sailly v. Morgan, 2 Esp. 691; Watson's Case, in 2 Starkie, 157; Rose v. Blakemore, Ryan & M. 384; Lloyd v. Passingham, 16 Ves. 64.

THE COURT (nem. con.) was of opinion that the party has not a right to ask of a witness, in cross-examination, any question tending to degrade him, (unless it be in relation to a fact in issue in the record. Quære.)

Mr. Brent, after the evidence on the part of the United States had been given, prayed the court to instruct the jury that there was no evidence given to support the second and third counts; but

THE COURT refused to give the instruction.

Mr. Key, for the United States, offered to prove by the witness, Hicks, that Richard H. White confessed that he burnt the treasury building, in order to prove that the building was burnt by design, and therefore that an offence had been committed; but

THE COURT (THRUSTON, Circuit Judge, contra) refused to suffer the evidence to be given.

THE COURT having given, in this cause, the same instruction respecting principal and accessory, Mr. Key contended that it applied only to the common-law count, as the other two counts were for misdemeanors, in which all are principals.

Mr. Brent, contra, contended that, as the third section of the penitentiary act made a distinction between principal and accessories, even in cases of misdemeanor, the indictment should state in which character the defendant is charged.

MORSELL, Circuit Judge, said that in misdemeanors all are principals. The statute did not alter the nature of the offense; and accessories, in misdemeanor, must be indicted as principals.

CRANCH, Chief Judge, said, such is the opinion of the court. The third section of the penitentiary act enumerates several offences, some of which are felonies, to which there may be accessories; it was proper therefore, at the close of the enumeration, to say, that every person duly convicted of any of those offences, "or as being accessory thereto," shall be sentenced, &c. Those words are applicable only to those of the previously enumerated offences, to which there can, by law, be accessories.

THRUSTON, Circuit Judge, said that he was opposed to the instruction altogether, because there was no evidence that the defendant was not present at the burning.

J. R. Key, for the United States, contended that as to the second count, (which he considered as charging a capital offence at common law,) the limitation was three years. The thirty-first section of the statute of April 30, 1790 [1 Stat. 112], relates to offences which were then capital, and if they had been enumerated in the section, instead of being referred to by a general description, arson would have been specifically named; and then prosecutions for arson would be limited to three years, in whatever manner the offence might be afterwards punishable. If it be not now a capital offence in this District, it is because its punishment has been changed by the penitentiary law for this District, either in the first, third, or fourteenth section. But the nature of the offence is not changed, nor the limitation of the time in which the offence may be prosecuted; for by the sixteenth section, "every matter not provided for" by that act is to remain as theretofore.

R. J. Brent, contra. In U. S. v. Mayo [Case No. 15,755], and [Adams v. Woods], 2 Cranch [6 U. S.] 336, it is decided that the limitation of 1790, is applicable to offences created after that act, and therefore does not apply exclusively to crimes as they then existed. If an offence, then not capital, has been since declared to be capital, the limitation would now be three years. As to two of the counts the question is not applicable, for they were only misdemeanors at common law, and the other count is not for arson. When the defendant offered a peremptory challenge, the court said that it was no longer a capital offence, and that therefore, a peremptory challenge could not be allowed.

Mr. Key, in reply, cited 8 Wheeler, Abr. 152, "Statute," § 5; and The Argo [Case No. 516].

THE COURT, (THRUSTON, Circuit Judge, doubting,) was of opinion that the limitation was two years only. And in answer to a prayer made by the defendant's counsel, THE COURT instructed the jury that if they find, from the evidence, that no indictment was found against the defendant within two years from the time the offence was committed in this case, then the statute of limitations is a bar; unless they also find that the prisoner left this district, or any other place within the United States, for the purpose, or with the view to avoid detection or punishment for the offence of burning the treasury building, or for any other offence; or that he concealed himself in any other way, for said purpose, or to prevent detection at any time within the said two years.

CRANCH, Chief Judge, stated that he concurred in this opinion as far as it went; but that it did not go far enough. He thought that if, at any time during the two years, the defendant went out of the United States, or from one place to another within the United States, or concealed himself to avoid arrest or detection for this or any other offence, the limitation did not run in his favor, unless afterwards within the two years, he appeared openly and notoriously, so that, with ordinary diligence, he might have been arrested in the United States; and so continued for two years after such concealment, &c. or until his arrest.

THRUSTON, Circuit Judge, did not concur, for the reasons stated in his written opin-

ion delivered at the trial of U. S. v. White [Case No. 16,675].

THE COURT (THRUSTON, Circuit Judge, contra) was also of opinion, that it was not necessary, in order to the defendant's having the benefit of the limitation, that the United States should have known that he was the person who burnt the treasury building.

Verdict guilty.

Mr. R. J. Brent, moved in arrest of judgment, because the indictment states that the offence was committed on the 30th of March, 1833, and the record shows that the indictment was found on the 30th of March, 1836, so that it appears upon the record that the offence was committed more than two years before the indictment was found; and it does not appear by the record that the defendant was a person "fleeing from justice."

Mr. Brent referred to U. S. v. Watkins [Case No. 16,649], in this court at May term, 1829, where the court decided that the objection was fatal upon demurrer. One of the objections in that case was, "that advantage of the limitation cannot be taken upon demurrer, because the United States would be thereby precluded from replying, according to the proviso of the act, that the defendant fled from justice within the two years. But the court answered, "that, however, it may be in practice, yet in theory, and by law, if judgment upon demurrer to an indictment for a misdemeanor be given against the defendant, it is a peremptory judgment of condemnation; and although in practice the court will often rather intimate its opinion, than pronounce sentence; and will permit the defendant to withdraw his demurrer, and plead to issue; yet upon the question whether the defendant may avail himself, by demurrer, of a bar apparent upon the record, the court must consider what would be the legal consequence of a judgment upon the demurrer; and when we see that it may be a peremptory judgment, and that the defendant has a good defence upon the face of the record, the court cannot deprive him of the benefit of it. We therefore think that the defendant has a right, upon demurrer, to avail himself of the statute of limitations. It has been said that the United States would be thereby precluded from replying the flight of the defendant, if such should have been the fact. But that is not the fault of the defendant. The United States have put themselves in that situation by stating the fact to have happened beyond the day of limitation. They were not bound so to do, for they might have laid the day to have been within the time of limitation, and proved a different day at the trial; and if the day proved should be beyond the time of limitation, and the United States could have shown that the defendant fled within the two years after committing the offence, they might have given it in evidence, or they might have stated, in the indictment, the true time and any facts which existed, and went to show that the defendant could not avail himself of the limitation." The point, therefore, is already decided by this court, that the objection is good on demurrer; and what is good on demurrer is good in arrest of judgment. 1 Chit. 285, 442, 662; Lee v. Clark, 2 East, 333; and Watkins' Case [Case No. 16,649], in which this court said that "upon a motion to quash, or in arrest of judgment, the defendant may avail himself of all the matters which he could upon demurrer." It does not appear in the record that the defendant fled from justice, but it does appear upon the face of the record that the defendant had a legal defence, and, therefore, the court cannot render judgment against the defendant. There is no allegation in the proceedings which will let in the evidence of the defendant's fleeing from justice. Piatt v. Vattier, 9 Pet. [34 U. S.] 415.

J. R. Key, and F. S. Key, for the United States, contra. The United States are not bound to show the day to be within the time of limitation. It is a matter of defence to be shown by the defendant. The doctrine in Chitty is only applicable to a statute which creates the offence, and directs that it shall be prosecuted in a certain time; not to a statute of limitations applicable to all misdemeanors. It relates to convictions on penal statutes, and summary proceedings in inferior jurisdictions. There is a difference between a demurrer and a motion in arrest of judgment, in this, that after verdict, it will be presumed that a day was proved within the time of limitations. The case in 9 Peters, only decides that in a case in equity, there must be allegations as well as proofs. But the defendant, on the trial claimed the benefit of the limitation, and the United States gave evidence that the defendant was a person fleeing from justice, and therefore had no right to claim that benefit; and the whole matter was submitted to the jury. All this will appear in the record, and the court will decide upon the whole record. 1 Chit. 284, 285; Lee v. Clarke, 2 East, 333; Rex v. Bryan, 2 Strange, 1101; Archb. Cr. Pl. 53.

Mr. Brent, in reply, cited Rex v. Fisher, 2 Strange, 865.

CRANCH, Chief Judge, delivered the opinion of the court.

The indictment in this case (which was for burning the treasury building of the United States,) charged the offence to have been committed on the 30th of March, 1833, and the indictment was not found until the 30th of March, 1836, so that more than two years appeared upon the record to have elapsed between the commission of the offence, and the finding of the indictment. By the 31st section of the act of congress of the 30th of April, 1790 (1 Stat. 112), it is enacted, that no person "shall be prosecuted, tried, or punished, for any offence not capital, nor for any fine or forfeiture under a penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incur-

ring the fine or forfeiture aforesaid; provided that nothing herein contained shall extend to any person or persons fleeing from justice." The defendant pleaded the general issue, and the jury found a general verdict against him. The defendant, by his counsel has moved in arrest of judgment, upon the ground that it appears on the record that the indictment was not found within two years after the commission of the offence.

On the part of the defendant it was contended that when the time for the prosecution of an offence is limited, the time, as averred in the indictment, should appear to be within the limit (1 Chit. Cr L. 223, and this court so decided in the case of U. S. v. Watkins in 1829 [supra]; when they sustained a demurrer to the indictment against him, upon the transaction with Hambleton; and it was further contended that whatever objection would have been good on demurrer, is good upon a motion in arrest of judgment. 1 Chit. 442. I am not disposed to disturb the decision in Watkins' Case. I think it was right. But there seems to be a great difference between a demurrer directly to the indictment, before any other pleadings have been had in the case, and a motion in arrest of judgment, after all the pleadings have been made up, issue joined and verdict thereupon. In the first case, the judgment must be upon the whole record as it then appears; and upon a motion in arrest of judgment after verdict, the judgment must be upon the whole record as it then appears. There may be a prima facie cause of demurrer to the indictment which may be removed by the subsequent pleadings. An indictment may, upon its face, state a fact which would be a good defence, and the defendant may in that stage of the cause, avail himself of it by demurrer; and if judgment should thereupon be rendered in his favor, and the indictment should be quashed, a new indictment may be sent up, omitting that fact, or stating other facts to show that it is no defence for that defendant; but if, without then taking advantage of the error in the indictment, the defendant proceeds to plead the matter of defence, and the United States reply matter showing that the defendant is not in a condition to avail himself of that defence, and the defendant should demur to the replication, thereby admitting the facts stated in the replication to be true, the judgment upon that demurrer must be against the defendant, because the matter of the replication admitted by the demurrer, would show that the defendant was not in a condition to avail himself of the prima facie matter of defence contained in the indictment. And if, instead of demurring to the replication, the defendant should take issue upon it, and the verdict should be against him, and he should move in arrest of judgment, the same matter would appear to the court. The whole record would be before them, and the motion in arrest must, upon that state of the record, be overruled.

This would be the result if the pleadings should be in writing and spread upon the record. But the judgment of the court must be the same, where the pleadings are ore tenus. The court is bound to take notice that the defendant, upon the plea of "not guilty" had a right to avail himself of the limitation of time if he was entitled to it; and that the United States had a right to show that he was not entitled to its benefit; and after a general verdict the court is bound to presume that the parties respectively availed themselves of their rights; and that every thing was alleged and proved which they had a right to allege, and could prove under that issue. If, from accident or ignorance of his rights, the defendant should have been prevented from asserting and using his right, it might be the ground of a motion for a new trial. But after a verdict upon the general issue, the court is bound to presume that the jury had considered and acted upon every defence which the defendant could make under that issue, and upon every matter which either of the parties could lawfully have given in evidence upon the trial. As the verdict was against the defendant, and as the jury could not have found such a verdict, unless they had found that the defendant was a person fleeing from justice, the court must presume that they were satisfied of that fact by the evidence. Thus, in the case of Lee v. Clarke, 2 East, 333, in error from the court of common pleas, in an action of debt for a penalty given by the game-laws for using a certain engine to kill and destroy the game of the kingdom, not having lawful authority so to do, the declaration stated that the offence was committed "within the space of six calendar months, to wit, on the 21st of January, 1801, whereas, the limitation by the statute of 2 Geo. III. c. 19, § 6, was six months, which, at common law, except in mercantile transactions, means six lunar months. Upon the plea of nil debet the verdict was for the plaintiff, and this matter among others, was assigned for error. A previous statute (26 Geo. II. c. 2), had limited the time for prosecution to the end of the second term after the offence committed. Lord Ellenborough, during the argument said, "Notwithstanding the allegation that the offence was committed within six calendar months, &c., yet if it were not committed within the time prescribed by the statute, the plaintiff must have been nonsuited;" thereby admitting that the defendant might avail himself of the limitation of time upon the general issue; and that if the plaintiff had not proved the offence to have been committed within the time limited by the statute, he must have been nonsuited in that action of debt, and, of course, if it had been a criminal prosecution by indictment, the defendant must have been acquitted. Lawrence, J., also said: "The time having elapsed would have been evidence for the defendant on the plea of nil debet. The argument goes the-

length of assuming that, if no time whatever had been alleged, it would have been sufficient for the plaintiff, at nisi prius, to have proved the offence committed at any time before the action commenced; which cannot be pretended." The counsel for the defendant in error said: "But the answer already given by the court is sufficient; the allegation itself was unnecessary, and may be rejected; and after verdict the court will presume that the fact was proved within time." After the argument was closed, Lord Ellenborough said: "To some of the errors assigned, an answer has already been given by the court; such as those which respect the allegation of the time within which the action was commenced being stated to be within six calendar, instead of lunar months, and not stated to be within two terms. The allegations were not material; and we cannot presume that the fact was not proved to have happened within the time prescribed by law for the commencement of the suit."

So in the case of Pugh v. Robinson, 1 Term R. 116, which was a case of special demurrer to the declaration, on the ground that it appeared, upon the record, that the suit was brought before the cause of action accrued, the court overruled the demurrer, because that fact did not appear upon the record. Mr. Law, (afterwards Lord Ellenborough,) in support of the demurrer, said: "Though on motions in arrest of judgment, and on trials at nisi prius, the court will inquire when the bill was actually filed, yet they will not on demurrer, where such inquiry is precluded." If this be the law, and it was an admission by eminent counsel, there is a difference between a demurrer and a motion in arrest of judgment. Upon a demurrer, the inquiry respecting a fact not appearing on the record is precluded; but may be admitted upon a motion in arrest of judgment, in some cases. But it is not necessary, in the present case, to insist upon that difference in this respect; for, after a general verdict, the court must presume that every thing in issue has been considered and decided by the jury; and every fact was in issue of which the parties could avail themselves upon the plea of "not guilty;" one of which facts was, on the part of the defendant, the limitation of time, and another of which facts was, on the part of the United States, the defendant's fleeing from justice. In the above case of Pugh v. Robinson, the promise and breach (which were the cause of action,) were, in the declaration, alleged to be on the 7th of November, 1785, which was the first day of Michaelmas term. The declaration was entitled generally of that term. The defendant demurred specially, and contended that the filing must, in law, relate to the first day of the term, and as the law knows no fractions of a day, it must relate to the first instant of that day. On the other side it was contended that the term, for the purpose of delivering the declaration, could not be considered as commencing until the sitting of the court. That this was evident on adverting to the ancient practice of the court when the parties declared ore tenus, which was minuted by the prothonotary; but, on account of the great increase of business, the present mode of delivering the declaration in writing, was substituted. That, therefore, this declaration could not be supposed to have been delivered before the sitting of the court; for, till that time, by the old practice, the party could not have declared ore tenus; and although the law does not, in general, allow fractions of a day, yet the court will take notice of their usual time of sitting, before which time the contract might have been made and broken, and the declaration be thus supported. Ashhurst, J., said: "The court ought to make any intendment against a mere captious objection. We must resort to the old practice of declaring ore tenus; and by referring to that we find that the declaration could not have been delivered till the sitting of the court, so that here the promise and the breach may well have taken place before the delivery of the declaration." On that ground the demurrer was overruled. Here, then, it is clear that the court may explain the record by reference to the ancient practice of pleading ore tenus, even in cases of demurrer; and, à fortiori, in cases of motion in arrest of judgment.

Weston v. Mason, 3 Burrows, 1725, is a strong case to show that there is a difference between a demurrer and a motion in arrest of judgment. It was an action of debt upon a bond, brought against the sureties of a sheriff's bailiff. The condition, after reciting that the sheriff had appointed the person bailiff for the hundred of East Gotson, was that, "if, therefore, he shall duly execute his office, &c., within that hundred, and shall duly execute all warrants directed to him, and make due and sufficient return thereof, &c., then the bond to be void." Performance of the condition was pleaded. The plaintiff replied that the bailiff had not made a due return to a particular warrant directed to him. The defendant rejoined that he had; upon which issue was joined, and verdict for the plaintiff. Mr. Dunning moved in arrest of judgment, and contended that the breach assigned was not sufficient, because it did not state that the warrant was directed to the bailiff, as bailiff of that hundred, and therefore he was not obliged to return it. He cited the case of Stoughton v. Day, Aleyn, 10, and contended that it was exactly like this, except that that was a warrant on an execution, and this on mesne process; that the condition of that bond was in the very words of this; and that upon looking into the record of that case it agreed with the present. Sir Fletcher Norton and Mr. Ashhurst said that "that case was on demurrer—this after verdict; therefore it shall be supposed that every thing necessary to maintain the action was proved." Lord Mansfield said: "A case is cited out of Aleyn, as in point; but the case out of Aleyn was upon demurrer. If it stood upon the construction

of the bond, I should have desired to consider of it; but this being in arrest of judgment, after verdict, and not on demurrer, it does not appear that it was directed to him as bailiff of the hundred." Mr. Justice Wilmot: "If it had stood upon a demurrer I should have thought the case in Aleyn to have been in point." "But upon this record we cannot take the warrant to be directed to him otherwise than as bailiff of the hundred; and by joining issue on the fact of returning it, he admits that it was not directed to him generally. And since he has admitted the execution of it, we cannot intend that it was not directed to him as bailiff of the hundred, in order to arrest a judgment." Mr. Justice Yates: "The case in Aleyn was determined on a demurrer. Therefore that case does not affect this." Mr. Justice Aston concurred, and the judgment was not arrested. Here, then, is a case where, if the defendant had demurred to the replication, the judgment would have been in his favor; but as he pleaded over, and took no exception until after verdict against him, the judgment could not be arrested, although the replication was still as defective after verdict as it was before. And the reason is, that after verdict, every thing which the plaintiff could have proved, under the issue, in support of the verdict, must be presumed to have been proved. This is evidently the spirit and reason of the case.

In the case of Henry H. White, now before us, the parties had clearly a right, under the general issue, to litigate the question of limitation of time. The defendant had a right to rely on the statute; and the United States had a right to show that the defendant was a "person fleeing from justice," and therefore not entitled to the benefit of the limitation. 1 Chit. 470, 475, 626. All this must, or might, have been before the jury; and as they found a general verdict against the defendant, the court is bound to presume that every thing which was necessary to support the verdict, and which could be proved under the issue, was proved to their satisfaction. There can be no doubt that the United States, upon the issue of not guilty, might have given evidence to show that the defendant was a person fleeing from justice; and if that fact was proved, it entirely removed the ground of demurrer which originally existed in the indictment, namely, that the indictment was not found within two years after the offence was committed; and as the court is now bound to presume, from the verdict, that the fact of the defendant's fleeing from justice was fully proved, there can no longer be a pretence for arresting the judgment upon that ground. A defendant who is permitted to avail himself of the benefit of the statute of limitations upon the general issue, in a criminal cause, ought not, thereby, to be placed in a better condition than if he had pleaded it specially. If he had so pleaded it, the facts would have been spread upon the record to show that he was not entitled to its benefit; and then upon the whole record the judgment could not be arrested. If he chooses to rely upon the statute, without pleading it, he must take it with all its burdens, and liable to all its provisos and exceptions. He cannot be permitted to have the full benefit of the statute, upon the general issue, and when the verdict is against him, arrest the judgment, because he had not pleaded it specially.

The defendant's counsel seemed to rely much upon the dicta of the supreme court of the United States in the case of Piatt v. Vattier, 9 Pet. [34 U. S.] 415. But those dicta are only a confirmation of the general maxim in courts of equity that the decree must be secundum allegata et probata. In those courts, proofs without allegations are quite as unavailable as allegations without proofs. But in a criminal case the defendant is permitted to prove, upon the general issue, matter of defence not specially alleged, and the United States to rebut the same by evidence, without any written special replication. It is a question of practice rather than of law, and the difference of jurisdiction causes a difference in practice.

Upon the whole, I am clearly of opinion that, in the present state of the record, the judgment cannot be arrested for the cause assigned.

THRUSTON, Circuit Judge, concurred. MORSELL, Circuit Judge, dissented.

The motion in arrest of judgment was overruled, and the defendant sentenced to seven years imprisonment and labor in the penitentiary.

[See Cases Nos. 16,677, 16,679.]

Case No. 16,677.

UNITED STATES v. WHITE.

[5 Cranch, C. C. 116.] [1]

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

MISDEMEANORS—LIMITATION—FLEEING FROM JUSTICE—INSTRUCTIONS TO JURY—EVIDENCE UNDER GENERAL ISSUE.

1. The defendant, in a prosecution for a misdemeanor, is not entitled to the benefit of the limitation in the act of congress of the 30th of April, 1790, § 31 [1 Stat. 112], if within the two years he fled from justice, although he should within the two years have returned openly to the place where the offence was committed, so that, with ordinary diligence and due means, he might have been arrested.

2. If, within two years after the commission of the offence, the defendant left the district in which it was committed, with intent to avoid detection or punishment for that offence, he was a "person fleeing from justice," although he might at various other periods within the two years have been arrested in the United States.

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

3. It is improper to give any instruction to the jury, after they have retired, upon any question not asked by the jury.

4. Upon trial of the general issue, the United States may give evidence to show that the defendant fled from justice, although that fact should not be averred in the indictment, and although it should appear upon the record that the offence was committed more than two years before the indictment was found.

This cause came on again for trial upon the venire de novo awarded at the last term. [Case No. 16,675.] The jurors, as called to the book, were sworn on the voir dire, and the chief justice put this question to each of them, namely: "Have you formed and delivered any opinion as to the guilt or innocence of the prisoner, Richard H. White, upon the indictment upon which he is now to be tried?" Twenty-nine were rejected upon their answer in the affirmative.

Brent & Brent, for defendant, contended that, as it appeared upon the face of the indictment and the record that the offence was committed more than two years before the finding of the indictment, the United States could not give evidence of the defendant's fleeing from justice, without an averment of that fact in the indictment, or by a special replication. Proof without allegation is not sufficient. Scott v. Lunt, 7 Pet. [32 U. S.] 607.

Upon this point, CRANCH, Chief Judge, delivered the following opinion: Mr. Brent, for the defendant, denies the right of the United States to give evidence to show that the defendant was a person fleeing from justice; because there is no allegation in the indictment that he was so fleeing; and it appears upon the record that the offence was committed more than two years before the indictment was found. On the 19th of December last, before the first jury was sworn in this cause, Mr. Brent moved the court to quash this indictment, for the same cause. THE COURT overruled the motion, because they thought it was competent for the attorney of the United States, upon the trial, to show that the offence was committed on a different day, or that the defendant was a person fleeing from justice, and the defendant might avail himself of the limitation, upon the trial, if he was entitled to its benefit. On the 19th of January last, Mr. Brent moved the court to arrest the judgment in U. S. v. White [Case No. 16,676], upon the same ground, namely, that it appeared upon the record that the offence was committed more than two years before the indictment was found; and the decision of this court in U. S. v. Watkins [Id. 16,649], upon the demurrer to the indictment on the transaction with Hambleton, was cited, in which the demurrer was sustained upon the same ground. In giving the opinion of the majority of the judges upon that motion, in White's Case [supra], a distinction was taken between the case, as it would have appeared upon a demurrer to the indictment, and as it appeared upon the motion in arrest of judgment; showing that upon a demurrer to the declaration, the judgment must be upon the record, as it then was; and upon a motion in arrest of judgment, after verdict, the judgment must be upon the whole record, as it then was. This court, in that case, said: "The court is bound to take notice that the defendant, upon the plea of 'not guilty,' had a right to avail himself of the plea of limitation of time, if he was entitled to it; and that the United States had a right to show that he was not entitled to its benefit;" and again this court said: "The parties had clearly a right, under the general issue, to litigate the question of limitation of time." And again this court said: "There can be no doubt that the United States, upon the issue of 'not guilty,' might have given evidence to show that the defendant was a person fleeing from justice." And again: "A defendant who is permitted to avail himself of the benefit of the statute of limitations, upon the general issue in a criminal cause, ought not thereby to be placed in a better condition than if he had pleaded it specially." "If he chooses to rely upon the statute, without pleading it, he must take it with all its burdens, and liable to all its provisos and exceptions." Upon the trial, the averment, in this indictment, that the offence was committed on the 30th of March, 1833, is only evidence of that fact, and relieves the defendant from the burden of proving it. If, instead of this admission of the fact, it had been proved by the defendant in any other manner, there can be no doubt that the United States might have rebutted it, by evidence that the defendant was a person fleeing from justice; the means by which the fact is proved, cannot deprive the United States of the right to rebut it. Upon the trial, the limitation is only a prima facie bar, which may be removed by showing a fleeing from justice; and upon the trial of the general issue, it is immaterial whether that prima facie bar is proved or admitted; it may, in either case, be rebutted by evidence of the fleeing from justice. If there had been a demurrer directly to the indictment, the demurrer must, according to the opinion and decision of this court in Watkins's Case have prevailed; but after the general issue joined (which admits evidence both of limitation and of fleeing), the record presents a very different aspect; the prima facie bar becomes a part of the issue to be tried; whereas, upon demurrer, it is an absolute bar; because, by demurrer, all replication is cut off, all further proceedings are stopped, and all further evidence excluded; whereas, upon the general issue, every matter of defence which the defendant may give in evidence may be rebutted by evidence on the part of the United States. In whatever way the defendant presents his defence of limitation, I think the United States have

a right to rebut it, if they can, by evidence of his fleeing from justice.

THRUSTON, Circuit Judge, concurred. MORSELL, Circuit Judge, dissented.

Brent & Brent then contended, that nothing but a continuous fleeing from justice during the two years, could deprive the defendant of the benefit of the limitation. The reason of the exception of persons fleeing from justice was, that they thus prevented the United States from arresting them. This reason fails, if within the two years they might have been taken. The defendant's counsel also contended, that going from Washington to New York, openly and publicly, and there remaining at the defendant's usual residence, was not a fleeing from justice, for he might as well be arrested in New York as in Washington. U. S. v. Smith [Case No. 16,332].

Mr. Key, contra. There is no provision in the law for a return after fleeing. It is not analogous to the provisions of the statute of limitations in civil cases. It is a forfeiture of the privilege. The limitation can begin to run only from the commission of the offence, not from the return. The words of the act are: "Provided, that nothing herein contained shall extend to any person or persons fleeing from justice." When fleeing? Not at the date of the statute; not at the time of the arrest of the offender; not at the time of finding the indictment; not merely while he was fleeing. Having once fled, he is a person fleeing from justice, and therefore he cannot claim the benefit of the limitation; he has lost it forever. If, in any case, a return would restore the benefit, it must be a surrender of himself into the hands of justice. Dwar. St. 743; 9 Law Lib. 743.

The judges (THRUSTON, Circuit Judge, absent) could not agree to give the instruction which they had before given at the last term, upon the prayer of the defendant's counsel, respecting the fleeing from justice, and the return to the district, &c. [Case No. 16,675.]

Mr. Key then prayed the court to instruct the jury, that if they should believe, from the evidence, "that the prisoner committed the offence charged in the indictment, and, within two years thereafter, fled from this district, with the intent to avoid detection or punishment for the offence, then the indictment's not being found within two years after the offence was committed, is no defence to the prisoner."

It being known that THRUSTON, Circuit Judge (who was absent), was of that opinion, it was agreed by the counsel that if the Chief Justice should be of that opinion also, the instruction should be given, MORSELL, Circuit Judge, dissenting; and it was so given; CRANCH, Chief Judge, observing that the original instruction upon this point, which was given on the trial, at the last term, was not drawn up by him, and he was never entirely satisfied with it; but he had agreed to that part of it which admitted a return, after flight, to entitle the prisoner to the benefit of the limitation, from the time of the return. He had, however, been satisfied by the argument, last evening, that the prisoner, if he fled, forfeited the benefit of the limitation, or rather, was not protected by the limitation. He considered it as analogous to flight in felony, &c., which forfeited the goods and chattels of the offender. If he fled, he must have been "a person fleeing," and therefore not within the protection of the act. See St. 7, Wm. III. c. 3, § 5; Fost. Cr. Law, 272; 2 Hawk. P. C. c. 49, § 14; and Jac. Dict. tit. "Fugam Fecit."

The jury having been out all Friday night, and until four o'clock, p. m., on Saturday, the 29th of April, sent the following question to the court: "Must the jury infer a 'fugitive,' provided that they believe that the prisoner left this district with intent to avoid detection or punishment for the offence, but could, at various other periods, within two years, have been arrested in the United States?"

To which THE COURT answered as follows:—If the jury should be satisfied by the evidence, that the defendant within two years after the commission of the offence charged in the indictment, left this district with intent to avoid detection or punishment for that offence, he was a person fleeing from justice, although they should be also satisfied by the evidence, that he might at various other periods, within the two years, have been arrested in the United States.

W. L. Brent, for defendant, requested the court to add an instruction, that the circumstances of the defendant's appearing publicly in the United States, and actually coming to Washington, within the two years, were proper considerations for the jury, in forming their opinion of the intent with which the defendant left the district.

But THE COURT (nem. con.) refused; because they thought it improper to give the jury, after they had retired, instruction upon any question not asked by the jury.

The jury could not agree, and were discharged by consent The defendant had leave to withdraw his plea, and file a general demurrer to the indictment.

[See Cases Nos. 16,678 and 16,679.]

Case No. 16,678.

UNITED STATES v. WHITE.

[5 Cranch, C. C. 368.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.

INDICTMENT FOR MISDEMEANOR — LIMITATIONS — DEMURRER—DISCHARGE OF RECOGNIZANCE.

1. If it appears, upon the whole record upon an indictment for a misdemeanor, that the of-

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

fence was committed more than two years before the indictment was found, the defendant may avail himself of that defence, by a general demurrer.

2. A recognizance, to appear in court from day to day, to answer to a certain indictment, and not to depart without the leave of the court, is not discharged by the quashing of that indictment, but remains in force until the defendant has leave from the court to depart, and if a new indictment be found, he and his bail are bound for his appearance to answer such new indictment.

Indictment for burning the treasury building of the United States. [See Case No. 16,675.]

The defendant [Richard H. White], by his counsel, W. L. Brent, filed a general demurrer to the indictment, at the last term [Case No. 16,677], because it appeared upon the face of the indictment, that the offence was committed more than two years before the finding of the indictment; and cited the opinion of this court in U. S. v. Watkins [Id. 16,649] at May term, 1829, in which case the court, upon demurrer, quashed one of the indictments on that ground.

In that case this court said: "In answer to this objection, it has been said (1) that it does not appear upon the face of the indictment at what time it was found; (2) that advantage of the limitation cannot be taken by demurrer, because the United States would thereby be precluded from replying, according to the proviso of the act, that the defendant fled from justice within the two years. The answer to the first objection is, that it will appear, from the caption of the indictment whenever the record is made up, at what time the indictment was found. And upon demurrer the judgment of the court must be upon the whole record. And if, upon the whole record, it should appear to the court that the offence was committed beyond the time limited, they could not give judgment against the defendant. To the second objection, to wit, that the defendant cannot take advantage of the limitation upon demurrer, the answer is this: That, however it may be in practice, yet in theory, and by law, if judgment upon demurrer to an indictment for a misdemeanor be given against the defendant, it is a peremptory judgment of condemnation; and although in practice the court will often rather intimate its opinion than pronounce sentence, and permit the defendant to withdraw his demurrer and plead to issue; yet, upon the question whether the defendant may avail himself, by demurrer, of a bar apparent upon the record, the court must consider what would be the legal consequence of a judgment upon the demurrer; and when we see that it may be a peremptory judgment, and that the defendant has a good defence upon the face of the record, the court cannot deprive him of the benefit of it. We think, therefore, that the defendant has a right, upon demurrer, to avail himself of the statute of limitations. It has been said that the United States would thereby be precluded from replying the flight of the defendant, if such should have been the fact; but that is not the fault of the defendant. The United States have put themselves in that situation by stating the fact to have happened at a time beyond the day of limitation. They were not bound to do so; for they might have laid the day to have been within the time of limitation, and have proved a different day at the trial; and if the day proved should be beyond the time of limitation, and the United States could have shown that the defendant fled within the two years after committing the offence, they might have given it in evidence; or they might have stated in the indictment the true time, and any facts which existed and went to show that the defendant could not avail himself of the limitation."

The defendant's counsel also cited the opinion of this court in the case of U. S. v. White [Id. 16,676], at March term, 1837, in which the defendant's counsel moved in arrest of judgment upon the same ground. But the court overruled the motion, and said: "There seems to be a great difference between a demurrer directly to the indictment, before any other pleadings have been had in the case, and a motion in arrest of judgment after all the pleadings have been made up, issue joined, and verdict thereupon. In the first case, the judgment of the court must be upon the whole record as it then appears; and upon a motion in arrest of judgment, after verdict, the judgment must be upon the whole record as it then appears. There may be a prima facie cause of demurrer to the indictment, which may be removed by the subsequent pleadings. An indictment may, upon its face, state a fact which would be a good defence, and the defendant may, in that stage of the cause, avail himself of it by demurrer."

Mr. Key, upon considering those cases, gave up the point, and THE COURT rendered judgment upon the demurrer for the defendant, and quashed the indictment.

Mr. Key then stated, that he had just sent up to the grand jury another indictment, charging his fleeing from justice, and thereby avoiding the bar of limitation, which new indictment was still under consideration of the grand jury, and therefore prayed that the defendant might be taken into custody; considering his recognizance as discharged by the quashing of the indictment.

The recognizance was in the usual form; to appear on a certain day, and from day to day, to answer to a certain indictment, and not to depart without leave of the court.

Mr. Key cited 1 Chit. Cr. Law, 103, that upon quashing an indictment the recognizance to answer it is discharged.

R. J. Brent, for defendant, cited the same book and page; that although the indictment is discharged, yet if the recognizance is to answer and not depart without leave, and the prosecutor sends up a new indictment, and

the defendant departs without leave, the recognizance is forfeited. He cited also the case of Reg. v. Ridpath, 10 Mod. 152.

THE COURT (THRUSTON, Circuit Judge, absent) directed the marshal to take the defendant into custody during this discussion; but, upon consideration, were of opinion that the recognizance being to attend from day to day to answer to the charge, and not to depart without the leave of the court, was not discharged by the quashing of the indictment.

And, as he had been heretofore long in confinement upon this charge, and having had three juries sworn, without a valid verdict, and having now appeared upon his recognizance, THE COURT refused to require new bail, but permitted him to go upon the old recognizance; and upon affidavit continued the cause until the next term, the grand jury having found a new indictment.

[See Case No. 16,679.]

Case No. 16,679.

UNITED STATES v. WHITE.

[5 Cranch, C. C. 457.] [1]

Circuit Court, District of Columbia. March Term, 1838.

INDICTMENT — PLEA IN ABATEMENT — MISCONDUCT OF GRAND JURORS — EXAMINATION OF WITNESSES — EVIDENCE AT FORMER TRIAL — DECEASED WITNESS.

1. That one of the grand jurors, who found the indictment, had previously expressed an opinion that the defendant was guilty of the offence, is no ground for a plea in abatement of the indictment.

[Cited in Lascelles v. State, 90 Ga. 347, 16 S. E. 949. Quoted in State v. Easter, 30 Ohio St. 545. Cited in State v. Hamlin, 47 Conn. 112.]

2. Exceptions to grand jurors for favor, are only cause for challenge before they are sworn, or before indictment found, not for a plea in abatement.

[Distinguished in U. S. v. Hammond, Case No. 15,294.]

[Cited in Patrick v. State, 16 Neb. 330, 20 N. W. 121; State v. Hamlin, 47 Conn. 112.]

3. The court will not permit questions to be put to a witness tending to disgrace him, and which he is not bound to answer.

4. What a deceased witness testified at a former trial of the same cause may be substantially proved. It is not necessary to prove the very words of the deceased witness.

[Cited in Brown v. Com., 73 Pa. St. 326.]

5. The court will not permit a witness who was a juror on the former trial to testify what was said by witnesses at that trial in relation to the general reputation of a witness as to veracity.

6. What a witness testified at a former trial may be given in evidence to discredit him by showing a contradiction between that and his present testimony, without having first asked the witness whether he did not testify to that effect.

The defendant [Richard H. White] was indicted for burning the treasury building of the United States. [See Case No. 16,675.]

A former indictment against the defendant, for the same offence, having been quashed upon demurrer at the last term, because it appeared, upon the record, that the offence was committed more than two years before the indictment was found [see Cases Nos. 16,677 and 16,678]; the grand jury found another indictment against him, charging the burning, as before, and that he fled from justice. Upon this indictment, he pleaded "not guilty," at the last term. He now came in proper person and offered a plea in abatement that Joseph Forrest, one of the grand jurors who found the bill, had previously expressed an opinion that the defendant was guilty of the offence charged in the indictment.

Mr. Key, U. S. Atty., objected to filing the plea, because the defendant had already pleaded the general issue, and because the matter pleaded is no ground for plea. The offence charged being a misdemeanor, the defendant cannot plead both in bar and abatement at the same time, as he might in felony.

R. J. Brent, for defendant, cited the following authorities: Burr's Trial [Case No. 14,694]; State v. Rockafellow, 1 Hals. [6 N. J. Law] 332 (which was a plea in abatement because one of the grand jurors was not a freeholder); 1 Chit. Cr. Law, 308, 309; 11 Hen. IV. c. 9; 2 Vin. Abr. 270, "Trial," H, d, 3; Co. Litt. 155; 2 Tyler, 273, 473; 2 Hale, Hist. P. C. 155, 167; 2 Hawk. P. C. c. 25, §§ 26–28; 3 Inst. 32–34. Burr's Case is decisive that it is a good cause of challenge. It is not too late for the defendant to take advantage of it. The plea itself shows why it was not urged as a challenge before indictment found. The defendant is not to be presumed to know that the grand jury are acting upon his case. He may not have been taken; and is generally absent when the indictment is found. 1 Chit. 308, 309.

Mr. Key, in reply. The case in Halstead's Reports [6 N. J. Law] is under a statute of New Jersey, which makes all indictments void if any one of the grand jurors is not a freeholder. Every challenge to a grand juror for favor must be before indictment found. 2 Hawk. P. C. c. 25, §§ 16, 18, 23. By the Maryland act of February, 1777, c. 15, § 10, the want of freehold is no cause of challenge. No challenge can be taken after verdict. 1 Leach, Crown Cas. 119, Case 58; Gord. Dig. 752, note; Burr's Trial [Case No. 14,694a]; U. S. v. Fries [Case No. 15,126]. The cases cited on the other side are cases in which the exception was a general disqualification of the person as a juror; not a particular exception for favor in an individual case. There is no case of challenge of a grand juror for favor after indictment found, and especially after general issue joined.

THE COURT (THRUSTON, Circuit Judge, absent) refused to receive the plea, and said: The authorities which have been cited refer to those legal disqualifications which render the juror incompetent, in law, to act as a grand juror in any case; and not to objections

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

which go only to the favor in some particular case. No exception for favor can be taken to a petit juror after he has been sworn; nor has any case been cited, in which an exception to one of the grand jurors, for favor, has been pleaded. The books cited show that challenges to grand jurors must be taken before they are sworn; or before the indictment is found. Exceptions for favor are causes of challenge only, and not grounds for a plea. It is also an objection to this plea, that it does not, like the plea cited in Halstead's Reports [6 N. J. Law], state what number of the grand jurors found the indictment to be a true bill; and that Mr. Forrest, (the juror referred to in the plea,) was one of that number, and that without his vote the indictment could not have been found. The objection to the juror in that case was a general disqualification to act as a grand juror; and not an exception for favor, which was only a disqualification to act in the particular charge against the defendant. We think that an exception for favor, which would be a good cause of challenge, cannot be pleaded to the indictment.

After the jury was sworn, W. L. Brent, for defendant, requested the court to order several of the witnesses to be kept out of court, and to be kept separate from each other during the examination of the respective witnesses, on the part of the United States.

THE COURT ordered the marshal to keep them out of court; but refused to order them to be kept separate from each other.

In cross-examination of William Hicks, a witness on the part of the United States, a question was proposed to be asked whether he was concerned with a certain man in counterfeiting money.

THE COURT said they had decided, in some case, the name of which was not recollected, that no question should be put to a witness, tending to disgrace him, and which he would not be bound to answer; and said they had, upon that point, considered the following authorities: Starkie, Ev. pt. 2, pp. 138, 144, et seq.; Harris v. Tippett, and Rex v. Yewin, 2 Campb. 638; Rex v. Watson, 2 Starkie, 116; People v. Herrick, 13 Johns. 82; Respublica v. Gibbs, 3 Yeates, 429; Bell's Case, 1 Browne [Pa.] 376; Stout v. Rassel, 2 Yeates, 334; Galbreath v. Eichelberger, 3 Yeates, 515; State v. Bailly, 1 Penn. [2 N. J. Law] 416e; Jackson v. Humphrey [1 Johns. 498]; 2 Penn. [3 N. J. Law] 728; Marbury v. Madison, 1 Cranch [5 U. S.] 144; Cooke's Case, 1 Salk. 153, 4 State Trials, 748; Torree v. Summers, 2 Nott & McC. 267; Cates v. Hardacre, 3 Taunt. 424.

Messrs. Brent & Brent, for defendant, wished to argue the point and to cite authorities.

But THE COURT (nem. con.) said they considered the point settled, and refused to hear argument or authorities upon it.

Mr. Key, for the United States, offered to prove what was testified at the former trial of this cause, by Mr. Howard, who is since dead, and cited 2 Russ. 683, and the cases there cited, and Cornell v. Green, 10 Serg. & R. 14; Bowie v. O'Neale, 5 Har. & J. 226; Wolf v. Wyeth, 11 Serg. & R. 149.

Mr. Brent, contrà, cited Rosc. Cr. Ev. 50; Caton v. Lenox, 5 Rand. (Va.) 31.

THE COURT (nem. con.) permitted Mr. Key to prove substantially the testimony of Mr. Howard, and said it was not necessary to prove the very words of the witness.

Mr. Brent, for the defendant, then offered to prove, by a person who was one of the jurors at the former trial of this cause, the general reputation of Mrs. Baldwin for veracity, from the testimony given respecting her character on that trial.

Mr. Key objected.

THE COURT (THRUSTON, Circuit Judge, absent) rejected the evidence.

CRANCH, Chief Judge, said, that the juror could only know that such testimony was given, but could not be supposed to have thereby acquired a knowledge of her general reputation for veracity.

Mr. Key, without having asked Mrs. Greer, whether at the former trial she testified so and so, (according to notes of her testimony taken at the former trial,) offered to prove what she had so testified, in order to show a contradiction or discrepancy between that and her present testimony.

Mr. Brent objected that the United States could not regularly prove what she testified at the former trial, without first asking her whether she had so testified.

But THE COURT (CRANCH, Chief Judge, contrà) overruled the objection, and permitted Mr. Key to give other testimony as to what she had testified. See Starkie, pt. 4, pp. 1753–1756.

The cause was argued to the jury by Mr. Key for the United States, and the Messrs. Brent for the defendants, from the 8th to the 13th of June, and on the 14th, the jury gave the following verdict: "We find the defendant, on the plea of limitations, not guilty." And he was discharged.

Case No. 16,680.

UNITED STATES v. WHITE.

[Hoff. Op. 475; Hoff. Dec. 25, 95.]

District Court, N. D. California. April 15, 1861.

MEXICAN LAND GRANT — CONFIRMATION OF PROCEEDING — RIGHT TO INTERVENE.

[One whose claim under a grant has never been presented, and has been abandoned, has no right, under Act 1851, § 13, to intervene in a proceeding to confirm a different grant, until after the determination of the proceeding by the confirmation of the claim.]

[This was a claim originally presented by Charles White for the rancho called the "Arroyo de San Antonio," in Sonoma county, granted August 10, 1840, by Juan B. Alvarado

to Antonio Ortega, and confirmed by the commission June 26, 1855, by the district court August 17, 1857, and decree reversed by supreme court. 23 How. (64 U. S.) 249. On the death of said White, Ellen E. White, administratrix, was substituted. Now heard on motion by persons claiming under Miranda for leave to intervene.]

HOFFMAN, District Judge. The claim in this case was confirmed in the district court, and an appeal taken to the supreme court. The order made in that court was that the decree appealed from be set aside and annulled, and the cause remitted for further proceedings. Among the proofs relied on by the United States, to show the invalidity and even the fraudulent character of the grant, was a grant for the same land to one Juan Miranda. A claim under this grant had been presented to the board, but was abandoned by the petitioner on his motion, and his claim withdrawn, and the land is, therefore, to be deemed public land, unless the present claimant can establish the validity of the grant under which he claims.

In the opinion of the supreme court, as reported [23 How. (64 U. S.) 249], it is said: "It is clear from the evidence in this case, that as against the United States either Ortega or Miranda has a just claim to a confirmation of his title to the tract in dispute; but whether Ortega was landlord, and Miranda his tenant, or which of the claimants has attempted to overreach the other, are questions in which the government has no interest. The United States officers are not bound to settle this dispute between these parties in these proceedings, nor should either party be permitted to carry on this litigation by assuming to act for the government, and thus take the advantage of their opponents by fighting under its shield and at its expense. The district attorney had neither interest nor authority to represent Miranda in order to defeat Ortega; nor can this court be compelled, on an appeal by the attorney general, to become the arbiters of disputes in which the government has no concern. * * * The act of congress points out the mode in which contesting claimants may litigate their respective right to a patent from the government. Instead of appeal from this court to settle the rights of Miranda in a proceeding to which he is no party, the claimants under him, if there be any, should proceed in the mode pointed out by the act, which provides, 'that,'" etc. The provisions of the thirteenth section of the act of 1851 [9 Stat. 633] are then recited, and the court after some further observations on the case, declares that it will not affirm the decree "of the district court for it might then appear that it had decided the title of Ortega to be superior to that of Miranda; nor reverse it, for that would imply that it considered Miranda to have the better title." It therefore determined to remand the record, with directions to suspend proceedings until Miranda could have an opportunity to contest the claim of Ortega, under the provisions of the thirteenth section of the act of 1851. At a subsequent day, the court, having reconsidered this order and opinion, ordered "that the decree of the district court be reversed, and the record remanded for further proceedings; and it declares that this last order is made that the district court may not be trammelled in its future consideration of this case, in all its merits, but without intimating an opinion as to the validity of the grant to Ortega." The mandate having been filed in this court, a motion is now made in behalf of parties claiming under Miranda, for leave to intervene and assert his rights.

Under all the previous rulings of this court, and of the supreme court, in this class of cases, such a motion must clearly have been denied. In the case of U. S. v. Fossatt, the supreme court says: "It is the opinion of this court, that the intervention of adversary claimants in the suit of a petitioner under the act of March, 1851, for the confirmation of his claim to land in California, is a practice not to be encouraged. * * * The language and policy of these enactments limit a controversy like the present to "the United States and the claimant." 20 How. [61 U. S.] 425. Many other decisions might be quoted in which similar language is used. But it is thought that the opinion of the supreme court in this particular case recognized the right of Miranda to intervene and assert his rights; that in the opinion first delivered, but subsequently reconsidered, it seems to have been assumed that Miranda could intervene, under the thirteenth section of the act of 1851, is not denied. But the same opinion expressly declares that except in that way, he has no right to appear, or even be represented by the district attorney. "The United States officers are not bound," says the court, "to settle this dispute between these parties in these proceedings. The district attorney had neither interest nor authority to represent Miranda, in order to defeat Ortega, nor can this court be thus compelled, on an appeal by the attorney general, to become the arbiters of disputes, in which the government has no concern." It cannot be supposed that the court, when holding such language, intended that this court, by allowing Miranda to intervene and assert his claim, should hear and decide the very dispute in which it says the government has no interest, and which its officers are not bound to settle. But even if Miranda's intervention were permitted, what purpose could be served? His claim has long since been abandoned, and must be treated as if never presented. The statute declares that "all lands, the claims to which have been finally rejected, and all lands, the claims to which shall not have been presented, shall be deemed, held, and considered as part of the public domain of the United States." So far, then,

as Miranda is concerned, the land must be treated as public land.

The only question in the present case which ever has been or ever could be presented to the board or to this court, is: Did Ortega obtain a valid grant from the Mexican government? The controversy, as is said by the supreme court in U. S. v. Fossatt [supra], is limited to the United States and the claimant. How, then, can the court in this suit, which relates exclusively to Ortega's grant, permit Miranda to assert an utterly different and inconsistent claim which has long since been barred by the statute. Can this court, in a suit between Ortega and the United States, enter a decree in favor of Miranda? Such a proceeding appears to me wholly inadmissible. It is true that the district attorney did take testimony to prove that the land claimed in this suit by Ortega had been granted to Miranda, but the motive for making this proof seems not to have been fully appreciated by the supreme court. "It (the government) cannot," says the court, "set up Miranda to defeat Ortega, or the contrary; admitting as they must that either of them can show a claim worthy of confirmation in the absence of the other." But this (with great deference) is precisely what the government does not admit. Miranda's claim has been abandoned and the rights under it lost. The district attorney did not act as the representative of Miranda, or with any view of enforcing his rights. But alleging the grant to Ortega to be fraudulent and spurious he sought to show, in proof of that allegation, that one Juan Miranda had obtained a grant for the same land. And that the occupation was that of Miranda, under a grant to himself, and not as tenant of Ortega.

Certainly these facts, if established by proofs, afford strong evidence to show that Ortega did not obtain his pretended grant, and whether he did or not is the only question to be determined in this proceeding. In this view the United States have a direct interest in the proceeding; for, independently of the general duty of the government, through its officers, to expose and defeat every fraudulent claim, whether the land claimed will ultimately belong to the United States, or to some Mexican grantee, it has here the additional motive for defeating Ortega's claim, furnished by the fact that it is the only one which covers the land in question,—Miranda's having been withdrawn, and all others having been barred by the statute. I cannot perceive, therefore, why the introduction by the district attorney of proof of the grant to Miranda, and his occupation under it, and not under Ortega's alleged title, was not in all respects pertinent and proper. But the court seems also to have considered that Miranda could intervene in the proceeding under the thirteenth section of the act of 1851, and in the opinion just delivered, it declines either to reverse or affirm the decree of this court but remands the cause with directions to suspend proceedings until he can have an opportunity to do so. The section in question undoubtedly authorizes any person contesting the title of the claimant to present a petition to the district judge, setting forth his title; and the judge is empowered to enjoin the party, at whose instance the claim has been confirmed from serving out a patent for the same until the title thereto shall have been finally decided, etc. But it is clear from the language of this section, that the lands the title of the claimant to which is thus allowed to be contested, are lands to which the claim has been confirmed. The interposition of the district judge is merely to prevent the patent from issuing, which could only be done after confirmation and survey. If, then, the original order of the supreme court had stood, and the claim been neither rejected nor confirmed, the somewhat embarrassing question would have arisen, whether any petition could be presented under the thirteenth section, there being as yet no final confirmation in favor of any claimant of the lands.

Again, it is open to grave doubts whether the statute was not intended to apply solely to cases of contest between persons holding derivative titles under the same grant; or if it is not to be confined to such cases, whether it can be construed to embrace cases where the contestant claims under a Mexican grant which has never been presented to the board, or which has been finally rejected. It will be observed that no power is given to this court finally to decide between the confirmee and the contestant. The authority given by the section is to be exercised by the district judge, and not by the court. No power to summon jurors, etc., is conferred, and the whole proceeding is shown by the act and proved by the debates of the senate, when it was adopted, to have been intended merely to give the judge authority to stay the issuing of the patent until the questions of private rights could be decided by the ordinary tribunals. The act was even amended in the senate in order that, in deference to constitutional objections, the functions of the judge might be thus limited. If, then, a person who claims under a title which has never been presented, or which has been finally rejected, can enjoin the issuing of the patent to a confirmee under a different grant, and can submit his own title to the state courts for adjudication, those tribunals will take jurisdiction of equitable claims against the United States, which the supreme court has repeatedly declared could not be noticed by any tribunal either state or federal, except those specially authorized to adjudicate them. And they might even review and reverse a final decision of the board, of this, or of the supreme court, by which a particular grant had been declared invalid; or they might take cognizance of a claim which had been barred by the statute. If, then, Miranda can, under the thirteenth section, obtain an injunction staying the issuance of a patent to the claimants under Ortega, (in case they obtain a con-

firmation,) the proceeding must either prove utterly abortive and the injunction be dissolved, because his title to the lands cannot be decided or set up in the state courts; or else those courts will pass upon, and perhaps sustain a claim which has been abandoned before the board, and is barred by the statute. It is possible that the supreme court have interpreted the words of the act, "All lands, the claims to which shall not have been presented," etc., "shall be considered part of the public domain," to mean lands to which no claim has been presented, and that, therefore, if any claim has been presented, though forged and invalid, any person claiming under an entirely different grant, and which has never been presented to the board, may, by some proceeding under the thirteenth section, assert his rights, and procure the judicial recognition of his title. It is only by construing the act in this way that Miranda's rights can, in the present case, be saved. But no such construction of the act of 1851 has ever been adopted by this court, or even suggested at the bar. If such be its true interpretation, it is much to be desired that it may, at an early day, be so declared by the supreme court.

But even on this construction of the law, Miranda can have no right to intervene until the determination of this suit in favor of Ortega; for, as has been already remarked, the lands the title to which the contestant may dispute under the thirteenth section, are lands confirmed to a claimant. If, then, Ortega's claim be rejected, how can Miranda assert his rights in any proceeding under that section? Or how present a petition to the judge, praying an injunction against the issuing of the patent to the claimant when the claim has been finally rejected and no patent can in any event be issued for it? But even if this anomalous and extraordinary proceeding could be had, and by means of it Miranda might establish his title, as against the United States, in a state court, the singular result would occur that a person claiming lands under a Mexican title, whose rights had been lost by his failure to comply with the statute, and whose claim is barred is saved and allowed to assert his abandoned and outlawed claim, merely because some other person has chosen to present a wholly distinct claim for the same, founded on a different grant which has been found to be a forgery or for other reasons invalid. It would seem that no rights to lands, under a Mexican grant, ought to be either saved or lost, by the circumstance that a stranger has seen fit to set up a fraudulent and invalid pretension to the same lands. I have presented these considerations in order that the attention of the supreme court may be drawn to the subject, and in the hope that it may see fit more fully to define and explain the meaning of some of the observations in the opinion referred to, for the guidance and instruction of this court, in these most important cases.

The motion for leave to intervene is denied.

[Upon final hearing the court rejected the Ortega grant. Case No. 16,673. That decree was affirmed by the supreme court. 1 Wall. (68 U. S.) 660.]

Case No. 16,681.

UNITED STATES v. WHITE.

[Hoff. Dec. 58.]

District Court, N. D. California. Jan. 4, 1862.

MEXICAN LAND GRANT—DETERMINATION OF BOUNDARIES.

[The mention in the act of possession of the length of a certain line as fixing its point of termination is not to be regarded as conclusive, merely because, at or near that distance from the starting point, a marked tree is found, which is not identified by any witness as the tree to which measurement was made.]

[This claim was by Charles White, and, after his death, by Ellen White and others, his widow and heirs, for Pala, one square league in Santa Clara county, granted November, 1835, by José Castro to José Higuera. The claim was confirmed by the commission December 19, 1854, and by the district court February 23, 1857. Heard on objections to surveys.]

HOFFMAN, District Judge. The grant in this case was for one square league of land. In the decree of confirmation the boundaries as stated in the record of judicial measurement are adopted, and the extent of the land is declared to be one square league, more or less. Those boundaries are substantially as follows: Commencing at a solar which lies to the south of the rancho, and faces towards the north, and running thence along the foot of the hills 2,500 varas to the Arroyo del Aguage; thence along said stream, towards the west, 2,000 varas, to the sowing lands formerly used by the grantee, and to a marked oak tree; thence southerly, passing by the Laguna de Locaire and the arroyito which rises from the same, 5,500 varas, to the first tree of an oak grove marked as a boundary; thence easterly 1,850 varas, passing along the Arroyo de los Alisos to the foot of the range of hills running from north to south.

It is objected, on the part of the United States, that the lines of the official survey do not conform to the lines thus described, in respect either of their length or the objects indicated as their points of commencement and termination, and a survey has been presented to the court to illustrate how, in the opinion of the parties claiming under the United States, the official surveys should be made. It will be noted that the first line of the judicial measurement is described as running from the solar which looks to the north to the Rincon del Arroyo del Aguage, a distance of 2,500 varas. The objects thus referred to are identified beyond any doubt, but the distance between them is found, on an

accurate measurement, to be about 5,000 varas, or nearly double the distance mentioned in the act of possession. I do not understand it to be claimed, on the part of the United States, that the length of this line should be determined by the call for distance, disregarding the natural objects to which it is to be drawn. But it is contended that the lengths of the second, third, and fourth lines should be those mentioned in the act of possession; and testimony has been taken to prove that, at or near the terminations of the northern and western lines so run, are found the marked oak trees referred to in the record and established as boundary marks.

The most important controversy is as to the length towards the south of the western line. It has already been stated that, according to the record of judicial measurement, the first line was run from the solar north, 50 cordels of 50 varas each, or 2,500 varas, to the rincon. The second or its northern line was drawn west from the rincon to an oak tree on or near the banks of the Arroyo de Aguage, 40 cordels, or 4,000 varas. The third line, from the oak tree, the first of a grove, 110 cordels, or 5,500 varas. It is concluded that the western line should be drawn from an oak tree near the banks of the Aguage, south to another oak, distant 5,143 varas. In length this line more conforms to the length of the western line, as given in the record of judicial measurement, than that run to the oak tree adopted in the official survey; for the latter is distant from the Aguage about 8,863 varas. But it is nevertheless plain, in my judgment, that the official survey is in this particular correct.

It has already been remarked that the position of the solar, the point of beginning of the first or eastern line, and that of the rincon, its point of termination, are determined beyond controversy. The distance between these two points is stated on the judicial measurement to be 50 cordels, or 9,500 varas. The length of the western line parallel to this, is stated in the same record to be 110 cordels, or 5,500 varas. Whatever, then, may in fact have been the length of the cordel used, or the accuracy of the measurement, it is plain that the officer intended to measure, and supposed he had measured, a western line of twice the length of the eastern line. But the eastern line, on accurate survey, is found to be only a quarter of a mile less than 5,000 varas in length. If, then, the western line be measured to the tree contended for by the United States, i. e. of the length of 5,143 varas, the two lines would be of nearly equal length, contrary to the terms of the record that the latter was to be more than double the length of the former.

Again, it is stated in the record that from the tree on the Aguage the line was run "to the south, passing by the Laguna de Locaire and the arroyito which rises from it, to an oak tree the first of a grove, etc." The positions of this laguna and the arroyito issuing from it are identified, I think, beyond reasonable doubt; and even if the laguna be that to the southwest of the one contended for by the claimants, it would only show that the western line should be extended towards the south, even further than has been done in the official surveys. This laguna is situated at a considerable distance to the south of the ancient house of Higuera. But if the western line be made to terminate at the point contended for by the United States, and the southern line be run thence east to the foot of the hills, it would leave the laguna far to the south.

It seems to have been intended by one of the witnesses on the part of the United States to convey the idea that a laguna formed by a creek which flows from the hills and passes near the house of Higuera, was the Laguna de Locaire referred to in the record. This same creek the witnesses for the United States zealously maintain to be the Arroyo de los Alisos mentioned in the act of possession, as forming the southern boundary. But this theory is inconsistent with the proofs, and even is self-contradictory; and for the following reasons:

1. The act of possession speaks of a laguna and arroyito which issues from it, or to which it gives birth. But the laguna suggested is formed by a creek which flows into it, but which does not flow from it.

2. The record states, that after passing by the laguna, and the little brook which is born of it, a tree was marked, the first of a grove, and from thence running towards the east, they followed the margias of the Arroyo de los Alisos until they reached the foot of the hills. It is obvious that the Arroyo de los Alisos, which was meandered to the foot of the hills in running the southern boundary, was a different stream from the arroyito issuing from the lake which had been passed in running the western line. It is therefore apparent either that the laguna suggested by the witness, into which a brook flows, cannot be the Laguna de Locaire, or, if it be that, the creek flowing into it cannot be the Arroyo de los Alisos of the judicial survey.

3. On the diseño is represented a laguna and small stream issuing from it at a considerable distance to the south of Higuera's house. This laguna, though in the copy of the diseño in the transcript it bears no name, is marked on the original "Laguna de Locaire." It must, therefore, be the same as that mentioned in the act of possession. Its position entirely corresponds with the situation of the laguna identified by the claimants' witnesses as the Laguna de Locaire. But the laguna suggested by the witness for the United States lies to the west of the house, and not to the south. And if the west line be no further protracted towards the south than that laguna the south line will pass close to the house, and even through what is identified by some of the witnesses as the site of the ancient corral of Higuera.

It is for these reasons, in my judgment,

clear beyond dispute, that the Laguna de Locaire and arroyito, which was passed when the western line was run, cannot be the laguna and arroyo spoken of by the witnesses for the United States, but that they were situated much farther to the south, and beyond the limits of the survey contended for by the United States. But the length of the western line run by the judicial officer, is further shown by the call for the Arroyo de los Alisos, which the record declares was meandered, after turning to the east, and when measuring the southern boundary.

Much testimony was taken to show that the stream which runs by the house of Higuera, and what is identified by some of the witnesses as his former rodeo ground, is the Arroyo de los Alisos. The claimants contend that the only stream known to the old inhabitants of the county by that name is the stream which is met on turning towards the east after passing the Laguna de Locaire. I think that the proofs greatly preponderate in favor of the latter supposition. Both streams have, it is true, alisos or sycamores upon them, and either might have acquired the name of "Arroyo de los Alisos." But all the older inhabitants—Pico, who was the alcalde who gave the possession; Chabolla, who is the owner of the adjoining rancho to the south; Hang Bee, who has been in the country 23 years; and others—concur in identifying the more southerly brook as that, and the only one, known as the "Arroyo de los Alisos." If the observations which have been made with regard to the situation of the Laguna de Locaire be just, it follows that the Arroyo de los Alisos of the measurement must lie to the south of it, for the laguna and its arroyito were passed before turning to the east; whereas, if the arroyo contended for by the United States be the alisos, it would have been reached not only before the laguna was passed, but before it was arrived at.

The witnesses for the United States, sensible of the necessity of so far conforming to the description of the western line given in the record of judicial measurement, as to run that line so as to pass a laguna and an arroyito, have attempted to make the more northerly arroyo and a small pond into which it runs satisfy at once the call for the laguna and the Arroyo de los Alisos. But this is, as before remarked, utterly inadmissible, for it is plain that the arroyito which flows from the laguna of the record of judicial measurement and the Arroyo de los Alisos of the same document are wholly distinct streams.

There are also indications of the diseño, and facts testified to by the witnesses for the claimants, which support the views I have expressed. On the diseño is represented to the south and west of the laguna and in the same direction from the house and at the distance of several thousand varas according to the scale, a grove of trees. This is evidently the grove, the first tree of which was marked as the southwest corner. But if the southwest corner be established as contended for by the United States, it will be situated nearly due west from the house, within a very short distance of which the southern line towards the hills will run. On the diseño the house is represented as situated about midway between the grove, on the south, and the Arroyo de Aguage. In the survey proposed by the United States, the house is situated on the extreme southern limit of the tract and almost on the boundary line.

Some of the witnesses for the claimants have identified the positions of the old corral, and the rodeo ground of Higuera. The traces of both these are nearly obliterated. But their positions are positively sworn to by ancient Spanish witnesses, and Mr. Healy, the very intelligent and candid surveyor of Santa Clara county, states that he discovers by the dank and peculiar vegetation of a spot near the house, what he thinks must be the site of the old corral. It is precisely the place where the other witnesses state the corral actually existed. If, then, this testimony be accepted as fixing the positions of the corral and the rodeo ground, it affords another argument against the survey contended for by the United States, for the southern line of that survey passes through the corral leaving its larger portion to the south, while the rodeo ground is wholly excluded.

Some reliance is placed by the United States on the fact that at the southerly termination of the westerly line, as contended for by them, a tree is found with ancient marks upon it. But by whom, and for what purpose these marks were made, we are ignorant. They are said to be of the age of 20 or 25 years, as ascertained by counting the annulations. The one witness for the United States swears they are only 15 years old. If the latter statement be correct, they must have been made subsequently to the date of the judicial measurement, 1835. But the mere existence of a tree with marks upon it, even if ancient, is not enough to outweigh the reasons above enumerated for concluding that the western line could not have terminated at that tree, especially as the stump of another tree is found at the termination of the western line, as contended for by the claimant, which is of the kind (white oak) mentioned in the act of possession, and which is identified by the alcalde, Pico, and adjoining rancho to Chabolla as the one actually marked as a boundary.

From the foregoing, it will be seen that the theory of the United States as to the point of termination of the western line is founded on three principal conditions:

1. The length as given in the record of judicial possession. To which it is answered, that independently of the notorious inaccuracy of such measurements under the former government, it appears in this case that the line was intended to be run more than twice as long as the first line from the solar to the rincon; whereas by the theory of the United States, the two lines would be nearly of the

same length, thus failing to conform to the record on a point as to which so gross a mistake is not conceivable.

2. The identification of the more northerly arroyo as the Alisos. But as to this, we have seen that the preponderance of the testimony is clearly against the theory of the United States, and the evidence of the older and better informed inhabitants unanimously in favor of the claimants; and, further, that the situation of the Laguna de Locaire, and the arroyito flowing from it, demonstrate that the arroyo to the north could not have been the Arroyo de los Alisos of the judicial measurement.

3. The existence of a tree with an ancient mark. But this circumstance, in the absence of testimony showing it to have been marked at the time of the measurement as a corner, is wholly inconclusive, for it may have been marked previously or subsequently, or even at the time, to indicate the course but not the termination of the line, and in view of the other considerations above adverted to, the fact becomes insignificant.

I therefore conclude that the termination of the western line should be that contended for by the claimants and established by the official survey.

It is not so easy to fix the length towards the west of the northern line along the Aguage. The termination claimed by the United States is a tree bearing an ancient mark, and situated at the distance of 2,160 varas from the rincon. The corner fixed by the official survey is at the distance of 2,895 varas from the rincon. The length of the line, as given in the act of possession, is 40 cordels, of 50 varas each, or 2,500 varas. There is no evidence to show by whom or for what purpose the mark was made upon the tree claimed by the United States to be the termination. Under ordinary circumstances, the fact that such a tree is found on or near the line described in the act of possession, and at about the distance therein mentioned from the starting point, would be sufficient to fix it as the boundary mark established at the judicial measurement. But in this case the mention of the lengths of the lines, or the number of cordels measured, affords as we have seen, no reliable information. It is difficult to imagine that the alcalde, after measuring a line from the solar to the rincon, of the length, as he declares, of 50 cordels or 2,500 varas, when in fact it is of nearly twice that length, should, with the same cordel and the same measures, have so nearly arrived at the true length of the second line; and the improbability of his having done so is increased by the fact that on proceeding to measure the third or western line, the error is repeated, and the distance from its beginning to its termination is stated at little more than one-half its actual length.

The termination of the northern line is stated by Pico, the alcalde, and Chabolla, the assisting witness, to have been fixed at a point some 800 varas further west than that fixed in the official survey. But no trees are now standing at the place, and the stumps are those of ash, sycamore and live oak trees (encinos), but not of white oaks, or sobles, as mentioned in the act of possession. Pico accounts for these discrepancies between the actual length of the lines and those stated in the record of possession, by stating that the cordel, after being measured of the length of 50 varas, was doubled, and that the cordels referred to in the act of possession were of 100 varas in length. But even on this computation, the measurement was still far from accurate. Some of the lines being found to exceed, and others to fall short of, the required length.

The statement of Pico is confirmed, however, by a circumstance which renders it almost inconceivable that he should have committed so gross an error as must have been committed if the cordels were only of the length of 50 varas. On the diseño which accompanied the grant, and a copy of which is attached to the act of judicial measurement, is a scale of two leagues, of 5,000 varas each. By this scale the distance from the solar to the rincon is about 5,000 varas, or one league, approximating with tolerable closeness to the actual distance between those points. By the same scale the distance from the Aguage to the Laguna de Locaire and the roblar beyond it appears to be about two leagues. If, then, the cordels referred to were of the length of only fifty varas, the error in the measurement is unaccountable, for the lengths of the lines were not merely but about half as great as the distances actually run, but were only half as great as the distances indicated by the scale of the diseño according to which the grant was made, and which was before the alcalde in making the measurement. On the diseño which accompanies the expediente, there is traced a line from north to south, and at a distance from the hills, as shown by the scale, considerably exceeding that of the western line, as fixed by the official survey, or as pointed out by Pico to Mr. Healy. This was evidently intended as the western exterior boundary of the tract granted; and no reason can be assigned why Pico, in running to the west, should have stopped at a point so far short of the exterior boundary as to make the rancho not much more than one-third of a league in width.

On the whole, it appears to me inconsistent and inadmissible, after ascertaining the gross errors which have been committed with regard to the lengths of the eastern and western lines, to accept the mention in the act of possession of the length of the northern line, as fixing its point of termination, and this merely on the strength of the fact, that at or near that distance from the starting point, a marked tree is found not identified by any witness as the tree to which the measurement was actually made. Such seems to have been the view of the United States surveyor, by whom the official survey was made; and, after de-

termining the length towards the south of the western line, he has located it, or rather determined the length of the northern line, down the Aguage by quantity, so as to include within the boundaries the one square league granted to Higuera. If, however, we are governed as to the lengths of the lines by the act of possession, and the hills be excluded, as decided by the board, there will be measured to the claimant a tract of not more than three-eighths of a league in extent, less than one-half the quantity granted. I agree, therefore, with Mr. Healy (who has made two surveys of the rancho, one at the instance of the settlers, and the other at that of the United States), in thinking that the official survey is as just and proper a location of the grant as can now, under all the circumstances, be arrived at. The official survey is, therefore, approved.

Case No. 16,682.

UNITED STATES v. WHITE et al.

[4 Mason, 158.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.[2]

JOINT INDICTMENT FOR CAPITAL OFFENCE—SEPARATE TRIALS—IMPANELING JURY.

1. Where two or more persons are jointly indicted for a capital offence, as for murder, they are not, as a matter of right, entitled to a separate trial if they request it; but it is matter of discretion to be judged of by the court under all the circumstances of the case.

[Cited in brief in Com. v. James, 99 Mass. 439. Cited in Hawkins v. State, 9 Ala. 137; State v. Desroche, 47 La. Ann. 651, 17 South. 211; State v. Jacobs, 106 N. C. 695, 10 S. E. 1031; State v. Meaker, 54 Vt. 118.]

[2. Cited in State v. Holme, 54 Mo. 159, to the point that the jury is to be composed of the first twelve men whose names remain upon the panel after all the challenges are exhausted.]

Indictment against the defendants [John D. White, otherwise called Charles Marchant, and Winslow Curtis, otherwise called Sylvester Colson] for murder on the high seas. They severally pleaded not guilty, and afterwards moved the court for a separate trial, contending for it as a matter of right. The motion was resisted on the part of the United States.

Mr. Blake, U. S. Dist. Atty.

Bartlett & Warner, for prisoners.

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

STORY, Circuit Justice. The present is a joint indictment against the prisoners for murder. They have severally pleaded not guilty. And a motion has now been made in writing, in behalf of one John D. White, otherwise called Charles Marchant, that he may be tried separately; and this he claims, as a matter of right. The motion is resisted on the part of the district attorney for the United States, who utterly denies that there exists any such right in law; and the parties are now before us upon the mere matter of right. In capital cases it is always the desire of the court to grant every reasonable favor to the prisoners; but it is, at the same time, its duty to allow the government its fair and regular claims. Upon a joint indictment for a capital offence, there is no doubt, that the prisoners may be jointly tried; and it is equally true, that upon such an indictment they may be severally tried. I do not cite authorities on this point, because the law is familiar and well settled. Where the trial is separate, each party is, of course, entitled to the full number of peremptory challenges. Where the trial is joint, the right of peremptory challenges is in no degree narrowed or affected. Each prisoner has a right, in such case, to challenge the full number, and is unaffected, in this respect, by what the other prisoners do. If, therefore, in a capital offence, where twenty peremptory challenges are allowable by law, there is a joint indictment and joint trial of several persons, each may challenge the whole number to which he is entitled; and if there be two on trial, the challenge may extend to forty; if three, to sixty, &c. The only question, in such cases, formerly was, whether a juror, challenged by one prisoner, and not by another, was to be withdrawn as to all. It was soon settled, upon just and reasonable principles, that no man ought to sit as a juror upon a joint trial, who was not, in the estimation of all the prisoners, indifferent as to all. Hawk. P. C. bk. 2, c. 41, § 9; 2 Hale, P. C. 268; Co. Litt. 156. These positions are believed to be incontrovertible.

It is argued, that the right of a separate trial is a necessary result of the several right of challenge, if the prisoner chooses to claim it. The reasoning is of this sort. The prisoner, in favorem vitæ, has a limited right to elect his jury. If he is tried alone, it is always in his power to say, who that jury shall be. But if he is tried jointly with another person, then the jurors he may wish to serve on his trial may be challenged by the other prisoner, and so his right of election and selection may be materially impaired. This is complained of as a hardship, which the law will not allow. If the argument itself be well founded in point of law, the conclusion is certainly right; for in a capital case the full benefit of the party's rights ought to be saved to him with the utmost tenderness. The difficulty in the argument (assuming the question to be new, and to be decided upon general principles) is, that it takes for granted the very point in controversy. The right to challenge for cause is unlimited; but the right of peremptory challenge, without cause, is limited. What is the right of peremptory challenge, but a right to exclude from the trial

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

[2] [Affirmed in 12 Wheat. (25 U. S.) 480.]

any persons, who are disagreeable to the party on trial? Suppose the panel to consist of 72 persons, and the challenges to be limited to 20, all that the prisoner can do, is to exclude 20 from this list; and it depends altogether upon the order, in which the jurors are called, who may be excluded or not. If the prisoner challenge the first 20, who are called, the 12 next called from the remaining 52, constitute the jury. It is true, that if he chooses to suffer any juror to be sworn, before he has exhausted his challenges, to that extent he selects his jury; but this is a mere incident to his right to exclude jurors to a limited extent; and not the principal object contemplated by the law. Mr. Justice Blackstone, in his Commentaries (4 Bl. Comm. 353), with his usual perspicacity and accuracy, states the reasons, on which the right of peremptory challenge is founded. He says: "In criminal cases, or at least in capital ones, there is in favorem vitæ, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons: (1) As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner, when put to defend his life, should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not, that he should be tried by any one man, against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. (2) Because upon challenge for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside." It is observable, that here the learned judge does not make the slightest allusion to any reason for the right of peremptory challenge, like that now insisted on. Indeed, from another right, admitted to exist in the crown, it is plain, that the reason could not generally apply. It is this. The crown, ever since the statute of 33 Edw. I., has been ousted of its right of peremptory challenge. But still the crown has a right to object to any jurors, without assigning any cause, until the whole panel is gone through; and the jurors so objected to, are set aside without more, if there are enough remaining upon the panel to form a jury, after the prisoner has exhausted his right of challenge. It is only, when sufficient jurors do not remain, before the challenges are exhausted, that the crown can be called upon to assign a cause. This is laid down in Hawk. P. C. bk. 2, c. 43, § 3, and is undisputed law. 2 Hale, P. C. p. 271, c. 36; 1 Chit. Cr. Law, 534; 4 Bl. Comm. 353, and Christian's note, 3 Bac. Abr. "Jury," E. 10; Staund. P. C. bk. 3, c. 7, § 162, b; 1 Starkie, Cr. Pl. 35, note; Rex v. Coningsmarke, 3 State Tr. 469. The result of this counter right on the part of the crown, it will at once be perceived, if exercised, may, in a great measure, accomplish the same purpose, as the challenges of a fellow prisoner. It does, in effect, prevent an absolute choice of those, who shall try; but leaves the party at liberty to say, who shall not.

The general reasoning, then, on which the argument is founded, of the matter of right, is not conclusive of itself. Let us now see, how it stands upon authority. One of the earliest cases is Beauchamp's Case (in the Year Book), 9 Edw. IV. § 27, pl. 40. It was an appeal against several, who pleaded not guilty, and one venire was awarded against all; and one of the defendants challenged a juror peremptorily; and the question was, if he was to be set aside, as to all; and it was held by all the judges, that, inasmuch as the venire was joint, the challenge of him is good for all; for he may not be drawn against one, and taken for the rest. And it was there said, that at a gaol delivery, if an inquest is demanded to pass upon two or three men and one challenge peremptorily, then the clerk ought to sever the felons, each one by himself. This case is cited in Plow. 100, and, accurately, as I have occasion to know, having examined the original. The only point decided was, that a challenge by one was good for all; and the party is struck from the panel. What is said, as to the practice at gaol delivery, is expressive only of the power of the court to sever the panel, and not of the right of a prisoner to demand a separate trial. In Plow. 100, the case was, that several persons were jointly indicted for murder. They pleaded not guilty, and were put on trial; and one inquest was charged upon them all; and they challenged divers jurors peremptorily, and all agreed in the challenge; and because there were not jurors enough left in the inquest to pass upon them, a tales was awarded, returnable immediately; after which return the prisoners challenged peremptorily, and did not agree in the challenges; for some challenged some of the jurors peremptorily, and others prayed they might be sworn. And it was held by the court, that the jurors so challenged must be drawn against all; for in judgment of law, it was not a joint arraignment, but several arraignments; because their offences are several; yet inasmuch as one venire was awarded for all, a juror, challenged by one, must be drawn as to all. The court perceived, that it was the intention of the prisoners, by exercising each his full right of challenge, to postpone the trial, "as there was but a small number of persons then in the town of sufficiency to be sworn." It was therefore debated, whether the panel might be severed, and the prisoners tried severally; and the court held, that it might; and that

they could do so upon the application of the crown. And the prisoners were informed of this, and finally agreed to join in their challenges, and were jointly tried. In this case, it is at once perceivable, that the whole question was the right of the court to sever the panel of the tales, and to order a several trial of the prisoners, they being willing to be jointly tried. 2 Hale, P. C. 264; Id. 263; Co. Litt. 156b. In Thymolby and Gray's Case (Dyer, 152b), a like course was adopted. The doctrine in Kelyng, 9, is to the same effect. It was there resolved by the judges, "that if several prisoners be put upon one jury, and they challenge peremptorily, and sever in their challenges, that then he, who is challenged by one, is to be drawn against all, because the panel being joint, one juror cannot be drawn against one and serve for another. But in such case it was agreed the panel might be severed, and that the same jury may be returned betwixt the king and every one of the prisoners; and then they are to be tried severally; and there the challenge of one prisoner is no challenge to disable the juror so challenged against another prisoner." And it was there added, that the case of Dr. Ellis's servant, Plow. 100, 101, was agreed to be good law as to the severing of the panels in that case; and accordingly afterwards, upon the trial of Harrison and others, who challenged peremptorily, and severed, in their challenges, particular jurors, the panels were severed.

Hitherto the cases may be fairly considered as advancing no farther than to establish the general authority of the court to sever the panel, when there is a joint venire, in cases where, by reason of challenges from the number of jurors returned, there might otherwise be a defect of trial. 2 Hale, P. C. 263. This will be easily understood, when it is known, that at common law the sheriff might have returned as many jurors as he pleased; but the statue of Westm. II. c. 38, ordained, "that in one assize no more shall be returned than twenty-four." The common practice of the sheriff, under his precept, used to be to return, at the sessions of gaol delivery and oyer and terminer, forty-eight jurors, although the precept named but twenty-four. 3 Bac. Abr. "Juries," bk. 6; 2 Hale, P. C. 263. It was, indeed, held, at an early period, that the statute of Westminster, did not apply to criminal trials. Still, the usual practice prevailed, unless when the court ordered a larger number to be returned. This is clearly stated in 3 Bac. Abr. tit. "Juries," bk. 6, and in J. Kelyng, 16. See U. S. v. Insurgents [Case No. 15,443]. By a statute made early in the reign of George II. (3 Geo. II. c. 5, § 8), the sheriff is required to return, not less than 48, nor more than 72 jurors, to serve at the assizes, unless the judges should direct a greater or less number. 3 Gwillim's Bac. Abr. "Juries," bk. 6, p. 330. With this practice in view, the necessity will readily be perceived of serving the panel in England, in many capital trials of persons jointly indicted; for if two or more persons should be jointly tried, and sever, in their challenges, there would ordinarily, if each should exercise his full right of challenge, be a defect of jurors. The consequence would be, that the crown would be forced to sever the panel, or to pray for an award of a tales, which might prevent a trial at the same assizes. Mr. Chitty accordingly, in his treatise on Criminal Law (1 Chit. Cr. Law, 535), states, "that when the right of challenging exists, though several defendants are tried by the same inquest, each individual has a right to the full number of his challenges; but if they refuse to join in their challenges, they must be tried separately, in order to prevent the delay, which might arise from the whole panel being exhausted." The reason here given, so far from intimating it as a right of the indictees to have a several trial, proceeds altogether upon the notion of public inconvenience and delay. See 1 Starkie, Cr. Pl. 35. So Lord Hale seems to have considered the case, in 2 Hale, P. C. p. 263, c. 34.

The principal doubt, on my mind, upon the first breaking of the question, arose from the decision in Charnock's Case, reported in 3 Salk. 81, 4 State Tr. 594, and 12 Howell, State Tr. 1454. It was an indictment for high treason against several persons. Upon their trial, Lord Chief Justice Holt is reported in 3 Salk. 81, to have told them, "that each of them had liberty to challenge thirty-five of those, who were returned upon the panel to try them, without showing cause; but if they intended to take this liberty, then they must be tried separately, and singly, as not joining in the challenges; but if they intended to join in the challenges, then they could challenge but thirty-five in the whole, and might be tried jointly upon the same indictment." His language, as reported in the State Trials, is somewhat stronger. "If," said he, "you will all join in the same challenge, then we can try you altogether, as you are altogether jointly in the same indictment, and save the time and trouble that will otherwise be unavoidable; but if you will not join in the same challenge, but every man challenge for himself, as by law he has liberty to do, we must be forced to try you single." And he again repeated, "if you do not all agree in the same challenges, ye cannot be tried together by the same jury, but the court must separate you, and try you every one single." This language at first led my mind to the conclusion, that Lord Holt might intend to speak of something more than a mere discretionary power in the court to sever the trial of the prisoners, upon a supposed inconvenience, or a possible defect of jurors. It admits of an interpretation favourable to the absolute rights of the prisoners, to be severally tried, if they should so choose. In the case before him, it does not appear, how many of the jurors, who were summoned (being, as

the report states, above eight score), were present, it only appearing, that "those, who answered to the call, were recorded." The prisoners elected to challenge jointly.

In Fost. Crown Law, 106, in the case of Swan and Jefferys, on a joint indictment for murder, it is stated, that "before the jury was called, the judges agreed between themselves, that if the prisoners should not think fit to challenge at all, they might be tried together; but if they should insist on their challenges, they must be tried separately; because they cannot join in their challenges, the number of their peremptory challenges being differently limited, Swan's to 35 (as in a case of petty treason), and Jefferys' to 20." Swan waived all benefit of challenging; Jefferys challenged two or three, and a jury was sworn, and they were found guilty and executed. The reason here given applies solely to the case of a right to different challenges in the prisoners. The language seems indeed to intimate, that if they challenged at all, they could not be jointly tried; but in point of fact, one did challenge, and the cause proceeded. The language is, in this respect, inaccurate. In another respect it perhaps requires some qualification. It is said, the prisoners could not join in their challenges. To the extent of twenty they certainly might; but beyond that, their rights were different. What the court probably intended was, that as they had different rights of challenge, and could not join throughout, they must be tried separately, unless they joined in their challenges, and Swan waived all beyond twenty; for there seems no difference in point of law, as to the right of a joint trial, whether Swan waived all benefit of challenging, or agreed, that Jefferys might challenge for both, waiving his right beyond Jefferys' challenges. It may be thought, that the doctrine in Fost. Crown Law, 106, rather inclines against the right of the prisoners to insist on a separate trial, where the right of challenge is the same. But it does not necessarily require this construction, because the question was not, whether they had a right to insist on a separate trial, but whether they could be jointly tried, unless Swan waived his extra right of challenge.

In the case of William Jackson and six others, tried for murder in 1748, before Mr. Justice Foster and others, 9 State Tr. 1, he told the prisoners, "that they might each of them challenge twenty of the panel, without showing cause for so doing; and that if they agreed to join in their challenges, they might be tried together; but if they did not, they would be tried separately." They agreed to join, and were tried accordingly. This language is not quite so strong, as that of Lord Holt; but it is not decisive against the argument for the right, derived from the language of the latter in 3 Salk. 81.

But in the course of the researches made by the bar, a case has been produced, which is directly in point. It is the case of Noble and two others, tried before Lord Chief Justice Parker in 1713. 9 State Tr. 1; 15 Howell, State Tr. 731. The indictment was joint against Noble for the murder of John Sayer, against Mary Sayer for petty treason, and against Mary Salisbury for aiding and abetting the murder. Noble moved the court for a separate trial, "and apart from the ladies, for that his crime and theirs were distinct things." The motion was overruled; and he was convicted, and the ladies acquitted. When brought up for judgment, he moved in arrest of judgment, on account of the mistrial, and to use his own words, "in that we were severed in our challenges, and yet were tried together by the same jury." He cited the Case of Charnock, before Lord Holt, and quoted his language at large from the printed trial; and he desired his counsel might speak to the point. The court overruled the motion in arrest of judgment, "alleging that the Lord Chief Justice Holt's reason, in the Case of Charnock, King, and Keys, was, that in case each of them severally challenged thirty-five, three times thirty-five would amount to one hundred and five, and then they must be obliged to sever them (as the court were near obliged to have done in the present case), for default of jurors." The prisoner was sentenced, and afterwards executed. There is a curious document appended in a note to this trial, in the State Trials, which was published before the execution of Noble, and is conjectured to have been written by Mr. Emlyn, but which purports to be by a student of law, upon the point ruled by the court. Its object is to establish, that the prisoner had a right to a separate trial; and the author has diligently collected and reviewed all the authorities. The pamphlet was probably intended to produce a pardon of Noble; but it failed of any such effect; and there does not appear to have been any question raised among the judges on that occasion. The author alludes to his having been present at the trial, which was in Surry; and he states a very curious fact, that happened on the motion in arrest of judgment. After having desired that his counsel might speak to the point, Noble was asked, who were his counsel. "He answered, Mr. Darnall and Mr. Bonwick, who were by the court readily assigned to be his counsel; but (for what reason I cannot well apprehend) could neither of them be prevailed on to speak to it."

Here, then, is a solemn adjudication of the very point, under circumstances of peculiar deliberation, and in which it is but just to presume, that Lord Chief Justice Parker, if at that time it was a matter of the slightest doubt, obtained the full opinion of the other judges. Considering the case, and its circumstances, and particularly the fact, that counsel, learned in the law, declined to argue the point, it seems but reasonable to suppose, that the law, as pronounced by the chief justice, was not supposed to be novel or extraordinary. The exposition given by him of the decision of

Lord Holt, is certainly not inconsistent with the language of it; and considering how very few years intervened between the two cases, it may justly be presumed, that the exposition was known by him, personally, to be according to Lord Holt's real meaning. At least, I cannot find, that this decision has at any time since been doubted or denied by any other judges, although the case must have been of frequent occurrence; and the case and the objections being in point, could not escape the general observation of the profession.[3]

It remains to examine the American cases. The case of U. S. v. Insurgents of Pennsylvania [Case No. 15,443], does not appear to have any direct bearing, except so far as it shows, that the rules of the common law, in all cases not expressly provided for, ought to be followed in criminal trials. In U. S. v. Sharp [Id. 16,264], upon motion made by counsel for a separate trial of some of the prisoners upon a capital indictment, the court granted the motion. No reasons are given, and no opposition seems to have been made to the motion; but it was claimed, as a matter of right. In People v. Howell, 4 Johns. 296, which was at the trial supposed to be a capital forgery, but afterwards was decided by the supreme court not to be so, the subject was a good deal discussed. The trial took place in the court of general sessions, the prisoner, Howell, being indicted jointly with another person. He requested to be tried apart; and the motion was overruled by the court. But peremptory challenges were allowed to the prisoners, and both challenged. The cause came on, and was afterwards argued before the supreme court, and this, among other causes, was assigned as an error at the trial. The learned counsel for Howell, who was himself educated at the English bar, admitted, in his argument, that there was a compulsive power in England to try the parties jointly; but he distinguished the case upon the local laws of New York. He observed, "that though in England prisoners may be compulsorily tried together, yet there were substantial reasons for a different practice in this state. In England the sheriff is unlimited as to the number of jurors to be returned on the panel. By the act of March 31, 1801 of New York, the sheriff is authorized to summon no more than 36." Mr. Chief Justice Kent delivered the opinion of the court; and after stating the fact, that the case was not capital under the act, proceeded to declare, "that in all cases, at least where the right of peremptory challenge does not exist, and two persons are jointly indicted, they may be tried jointly or separately, at the discretion of the court." I think I may say, that such an opinion establishes the conclusion, that up to that period no doctrine was known in New York, recognising the absolute right of a prisoner to a separate trial. If it had been, it could not have escaped the notice of this accurate judge.

I have made inquiries among those learned minds in our own state, whose situations would lead them to a thorough knowledge of the practice; and the result of those inquiries is this. No case has occurred, in which, when a prisoner, jointly indicted with others, has moved for a separate trial, it has ever been objected to by the officers of the government, or denied by the court. On the contrary, it has been always granted, without objection, under the prevailing notion, that if not matter of right, it was at least a sound exercise of legal discretion. If the point ever had been made and decided, I would gladly follow the course of the court; but it has not. I cannot however say, that there is now any clear authority in favor of the motion, as a matter of right, which is the only way in which the counsel of the prisoner have advisedly chosen to present the point to this court. On the other hand, there is a direct authority, before an eminent judge, against it. In criminal cases, a court should slowly advance any new doctrines; and for one, I must say, that although my first impression, upon a cursory examination of authorities, was in favor of the motion, as a matter of right, my final judgment is against it.

If the motion shall be put, as a matter of discretion, to the court, it will present a very different question. In favor of life, especially where the party puts his defence upon a ground distinct from his fellow prisoner, and adverse to him, there is much reason to induce a court to yield every indulgence, not absolutely inconsistent with justice to the government. I am for overruling the motion, in its present form, because it claims it as a matter of right, leaving the prisoner to any new course, which his counsel may advise.

Motion overruled.

The district judge concurred in this opinion; but as it was a matter of not infrequent occurrence, and important to the practice of the court, the judges afterwards divided in opinion for the purpose of obtaining a solemn decision of the superior court, and at January term, 1827, the supreme court affirmed the doctrine of the present opinion. 12 Wheat. [25 U. S.] 480.

[See Case No. 14,905.]

[3] In Rookwood's Case, 4 State Tr. 661, 667, 13 Howell, State Tr. 139, the course adopted by Lord Chief Justice Holt and the other judges, seems to have been guided by the very reasoning, which Lord Chief Justice Parker supposes to have governed in Charnock's Case, and confirms his opinion.

Case No. 16,683.

UNITED STATES v. WHITE et al.

[6 N. Y. Leg. Obs. 230.]

District Court, S. D. New York. June 6, 1848.

SEAMEN — ENDEAVOR TO MAKE A REVOLT — SHIPPING ARTICLES—DEVIATION.

1. Seamen shipped under articles for a voyage from New Orleans to Havre, and thence to one or more ports in Europe, and thence back to a port of discharge in the United States. The master, intending to make Charleston the final port of discharge, stopped at New York,

and landed passengers and freight. *Held*, that the seamen were not guilty of the offence of "endeavoring to make a revolt," in refusing to get the ship under way, and doing further duty, for the purpose of proceeding to Charleston.

2. The shipping articles must be referred to, and would furnish "prima facie" evidence as to the right of the master to require the seamen to proceed any further.

3. Shipping articles must specify all ports or places of stoppage for purposes of this character.

4. The shipping articles in question not containing any mention of the port of New York, the case in question presented a clear unauthorized deviation, which discharged the seamen from all blame in refusing to proceed further.

5. To justify a deviation from the direct voyage contained in the articles, the same must be unpremeditated, and caused by a "vis major."

[This was an indictment against Charles W. White, John Collins, William Stearns, Edward Dewey, Francis McGoin, William Jones, John Webster, Philip Pease, and Duncan Thompson upon the charge of endeavoring to make a revolt.]

B. F. Butler, U. S. Atty., and W. M. Evarts, for the United States.

C. Donahue and W. R. Bebee, for prisoners.

MORTON, Commissioner. The prisoners are brought before me on a charge of an endeavor to make a revolt on board the ship Archelaus, under the 2d section of the act of congress of 1835 [4 Stat. 775]. The testimony on the part of the United States and the admission of the prisoners' counsel present the following facts: The prisoners all shipped at New Orleans, and, with the exception of two of the men, signed shipping articles for a voyage from New Orleans to Havre, and thence to one or more ports in Europe, should the master require, and thence back to a port of discharge in the United States. At Havre the ship took on board 250 passengers and 8 cases of glassware for the port of New York, and the cargo of the John Cadmus (a vessel bound from Liverpool, that had put into Havre in distress), to carry on freight to Charleston. The Archelaus arrived at this port on the 2d June, landed her passengers and their baggage. The 8 cases of glass, belonging to some of the passengers, were also landed and entered at the custom house. The captain was then about sailing from this port for Charleston, to deliver the remainder of his cargo, when the crew, claiming that the voyage ended on the arrival at this port, refused to proceed further in the ship. An affidavit being made by Capt. Boutelle that the crew had endeavored to make a revolt, a warrant was issued by the commissioner, and the prisoners brought up for commitment.

The decisions of the courts of admiralty, both of England and our own country, agree upon the subject of the rights and duties of seamen in reference to commercial voyages, and, while recognizing the great importance of commerce, both as a subject of public and individual mercantile welfare, yet require, as absolutely indispensable for the true interests of all, that a clear and authentic declaration of the details of every voyage shall be contained in the shipping articles, thus providing an authoritative source, readily to be appealed to, for a solution of any difficulties that may arise upon this most important element of the maritime contract, and which is now directly in question. The law will not tolerate that, under equivocal or ambiguous terms contained in the articles, or at the mere option of masters or owners, voyages may be prolonged or deviations made. The courts, besides considering that such assumptions violate the legal rights of seamen, further regard them with clear disapprobation, as having a tendency to break up and defeat those subjects of just and humane consideration supposed possible to exist even in behalf of sailors, in the shape of domestic ties and obligations, "and the natural desire to return to their homes." In cases where the refusal of seamen to proceed on a voyage has been charged against them criminally, as constituting the offence of "endeavoring to make a revolt," or is set up as working a forfeiture of wages, the courts refer at once to the shipping articles, for the purpose of determining the rights and responsibilities between the sailor and the public, and the master and owners. The law upon this subject is unequivocal and imperative, declaring that the shipping articles must contain a statement of the precise voyage or voyages for which the sailor contracts, and if a deviation from such specification is carried out, not caused by a "vis major," without the consent of the mariner, by going to intermediate ports, and landing or receiving on board passengers or freight, or an ulterior voyage is attempted to be superadded or substituted, and the sailors refuse to do further duty, such conduct on their part is justifiable, and does not either forfeit their wages, or render them liable criminally, under the act in question, for "an endeavor to make a revolt." U. S. v. Matthews [Case No. 15,742]; The Countess of Harcourt, 1 Hagg. Adm. 248; 1 Stat. 131; Act 1790, c. 29, § 1.

The present case is clearly embraced by the decision of Judge Story, above referred to, in U. S. v. Matthews [supra], whether the port of New York is to be considered as the port of discharge, or only as an intermediate port. If the port of discharge, there was no color of right to require the crew to navigate her afterwards to Charleston. If the port of Charleston was contemplated by the master as her port of discharge, then coming to the port of New York, not being contained in the shipping articles, constituted so plain a deviation from the voyage as discharged the seamen from all obligation of proceeding further with the vessel. They are therefore entitled forthwith to be discharged from arrest. Order accordingly.

Case No. 16,684.

UNITED STATES v. WHITE et al.

[Taney, 152.] [1]

Circuit Court, D. Maryland. April Term, 1851.

PUBLIC OFFICERS — EXTRA COMPENSATION — NAVY AGENTS — APPOINTMENT AS PURSER OF NAVAL SCHOOL — AUTHORITY OF SECRETARY OF NAVY — DISMISSAL DURING TERM — OFFICE RENT AND CLERK HIRE.

1. Under the acts of congress of March 3, 1839, and August 26, 1842 [5 Stat. 362, 535], an officer with a fixed salary is not entitled to any additional compensation for extra services, unless it is provided for by law, or by the regulation of an officer of the government, authorized by law to make it.

2. The regulation authorized by these acts, is a general one, fixing prospectively, the additional compensation for specific services, within the limits prescribed by law, and graduating it in different places, as he may, in his discretion, deem just and most advisable for the public interest.

3. He is not authorized to give or refuse compensation, at his discretion or pleasure, in each particular instance, after the service is performed.

4. A navy-agent, therefore, is not entitled to compensation beyond his salary, as fixed by law, for any extra services, although such services may be out of the district for which he is appointed, and may, more properly, appertain to the duties of another navy-agent, or even to an officer of the government filling an office of a different character: his salary is the only compensation for services required of him, and performed by him, if he hold no other office or appointment.

5. He is not entitled to an allowance for the hire of a porter, unless such allowance be made by a general regulation of the secretary.

6. Nor is he entitled to an allowance for services rendered as pension-agent.

7. Where the secretary of the navy appointed the navy-agent at Baltimore, acting purser for the naval school at Annapolis: *held*, that he had the right to make such appointment, if the demands of the public service elsewhere, or any other sufficient cause, put it out of his power to employ a purser regularly appointed; and that the court was bound to presume, in this instance, that the power was exercised under circumstances that justified the appointment, and that such navy-agent would be entitled to the salary allowed by law to pursers.

8. The circumstance that he held the office of navy-agent, at the same time, can make no difference; there is no law which prohibits a person from holding two offices at the same time. In the absence of any legal provision to the contrary, this appointment was valid; although, as a matter of policy, it would be highly exceptionable, in most cases, as a permanent arrangement.

9. The navy-agent is entitled to office rent and clerk hire, and to engage them by the quarter; if he is dismissed from office, before the end of the quarter, he will be allowed for the whole quarter.

This was an action of debt instituted in the circuit court, on the 25th of March, 1850, on the bond of the defendants [Joseph White, John McColgan, and William P. Whyte], given to the United States, on the 14th of February, 1846, to secure the performance, by Joseph White, of the duties of navy-agent, at the city of Baltimore.

The defendant claimed, by way of set-off against the claim of the plaintiff, amounting to $6,407 50, the following sums:

This sum paid Midshipman Reany, by order of chief of bureau of surgery, &c.; voucher on file in fourth auditor's office	$ 30 00
This sum as purser at naval school, per the appointment of Hon. George Bancroft	5,238 08
This sum as navy pension-agent	1,013 75
This sum charged for bills not belonging to station	1,149 84
This sum for porter hire	742 50
This sum claimed for balance of office rent and clerk hire	69 83
	$8,334 00

Making a balance in his favor of $1,926.50.

At the trial, the plaintiff prayed the court to instruct the jury: (1) That the defendant, Joseph White, whose emoluments and pay were fixed by law as navy-agent, is not entitled, in this case, to any extra compensation, nor any other allowance, for the disbursement of the public money. (2) That the secretary of the navy had no power, under the laws or regulations of the navy, to appoint the defendant "acting purser;" no such office being authorized by congress. (3) That congress has prohibited any person from acting as purser, who shall not have been first nominated and appointed, by and with the advice and consent of the senate, and given bond; the defendant is, therefore, not entitled to the pay claimed by him as "acting purser," in this case, as he was not appointed by and with the advice and consent of the senate, and never gave a bond, as required by law.

Z. Collins Lee, U. S. Dist. Atty.

D. Stewart and Wm. Pinkney Whyte, for defendants.

TANEY, Circuit Justice. This case must be governed by the acts of congress of 1839 and 1842; the decisions of the supreme court in relation to cases of this description, made previous to the passage of those laws, do not, therefore, apply. Under these acts of congress, an officer with a fixed salary is not entitled to any additional compensation for extra services, unless it is provided for by law, or by the regulation of an officer of the government, authorized by law to make it. The regulation authorized by these acts, we understand to be, a general regulation, fixing prospectively the additional compensation for specified services, within the limits prescribed by law, and graduating it, in different places, as he may, in his discretion, deem just and most advisable for the public interest; he is not authorized to give or refuse compensation, at his discretion or pleasure, in each particular instance, after the service is performed; for that would open the door to favoritism and partiality, which it was the object of these laws to prevent. A navy-

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

agent, therefore, is not entitled to compensation, beyond his salary, as fixed by law, for any extra services, although such services may be out of the district for which he is appointed, and may more properly appertain to the duties of another navy-agent, or even to an officer of the government filling an office of a different character; his salary is the only compensation for services required of him, and performed by him, if he hold no other office or appointment. The credits and set-offs claimed by the defendant must be tried and determined upon these principles.

1. He is not entitled to extra compensation for disbursing money, under the orders of the navy department, to pay for articles delivered or purchased out of his district; and it makes no difference in this respect whether they be purchased by himself or any other person, under the orders of the department; the item of $1,149.84 must, therefore, be disallowed.

2. Neither is he entitled to the credit of $742.50 for the hire of a porter, while he held the office. The services of such a person in the office of a navy-agent would, indeed, seem to be necessary, and the secretary, we think, had the power, by a general regulation upon the subject, to have made a reasonable allowance to provide one; but as he has not done so, the credit claimed cannot be allowed.

3. Nor can he set off the sum of $810.99 for services as pension-agent. Undoubtedly, an appointment as pension-agent is a distinct one from that of navy-agent; and if by law or regulation, any compensation was allowed to a pension-agent, the defendant would be entitled to it. But the act of April 20, 1836 [5 Stat. 9], in express terms, forbids any compensation to be made for the payment of pensions, without authority of law. It is true that, at that time, the public money was deposited in banks, and the pensions paid by them; but this provision shows that it was the intention of congress that this duty should always be superadded to the duties of some other appointment or officer. The act of February 22, 1840 [5 Stat. 367], authorizes pension-agents to take certain fees from the parties interested, for administering oaths, but gives them nothing more. The first act which authorizes compensation by the public, is the act of February 20, 1847 [9 Stat. 126], and by this act, the secretary of war was authorized to allow a sum not exceeding two per cent. for the payment of pensions; the whole allowance to any one agent not to exceed one thousand dollars in any one year: it does not, however, appear that the secretary of war, or secretary of the interior, who has succeeded to the power of the secretary of war in this respect, has exercised the discretionary power conferred by this law, or made any regulation upon the subject. This item also must, therefore, be disallowed.

4. But he is entitled to set off the sum of $5,328.08 for his salary as acting purser to the naval establishment at Annapolis. The secretary of the navy had a right to appoint a purser ad interim, usually called acting purser, to discharge the duties of purser at this establishment, if the demands of the public service elsewhere, or any other sufficient cause, put it out of his power to employ a purser regularly appointed. The court is bound to presume that the power, in this instance, was exercised under circumstances that justified the appointment of the defendant as acting purser. He performed all the duties of purser at the naval establishment; settled his accounts with the proper officer at Washington as such, and not as navy-agent; and was recognised as acting purser in the reports to congress concerning certain expenditures chargeable to that branch of the service. The act of congress fixes the salary of purser, when not otherwise provided for, at $1,500 a year. As the defendant performed all the duties of the office, and performed them in the name and in the character of purser, he is entitled to the compensation which the law has provided for such services. The circumstance that he held the office of navy-agent at the same time can make no difference; there is no law which prohibits a person from holding two offices at the same time. As a matter of policy, it would certainly be highly exceptionable, in most cases, as a permanent arrangement; but in the absence of any legal provision to the contrary, this appointment was valid. Indeed, it often happens that, in unexpected contingencies, and for temporary purposes, the appointment of a person already in office, to execute the duties of another office, is more convenient and useful to the public, than to bring in a new officer to execute the duty; and if the duties of the second office are performed, and the law has fixed the compensation which it deems just for such services, it cannot be material whether they are rendered by one holding another office or not; provided they are faithfully discharged.

5. He is also entitled to the $69.83 for office rent and clerk hire, for the twenty-five days which intervened between the day of his dismissal and the expiration of his quarter. He was entitled to office rent and clerk hire; and the shortest period for which, according to the usual course of business, he could rent an office, or engage a clerk, was by the quarter; if before the expiration of the time, it was deemed proper to remove him from office, his successor was entitled to the use of the office and the services of the clerk, until the end of the quarter. They were engaged for the use of the officer, and not of the defendant individually; and as he had a right to engage them by the quarter, the expense justly belongs to the office, and ought not to fall upon the individual.

6. He is also clearly entitled to the small item of $30 paid to Midshipman Reany, and the objection to this item has very properly been abandoned by the government.

It is unnecessary to mention the remaining item of the defence, as it has been properly

withdrawn by the defendant. As the alleged error in omitting to credit himself, in his navy-agent's account, with the sum of $561.10, which he transferred to his debit in his purser's account, does not appear on the face of the accounts, and as this credit was not presented and rejected, it is not open to investigation here. If the error exists, it may be discovered by an examination of the accounts at Washington, and without doubt would be readily corrected by the accounting officers.

The jury will find their verdict for the balance due to the government, after deducting the credits and set-off to which the defendant is entitled as hereinbefore stated.

Case No. 16,685.

UNITED STATES v. WHITE.

[2 Wash. C. C. 29.] [1]

Circuit Court, D. Pennsylvania. April Term, 1807.

CRIMINAL LAW — EXAMINATION OF WITNESSES — POWERS OF JUDGE—GRAND JURY WITNESSES.

1. In the incipient stage of a prosecution, the judge may examine witnesses for the defendant, who were present at the time the offence is charged to have been committed, for the purpose of explaining the testimony of the witnesses for the United States; and the witnesses for the prosecution may be cross-examined.

[Cited in Re Ezta, 62 Fed. 986; Re Dana, 68 Fed. 892, 896.]

2. Witnesses for the defendant are never sent to the grand jury, but by the consent of the prosecution.

[Cited in U. S. v. Terry, 39 Fed. 362.]

The defendant was bound to appear at this court on a recognizance taken before a judge of the state of Pennsylvania, to answer a charge of preparing and setting on foot an expedition against the territories of Spain. The witnesses for the United States not being present, Mr. Dallas, District Attorney, moved to bind the defendant over to appear at the next court to answer the charge. He read some affidavits to prove that the defendant had applied to some persons at two different times, to engage in the expedition under Colonel Burr, and that he gave them papers, bearing the resemblance of, and which the witness believed to be, bank notes.

Mr. M'Kean, for defendant, offered to read affidavits, and also to cross-examine one of the witnesses, who had deposed in favour of the United States, to prove that the proposal alluded to was made and understood to be in jest.

Mr. Dallas opposed any examination of testimony for the defendant in this stage of the proceedings, as being unusual and improper.

THE COURT said, that generally speaking, the defendant's witnesses are not examined upon an application to bind him over to answer upon a criminal charge. The defendant's witnesses are never sent to the grand jury, except where the attorney for the prosecution consents thereto. But in this incipient stage of the prosecution, the judge may examine witnesses who were present at the time when the offence is said to have been committed, to explain what is said by the witnesses for the prosecution; and the cross-examination of the witnesses for the prosecution, is certainly improper. The affidavits were accordingly read, but they did not sufficiently do away with the probable cause established by the affidavits for the prosecution, and therefore the defendant was ordered to give bail in 4,000 dollars, and two sureties in 2,000 dollars each.

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

Case No. 16,686.

UNITED STATES v. WHITE et al.

[4 Wash. C. C. 414.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1823.

JUDGMENT ON OFFICIAL BOND — ASSESSMENT OF DAMAGES—LIABILITY OF SURETIES.

1. Where an interlocutory judgment is rendered on a bond, with a collateral condition, the jury, if required by either party, must ascertain the damages if they be uncertain; and if not so, the court must; and for the sum so ascertained, and for no other, can the execution issue.

[Cited in Gurney v. Hoge, Case No. 5,875.]

[Cited in brief in Skidmore v. Bradford, 4 Pa. St. 298.]

2. The sureties in a bond given by J. S. to the secretary of the navy for the faithful execution of his agency in paying invalid pensioners, are not answerable for his defaults in not paying the navy and privateer pensioners; although J. S. was duly appointed agent for the two latter duties. A surety is never bound beyond the scope of his undertaking.

[Cited in Leggett v. Humphreys, 21 How. (62 U. S.) 76.]

[Cited in brief in State v. McFetridge (Wis.) 54 N. W. 3.]

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

This was an action of debt brought in the district court by the United States against the defendants [William White, John White, and Isaac Johnson] upon a bond given by them to the United States, in the penalty of $5000. The district attorney, at the return term of the writ, entered up a judgment by default for the penalty, without assigning breaches, or calling for a plea, and issued a fieri facias for that sum, endorsed "$3373 74 cents, the real debt due." This sum being raised under the venditioni exponas, and the sureties having been advised that they were not liable for the defaults of William White on account of the

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navy pension, and privateer pension funds, (which formed parts of the aggregate sum levied under the venditioni exponas), gave notice to the marshal not to pay over the money so raised to the United States; and upon the return of the writ, they moved the court for an order to the marshal to pay over to them so much of the money levied under the execution, as was claimed by the United States on account of the defaults of William White, as agent for the above funds, admitting that they were liable for the sum claimed in relation to the invalid pension fund. Upon this motion, the court ordered the plaintiff to file a new declaration upon the defendants' bond for the penalty of it, and the defendants to plead payment, in order that the actual sum due might be submitted to a jury under the direction of the court. Upon this plea an issue was formed, and a jury sworn, when the United States gave in evidence the bond on which the suit is brought, executed by the defendants on the 26th of February, 1813, in the above penalty of $5000, and also four several accounts against William White, balanced, one with the sum of $515 35 cents, another with the sum of $1828 84 cents, a third with the sum of $1012 10 cents, and the fourth with the sum of $17 37 cents. A mortgage of the defendant Johnson, and another of the defendant John White, both given in 1821 to the district attorney, in trust for the United States, for securing the payment of $3373 74 cents, the aggregate of the above balances due by the defendant William White. Also a letter dated the 28th of February, 1821, from the attorney of the defendant to the district attorney, requesting him to send him copies of the accounts containing the claims of the United States against the defendants, which were sent, and the receipt of the marshal for one half of the above sum of $3373 74 cents, under a venditioni exponas against him. The condition of the bond on which the suit is brought, after reciting that the secretary of the navy had appointed William White agent for paying invalid pensioners belonging to the state of Pennsylvania, is, that he shall in all things well and faithfully execute his agency. The defendants gave in evidence a letter from the comptroller of the treasury of the United States to the sureties, dated the 22d of December, 1820, stating that William White, in his capacity as agent for paying the pensions of invalids, in which they are sureties, owes a balance of $3373 74 cents, and that his accounts in relation to the debt due to the United States are closed. Also, a letter from the sureties to the comptroller, dated the 7th of May, 1821, stating that although they had not seen a particular statement of the accounts of William White, late commissioner of loans, with the United States, they had then no doubt that the balance of $3373 74 cents, mentioned in the comptroller's letter, was due. The letter then proceeds to solicit an indulgence as to the time of paying it, on an offer to give mortgages for securing the debt; also a letter from the comptroller to the district attorney, dated the 18th of May, 1821, mentioning the request of the sureties for indulgence, and directing him, instead of proceeding against them for a judgment, to accept of a deed of trust for securing the debt, upon sufficient property, should such be offered, and that the extent of time to be allowed for payment of the debt, would be afterwards decided at the treasury department. The district court charged the jury that the defendants were not liable to the claim of the United States for the above balance of $1029 55 cents, and interest thereon, which charge was excepted to, and a writ of error taken out. [Case unreported.]

The District Attorney, for plaintiffs.
Chauncey & John Sergeant, for defendants.

WASHINGTON, Circuit Justice. The proceedings in this cause in the district court were, as I understand, conformable with the practice of the courts of this state in actions upon bonds with collateral conditions. The inconvenience of such a practice is, to my mind, so striking, that had congress made no provision on the subject, I should not hesitate to adopt a different practice in this court. The inconvenience, or rather injustice, which may frequently attend the practice is, that the sum to be levied under the execution is at the will of the plaintiff's attorney; and after the property of the defendant has been sold, and often sacrificed, under the execution, he may be very inadequately compensated by the subsequent decision of the court that the execution had issued for more than was due, and an order of restitution of the overplus. It would certainly seem to be most proper that in some way or other, this matter should be decided before the execution is permitted to issue.

The practice in relation to bonds with collateral conditions is clearly established by the twenty-sixth section of the judiciary law [1 Stat. 87], which enacts: "That in all cases brought before either of the courts of the United States, to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance shall appear by the default, or confession of the defendant, or upon demurrer, the court before whom the action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity. And, when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury." In cases, therefore, where the sum is uncertain, and a jury is requested by either party, the court may either direct a writ of inquiry to issue, or may swear a jury immediately to ascertain the sum justly due to the plaintiff. If the sum for which the judgment should be rendered be not uncertain, the court, I conceive, is to ascertain it: if uncertain, and a

jury be not requested, still the court may, in its discretion, ascertain it, or submit the matter to a jury. But under no circumstances can a final judgment be entered for the forfeiture, or penalty of the bond, in the cases mentioned in this section. The district court, having rendered judgment in this case for the penalty of the bond on which the suit is brought, without having ascertained the sum justly due to the United States in the way pointed out by the above section, committed an error for which this court would reverse the judgment, if the defendants had taken out a writ of error to that judgment. But as the only record before the court is that of the proceedings upon the new declaration and plea directed by the district court, I shall proceed to examine those, and the judge's charge to the jury.

There is no uncertainty as to the debt claimed by the United States. That is ascertained by the mode pointed out by the act of congress. The only question before the district court was, whether, in point of law, the sureties for William White were liable for the sums due by him as agent for the navy pension fund, and the privateer pension fund, to settle which it would seem that a jury was unnecessary, and I think improper. Still, if the charge was right, the court will not reverse the judgment for that error, as the jury was requested so to act by both parties.

Upon the question of law, I think the sureties were not liable for the sums due by William White as agent for the two last mentioned funds. The bond upon which this action is founded recites in the condition, that William White had been appointed by the secretary of war agent for paying invalid pensioners belonging to the state of Pennsylvania, and is, that he shall faithfully execute his agency. The fund for paying invalid pensioners, and those for paying the navy and privateer pensions, are perfectly distinct, raised from different sources, and the administration and management of them are vested in different persons. The first is committed to the superintendence of the secretary of war, who is directed by law to take a bond from his agents in a penalty not exceeding $5000 for the faithful discharge of their duties. The navy pension fund was formed by a pledge of all moneys accruing to the United States from the sale of prizes, and a further pledge of the public faith, to make it sufficient for the purposes to which it was destined; and so much of the fund accruing from prizes which was paid prior to the 26th of March, 1804, was placed under the management of the secretaries of the treasury, war and navy departments. That which was paid afterwards was to be disbursed by the treasury, into which it was to be paid, pursuant to warrants from the secretary of the navy. The fund destined for disabled seamen on board of privateers, their widows and children, was raised from a source distinct from the other two, was paid into the treasury, and directed to be disbursed according to the directions of the secretary of the navy. William White, who was appointed by the secretary of war agent for paying the invalid pensioners of Pennsylvania, was also appointed agent for paying the navy pensioners, by the commissioners of that fund, and agent for paying the privateer pensioners, by the secretary of the navy. Whether he gave bond to those commissioners, and to the secretary of the navy, for the faithful performance of his duties, does not appear; nor can I find any law which required such bonds to be given. But nothing can be more clear in law, in reason, and in justice, than that the sureties for his fidelity in paying away the money placed at his disposal by the secretary of war to invalid pensioners are not his sureties for his faithful disbursement of moneys put into his hands by the commissioners of the navy fund, or by the secretary of the navy for the use of privateer pensioners. It forms no part of the engagement into which they entered, and the case is in no respect varied by the circumstance that William White happened to be appointed, by the superintendents of the three funds, agent in relation to each of them. A surety can never be bound beyond the scope of his engagement; and therefore a surety for the faithful service of B as clerk to C, who afterwards enters into partnership with D, is not liable for unfaithful conduct to C and D. 3 Wils. 532.

The acknowledgment by the sureties in their letter to the comptroller of the 7th of May, 1821, that the balance of $3373 74 cents was due, cannot affect this question, since it is obvious that they made that acknowledgment under a mistake, which the letter of the comptroller of the 22d of December, 1820, led them into. Neither is it affected by the mortgages which they gave, as the present suit is not on the equity side of the court to foreclose the equity of redemption. If it had been, the court, upon the facts appearing in this case being disclosed in that, would have dismissed the bill. I am, therefore, of opinion, that the sureties in this case are not liable to the United States for the sum of $1029 55 cents, and the interest, which is claimed as due by William White on account of the navy pension, and privateer pension funds; and as the claim against him, on account of the invalid pension fund has been satisfied, the judgment of the district court, which is in favour of the defendants, must be affirmed.

UNITED STATES (WHITE v.). See Case No. 17,558.

UNITED STATES v. WHITEHEAD. See Case No. 14,626.

Case No. 16,687.

UNITED STATES v. WHITTAKER.

[The case reported under above title in 2 Tex. Law J. 166, is the same as Case No. 16,688.]

Case No. 16,688.

UNITED STATES v. WHITTIER.

[5 Dill. 35; 18 Alb. Law J. 110; 6 Reporter, 260; 10 Chi. Leg. News, 229; 24 Int. Rev. Rec. 126, 234; 7 Cent. Law J. 51; 2 Tex. Law J. 166.] [1]

Circuit Court, E. D. Missouri. March 30, 1878.

POSTAL LAWS AS TO OBSCENE LITERATURE CONSTRUED.

1. The act of congress of July 12, 1876 (19 Stat. 90), in respect to mailing obscene books, etc., construed, and *held* not to extend to the case of a sealed letter written by the defendant to a person who had no existence, in answer to a decoy letter of a detective, and which on its face gives no information of the prohibited character.

[Cited in U. S. v. Reese, Case No. 16,137; U. S. v. Williams, 3 Fed. 491; U. S. v. Kaltmeyer, 16 Fed. 763; U. S. v. Denicke, 35 Fed. 409; U. S. v. Rapp, 30 Fed. 822; U. S. v. Mathias, 36 Fed. 895; U. S. v. Huggett, 40 Fed. 637; U. S. v. Garretson, 42 Fed. 25; U. S. v. Kelsey, Id. 887. Followed in U. S. v. Bethea, 44 Fed. 802; U. S. v. Grimm, 45 Fed. 560. Cited in U. S. v. Grimm, 50 Fed. 531; U. S. v. Dwyer, 56 Fed. 467; U. S. v. Wilson, 58 Fed. 771. Followed in U. S. v. Adams, 59 Fed. 674, 676, 677. Cited contra in Grimm v. U. S., 156 U. S. 610, 15 Sup. Ct. 472.]

[Cited in Connor v. People (Colo. Sup.) 33 Pac. 161; People v. Hanselman, 76 Cal. 464, 18 Pac. 426.]

2. The cases in which it is allowable to make use of decoy letters discussed.

[Cited in U. S. v. Rapp, 30 Fed. 822; U. S. v. Wight, 38 Fed. 109.]

This is an indictment founded on an act of congress, approved July 12, 1876 (19 Stat. 90), which provides that: "Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means, any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office, nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall, for each and every offence, be fined not less than one hundred dollars nor more than five thousand dollars, or be imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court."

The indictment charges, in substance, that there was delivered to the defendant, in the city of St. Louis, on ——, etc. (naming the time), a certain written letter, contained in an envelope, in the words following, namely: "Butler, Ga., Nov. 14th, 1877. Dr. Whittier: Can you furnish me an absolutely sure way to prevent conception? What will it cost? How can I get it? What is the price of your 'Marriage Guide?' Address, Miss Nettie G. Harlan, Butler, Georgia." Which letter on the envelope, was addressed thus: "Dr. Whittier, St. Louis, Mo., No. 617 St. Charles St."

The question before the court arises on a motion by the defendant to quash the indictment, and, for the purpose of determining the law of the case, the parties have agreed that the facts in respect to the allegations in the indictment are as hereinafter stated, and that these facts are to be considered by the court on the motion to quash the indictment as if they were alleged in it, namely: That the letter described in the indictment as having been written by Miss Nettie G. Harlan, at Butler, Georgia, was in fact written by Robert W. McAfee, who then was, and still is, the agent of a society known as "The Society for the Suppression of Vice," and that in the acts done by him, as herein set out, he was acting as such agent; that there is no such person as Nettie G. Harlan; that, by and with the consent of the United States postal officers, the said letter was enclosed in a sealed envelope, addressed as in the indictment described, having a three cent postage stamp upon the face thereof, and said envelope upon its face was postmarked "Butler, Georgia, November 14th;" that said letter was not mailed as postmarked, at Butler, Georgia, but was postmarked at St. Louis, Missouri, with a marking-stamp furnished said McAfee by the secret service of the United States post-office department, and that said postmark was affixed by the said McAfee, with the said marking-stamp so furnished, in the presence, and with the consent, of the said officers; that thereupon said letter, in said envelope so sealed, postmarked, addressed, and stamped, was by said McAfee delivered to the officers of the St. Louis post-office, and by them placed in the mail, and, in due course of mail, was delivered by James Haran, a letter-carrier of the postal service of the United States, from the post-office in St. Louis, at the office of the defendant, in the city of St. Louis, No. 617 St. Charles street, and that the same was there received by a person having charge of said office; that said letter was written and sent

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 6 Reporter, 260, contains only a partial report.]

in the manner aforesaid for the purpose of procuring information whether the defendant was engaged in the business of sending through the mail non-mailable matter, and information, also, as to where, how, and by whom, or by what means, the matters, articles, and things declared by the acts of congress as non-mailable were being obtained.

It is further stipulated, for the purpose of the motion to quash the indictment, that the letter charged in the indictment as having been written in reply to the said letter of Miss Nettie G. Harlan by the defendant was by the defendant deposited, or caused to be deposited, in the St. Louis post-office, and the same was never sent to Butler, Georgia, nor delivered to Miss Nettie G. Harlan; but the said letter was taken out of the said St. Louis post-office by the postal officers, or said McAfee, for the purpose, singly and solely, of procuring information aforesaid, and detecting the defendant, if guilty of carrying on the business of knowingly depositing, or causing to be deposited, non-mailable matter in the United States mail. The allegation in the indictment is that the defendant answered the letter which he received, purporting to be from Miss Nettie G. Harlan, and deposited his answer, contained in an envelope, in the post-office at St. Louis, and that the letter thus written and deposited by the defendant in the post-office is in the words following, namely: "Miss Nettie G. Harlan, Butler, Ga.: I have what you desire. It is perfectly safe, sure, and healthful, and can be easily used. The price is ten dollars, sent by express only on receipt of price. Price of 'Marriage Guide' is fifty cents. Respectfully, C. Whittier, M. D."

The indictment then proceeds to aver that said letter was knowingly deposited by the said defendant in the post-office at St. Louis, and then and there gave information in the manner and form aforesaid, that a certain article or thing designed and intended for the prevention of conception (a more particular description of which said article said jurors are unable to give) might be obtained from him, the said Clarke Whittier, contrary to the form of the statute in such case made and provided.

On the indictment, as thus framed, in connection with the foregoing facts, which it is stipulated shall, for the purpose of this motion, be considered as a part of the indictment, with the same effect as if they had been alleged therein, a motion is made to quash; and the question which counsel desire to have decided is, whether, if these facts appear as they are alleged and agreed to exist, the prosecution can be sustained, under this statute, for the offence charged in the indictment.

W. H. Bliss, Dist. Atty., and J. P. Ellis, for the United States.

D. P. Dyer and David Wagner, for defendant.

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

DILLON, Circuit Judge. The question submitted has given the court some difficulty. Certain propositions and principles will aid in its correct decision:

1. Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If this rule is lost sight of, the courts may hold an act to be a crime when the legislature never so intended. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused. U. S. v. Morris, 14 Pet. [39 U. S.] 694; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76; U. S. v. Sheldon, 2 Wheat. [15 U. S.] 119; U. S. v. Clayton [Case No. 14,814].

2. Congress has, it is conceded, no power to make criminal the using of means to prevent conception, or to procure abortion, etc., in the several states. That power belongs to the respective states. But congress has plenary power over the mails and postal service, and may, undoubtedly, declare what shall not be mailable matter, and punish violation of its criminal enactments in this regard. The protection of the public morals in such cases is incidental to the protection of the mails. U. S. v. Bott [Case No. 14,626]; In re Jackson [96 U. S. 727], Oct. term, 1877. The statute upon which this indictment is founded must be construed with reference to this limitation upon the federal function and the supposed federal purpose in the enactment of the statute. Congress meant by this legislation to prevent the mails from being used to transport matter corrupting to the public morals. Re Jackson, supra.

3. Where persons are suspected of being engaged in the violation of criminal laws, or of intending to commit an offence, it is allowable to resort to detective measures to procure evidence of such fact or intention. Many frauds upon the postal, revenue, and other laws are of such a secret nature that they can be effectually discovered in no other way. Accordingly, there have been numerous convictions upon evidence procured by means of what are called "decoy letters"—that is, letters prepared and mailed on purpose to detect the offender—and it is no objection to the conviction, when the prohibited act has been done, that it was discovered by means of letters specially prepared and mailed by the officers of the government, and addressed to a person who had no actual existence. The books contain many cases where such convictions have been sustained. U. S. v. Cottingham [Case No. 14,872]; Reg. v. Rathbone, 2 Moody, Crown Cas. 310, Car. & M. 220; Reg. v. Gardner, 1 Car. & K. 628; Reg. v. Williams, Id. 195; Reg. v. Mence, 1 Car. & M. 234.

There is a class of cases in respect of larceny and robbery in which it is held that

where one person procures, or originally induces, the commission of the act by another, the person who does the act cannot be convicted of these particular crimes, although he supposed he was taking the property without the consent, or against the will, of the owner. Archb. Cr. Prac. & Ev. 364; Rex v. Eggington, 2 Bos. & P. 508; State v. Covington, 2 Bailey, 569; Dodge v. Brittain, Meigs, 84, 86; Alexander v. State, 12 Tex. 540; 3 Chit. Cr. Law, 925; 2 East, P. C. 665; 1 Bish. Cr. Law (5th Ed.) §§ 262, 263. The reason is obvious, viz.: The taking in such cases is not against the will of the owner, which is the very essence of the offence, and hence no offence, in the eye of the law, has been committed. The offender may be as morally guilty as if the owner had not consented, but a necessary ingredient of legal guilt is wanting. This is strikingly shown by Rex v. McDaniel, Fost. Crown Law, 121, 2 East, P. C. 665, where "Salmon, McDaniel, and others conspired to procure two persons, ignorant of the design, to rob Salmon on the highway, in order that they might obtain the reward at that time given for prosecuting offenders for highway robbery. Salmon, accordingly, went to the particular place fixed upon, with some money, and the two men who were procured, being led there by one of the conspirators, robbed him, and they were afterwards prosecuted and convicted; but the conspiracy being afterwards detected, the conspirators were indicted as accessories before the fact to the robbery, and, the facts being found by a special verdict, the case was argued before all the judges, who held that the taking of Salmon's money was not a larceny, being done not only with his consent, but by his procurement." But this principle must be limited to the cases where the consent will, as a matter of law, neutralize the otherwise criminal quality of the act. 1 Bish. Cr. Law (5th Ed.) § 262. Thus, where a prosecution was founded on an act of the legislature imposing a penalty on any one who should deal or traffic with a slave without a written ticket or permit from the owner, it is held that the offence is consummated, although the trading was done by the slave in pursuance of instructions of the owner, and in his presence, when the accused was ignorant of such instructions and presence. The reason is that, "like Eggington's Case, supra, this is a contrivance to detect the offender." State v. Covington, 2 Bailey, 569, 573. See, also, Reg. v. Williams, 1 Car. & K. 195; Reg. v. Gardner, Id. 628.

The facts in the case now under consideration show that the defendant is as morally guilty as if the letter he was answering had been written by a person seeking the prohibited information, and not by a detective. But I am of the opinion that these facts do not clearly bring the case within the particular clause of the statute on which the indictment is founded. The indictment charges that the defendant knowingly deposited in the mail a letter giving information where, how, and of whom an article or thing designed and intended to prevent conception could be procured. This was in answer to a fictitious letter of inquiry. The letter written and mailed by defendant was addressed to a person who had no existence. On its face it did not show that it was within the prohibited statute. If it had been suffered to go through the mail to the place to which it was addressed, it would not have been called for, but would have been sent to the dead-letter office, and could not have given to any person the prohibited information. The defendant doubtless intended to give the inhibited information, but the statute does not apply to a letter merely intended by the writer to give such information, but to a letter " 'actually' giving the information." If a letter of inquiry seeking the prohibited information had been written by an actual person, although under a feigned name, an answer in reply, giving such information, would present a case distinguishable, it would seem, from the one under consideration.

I place my judgment in this case upon the single ground that the sealed letter written by the defendant, addressed to a person who had no existence, and which on its face gave no information of the prohibited character, and which is brought within the statute only by the fictitious letter of inquiry written by a detective, is not the "giving of information" within the meaning of the statute. At all events, it is not certain that congress intended to punish such an act; and, therefore, upon the principle above mentioned, that criminal statutes are not to be extended by judicial construction to cases not clearly and unmistakably within their terms, my judgment is that this prosecution, on the admitted facts, cannot be sustained. It is a case of clear moral guilt, but not of legal criminality. There is no legal crime committed, although the defendant did not know of the fact which deprived his act of its criminal quality. 1 Bish. Cr. Law (5th Ed.) § 262. In this respect the case falls within the principle strikingly illustrated by Rex v. McDaniel, above referred to.

In order to prevent misconception of the decision now made, it may be proper to add that we only decide the narrow and single point that the letter written and deposited by the defendant did not give the prohibited information, and hence is not within the statute. It would present a different case for consideration if the letter written and deposited by the defendant had been capable, into whosesoever hands it might have fallen or come, of imparting the prohibited information.

We do not decide that decoy letters cannot be used to detect persons engaged, or suspected to be engaged, in violating criminal laws, but recognize the doctrine that such letters may be so used. We only decide that the defendant, by his answer to the decoy letter, did not, under the special circumstan-

ces of the case, bring himself within the criminal prohibition of the act of congress.

It would also present a different case if the letter of inquiry had been written by some person actually seeking the prohibited information for immoral purposes, although written under an assumed name, and the defendant had mailed such a letter as he actually wrote and deposited in this case. Congress has not, and probably cannot, make the business in which it is claimed the defendant is engaged, viz., of furnishing to whoever may apply therefor the means of preventing conception, to procure abortion, etc., illegal, and punish the same; but the state of Missouri may do so. If the state has done so, and the defendant is suspected of being engaged in the illegal business, undoubtedly decoy letters may be used for the purpose of discovering his violation of the law, as the cases above cited show. And if, in answer to a decoy letter, the prisoner deposits in the mail any written or printed card, circular, etc., which on its face gives information of the prohibited character, there is nothing in this decision which precludes us from holding such a case, if it should arise, to be within the act of congress.

On the admitted facts, I am of opinion, for the reasons above given, that the prosecution cannot be maintained.

TREAT, District Judge, concurring. The questions involved in this case are extremely difficult of solution. It is necessary to discriminate with care, on the one hand, between the offence charged against the postal laws and the modes of proving the same, and on the other hand, the offence stricken at by state statutes and the moral wrong and outrages implied in the vocation or business denounced.

The sense of indignation against such vocation or conduct should not permit a violation by the courts of established rules of law, or an unlawful exercise of jurisdiction, nor the countenance of unlawful contrivances to induce or manufacture crime. The postal system is designed by statute, for obvious reasons, to observe and enforce the sanctity of private correspondence. Severe penalties are denounced against all who intercept letters, etc., with a view of prying into their secrets. Rev. St. § 3892.

Section 3893, as amended (19 Stat. 90, c. 186), under which this indictment is found, prohibits the conveyance through the mails, or delivery from any post-office, or by any letter-carrier, of any printed circular, or notice of any kind, giving the inhibited information, directly or indirectly. It then proceeds as follows: "And any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any such non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall be deemed guilty," etc.

Thus the section provides for two classes of offenders, viz.: Those who deposit knowingly, for mailing or delivery, such non-mailable matter, and also those who knowingly take the same from the mails for the purpose stated. The various acts of congress in pari materia must be considered in connection with constitutional limitations. It is for preserving the purity and privacy of the postal service that congress has passed the many laws to which reference is made; yet, if non-mailable matter is not to be delivered, how are the contents of a sealed letter to be ascertained?

It must be conceded that contrivances to induce crime (the contriver confederating for the purpose with the criminal) are most rigidly scrutinized by the courts, even when the contrivances are lawful in themselves. But when the contrivances are of an unlawful character, should courts not be even more strict?

Again: The statute denounces the deposit of forbidden matter in the mails which "gives" (not which is intended or designed to give) "information, directly or indirectly," etc. In this case the letter deposited did not, of itself, give any such inhibited information; it was not addressed to any person in existence, and if, in the ordinary course of the mails, it had reached its destination, it would have been delivered to no one, for there was no one to whom to deliver, but would have passed to the dead-letter office. To make the letter bear an interpretation against the prohibitions of the statutes, it is necessary to examine the same in connection with the fictitious or decoy letter, bearing simulated postmarks, and also to say that the letter addressed to the fictitious person could, despite section 3892, be lawfully taken from the mails after it was deposited therein, and before it had been delivered to the person to whom addressed, "with the design of prying into the business or secrets of another."

No case, after most diligent search, has been found which disposes exactly of the point under consideration. In my judgment, it must be settled in the light of elemental principles.

No court should, even to aid in detecting a supposed offender, lend its countenance to a violation of positive law, or to contrivances for inducing a person to commit a crime. Although a violation of law by one person in order to detect an offender will not excuse the latter, or be available to him as a defense, yet resort to unlawful means is not to be encouraged. When the guilty intent to commit has been formed, any one may furnish opportunities, or even lend assistance, to the criminal, with the commendable purpose of exposing and punishing him. But no case has been found which goes beyond these views. There are legitimate means and jurisdictions where offences can be tried and punished, and the

public weal is best subserved where rigid adherence thereto is enforced.

Motion sustained.

Case No. 16,689.

UNITED STATES v. WICKHAM.

[1 Wash. C. C. 316.] [1]

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

SEAMEN—AUTHORITY OF MASTER—SUPPRESSION OF MUTINOUS CONDUCT.

The master of a vessel, while at sea, has a right to give a seaman moderate correction; and in case of mutinous conduct, he may suppress it in the best mode he can; and therefore he may use a greater degree of violence on such occasions, than wnen there is misbehaviour only.

[Cited in Fuller v. Colby, Case No. 5,149.]

This was an indictment against the captain of a vessel, upon the complaint of one of his mariners, for an assault and battery committed at sea. It appeared in evidence, that the sailor had misbehaved himself very much, had abused the captain, and had even endeavoured to strike him; in consequence of which, the captain gave him a severe blow with his fist.

THE COURT informed the jury, that for misbehaviour of a mariner at sea, the captain was justified in giving a sailor moderate correction; and in case of resistance or mutinous conduct, he might suppress it in the best way he could; and of course might use a greater degree of violence, than for misbehaviour merely; that a contrary doctrine would destroy all subordination on board of a vessel. The jury found the defendant not guilty.

NOTE. See Abb. Shipp. 107, 108; 2 Bos. & P. 224. Master may give a seaman moderate correction, but he must plead specially what fault plaintiff was guilty of, and that he corrected him moderately. He cannot give it in evidence, on the general issue, in mitigation of damages.

Case No. 16,690.

UNITED STATES v. WIGGLESWORTH.

[2 Story, 369.] [2]

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

CUSTOMS DUTIES—CONSTRUCTION OF TARIFF LAWS—INDIGO.

1. Act July 14, 1832, c. 227, § 24 [4 Stat. 583], levies a duty of 15 per cent. ad valorem, on indigo. Act March 2, 1833, c. 55, § 5 [Id. 629], declares, that it shall be free from duty after June 30, 1842. Act 1841, c. 24, § 1 [5 Stat. 463], levies a duty of 20 per cent. ad valorem, on all articles imported into the United States after September 30, 1841, which were then free or chargeable with a duty less than 20 per cent. ad valorem, except on certain enumerated articles, among which is indigo, "which shall pay respectively the same rates of duties imposed upon them under existing laws." *Held*, that the act of 1841 did not lay a permanent duty of 15 per cent. ad valorem, on indigo, but left the duty thereupon as it stood under the act of 1833, and to expire after the 30th of June, 1842, and, therefore, that no duty was due upon it by Act Aug. 30, 1842, c. 270, § 25 [5 Stat. 548].

[Cited in State v. Pullman's Palace-Car Co., 64 Wis. 103, 23 N. W. 874.]

2. Statutes levying taxes or duties, on subjects or citizens, are to be construed most strongly against the government, and in favor of the subjects or citizens, and their provisions are not to be extended by implication beyond the clear import of the language used.

[Cited in U. S. v. Athens Armory, Case No. 14,473; Devereaux v. City of Browneville, 29 Fed. 753.]

[Cited in City of Memphis v. Bing (Tenn. Sup.) 30 S. W 746; Re Will of Euston, 113 N. Y. 178, 21 N. E. 88; Green v. Holway, 101 Mass. 248; Hale's Estate, 161 Pa. St. 182, 28 Atl. 1071; Hale v. Commissioners of Hampshire, 137 Mass. 114; Schilling v. State, 116 Ind. 202, 18 N. E. 682. Cited in brief in State v. Grant, 74 Mo. 34. Cited in State v. Pullman's Palace-Car Co., 64 Wis. 101, 23 N. W. 873.]

Debt for the recovery of duties, alleged to be due upon certain cases of indigo, imported by the defendant [Thomas Wigglesworth] into the port of Boston. The case came before the court upon an agreed statement of facts as follows: The defendant was the owner of the said cases of indigo, which were laden on board of the American ship ——, at a port east of the Cape of Good Hope; and which sailed therefrom for Boston before the first day of September, 1842, and arrived safely. At the time of her arrival, the collector considering this article to be free of duty under tne act of 1833 (chapter 354, § 5), and subsequent acts, permitted it to be entered and landed accordingly. But he was subsequently instructed by the treasury department, that indigo was at that time subject to a duty of 15 per cent., by virtue of the acts of 1832, c. 227, § 24, and 1833, c. 55, § 5, and 1841, c. 24, § 1, and 1842 (establishing the last tariff) c. 270, § 25. And this suit is brought for the recovery of such alleged duty on those cases.

F. Dexter, U. S. Dist. Atty.

C. G. Loring, for defendant.

STORY, Circuit Justice. The question in this case is, whether, under the agreed statement of facts, the indigo imported was, under the duty act of the 11th day of September, 1841, c. 24, and the act of the 30th of August, 1842, c. 270, liable to pay the 15 per cent. duty, imposed by the act of the 2d day of March 1833, c. 55, commonly called the "Compromise Act," or was entitled to importation free of duty. The act of 1842, c. 270, in the 25th section, expressly exempts from its operation all cases of goods "shipped in a vessel bound to any port of the United States, actually having left her last port of lading eastward of the Cape of Good Hope, or beyond Cape Horn, prior to the 1st of September,

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

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

1842," in which predicament the indigo, upon which the present duty is claimed, actually is. The 25th section then proceeds as follows: "And all legal provisions and regulations existing immediately before the thirteenth day of June, 1842, shall be applied to importations, which may be made in vessels, which shall have left such last port of lading eastward of the Cape of Good Hope, or beyond Cape Horn, prior to the said 1st day of September, 1842." So that, according to the language and purport of this enactment, goods in the predicament above stated are to pay duties or not, according to the provisions and regulations of the laws in force immediately before the 30th of June, 1842. What, then, were the provisions and regulations as to duties on indigo, in force immediately before the 30th of June, 1842? They were in effect those, which were established by the act of the 14th of July, 1832, c. 227, as modified by the act of the 2d of March, 1833, c. 55, and by the act of 1841, c. 24. The act of 1832, in the 24th clause of the second section, levied a duty on indigo of 15 per cent. ad valorem. The act of 1833, in the 5th section, declared, that indigo should be free from duty from and after the 30th day of June, 1842. Now, if the case had stopped here, upon these two acts, there would have been no ground of doubt, that indigo was to be liable until the 30th day of June, 1842, to the duty of 15 per cent. ad valorem; and that indigo imported after that period was to be free from duty. But then came the duty act of 1841, c. 24, which provides, "that on all articles imported into the United States, from and after the 30th day of September, 1841, there shall be laid, collected, and paid on all articles, which are now admitted free of duty, or which are chargeable with a duty of less than 20 per cent. ad valorem, a duty of 20 per cent. ad valorem, except on the following enumerated articles (among which indigo is enumerated,) which shall pay respectively the same rates of duties imposed on them under existing laws." The act of 1842, c. 270, would by its general provisions have reached the present case, but for the exception contained in the 25th section already alluded to; and, therefore, that act may be laid out of our consideration, except so far as it leaves the present case to the operation of the legal provisions and regulations existing immediately before the 30th day of June, 1842.

How, then, stands the case before the court? By the act of 1833, indigo was subject to a duty of 15 per cent. ad valorem, until the 30th day of June, 1842. At the time of the passage of the act of 1841, it was still subject to that duty (the prescribed period of the repeal of the duty not having then arrived); and the act of 1841, by the exception, left indigo to pay the rate of duty (15 per cent.) imposed on it "under the existing laws." Some stress was laid at the argument upon the word "under," as used in the first section of the act of 1841; and it was said that "under existing laws" means now imposed by virtue of the existing laws, whereas, "by existing laws" would mean imposed according to the provisions of existing laws. Upon this interpretation it is said, "imposed under a law" means rightfully collected under a law; and, "imposed by a law," means provided for by the law. I confess that I do not feel the force of the distinction as applied to a case of this sort. It strikes me that a duty imposed by a law, and a duty imposed under a law, are precise equivalents in meaning. No duty is collectable or payable unless it is authorized by law; and if authorized by law, it is then properly said to be imposed by the law, and to be collectable and payable under the law; that is, by or in virtue of the law. We familiarly say that the courts of the United States have a certain jurisdiction under the judiciary act of 1789, c. 20 [1 Stat. 73], by which we certainly mean no more than that the jurisdiction is conferred by that act; that is, it is exercised in virtue of and under the authority of that act. It would be quite too perilous to found an interpretation of any law upon a verbal distinction so refined and subtile, and a fortiori, to found such a distinction in cases of revenue laws, which are designed to operate upon the public at large, and are supposed to use words in the senses belonging to the familiar language of common life and commercial business.

The question then resolves itself into this: Whether the first section of the act of 1841, upon its true intendment and interpretation, meant to impose a permanent duty of 15 per cent. ad valorem, upon indigo and the other excepted articles, or whether it meant to levy that duty as long as the act of 1833 authorised the same duty to be levied, and no longer; that is to say, until the 30th of June, 1842, and then to leave it free. The question is certainly not without embarrassment and difficulty, from the obscurity of the language used, as well as from the loose mode of engrafting the provisions of one revenue statute apparently as a permanent character upon the provisions of another revenue statute, apparently of a temporary character and duration, and imposing varying duties, at different times, upon the same articles. Upon the best consideration which I have been able to bestow upon the subject, my opinion is, that the act of 1841 left the act of 1833 to its full and entire operation upon indigo, and the other excepted articles, without adding to, or varying, or prolonging the period, during which the duty imposed thereon was to be levied. In other words, the act of 1841 did not intend to levy a permanent duty of 15 per cent. ad valorem upon indigo, but left the duty, as it stood, under the act of 1833, and to expire, as that act had provided, after the 30th of June, 1842. My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all statutes, levying taxes or duties upon subjects or citizens, not to extend their provisions, by im-

plication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters, not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed. Hence in the present case, if it be a matter of real doubt, whether the intention of the act of 1841 was to levy a permanent duty on indigo, that doubt will absolve the importer from paying the duty beyond the period, when it would otherwise be free.

In the next place, I think, that the natural meaning of the language of the first section of the act of 1841, justifies, if it does not absolutely require, this interpretation. The language is not, that the present existing rates of duty shall continue hereafter to be levied upon indigo, and the other excepted articles, which would be the appropriate language, if congress intended to make the levy of the duty permanent; but the language is, that indigo and the other excepted articles "shall pay respectively the same rates of duty imposed on them under existing laws;" that is, the existing laws shall regulate the rates of duties upon these articles throughout, and the act of 1841 shall have no operation whatsoever upon them. The exception takes them all out of the purview of the act, and leaves them where it found them, under the dominion of the act of 1833, and the other acts then in force, and of those only. Now, construing the language in this way, it is plain that the duty on indigo ceased on the 30th of June, 1842, by the very limitations of the act of 1833. The argument, addressed at the bar to this point, has great cogency. Suppose the act of 1833 had laid a duty on indigo, varying in its amount at different periods, between the passage of the act of 1833 and that of the 30th of June, 1842, either higher or lower than 15 per cent.; what ground would there be to say, that the act of 1841 contemplated a repeal of such a varying duty, and fixed a uniform permanent duty on the articles of 15 per cent.? I profess, that I am unable to see any ground, upon which such a construction could be maintained. And yet, if it be not maintainable, there is the same reason for giving effect to the repeal of the whole duty provided for by the act of 1833, as there would be for giving effect to such a varying duty. In the one case there would be a partial cesser, in the other a total cesser of the original duty. But the interpretation of the act of 1841 must be the same in both cases.

My view of the whole matter, then, is this, that the duty imposed on indigo "under the existing laws," before the act of 1841, was a duty of a limited duration: it was 15 per cent. until the 30th of June, 1842, and then it was declared that the article was free of duty. That declaration was as much a part of the "existing laws" as the levy of the duty itself. If the duty up to the 30th of June, 1842, was leviable "under the existing laws," the exemption was, after that period, equally "under the existing laws." They were both inseparable adjuncts in the contemplation of the act of 1833. They are not severed in terms, nor, in my judgment, are they severable by any intendment of the act of 1841, in its actual provisions or its avowed objects. And, upon the whole, my opinion is, that judgment upon the agreed facts ought to be for the defendant.

Case No. 16,691.

UNITED STATES v. WILCOX.

[4 Blatchf. 385.] [1]

Circuit Court, N. D. New York. Oct. 18, 1859.

FRAUDS AGAINST U. S.—TRANSMISSION OF FORGED PAPERS TO PENSION OFFICE—CLAIMS FOR BOUNTY LANDS—INDICTMENT.

1. Under the 1st section of the act of March 3, 1823 (3 Stat. 771), it is a felony to transmit to the pension office forged papers in support of a claim for bounty land under an act of congress.

[Cited in Fidelity Safe-Deposit & Trust Co. v. Armstrong, 35 Fed. 566.]

[Cited in U. S. v. Spaulding, 3 Dak. 85, 13 N. W. 359, 538.]

2. The word "claim," in that section, is not limited to a demand for money, but extends to such a claim for bounty land.

3. An indictment for transmitting such forged papers, need not show that the forged papers stated all the facts necessary to be established in order to entitle the party to the bounty land, provided it shows that they were transmitted for the purpose of obtaining the allowance of the claim for the bounty land applied for.

This was a demurrer to an indictment. The indictment contained two counts, each founded upon the 1st section of the act of congress of March 3, 1823 (3 Stat. 771), which provides, that if any person or persons "shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, every such person shall be deemed and adjudged, guilty of felony," &c. The first count set forth, that "Samuel C. Albro and Morris Wilcox, late of Whitestown, in the county of Oneida and state of New York, heretofore, to wit, on the tenth day of August, in the year of our Lord one thousand eight hundred and fifty-eight, at Whitestown, in the county of Oneida, in the

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

Northern district aforesaid, and within the jurisdiction of this court, did feloniously transmit to, and present at, the office of the commissioner of pensions, of the department of the interior, of the United States of America, a certain false, forged and counterfeit writing, in support of and in relation to a claim for bounty land against the United States, which purported to be the genuine and true declaration and affidavit of Henry West, and made out and subscribed and sworn to for the purpose of obtaining the bounty land to which the said Henry West was or might be entitled, under the act of congress approved the third day of March, in the year of our Lord one thousand eight hundred and fifty-five, and attached thereto and connected therewith was what purported to be the affidavits of Charles H. Williamson and Charles Bowers, and the certificate of said Morris Wilcox, a justice of the peace within and for the county of Oneida, which said false, forged and counterfeited writing is in words and figures as follows: 'Declaration of an officer or soldier who has not received bounty land. State of New York, County of Oneida, ss. On this tenth day of August, A. D. 1858, before me, Morris Wilcox, a justice of the peace within and for the county and state aforesaid, personally appeared Henry West, aged 74 years, a resident of Newport, Herkimer county, in the state of New York, who, being sworn according to law, declares that he is the identical Henry West who was a musician in the company commanded by Captain Benjamin Minor, in the 12th regiment of detached militia, commanded by John S. Vandalson, in the war with Great Britain, declared by the United States on the 18th day of June, 1812; that he entered the service at Schenectady, New York, on or about the first day of September, A. D. 1812, for the term of six months, and continued in actual service in said war, for the term of about six months, and was honorably discharged at Sackett's Harbor, New York, on or about the first day of March, A. D. 1813. He makes this declaration for the purpose of obtaining the bounty land to which he may be entitled under the "Act in addition to certain acts granting bounty land to certain officers and soldiers who have been engaged in the military service of the United States," passed March 3d, 1855. He also declares, that he has not received a warrant for bounty land under this or any other act of congress, nor made any application therefor. Henry West. We, Charles H. Williamson, and Charles Bowers, residents of Whitestown, county and state aforesaid, upon our oaths declare, that the foregoing declaration was signed and acknowledged by Henry West in our presence, and that we believe, from the appearance and statements of the applicant, that he is the identical person he represents himself to be. Signatures of witnesses: Charles H. Williamson, Charles Bowers. The foregoing declaration and affidavit was sworn to and subscribed before me, the day and year above written; and I certify, that I know the affiants to be credible persons, that the claimant is the person he represents himself to be, and that I have no interest in this claim. Morris Wilcox, Justice of the Peace'—which writing was transmitted to, and presented at, the said office of the commissioner of pensions, by said Samuel C. Albro and Morris Wilcox, with intent to defraud the said United States, they, the said Samuel C. Albro and Morris Wilcox, then and there knowing the same to be false, forged and counterfeited, contrary to the form of the statute in such case made and provided, and against the peace of the said United States of America and their dignity." The second count was, in form and substance, the same as the first count, except that the charge in the second count was for causing and procuring the papers referred to, to be transmitted to and presented at the pension office, instead of transmitting and presenting them, as charged in the first count.

HALL, District Judge. The questions raised by the demurrer to the indictment are substantially the same in regard to each count. The papers referred to, and set forth, in the two counts are the same, and, in respect to each, it was argued, that the word "claim," as used in the statute, can have reference only to a demand for money, and does not embrace a claim for bounty land. It is conceded that, if the word "claim" stood alone, it might apply to a demand for bounty land, but that, as used in the statute, in connection with the word "account," it is entirely inapplicable to a claim of the kind mentioned in the indictment.

There can be no doubt that the word "claim," standing by itself, and unrestricted by the use of the word "account," and the other language of the section in which it is found, and with which it is connected, would embrace a claim for bounty land, as well as a claim for money; and I do not see that the connection in which it is used, or the other parts of the section in which it is found, have, in any measure, restricted its ordinary meaning, or indicated an intention not to embrace within the statute a claim for bounty land, as well as one for a pension, or for a sum of money due under a contract with the government. Indeed, I think the difference in the terms used in the different portions of this section, and the addition of the word "claim," in that portion of the section upon which this indictment is founded, afford strong evidence that claims of this description are intended to be embraced. The first part of the section is, by its terms, expressly limited to acts done for the purpose of obtaining or receiving, or of enabling others to obtain or receive, "any sum or sums of money;" but, in the portion of the section under which this indictment has been found, the language is changed, and the transmitting, &c., of any

false, altered, forged or counterfeited writing, "in support of, or in relation to, any account or claim," is declared criminal. There is no evidence of an intention to restrict this language, so as to make this portion of the statute applicable only to a mere money claim, and I do not doubt, that the statute extends to such a case as that mentioned in the indictment. The careful addition, after the word "account," of a term of a much broader signification, and the use of the very comprehensive language which immediately precedes those terms, satisfy me that it was the intention of congress to embrace all claims, whether for land or money, and that the construction insisted upon by the defendant cannot be maintained.

It was also insisted, that the indictment was bad, because the claim or declaration of the supposed applicant, set out in full in each count of the indictment, does not state all the facts necessary to be established in order to entitle the party to bounty land under the act therein referred to. I cannot think that this objection is well taken. The declaration states facts necessary to be stated in order to obtain the examination of rolls, records, and other proofs in the pension office, which may show that the applicant is entitled to the bounty land claimed, and is believed to be in the general form required at the pension office; but it does not state specifically that the applicant was mustered or called into the service of the United States, or paid by the United States, nor does it state other facts necessary to be established by record proof or otherwise, before the claim could be properly allowed. Such defects, and further proof, when the records are insufficient, are frequently supplied by supplementary declarations or affidavits, and the omission to make a false or forged declaration perfect in those respects, does not, in my judgment, change the case. If transmitted to the pension office for the purpose of obtaining the allowance of the claim for the bounty land applied for, it is not the less transmitted in relation to and in support of a claim against the government, because it happens to be insufficient or defective, whether it be sent under the supposition that it is in itself sufficient, or with a knowledge of its insufficiency, and with the intention to supply its defects by supplementary or additional papers, or under the expectation that the pension office records will furnish all the other evidence required. Besides, I am inclined to think that the declaration set out in the indictment would have been held sufficient by the pension office, if the rolls of the company or regiment therein referred to, in possession of the proper officer at Washington, had established the fact that the applicant had served as stated, and had been mustered into the service of the United States, and paid by its officers for such service as would entitle him to the bounty land desired. If the construction insisted upon by the learned counsel for the defendant should be adopted, it would be easy to defraud the United States, without danger of conviction, under this statute, because each declaration, and every subsequent paper separately transmitted, might be, in itself, insufficient, whilst the papers transmitted at different times, might, when taken together, fully establish the claim made.

The demurrer to the indictment must be overruled, but the defendant will be allowed to plead at the present term.

Case No. 16,692.

UNITED STATES v. WILCOX.

[4 Blatchf. 391.] [1]

Circuit Court, N. D. New York. Oct., 1859.

INDICTMENT FOR PERJURY—REQUISITE AVERMENTS—OFFICER ADMINISTERING OATH.

1. An indictment in this court, for perjury, alleged to have been committed on an examination before A. C., "a commissioner of the United States duly appointed," but not stating how, or by whom, or under what statute, or for what purpose, such commissioner was appointed, is bad, on demurrer.

[Cited in U. S. v. Quinn, Case No. 16,110; U. S. v. Cover, 46 Fed. 285.]

2. The indictment should set out the name and official title of the officer before whom the oath was administered.

[Cited in U. S. v. Howard, 37 Fed. 667.]

3. An indictment for perjury, alleged to have been committed on an examination of a person charged with a crime against a law of the United States, should show what the particular crime was.

4. The act of April 30, 1790 (1 Stat. 116, 117, §§ 19, 20), in reference to the forms of indictment for perjury and subornation of perjury, does not dispense with the necessity of such averments.

This was a demurrer to an indictment [against Morris Wilcox] for perjury.

HALL, District Judge. The indictment alleges the perjury to have been committed on "an examination of certain persons charged with crimes or offences against the laws of the United States," before Aurelian Conkling, Esq., "a commissioner of the United States, duly appointed according to law, and having competent authority and power to arrest offenders for any crime or offence against the United States, and to examine the same, and to imprison or hold the same to bail, and, in the proceedings and matters before him, in relation to offences and offenders, as aforesaid, to administer oaths and examine witnesses, and in the matters and proceedings relating to and concerning the offences and crimes charged against" the persons, &c., named in the indictment; but the indictment does not state how, or by whom, or under what statute, or for what purpose, such commissioner was appointed.

The case of U S. v. Stowell [Case No. 16,-

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

409], is in point to show, that this is not a sufficient common law averment of the legal authority and jurisdiction of Commissioner Conkling to administer the oath under which it is alleged the defendant committed the offence charged; and, unless such an averment is rendered unnecessary by the act of congress of April 30, 1790 (1 Stat. 116, 117, §§ 19, 20), in reference to the forms of indictment for perjury and subornation of perjury, the indictment is clearly bad for that reason.

I have examined, with some care, the question whether the statute referred to authorizes this form of pleading, and my conclusion is that it does not. The allegation is, that Mr. Conkling was a commissioner of the United States; not of the circuit court of the United States, or appointed by the circuit court of the United States. Commissioners of the United States, in the ordinary sense of that term, have not the powers alleged to have been possessed by this commissioner. Although the language of the statute referred to is very broad, I do not think it dispenses with the necessity of setting out the true and proper designation of the court, or the name and official title, designation or character of the officer before whom the oath was administered. This, it strikes me, is of the substance of the offence, and not mere matter of form. The setting forth of the commission, or the particular powers and authority of the officer, and the source whence they are derived, is not necessary, if he is alleged to hold an office which apparently confers upon him the authority to administer the oath in the particular case specified. This being done, the general allegation, that he had competent authority to administer the oath, is declared to be sufficient. People v. Phelps, 5 Wend. 9, 19; Reg. v. Overton, 4 Adol. & E. (N. S.) 83. But, there is no distinct and precise allegation that this commissioner had competent authority to administer the particular oath stated, and, therefore, the requirement of the statute has not been complied with; and, certainly the indictment would be bad at common law.

It was also objected, upon the argument of the demurrer, that the indictment does not show that the proceeding before the commissioner was one in which an oath was required, so as to bring the case within the 13th section of the act of March 3, 1825 (4 Stat. 118), on which the indictment is founded. In this respect, also, the indictment is bad. It is not enough to allege that the persons named were charged with a crime or offence against a law of the United States, for that is a conclusion of law, but the particular charge should be stated. The act of congress, before referred to, does not dispense with this statement. Reg. v. Overton, 4 Adol. & E. (N. S.) 83.

It was also objected, that it does not appear, from the indictment, what charge was under investigation before the commissioner, and that, therefore, the court cannot see that the testimony alleged to have been falsely given was material. In this respect, also, the indictment is defective.

The indictment was evidently drawn during the disorder and hurry of the circuit, and is in other respects uncertain and defective. The demurrer must be allowed, and judgment be rendered thereon for the defendant.

Case No. 16,693.

UNITED STATES v. WILCOX.

[4 Blatchf. 393.] [1]

Circuit Court, N. D. New York. Oct., 1859.

SUBORNATION OF PERJURY—INDICTMENT—NECESSARY AVERMENTS.

An indictment for subornation of perjury, under section 13, Act March 3, 1825 (4 Stat. 118), averred that 'the defendant did feloniously, knowingly, and willingly procure B. to swear falsely, in the taking of an oath, &c., but did not aver that B. knowingly and willingly swore falsely. *Held*, on demurrer, that the indictment was bad.

[Cited in People v. Ross (Cal.) 37 Pac. 379.]

This was a demurrer to an indictment [against Morris Wilcox] for subornation of perjury, founded upon the 13th section of the act of congress approved March 3, 1825 (4 Stat. 118), which provides, that "if any person, in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every person, so offending, shall be deemed guilty of perjury, and shall, on conviction thereof, be punished by a fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor not exceeding five years, according to the aggravation of the offence; and, if any person or persons shall knowingly or willingly procure any such perjury to be committed, any person so offending shall be deemed guilty of subornation of perjury, and shall, on conviction thereof, be punished by fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor not exceeding five years, according to the aggravation of the offence."

HALL, District Judge. The indictment contains twelve counts, but they are substantially in the same form, and the objections urged apply with equal force to all of them.

1. It was insisted, that the act of swearing falsely, as set forth in the indictment, is not a crime under the laws of the United States. This objection is, I think, well founded. The indictment alleges, that the defendant did feloniously, knowingly, and willingly procure David C. Besse and Wakeman R. Titus to swear falsely, in the taking of an oath, &c., but it does not allege that

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

Besse and Titus, or either of them, did "knowingly and willingly swear or affirm falsely," in the taking of such oath; and, unless they did so, the case is not within the statute. The indictment alleges, that the defendant knew that the statement which Besse and Titus swore to was false, but it does not at all allege that they knew it to be false, or that they willingly, knowingly, or corruptly swore falsely. This is clearly a fatal defect.

2. It was, also, insisted, that the indictment does not show that the oath alleged to be false was taken in a case, matter, hearing, or proceeding where an oath or affirmation was required under any law of the United States, or that it was procured or made for the purpose of being used in any such proceeding. I am inclined to think that this objection also is well taken, but, as the defect first noticed is clearly fatal, it is unnecessary to express any very decided opinion upon any other objection.

Case No. 16,694.

UNITED STATES v. WILDER.

[3 Sumn. 308; [1] 1 Law Rep. 189.]

Circuit Court, D. Massachusetts. May Term, 1838.

GENERAL AVERAGE — LIEN OF SHIPOWNERS FOR CONTRIBUTION—GOVERNMENT AS SHIPPER—LIABILITY TO CONTRIBUTE — BOTTOMRY — LIEN FOR WAGES—PUBLIC SHIP.

1. In cases of general average, the master and owners may retain all goods of the shippers, until their share of the contribution towards the average is either paid or secured.

[Cited in Gillett v. Ellis, 11 Ill. 582.]

2. Semble, that there is no exception to the general rule in favor of the United States, or any other government or sovereignty, although there may be cases of contract, where liens on the property of government do not attach, as on that of private persons.

[Cited in Long v. Tampico, 16 Fed. 501.]

[Cited in Revenue Cutter No. 1, Case No. 11,713; Gleeson v. Willamette Valley, 62 Fed. 305.]

3. Certain slop clothing, belonging to the United States, was shipped on board a vessel, which went ashore, and much expense was incurred in saving the goods on board. *Held*, that the officers of the United States had no right to take the goods shipped by them, without paying or securing their contribution to the general average.

[Cited in U. S. v. Ames, Case No. 14,441; The Siren v. U. S., 7 Wall. (74 U. S.) 160.]

4. Semble, that in cases of salvage of private ships and cargoes, the freight on board belonging to government is equally subject to the admiralty process in rem, for the proportion due for salvage, with that of mere private shippers. Quære, how it is in cases of salvage of public ships.

[Cited in Mutual Safety Ins. Co. v. Cargo of The George, Case No. 9,981; Dupont v. Vance, 19 How. (60 U. S.) 171; The Siren v. U. S., 7 Wall. (74 U. S.) 161; U. S. v. Douglas, 10 Wall. (77 U. S.) 18.]

5. The lien of seamen's wages and of bottomry bonds exists, in all cases, as much against the government, becoming proprietors by way of purchase, or forfeiture, or otherwise, as against private persons.

[Cited in The Ranier, Case No. 11,565.]

6. Sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of the courts of justice; and it seems a fair inference from the duties of the sovereign in such cases, that where a lien exists on property, upon general principles of justice, jure gentium, that lien ought to be presumed to be admitted and protected by every sovereign, until the presumption is repelled by some positive edict to the contrary.

[Cited in Clarke v. New Jersey Steam Nav. Co., Case No. 2,859.]

[Cited in Briggs v. A Light Boat, 7 Allen, 297; Briggs v. Light Boats, 11 Allen, 182–184.]

7. Quære, whether a lien exists for repairs of a public ship, or materials therefor, or for wages of the crew thereof, or for work and labor performed upon the arms, artillery, camp equipage, and other warlike equipments of the government.

8. Quære, whether a lien for freight, on the shipment of goods by the United States, exists against the government.

Trover for certain slop clothing. The parties agreed to the following statement of facts: "In this case it is agreed, that the schooner Jasper, from Boston to New York, went ashore on Block Island. Much expense was incurred in saving the goods, which is to be averaged by way of general average. Among the property on board, there were about one hundred bales of slop clothing belonging to the United States, invoiced at $7,320. The goods being brought back to Boston, the owners of the vessel make out an average bond for the freighters to sign. The store-keeper of the United States (by whom the clothing was shipped), declines signing the bond; claiming for the United States the right to take the goods, without paying or securing their contribution to the average. This right being denied by the owners of the vessel, they refuse to deliver the clothing to the United States, and this action is brought to recover the value of the clothing. It is agreed, that if the court are of opinion, that the United States have no such right, judgment shall be entered for the defendant [James Wilder]; and if the court are of opinion that the United States have such right, the defendant shall be defaulted, and the clothing immediately given up."

Mr. Mills, U. S. Dist. Atty.

Theophilus Parsons, for defendant.

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

STORY, Circuit Justice: The sole question, in the present case, is, whether there exists a right of lien for the general average due on the goods (slop clothing), belonging to the United States, under the circumstances stated by the parties. There is no dispute, that there has been a general average in this case, towards which all the goods on board, and among others the slop clothing of the United

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

States, are to contribute. There is as little doubt, that, for such general average there does exist, on the part of the master and owners of the schooner Jasper, a right of lien against all the goods belonging to all the other shippers, except the United States. In other words, that the master and owners of the schooner, have a right to retain all the goods of such shippers, until their proper share of contribution towards the general average is either paid, or satisfactorily secured to be paid. That is sufficiently apparent from what is laid down in Abb. Shipp. pp. 361, 362, pt. 3, c. 8, § 17; Simonds v. White, 2 Barn. & C. 805, 811; Scaife v. Tobin, 3 Barn. & Adol. 523, 528, 529; The Hoffnung, 6 C. Rob. Adm. 383, 384; 2 Browne, Civ. & Adm. Law, 201; and Stev. Ave. 50, as the universal maritime law. See, also, Poth. Mar. Cont. (by Cushing) p. 76, note, 134.

The question, then, is, whether a like lien exists in regard to goods belonging to the United States. No case has been cited, in which any exception has ever been made in regard to the United States; nor has any authority been produced to show that it constitutes a known prerogative of any other government or sovereignty. I have examined the treatises upon the prerogatives of the crown of England, and I do not find there, or in any of the great abridgments of the law under the title "Prerogative," any such exception recognized, or even alluded to. The argument rests the objection upon the ground of public inconvenience, if it should be held, that, whenever a lien exists against a private person, it is to be held that the like lien attaches against the United States. And it is said, that in cases of contract for labor and services, or repairs, or supplies, with the United States, no lien can be presumed to exist; but that the only remedy is an appeal, not to law, but to the justice of the government. There may, for aught I know, be a just foundation for a distinction, as to liens, between the case of the government and that of a mere private person in many cases of contract. It may, perhaps, be justly inferred, in many cases, from the nature of certain contracts, and employments, and services for the government, that no lien attaches thereto. Thus, for example, it may be true, that no lien exists for repairs of a public ship, or for materials furnished therefor, or for wages due to the crew thereof, or for work and labor performed upon the arms, artillery, camp equipage, and other warlike equipments of the government. In such cases, the nature and use of the articles, as the means of military and naval operations, may repel any notion of any lien whatever, grounded upon the obvious intention of the parties. Many other cases of a like nature might be stated, in which the inference against a lien might be equally cogent. Some of them are alluded to in the opinion of the late lamented judge of the district court of Maryland (Judge Winchester), in the case of U. S. v. Barney [Case No. 14,525]. However, upon cases of this sort, I desire to be understood as not expressing, because it is unnecessary in the present case, any absolute opinion. But, that in all cases of contract made by the United States, a like exemption exists, from the ordinary lien attached thereto by the maritime law, is more than I know, or am prepared to admit. On the contrary, it seems to me, that the nature of the contract itself may sometimes furnish a suitable foundation, on which to rest the presumption of a lien. Take the case of a shipment of goods, like the present, by the United States, on board of a coasting vessel for transportation from one port to another, under the terms of the common bill of lading, by which the goods are deliverable to the consignee or his assigns, he or they paying freight; I must say, that I am not prepared to declare, that the ordinary lien for freight does not attach in such a case, upon the very footing of the terms of the contract, in the same manner, as it would upon a shipment by a private person. But on this also I give no opinion; for it is not the case in judgment. The present case is not one arising under contract; but by operation of law, and, if I may so say, in invitum. It is a case of general average, where, as in a case of salvage, the right of the party arises from sacrifices made for the common benefit, or labor and services performed for the common safety. Under such circumstances the general maritime law enforces a contribution, independent of any notion of contract, upon the ground of justice and equity, according to the maxim, qui sentit commodum, sentire debet et onus. And it gives a lien in rem for the contribution, not as the only remedy, but as, in many cases, the best remedy, and in some cases the only remedy; as, for example, where the owner of the goods is unknown. Indeed, it may be asserted with entire confidence, that, in a great variety of cases, without such a lien, the ship-owner would be without any adequate redress, and would encounter most perilous responsibility. The case of Scaife v. Tobin, 3 Barn. & Adol. 523, already cited, has sufficiently established this; for in that case it was held, that against a consignee of goods, not being the owner, no remedy for contribution in personam would lie, notwithstanding his receipt of the goods; and that against him the only remedy was the detention of the goods for the contribution, unless upon a special contract.

It is said, that, in cases where the United States are a party, no remedy by suit lies against them for the contribution; and hence the conclusion is deduced, that there can be no remedy in rem. Now I confess that I should reason altogether from the same premises to the opposite conclusion. The very circumstance, that no suit would lie against the United States in its sovereign capacity, would seem to furnish the strongest ground, why the remedy in rem should be held to exist. And I do not well see how otherwise it would be practicable at all, or, if practicable, how

without extreme peril to the ship-owner, any private ascertainment or settlement of the general average could be made at all. The United States would not be bound by any such ascertainment or settlement of the average. They might deny the correctness of the valuation and apportionment; there would be no remedy to compel a submission to the authority of any tribunal of justice; and whether the ship-owner should ever receive any compensation or not, and what compensation, would depend upon the good will of congress after, what is a most lamentable defect in the existing state of things, a protracted appeal, and after many years duration of unsuccessful and urgent solicitations to that body. And yet the contribution of every other shipper may be, and indeed must be materially dependent upon what is properly due and payable by the United States. In the case of mere private shipments a court of equity (and probably a court of admiralty, also, by a proceeding in rem) would have ample jurisdiction to compel a reluctant shipper to submit to its jurisdiction, in ascertaining and decreeing an apportionment of the contribution to be made by all the shippers. I cannot, therefore, but think, that the circumstance, that the United States can in no other way be compelled to make a just contribution of its share in the general average, so far from constituting a ground to displace the lien, created by the maritime law, does in fact furnish a strong reason for enforcing it. For I know no reason, why this court should create by its own mere authority an exemption, no where found recognised in the maritime law, and standing upon no very clear or urgent ground of public policy. To me, it is no small objection to such an exemption, that there is an entire silence on the subject, pervading all juridical treatises concerning the rights of sovereignty, and the liens created by the maritime law. Nor do I perceive any real inconvenience in asserting the lien. It is certainly competent for the treasury department, or other department of the government, to discharge debts of this sort, as well as others growing due by the United States; and, if necessary, to authorize any subordinate public officer to give due security for the payment, when ascertained, or to deposit a suitable pledge for it. The argument, therefore, addressed to this court, on behalf of the government, ab inconvenienti, does not seem to have any very solid foundation. On the other hand, the argument ab inconvenienti on the other side is very cogent and persuasive; for it is beyond doubt, that if there be no lien, there is no remedy to enforce an incontrovertible right.

I confess myself wholly unable to distinguish this case from one of salvage; and yet it has never been doubted, as far as I know, that in cases of salvage of private ships and cargoes, the freight on board, belonging to the government, is equally subject to the admiralty process in rem, for its proportion due for salvage, with that of mere private shippers. It may, for aught I know, be different in cases of the salvage of public ships. The same reasoning, however, which has been applied by the government against the lien for general average, applied with equal force against the lien for salvage of government property under all circumstances. Besides, it is by no means true, that liens existing on particular things are displaced by the government becoming, or succeeding to the proprietary interest. The lien of seamen's wages and of bottomry bonds exist in all cases as much against the government, becoming proprietors by way of purchase, or forfeiture, or otherwise, as it does against the particular things in the possession of a private person. See, also, The Copenhagen, 1 C. Rob. Adm. 289.

I have remarked, that it may be true, that no lien exists for salvage services to public ships of our own government. It seems, that in the case of The Comus, cited in 2 Dod. 464, the high court of admiralty of England declined to entertain a suit for salvage of a British ship of war. What the particular ground of that decision was, is unknown; for the case is not reported. In respect to salvage services to a public ship of war of a foreign sovereign, no decision adverse to the right of salvage has been made, although the question was directly before the court in the case of The Prins Frederik, 2 Dod. 451, and underwent a very learned discussion. That case never came to a final decision, the foreign sovereign having submitted to pay such compensation as Sir William Scott should award, and he accordingly awarded to the salvors £800. A distinction was taken in that case, which, indeed, has been often taken by writers on public law, as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious and public purposes; things extra commercium et quorum non est commercium. That distinction might well apply to property like public ships of war, held by the sovereign jure coronæ, and not be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce. The case of The Alexander, 2 Dod. 37, may be supposed to have turned upon some distinction of this sort; but in reality it turned upon very different considerations. In that case, a British ship, having on board a neutral cargo, and among other things a monument, belonging to the king of Prussia, intended to be erected to the memory of his late queen, was captured by an American ship of war, and was afterwards recaptured by a British privateer. Salvage was decreed to the recaptors for the ship; but was denied as to the cargo, being neutral; and the expenses were decreed not to be a charge on the property of the king of Prussia. It is plain, that as the neutral cargo was in no danger of

condemnation, the recaptors were entitled to no salvage on that, upon the well known doctrine recognised in the British and American courts, that the recapture of neutral property confers no real benefit in ordinary cases, and, therefore, there is no foundation for any claim of salvage. See Talbot v. Seeman, 1 Cranch [5 U. S.] 1, 28, 31, 37; The War Onskan, 2 C. Rob. Adm. 299. The American prize courts, equally with the British, must have restored the monument belonging to the king of Prussia; for, although Prussia was an ally of Great Britain in her continental wars, she was neutral in the war with us.

In the case of The Exchange, 7 Cranch [11 U. S.] 116, it was considered by the court, that the ground of exemption of the ships of war of a foreign sovereign, coming into our ports, from all process, was founded upon the implied assent of our government. But it was not decided, that the other property of a foreign sovereign, not belonging to his military or naval establishment, was entitled to a similar exemption. Bynkershoek seems, indeed, in his bold and uncompromising manner to have held all the property of a foreign sovereign, including his ships of war, to be liable, in the courts of another sovereign, where they are found, to be attached for his debts. His own government, however, in a case of that sort, released the property. See Bynk. De foro Legatorum, cc. 3, 4. See, also, S. P. cited [The Exchange] 7 Cranch [11 U. S.] 125, 126, and The Prins Frederik, 2 Dod. 458–462. Bynkershoek has the support of other jurists in favor of his opinion, at least to the extent of their common private property, found in the foreign territory. Mart. Law Nat. bk. 5, § 9. But it is not necessary to consider this point further, as there may be a clear distinction between the case of a foreign sovereign and that of a domestic sovereign in this particular.

It has been laid down by Vattel (book 2, § 213) that the promises, the conventions, and all the private obligations of the sovereign are naturally subject to the same rules as those of private persons. And this, as a general rule, has been adopted in the interpretation of contracts, to which our government is a party, by the supreme court of the United States, in the case of U. S. v. Barker, 12 Wheat. [25 U. S.] 559. Vattel has added in the same place: "If there exists any difficulty on this account, it is equally conformable to prudence, to the delicacy of sentiment, which ought to be particularly conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. This is the practice of the states that are civilized and governed by laws." Vatt. Law Nat. bk. 2, § 213.

I fear, that this republic cannot justly claim the praise of carrying into effect this deep and solid principle of justice. The United States are not suable even in their own courts of justice; and the several states of the Union, with very few exceptions, have insisted on the same immunity. But I do not rely upon the language of Vattel to show, that it is the duty of the sovereign to fulfill all his obligations; whether founded in contract, or implied by the general principles of law; and that sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of courts of justice. And it seems to me a fair inference from the duties of the sovereign, in such cases, that where a lien exists on property, upon general principles of justice, jure gentium, that lien ought to be presumed to be admitted and protected by every sovereign, until the presumption is repelled by some positive edict to the contrary. None such exists in our country.

It was remarked by Sir William Scott in the case of The Waterloo, 2 Dod. 433, 435, where an exemption from salvage was set up by the East India Company, on account of the salvor ship and the salved ship, being both at the time in its own service, that the exemption was "claimed from a right, otherwise universally allowed, and highly favored in law, for the protection of those, who are subjected to it; for it is for their benefit, that it exists under that favor of the law. It is what the law calls 'jus liquidissimum,' the clearest general right, that they, who have saved life and property at sea, should be rewarded for such salutary exertions; and those, who say, that they are not bound to reward, ought to prove their exemption in very definite terms, and by arguments of irresistible cogency." The same considerations apply, with the same force, to the claim for general average. And I cannot but think, that public policy will be promoted, and not impugned, by holding, that the remedy for the reward is not uncertain or precarious, but attaches as a lien, primarily in rem, and does not await the slow, or tardy, or distant justice of the government in awarding it. If there ever was a case, which ought to be settled by a court of justice, upon principles of right and liberality, this is precisely that case. No court of justice ought to decline to enforce it, unless there be some clear, definite, and incontrovertible prohibition against the exercise of it.

Finding, therefore, no such exemption from the ordinary lien for general average, as the government seeks to sustain, justified by any general principle, or any authority, I am not bold enough to create one. The consequence is, in my opinion, that the present suit is not maintainable, and that judgment ought to be entered for the defendant.

My learned brother, the district judge, concurs in this opinion, and therefore let judgment be entered accordingly.

Case No. 16,695.

UNITED STATES v. WILKINSON et al.

[5 Dill. 275.] [1]

Circuit Court, W. D. Missouri. 1878.

ATTACHMENTS—REV. ST. §§ 3466, 3467, CONSTRUED—PRIORITY OF THE UNITED STATES AS A CREDITOR.

1. Under the legislation of congress (Rev. St. §§ 3466, 3467), the priority of the United States as a creditor is secured only when by law or the act of the debtor his property is attached, sequestered, or being administered for the benefit of his creditors generally.

[Cited in brief in Jackson v. Davis, 4 Mackey, 198.]

2. The attachment mentioned in the foregoing section is not such an attachment as is authorized by the laws of Missouri, which is for the exclusive benefit of the creditor who makes the attachment.

This is a bill filed by the United States against Charles B. Wilkinson and the Bank of St. Joseph, alleging that said Wilkinson, from the year 1872 to 1875, was internal revenue collector for the Sixth collection district of Missouri; that as such collector he became indebted to the United States in the sum of $8,357.31; that the United States, on the 30th of March, 1876, recovered judgment for said amount, which judgment remains unsatisfied; that in September, 1875, said Wilkinson was the owner of a large amount of property (described in the bill); that about the date last aforesaid he fled the country; that the Bank of St. Joseph instituted suit by attachment in the state court, attaching all the property of said Wilkinson and garnishing his debtors; that, under the judgment obtained, said Bank of St. Joseph sold all of the property attached and became the purchaser thereof. The prayer of the bill is to declare the bank trustee and direct it to pay over the funds in order to satisfy the debt of the United States. The bill is demurred to.

Botsford & Williams and Mr. Waters, for the United States.

Willard P. Hall and Franklin Porter, for the defendant.

KREKEL, District Judge. The legal question raised may be considered under the first cause assigned in the demurrer, "that the bill does not state a cause of action against the defendant bank."

The right of recovery on part of the United States is based upon section 3466 of the Revised Statutes of the United States, which is as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." See, also, Rev. St. § 3467.

It would appear that the priority provided for applies and extends to cases only in which the estate of the debtor passes from him or is administered for the benefit of his creditors. Burrill, Assignm. p. 534, and cases cited. An insolvent estate is so administered. The administrator or executor deals with the assets of the estate for the benefit of creditors in the first instance. An assignment made voluntarily brings the property to be administered into the same category. Thus far there is no difficulty in ascertaining the meaning and intent of the law securing the preference. The clause affecting the estate and effects of an absconding debtor when attached by process of law, presents the real difficulty.

We have two classes of attachment in the United States; in the one the effect is to vest the property of the debtor in trustees for the benefit of all the debtor's creditors; in the other class (as in Missouri) the attachment is for the exclusive benefit of the attaching creditor.

In New York, New Jersey, Delaware, and Pennsylvania, the property of absconding and concealed debtors, when attached, passes into the hands of trustees, to be administered for the benefit of the whole of the creditors. The provision of the United States statutes uses the words "absconding, concealed, and absent debtor," and it is a reasonable construction to say the attachments spoken of refer to the class of attachments in the states named. This has been so held. 1 Kent, Comm. 247 (side page), and notes; U. S. v. Clark [Case No. 14,807]; Smith v. Tinker, 2 Day, 241; M'Lean v. Rankin, 3 Johns. 369; U. S. v. Crookshank, 1 Edw. Ch. 233; Johnson v. Hunt, 23 Wend. 87, 89; Plunkett v. Moore, 4 Har. (Del.) 380; Cummins v. Blair, 18 N. J. Law, 152; Bouchaud v. Dias, 1 N. Y. 204; Burrill, Assignm. 534; Field v. U. S., 9 Pet. [34 U. S.] 201; U. S. v. Fisher, 2 Cranch [6 U. S.] 390, note; U. S. v. Mott [Case No. 15,826]; U. S. v. Hooe, 3 Cranch [7 U. S.] 87; Conrad v. Insurance Co., 1 Pet. [26 U. S.] 439, 440; Watkins v. Otis, 2 Pick. 101, 102; Drake, Attachm. §§ 644, 668, 673.

The effect of an attachment in Missouri is to secure to the attaching creditor a conditional lien, which may be perfected by a judgment, and affects the property attached only, and does not affect the interest of any other than the attaching creditor in any way. The fact that the St. Joseph Bank attached all the property of Wilkinson—the defaulter—cannot alter the case or change the effect of the law. The attaching bank, under the laws of Missouri, was the only party interested, both as a creditor and as regards the property attached.

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

The next section of the Revised Statutes after the one quoted supports this view. That section provides that "every executor, administrator, or assignee, or other person who pays any debt due by the person or estate for whom or for which he acts, before he satisfies and pays the debts due the United States" [Rev. St. § 3467], shall become personally answerable in his own person and estate for the debts due to the United States. The class of persons here referred to is evidently a class acting as trustees in some capacity, and not for themselves. Reading this provision thus, it harmonizes with the construction given to the attachment referred to in section 3466.

In considering the question at issue, it may not be improper to ask: Does the priority secured to the United States so impress itself upon the property as to create a lien, subject to which the Bank of St. Joseph acquired the property of the defaulting debtor, Wilkinson? If it did, then every person dealing with one who is or may become indebted to the United States does so at his peril. All property of a debtor of the United States would be affected by possible liens, the existence and extent of which no one could well ascertain. The question of such implied lien in favor of the United States has been considered by commentators and courts. Chancellor Kent (1 Commentaries, side page 245, citing U. S. v. Hooe [3 Cranch, 72]), says that it was there held "that the priority to which the United States were entitled did not partake of the character of a lien on property of the public debtor. The United States, in the character of a creditor, have no lien on the real estate of their debtor. If the priority existed from the time the debt was contracted, and the debtor should continue to transact business with the world, the inconvenience would be immense. The priority only applied to cases where the debtor had become actually and notoriously insolvent, and, being unable to pay his debts, has made a voluntary assignment of all his property, or, having absconded or absented himself, his property had been attached by process of law." In the case of Prince v. Bartlett, 8 Cranch [12 U. S.] 431, it was decided "that the effects of an insolvent debtor duly attached in June were considered not liable to the claim of the United States on a custom-house bond given prior to the attachment and put in suit in August following. The private debtor had acquired a lien by his attachment which could not be divested by process on part of the United States subsequently issued. Beaston v. Farmers' Bank, 12 Pet. [37 U. S.] 102.

Under the views expressed, no lien in favor of the United States on account of preference existed at the time the sheriff of Buchanan county seized the property afterwards sold under execution on judgment in favor of the bank obtained in the attachment suit. The property being free of liens, the bank buying it thereby incurred no liability to the United States, and holds the property free of any claim of the United States.

The judgment of the court is that the demurrer be sustained and the bill dismissed. Decree accordingly.

NOTE. In U. S. v. Cook Co. Bank [Case No. 14,853], Mr. Justice Harlan (circuit court for Northern district of Illinois, 1879), construing the legislation of congress applicable to the question (Rev. St. §§ 3466, 3467, 5236), held that the United States government has a prior lien over other creditors on the proceeds of the sale of bonds deposited as security for the circulation of national bank bills, as well as a prior claim in the distribution of the bank's assets, for the payment of claims of the government against such bank, and may apply the proceeds of such assets to the payment pro tanto of its claim for postal funds and money order funds deposited in such bank by the postmaster.

In giving his opinion, Mr. Justice Harlan said: "Very early in the history of the government it was provided by statute that debts due the United States should be first satisfied in all cases where any revenue officer, or other person, thereafter becoming indebted to the government, by bond or otherwise, should become insolvent, or where the estate of any deceased person in the hands of executors or administrators should be insufficient to pay all the debts due from the deceased. The priority thus established was declared to extend not only to cases in which an act of legal bankruptcy should be committed, but to cases in which a debtor, not having sufficient property to pay all his debts, should make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor should be attached by process of law. Acts March 3, 1797 (1 Stat. 515). That was an act providing more effectually for the settlement of accounts between the United States and receivers of public money, but it was held to include all debtors to the United States, whatever their character and by whatever mode bound. U. S. v. Fisher, 2 Cranch [6 U. S.] 358; Beaston v. Farmers' Bank, 12 Pet. [37 U. S.] 102. In the act of March 2, 1799, regulating the collection of duties on imports, a like priority was given to the government as to the claims upon bonds given for the payment of duties (1 Stat. 676). Act of 1790 (1 Stat. 169). The policy inaugurated by these statutes seems to have been steadily maintained by the government. Their substantial provisions have been preserved in the authorized revision of the statutes. Rev. St. § 3467, et seq. It is insisted, however, by the defendants, that a different rule must be observed in the distribution of the assets of an insolvent national bank in charge of a receiver appointed by the comptroller of the currency. They assume that the national bank act of 1864, the provisions of which are preserved in the Revised Statutes, placed all the creditors of a suspended national bank upon an equal footing, except that for any deficiency in the proceeds of the sale of United States bonds pledged to secure the circulation of such bank, but for no other purpose, the government is given 'a first and paramount lien upon all the assets of such association,' and to that extent, and no farther, it is entitled, in the distribution of assets, to priority above all other creditors. 13 Stat. 114. This position, it is earnestly claimed, is sustained by section 50 of the act of 1864. Rev. St. § 5236. The specific contention is, that these provisions of the national bank acts operate as a repeal or modification, pro tanto, of the statutes which give the government a priority in the distribution of the estates of those indebted to it. We cannot yield our assent to any such construction of the statutes in question. The authorities cited by the learned counsel do not, as we perceive, justify the conclusion for which they contend. They only announce

the general rule, recognized in all the books, 'that a subsequent statute which is clearly repugnant to a prior one, necessarily repeals the former, although it does not do so in terms; and, even if a subsequent statute be not repugnant in all its provisions to a prior one, yet, if the later statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the former act, leges posteriores contrarias abrogant.' * * * It is admitted by learned counsel that before the passage of the act of 1864, the government had a priority in all the cases specified in the acts of 1797 and 1799, whether the debtors were individuals or corporations. It is also admitted that such priority now exists, except in the cases of national banks for whom receivers have been appointed. But no sound reason has been assigned for a distinction in behalf of the general creditors of national banks, which, counsel concede, is not allowed in behalf of the creditors of other corporations, by whatever authority created, and which are indebted to the United States. The words of the statute are broad, that 'whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied.' The defendant bank is, therefore, embraced by the express language of the statute. The same considerations of public policy which suggested the act of 1797, exist now, as well as when the act of 1864 was passed, and there is no such irreconcilable inconsistency between the two acts, or between the several provisions of the Revised Statutes upon the same subject, as requires us to assume that congress intended by the last statute to surrender the government's priority in any case covered by the prior statute. The two acts may well exist together."

Case No. 16,696.

UNITED STATES v. WILKINSON et al.

[See 12 How. (53 U. S.) 246.]

Case No. 16,697.

UNITED STATES v. WILL.

[20 Leg. Int. 341;[1] 11 Pittsb. Leg. J. 73; 5 Phila. 293; 2 Pittsb. Rep. 467.]

District Court, W. D. Pennsylvania. Sept. 21, 1863.

CONSCRIPTION LAWS—HINDERING ENROLLING OFFICER.

The act of congress of March 3, 1863 [12 Stat. 731], provides no punishment for obstructing, hindering, and delaying an enrolling officer, and an indictment will not lie therefor.

[This was an indictment against Joseph Will for violating the conscription act. Motion in arrest of judgment.]

Mr. Carnahan, U. S. Dist. Atty.

Mr. Noon, Mr. Mageehan, and Mr. Johnston, for defence.

McCANDLESS, District Judge. This case was argued at Pittsburgh, with marked ability, and this opinion written there, but as it involved a principle of national importance, I have delayed the announcement of my decision, until I could have a conference here with my brother, Mr. Justice GRIER. I am pleased to say that we concur in opinion. The defendant was convicted at the late term of this court upon an indictment charging him with "obstructing, hindering and delaying" an enrolling officer in the performance of his duties. The indictment is framed under the 25th section of the act of the 3d of March last, commonly called the "Conscription Act" [12 Stat. 735]. It is moved in arrest of judgment:

(1) That the act of congress, under which the indictment is drawn, does not provide any punishment for the offence for which the defendant is indicted. An act of congress passed during the commotion of a civil war, is, some times, difficult of construction. Its peace and warlike provisions must be separated, and the penal sanctions applicable to the one, should not be applied to the other. I have been impressed with this distinction in examining the provisions of the act in question. Its title indicates that it has two objects—first, "enrolling," and, second, "calling out" or drafting the "national forces." The first is a peaceful measure, the other is an order peremptory in its character and requiring force to support it. Since the world began, all civilized nations at given periods in their history have ascertained not only their material wealth, but their physical force. In ancient times it was an authentic declaration, before the censors, by the citizens, of their names and places of abode. In the United States, this enumeration has been once in ten years, and its primary object is to fix the rate of representation in congress, but to this is now added a vast compendium of the national resources. When a great public emergency arises, congress may direct another, and an intermediate enumeration for the purpose of ascertaining the power they possess to suppress insurrection or repel invasion, and this they have done in the present instance, the census of 1860 affording but an imperfect guide to the national strength in 1863. Congress had a right to suppose, and did suppose, that the enrollment would be a peaceful measure in which there would be a general acquiescence, and which required neither penalties nor military authority to accomplish it. The national force was to be found by the same mild means that an assessor would fix the value of real estate, or other property subject to taxation. From the past history of the American people, congress did not presume that there would be any resistance to a measure merely preliminary in its character. The act is not for the time being only, for this register of the people is to occur every two years, and without limitation. Congress designed that the government should at all times be ready, whether for a foreign war, or any new complication of domestic difficulties. Wise statesmen always anticipate such emergencies and provide for them. They have done so here, in trying to reduce to precision the force or power upon which they could rely to restore the rightful

[1] [Reprinted from 20 Leg. Int. 341. by permission.]

authority of the government. The first eleven sections of this act are wholly taken up with provisions relative to the enrollment, and there is no penalty interposed for resisting the enrolling officer or omitting to respond to his inquiries, if he should choose to make them. Thus far the act treats the enrollment as a thing complete in itself. A draft may or may not be made. That is to happen when, in the judgment of the president, the public safety may require it. By the twelfth section, he is then authorized to assign "to each district," the number of men to be furnished by each district and "thereupon" the enrolling board shall, under the direction of the president "make a draft." This is the first exhibition of the warlike power. Then spring into activity the provost marshals, other officers and their subordinates, who are to draw or "call out" the people, in given classes, who have been previously enrolled. They are to answer the president's demand, or upon failure, they become, for the first time, subject to the rules and articles of war, except where the act directs that they shall be turned over to the civil authorities for trial. As was well said, upon the argument, the enrollment left every man where he was minding his own business; the draft took the citizen from his home, his parents, his wife, or his children.—Hence, congress might well consider the enrollment able to take care of itself; while the draft should be guarded by severe penalties. Full directions are given in the following sections, as to the mode of conducting the draft, until we arrive at the 24th and 25th, which may be termed the "penal clauses" of the bill. As this indictment derives its validity from the latter, this brings us to the consideration of the other reasons assigned for arresting this judgment, which is,

(2) That the indictment sets forth no crime for which the defendant can be convicted. The point is well taken. The section declares: "That if any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft; or shall assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto; or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted man not to appear at the place of rendezvous, or willfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the provost marshal, and shall be forthwith delivered to the civil authorities, and upon conviction thereof, be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments." It will be borne in mind that the indictment charges that the defendant did "assault" the "enrolling officer," and did "hinder, delay and obstruct" him, in the performance of his official duties. But the section has no reference to the enrollment except in the past tense, as a fact accomplished, an act consummated. The draft is the subject matter treated of, and the draft alone. It is the draft of men already "enrolled" under the provisions of the act. The clause "or in the performance of any service in relation thereto" can have for its antecedent the draft and nothing else. The sentence can bear no other grammatical construction, and that is its fair legal interpretation.

Congress having provided no penalty for obstructing the enrollment, we must take the law as we find it, and not create an offence by intendment. If experience has shown that the officers charged with this public function are not sufficiently protected, the omission can be supplied at the next session, and before, by the terms of the act, the next biennial enrollment is to take place. As the law now stands, the opinion of the court is with the defendant on both the points submitted, and the judgment is arrested.

Case No. 16,698.

UNITED STATES v. WILLARD et al.

[1 Paine, 539.] [1]

Circuit Court, D. New York. April Term, 1826.

PLEADING — SPECIAL DEMURRER — EVIDENCE — TRANSCRIPTS FROM TREASURY ACCOUNTS — HOW EXPLAINED — ADVANCES TO MILITIA PAYMASTER.

1. If a plea which purports to answer all the breaches in the declaration is a good answer to some of them only, the objection cannot be taken advantage of on error, but on special demurrer only.

2. Transcripts of accounts in the treasury department are written documents, and their construction is matter of law.

3. Witnesses acquainted with the mode of accounting at the treasury, cannot be called to give their opinion as to the effect of particular charges. If there is any obscurity which requires explanation, the officers of the treasury should be examined.

[Cited in Robertson v. Stark, 15 N. H. 113.]

4. As where sums were charged as advanced to a paymaster of the militia, and witnesses were examined to prove that they believed, from the manner in which the charges were made, that a part of such sums were to pay the regular troops, their testimony was held inadmissible.

5. The duties and powers of a military officer of the United States are regulated by law, and for the court to determine.

6. Monies were advanced to a militia paymaster, under the acts of congress of 20th of January and 3d of March, 1813 [2 Stat. 791, 816], and charged to him in account under the words "Pay of the army." *Held*, that these words were evidence of the appropriation out of which the advances were made, and not that such advances were to be disbursed to regular troops, but not to the militia.

[7. Cited in Harris v. Barnett, 4 Blackf. 373, as showing that the seal of the treasury depart-

[1] [Reported by Elijah Paine, Jr., Esq.]

ment, attached to transcript of accounts, was received in evidence without question of its authenticity.]

In error to the district court of the United States for the Northern district of New-York.

The plaintiffs brought an action of debt in the court below, on a bond executed by Thomas P. Baldwin, Seth C. Baldwin, and John Willard, conditioned that the said Thomas P. Baldwin, who had been appointed district paymaster of the militia of the state of New-York in the service of the United States, in the county of St. Lawrence, should faithfully discharge the duties of his office, and regularly account when thereto required for all monies received by him as such paymaster, with the persons thereto authorized by the United States, and pay into their treasury such balance as, on a final settlement of his accounts, should be found due to them. Different breaches were assigned in the declaration, charging Baldwin with not having paid the troops the monies he had received for that purpose; with not having accounted; and with not having paid the balance due the plaintiffs, on a final settlement. Judgment by default was entered against Thomas P. Baldwin and Seth C. Baldwin. The defendant, Willard, pleaded ten pleas. The eighth plea averred a faithful payment of all monies received by Baldwin. The ninth plea averred a like payment, and also that Baldwin, as such paymaster, had never received more than 20,000 dollars, with which sum he had been charged, and on accounting with the officers of the treasury, he had been credited with payments to that amount. The tenth plea averred, that Baldwin had, as such paymaster, received no more than 20,000 dollars, for which he had in like manner duly accounted. Each of these pleas purported to answer all the breaches in the declaration. On the trial the plaintiffs offered in evidence a certified transcript of the account of Baldwin, audited at the treasury, in which he was charged as follows: "On account of militia, 20,000 dollars." "Pay of the army, 29,732 dollars 42 cents." Both sums paid him, as district paymaster of the 5th brigade of New-York militia, by Governor Tompkins. He was credited in said account for disbursements made to said brigade, including his own pay and emoluments for services rendered the United States in 1812 and 1813, as follows: "On account of militia, 20,000 dollars: Pay of the army, 21,391 dollars 59 cents: and for subsistence, forage, clothing, and contingencies, 6,858 dollars 33 cents;" leaving him indebted to the United States this sum, 1,482 dollars 50 cents. The defence set up by Willard was, that Baldwin had received only the 20,000 dollars to pay to the militia, which he had applied to that purpose; but that the residue of the money received by him was to pay the regular troops, which, so far as it had been accounted for as paid, appeared to have been applied to pay them; and that he, Willard, as surety, was not liable for any sums advanced to Baldwin, except such as were advanced to pay the militia. To maintain this defence he called two witnesses, Elisha Jenkins and Robert Swartwout, who testified, that they were skilled in accounts, were quarter-masters during the war, and had seen accounts made out at the treasury department in relation to the quarter-masters' department. That they had examined the account in evidence, and should understand from it that 20,000 dollars only had been advanced to Baldwin to pay the militia, and that 29,732 dollars 42 cents had been advanced to pay the regular troops, and not the militia; and that the sum of 20,000 dollars had been disbursed in payment of the militia; and that the residue of the disbursements were in payment of the regular troops, and not the militia. They also testified, that Brigadier General Brown, of the militia, commanded said 5th brigade of militia in the county of St. Lawrence, and was commanding officer of the district: That said Brown would have had the command of all the regular troops in that county, unless there had been an officer there of the regular army of equal grade; and that it would have been Baldwin's duty, if so directed by General Brown, to pay the regular troops as well as the militia; and that such regular troops would have been properly called and considered a part of the said 5th brigade. They also stated, that a regiment of regular troops were stationed in said county during the period in question. This testimony was objected to by the plaintiffs, but admitted by the court, who charged the jury that they were to determine, from the account and the testimony offered, whether any monies had been advanced and paid on account of the regular troops, and if they should be of that opinion, that Willard as surety was not liable therefor. The jury found for the plaintiffs on the seven first issues, and for the defendant on the three last. [Case unreported.] The cause came up to this court on exceptions taken by the plaintiffs to the admission of the testimony of the defendants' witnesses, and the charge of the court.

R. Tillotson, U. S. Dist. Atty.
T. A. Emmet, for defendant.

THOMPSON, Circuit Justice. This case comes up on a writ of error to the district court for the Northern district of the state of New-York. It is an action of debt upon a bond in the penalty of fifteen thousand dollars, dated the 23d of December, 1812, with a condition reciting, that Thomas P. Baldwin had been appointed district paymaster of the militia in the state of New-York in the service of the United States, in the county of St. Lawrence of said state, and that he had received forty-nine thousand seven hundred and thirty-two dollars forty-two cents of Daniel D. Tompkins, governor of said state,

for that purpose, and would as such paymaster receive more from time to time. The obligation to be void if the said Thomas should well and truly execute and faithfully discharge according to law, all instructions received by him from proper authority, his duties as paymaster aforesaid, and account, when required, for all monies received by him as paymaster aforesaid, and pay into the treasury of the United States such balance as on a final settlement should be found justly due. In the declaration upon this bond, five breaches are assigned. Judgment by default has been entered against the two Baldwins, and Willard interposed ten pleas, upon which issues were joined. And on the trial a verdict was found in favour of the plaintiffs upon the first seven issues, and in favour of the defendants upon the three last. And upon the trial, a bill of exceptions was taken, on the part of the United States, to the admission of certain testimony offered by the defendant in support of his three last pleas.

Upon the argument in this court, exceptions have been taken to the sufficiency of the three last pleas, as well as to the admission of the testimony in support of them. If the exception to the pleas is well founded and available after verdict, there is no doubt but that the objection can be taken here upon the writ of error. The whole record is before this court, and if substantially erroneous in any part, the judgment must be reversed.

I have had occasion frequently to notice, that records coming from the Northern district of this state are unnecessarily, and sometimes have appeared to me to be vexatiously, voluminous, containing, in some instances, nearly thirty pleas, which never could be necessary for any purpose of real defence, and was obviously an abuse of pleading; and I would respectfully intimate to that court the propriety of applying some corrective to such a practice. The observation is not intended to apply in its full extent to the present case, although I cannot discover the least necessity for ten pleas, in order to let in all the defence which appears to have been set up. The only objection taken to the sufficiency of the pleas, is, that they only aver that the paymaster had duly paid out and disbursed all the monies received by him, but do not allege that he had accounted for the same. The exception is not true in point of fact, so far as respects the ninth and tenth pleas, which do set out specially, an accounting with the proper officer, for all monies received by him; and the eighth plea, although it does not allege any accounting, yet it is a plea to the whole declaration, purporting to be an answer to all the breaches, some of which do not allege as a breach of the condition of the bond, an omission to account. The plea is, therefore, a good answer to some of the breaches, and if defective by reason of not extending to and meeting all the breaches, it is a defect which required a special demurrer, and cannot be taken advantage of on writ of error; and is, at all events, amendable, should a venire de novo be awarded.

The result of the question now before this court must, therefore, depend upon the validity of the exception taken to the admission of the testimony of Jenkins and Swartwout, as appearing upon the bill of exceptions. The question before the jury was, whether Thomas P. Baldwin had duly expended and accounted for all the monies he had received as district paymaster of the militia of the state of New-York in the service of the United States, in the county of St. Lawrence of said state. It being contended by Willard, that he was security only for the faithful expenditure of monies received by the paymaster in that capacity, and to be expended for that object; and that, although he might have received money for other purposes, and failed duly to expend it, yet he, as security in this bond, was not accountable for such default. The correctness of this construction of the bond is not denied on the part of the United States. Nor is it denied on the part of the defendants, but that the paymaster has failed to account for all the monies received by him, and that a balance to a considerable amount now stands against him on the books of the treasury of the United States. But it is said this balance arises out of monies received, and to be expended for other purposes than those mentioned in the bond of the defendant, and with which the defendant, Willard, has no concern. The real points of inquiry, therefore, were, how much money Thomas P. Baldwin had received in his capacity as district paymaster, as described in the bond, and how much he had expended for the purposes therein mentioned. To show this there was introduced, on the part of the United States, certain transcripts from the records of the treasury department, duly authenticated, containing a statement of the debits and credits appearing on the treasury books against Thomas P. Baldwin: and to explain these accounts was the purpose for which the evidence was offered and received. The witnesses swore, that they had frequently seen accounts relative to the quarter-masters' department, as made out at the treasury department; that they had examined the accounts in question, and should understand from them that twenty thousand dollars had been advanced to Baldwin to pay the militia, and twenty-nine thousand seven hundred and thirty-two dollars forty-two cents, advanced for the purpose of paying the regular army, and not the militia; and that they should understand from the accounts, that Baldwin had fully expended the twenty thousand dollars in payment of the militia, and that the residue of the disbursements with which he was credited, had been made in payment of the regular troops; and also, that General Brown would have had the command of all the regular troops in the county of St. Lawrence, unless an officer of the regular army, equal in grade to a brigadier-general,

had been there; and that, under such circumstances, it would have been the duty of Baldwin, had he been so directed by General Brown, although not strictly within the line of his duty without such directions, to have paid the regular troops as well as militia in the county of St. Lawrence; and that such regular troops would have been properly called and considered a part of the 5th brigade; and that a battalion of riflemen of the regular army of the United States, commanded by Colonel Forsyth, was stationed during the period in question in the county of St. Lawrence.

The testimony I think was improperly admitted. It was in the first place calling upon witnesses to explain the legal effect, operation, and construction of written documents. This was the province of the court. The mode and manner of drawing money and keeping the accounts at the treasury department, is regulated by law. And it was for the court to say, with reference to such laws, what was the legal construction to be given to such accounts; and if any obscurity rested upon them that required or admitted of explanation, it should have been given by officers in the treasury department, where the accounts were kept and made out. The evidence did not relate to any professional matters, or questions of art, science, or trade, upon which the opinions of witnesses are sometimes received in evidence; nor are any facts stated upon which the opinion of the witnesses was given. And whether General Brown would have had the command of the regular troops in the county of St. Lawrence, in the absence of an army officer of equal grade, was a question of law, and for the court to decide. And whether he had authority to direct Baldwin to pay the regular troops, was also a question depending upon the laws of the country, and upon which the opinion of the witnesses was not admissible. There was no evidence that, in point of fact, General Brown ever gave any directions to Baldwin to pay the regular troops, or that he ever had expended any money in such payment, except what is to be inferred from the accounts from the treasury department. And I cannot say that such conclusion is necessarily to be drawn from those accounts, when taken with reference to the laws regulating the treasury department, and making the appropriations out of which the monies were drawn. By the act of congress of the 3d March, 1809 (4 Bior. & D. Laws, 220 [2 Stat. 535]), all warrants drawn by the secretaries of the different departments upon the treasurer, must specify the particular appropriation to which the same is to be charged. And the money paid under such warrant, must be charged to such appropriation in the books of the proper officer in the treasury department, and the officer who receives such money for disbursement, is required to render distinct accounts of the application of the money, according to the appropriation under which the same shall have been drawn. By an act of the 12th of December, 1812 [2 Stat. 787], there was an appropriation of a million of dollars towards defraying the expenses incurred, or to be incurred, under certain laws therein mentioned, authorizing the calling out of the militia. This was therefore an appropriation on account of the militia, and all advances under it would be properly chargeable to the appropriation under that name. The bond in question was given a few days afterwards, (23d December, 1812,) and recites, that money had been advanced to Baldwin to pay the militia of the state of New-York, in the service of the United States, in the county of St. Lawrence. The amount advanced is left blank in the bond, but the treasury account shows it was twenty thousand dollars; and the law required it to be charged to the appropriation on account of militia, which fully explains the reason why that advance stands so charged. The other charge of advances to Baldwin is twenty-nine thousand seven hundred and thirty-two dollars forty-two cents, pay of the army. And the opinion of the witnesses was admitted to establish the fact, that this was to be expended on account of the regular army, excluding the militia. But the account per se warrants no such conclusion, as will be evident from the laws making the appropriation.

By the acts of the 20th of January, 1813, and of the 3d March of the same year (4 Bior. & D. Laws, 487, 527 [2 Stat. 791, 816]), the appropriations are to defray the expenses of the military establishment of the United States for the year 1813, including volunteers and militia in the service of the United States —and there was no separate and distinct appropriation for the expenses of the militia. All advances under this appropriation would be properly chargeable to the appropriation for the army generally, including the militia; and expenditures would be properly made under it for account of the militia. The appropriations for 1814 are in like manner for the military establishment generally. The appropriations for this year do not properly come under consideration in the present case, as the accounts apply only to expenditures in 1812 and 1813; but they serve to show, that after the first distinct appropriation for militia in 1812, there were no separate appropriations for the regular troops and the militia, but they were united under the denomination of the military establishment of the United States, the militia being particularly mentioned and included. And unless the expenses of the militia were to be paid out of these appropriations of 1813 and 1814, there was no appropriation to defray such expenses. It does not therefore follow, that because the advances were made to the paymaster under the appropriation for the army, (in which I understand the militia to be included,) that he was to expend the money on account of the regular troops; so that if the testimony was admissible, the witnesses I think have drawn

a conclusion not warranted from any thing appearing on the face of the accounts, in connexion with the laws of the United States making the appropriations. The judgment must therefore be reversed, and a venire de novo awarded, returnable in this court; and the doubt which at present seems to hang over the case may be easily explained by proper inquiry at the treasury department.

Case No. 16,699.

UNITED STATES v. WILLETTS et al.

[5 Ben. 220.] [1]

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

REVENUE FRAUDS—ACT OF 1863—ACTION OF DEBT TO RECOVER VALUE OF GOODS—CONSTRUCTION OF STATUTES.

1. Under the 1st section of the act of March 3d, 1863, to prevent frauds on the revenue (12 Stat. 737), an action of debt lies in behalf of the United States, to recover the value of goods imported in violation of the provisions of that section, against the person, be he owner, consignee or agent of the goods, who knowingly makes or attempts to make an entry of them by any of the false or fraudulent means specified in that act.

[Cited in brief in Ransdell v. Patterson, 1 App. D. C. 491.]

2. Revenue laws, which impose forfeitures for fraud, are not technically penal, so as to call for a strict construction, but are to be construed so as effectually to accomplish the intention of their makers.

[Cited in U. S. v. Laescki, 29 Fed. 700.]

3. Where a penalty is given by statute, and no remedy for its recovery is expressly given, debt will lie.

Noah Davis, Dist. Atty., for the United States.

William M. Evarts, for defendants.

BLATCHFORD, District Judge. This is an action of debt [against Edmund Willetts] to recover the sum of $50,000. There are thirty-eight counts in the declaration, nineteen of the counts being of one type, and nineteen of them being of another type. They relate to importations of foreign goods by different vessels, there being two counts in regard to each importation. The importations were of earthenware, and run from May, 1868, to July, 1869. The first count and all the other counts which bear odd numbers are like each other. The second count and all the other counts which bear even numbers are like each other, and are different from the counts which bear odd numbers. There is a general demurrer to each of the counts. It is necessary to consider only the first and second counts.

The counts are all of them founded on the 1st section of the act of March 3d, 1863 (12 Stat. 737). That section, after prescribing the requisites for invoices, declarations, and certificates of consuls, and the steps to be taken in regard to the same, to procure an entry of merchandise imported into the United States from a foreign country, contains the following provision: "And, if any such owner, consignee or agent, of any goods, wares, or merchandise, shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice-consul, or commercial agent, or of any invoice which shall not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, said goods, wares and merchandise, or their value, shall be forfeited and disposed of as other forfeitures for violation of the revenue laws."

The first count avers, that the defendants imported from England into the United States certain earthenware, which goods were subject to the payment of certain ad valorem duties to the United States, on their importation, and were obtained in a foreign country, in other manner than by purchase, after the 1st day of July, 1863, and which the defendants knowingly, as consignees or agents, made an entry of in the office of the collector of customs for the port of New York, by means of a false invoice, and by an invoice which, to their knowledge, was false, and did not contain a true statement of all the particulars required by the provisions of section 1 of the act of March 3d, 1863, and made said entry by means of a false and fraudulent declaration indorsed on said invoice, and signed by the manufacturer, owner, or agent of the owner, of said goods, and by means of other false and fraudulent documents, papers, practices and appliances, contrary to the provisions of said act; that said invoice was false and fraudulent, in that it did not contain the actual market value of said goods, at the time and place when and where the same were procured or manufactured, but said goods were entered in said invoice at a less market value than the actual market value thereof at the time and place of manufacture, and in that it contained a discount, bounty and drawback which had not been actually allowed thereon; that said declaration was false and fraudulent, in that, whereas, by it the manufacturer, owner or agent declared that said invoice was in all respects true, it was not in all respects true, and in that, whereas, by said declaration, said agent, owner or manufacturer declared that said invoice contained a true and full account of the actual market value, or wholesale price, of said goods, at the time and place when and where the same were procured or manufactured, said invoice did not contain a true or full account thereof; and in that, whereas, by said declaration, said agent, owner or manufacturer declared that said invoice contained all charges on said goods, and set forth that no discounts, bounties or drawbacks were contained in said invoice, except such as had been actually allowed thereon, said invoice did contain dis-

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

counts, bounties and drawbacks that had not been actually allowed thereon; that, by said declaration, entry and invoice, the government was defrauded of a large part of the duties with which said goods were justly chargeable; and that, by reason of the premises, and by force of the statute, the value of said goods, to wit, the sum of $5,000, in gold, became and was forfeited by the defendants to the United States, whereby and by force of the statute an action hath accrued unto the United States, to have of and from the defendants the sum of $5,000, in gold.

The second count varies from the first count, in substance, only by averring that the goods imported were obtained in the foreign country, after the 1st day of July, 1863, by purchase, and that the defendants were owners of the goods, and, as such made entry of them, and that the goods cost more than was stated in the invoice, and that the declaration was false in stating that the invoice truly stated the cost, and that the defendants made the entry with the intent to defraud the government of the duties with which the goods were chargeable.

It is to be noted, that the act of 1863 forfeits the goods "or their value," but does not state of whom such value may be recovered. The 4th section of the act of December 31, 1792 (1 Stat. 289), which was the provision of law involved in the case of U. S. v. Grundy, 3 Cranch [7 U. S.] 338, enacted, in reference to an oath or affirmation to be taken on registering a vessel, that, "in case any of the matters of fact in the said oath or affirmation alleged, which shall be within the knowledge of the party so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath or affirmation shall have been made." The 66th section of the act of March 2d, 1799 (1 Stat. 677), which was the provision of law involved in the case of Caldwell v. U. S., 8 How. [49 U. S] 366, enacts, in reference to goods entered, which are not invoiced according to their actual cost at the place of exportation, with design to evade the duties thereupon, or any part thereof, that all such goods, "or the value thereof, to be recovered of the person making entry, shall be forfeited."

The defendants call attention to the fact, that there is no allegation in the declaration, that the goods themselves were forfeited to the United States, or that the defendants have, or have had, the value or proceeds thereof in their possession, or have otherwise become chargeable with the same. They contend, that the several counts of the declaration are bad in substance; that such counts fail to show any relation of debtor to the United States on the part of the defendants; that the action cannot be sustained unless, by contract or by statute, the obligation of debt has been raised in favor of the United States against the defendants; that the act of 1863 creates no personal liability for the forfeiture, and confers no jurisdiction over any personal action; that the 3d section of the same act prescribes a fine not exceeding $5,000, or an imprisonment not exceeding two years, or both, as a punishment on a conviction for doing certain acts in connection with a fraudulent entry; that the omission, in the act of 1863, to prescribe that some particular person shall be liable to a civil action for the value of the goods, leaves the forfeiture of such value to operate on a bond or whatever else may be substituted for the goods themselves, when such goods are proceeded against in rem; and that, unless the statute is thus interpreted, it exposes to unlimited liability, as to time and amount, all persons who may have participated in the entry which exposes the goods themselves to forfeiture.

The question involved in these demurrers came before this court in March, 1871, in the trial before a jury of the case of U. S. v. Baker [Case No. 14,500], which was an action against the owners of imported merchandise, founded on the 1st section of the act of 1863, to recover its value, on the ground that such value had been forfeited to the United States, because of frauds, in violation of that section, in entering the merchandise. The point was taken by the defendants, that the section gave no personal action for the value of the goods. In charging the jury, I said, after quoting the provision in question in the act of 1863: "This section of this statute and the 66th section of the act of March 2d, 1799 (1 Stat. 677), are the only two sections to be found in any statute of the United States relating to forfeitures under the customs laws, which are thus expressed in the alternative—a forfeiture of the offending merchandise or its value. All other statutes, of which there are innumerable ones, forfeit the merchandise simply, and forfeit it only in case it is seized and taken bodily into possession by the United States, and proceeded against as an offending thing, in rem, as it is called, when the question is, whether the property so seized and prosecuted shall be condemned. But this is a prosecution for the value of goods, under the alternative clause—the goods, or their value. The 66th section of the act of 1799, in declaring that goods, or their value, shall be forfeited, when entered on a fraudulent invoice, declares, that the goods, or the value thereof, 'to be recovered of the person making entry,' shall be forfeited, thus designating who shall be the responsible party to be sued by the government. The act of 1863 merely says, that the goods, or their value, shall be forfeited. It does not say, 'to be recovered of the person making entry.' But these words are not necessary to give the right of action under the act of 1863. That is the meaning of this law; and, according to the testimony in this case, the value claimed, if to be recovered from anybody, is to be recovered from these defendants." In that case,

the entry had been made by one of the defendants, and they were the owners of the goods, and the only question was whether the person making the entry had knowingly made it by means of false papers.

Some sensible interpretation must be given to the words "or their value," in the act of 1863. The defendants suggest only this interpretation—that the words mean the value of the goods seized and proceeded against, when such goods are replaced by a bond for their value, or by money paid into court as their value. But the words "or their value" are wholly unnecessary to give to the court in which the suit in rem against the goods is pending, power to condemn any substitute for the goods, or to enforce payment of a bond given for their value. Such is the ordinary practice under the numerous statutes which declare merely a forfeiture of a res, and say nothing about its value. The words "or their value" must have some other scope. They cannot refer to a liability which grows out of the fact that the forfeited goods came into the possession of a person who turns them into money and retains such money. The money could never be identified so as to be seized and proceeded against in rem. Moreover, if the statute had intended to give a remedy in rem against such money, it would naturally have used the word "proceeds," and not the word "value." It is very clear, that the words "or their value" imply a personal action against some person for the value, the money value, of the offending goods. And it does no violence to the language of the act to say, that it intends a personal action, to recover such value from the owner, consignee or agent of the goods, who knowingly makes or attempts to make the entry thereof by means of the false or fraudulent paper, practice or appliance. It intends to give to the United States an elective forfeiture, and to make the person who knowingly, as owner, consignee or agent, makes or attempts to make the forbidden entry, responsible for the value of the goods so entered or attempted to be entered. There is no hardship in this. Revenue laws, which impose forfeitures for fraud, are not technically penal, so as to call for a strict construction, but they should be construed so as effectually to accomplish the intentions of their makers. Taylor v. U. S., 3 How. [44 U. S.] 197. And they should not be construed so strictly as to defeat the obvious intention of the legislature. U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76, 95; American Fur Co. v. U. S., 2 Pet. [27 U. S.] 358, 367. When a penalty is given by statute and no remedy for its recovery is expressly provided, debt will lie. Jacob v. U. S. [Case No. 7,157.] Under a statute like the one now under consideration, the proper action for the penalty is an action of debt in the name of the United States. Matthews v. Offley [Id. 9,290]; U. S. v. Bougher [Id. 14,627]. The only question in this case is, whether the alternative forfeiture of the value of the goods, given by the statute, is a forfeiture to be recovered of the person, be he owner, consignee or agent of the goods, who knowingly makes or attempts to make the entry by any of the false or fraudulent means specified. I have no doubt that such and such alone was the intention of congress. The act of 1863 is one, as its title declares, "to prevent and punish frauds upon the revenue," and it is impossible to say that congress intended anything by the words "or their value," unless it intended a personal action, for the value of the goods, against the guilty party whom it had just previously designated. The demurrers are overruled, and the defendants are allowed to plead to the declaration, on payment of costs.

Case No. 16,700.

UNITED STATES v. The WILLIAM.

[2 Hall, Law J. 255.]

District Court, D. Massachusetts. Sept. Term, 1808.

CONSTITUTIONAL LAW—LEGISLATIVE AND JUDICIAL POWERS—EMBARGO LAWS.

[1. It seems that the judicial authority of the federal courts is precisely limited in regard to deciding on the validity of legislative acts, and that the power to declare them void exists only in cases of contravention, opposition, or repugnancy to some express restriction or provision in the constitution.]

[2. Before a court can determine whether a given act of congress, bearing relation to a power with which it is vested, be a legitimate exercise of the power or transcend it, the degree of legislative discretion admissible in the case must first be determined. Whether, therefore, it be within the judicial power to declare an act invalid merely on the ground that congress has transcended or exceeded a power with which it is vested by the constitution, quære.]

[3. The constitutional power of congress to regulate commercial intercourse, qualified by the limitations and restrictions expressed in the constitution and by the treaty making power of the president and senate, is sovereign, and may be used not only for the advancement of commerce, but for the promotion of other objects of national concern.]

[4. The embargo laws of December 22, 1807, and March 12, 1808, are not unconstitutional, either on the ground that they exceed the powers of congress to "regulate," because they interdict all foreign commerce, or because they are not by their terms limited to a specific duration.]

In admiralty.

DAVIS, District Judge. This libel is founded on the act of congress, passed 22d December, 1807 [2 Stat. 451], intitled, "An act laying an embargo on all ships and vessels in the ports and harbors of the United States," and on the first supplementary act, passed January 9th, 1808 [Id. 453]. The libel alleges, that sundry enumerated goods, wares and merchandize, on the 17th day of March last, on the high seas, were put, from said brigantine, on board another vessel, called the Nancy; and also, that other goods, wares and merchandize, on the 11th day of May last, at Lynn, in said district, were put, from said brigantine, on board another vessel, call-

ed the Mary, with intent, that said goods, wares and merchandize should be transported to some foreign port or place, contrary to the acts aforesaid, by which, it is alleged, that said brigantine is forfeited.

It has been contended, by the counsel for the claimants, Benj. Ireson and others: 1st. That the facts, appearing in evidence, do not present a case, within the true intent and meaning of the acts aforesaid. 2d. That the acts, on which a forfeiture is claimed, are unconstitutional. After argument, on these heads, it is suggested, by the counsel for the claimants, that the case may receive material elucidations from the facts that will appear, on the trial of the brigantine Nancy; and they pray for a postponement of a decision on this libel, until a hearing shall be had, relative to that vessel. As that case is necessarily continued, and as that of the Sukey, also pending at this term, appears to have connexion with the transactions in the case of the William, I shall not make up a judgment relative to the facts on this libel, until those of the Nancy and Sukey shall have been tried, or until the further evidence suggested, shall have been heard. But it appears to be necessary to declare an opinion on the constitutional question, which has been so fully discussed, especially as the objection, if available, equally applies to many other cases before the court. Under these circumstances, I have considered it expedient, and indeed an incumbent duty, to give an opinion on this great and interesting question; though an entire decision on the case, in which it was presented and argued, is, for the reasons suggested, postponed.

In considering the several acts, relative to the embargo, as one system, it may be convenient to exhibit an analysis of their contents. The general, or primary, provisions are contained in the first act, passed December 22, 1807, which lays "an embargo on all ships and vessels in the ports and places, within the limits and jurisdiction of the United States, cleared or not cleared, bound to any foreign port or place;" and in the fourth section of the third additional act, passed March 12th, 1808, which prohibits the exportation, from the United States, in any manner whatever, either by land or water, of any goods, wares or merchandise, of foreign, or domestic, growth or manufacture. To the same head belongs the prohibition of the exportation of specie, by any foreign ship or vessel, by section 5th, of the first supplementary act.

The exceptions to these prohibitions are: 1st. Vessels under the immediate direction of the president of the United States. 2d. Foreign ships or vessels, either in ballast, or with goods, wares and merchandise on board, when notified of the first act. 3d. Armed vessels, possessing public commissions, from any foreign power, not including in this description, privateers, letters of marque, or other private armed vessels. 4th. Vessels licensed for the fisheries, or bound on a whaling voyage, with no other cargo than sea stores, salt, and the usual fishing tackling and apparel. 5th. Vessels dispatched in ballast, under permission from the president of the United States, to import, from abroad, property from any citizen, which was actually without the jurisdiction of the United States, prior to the 22d December, 1807. The remaining provisions, in the several acts, are merely auxiliary, and appear intended more effectually to ensure the execution of the primary prohibitions. The first act is without limitation, and the several supplementary acts are to exist, during the continuance of the first. A separate act, passed April 22d, 1808 [2 Stat. 490], authorises the president of the United States to suspend the operation of the act laying an embargo, and the several supplementary acts, "in the event of such peace, or suspension of hostilities, between the belligerent powers of Europe, or of any changes in their measures, affecting neutral commerce, as may render that of the United States safe, in the judgment of the president"—with a proviso, that such suspension shall not extend beyond twenty days, after the next meeting of congress.

My views of the constitutional question, which has been raised in this case, will be confined to the acts relative to navigation, and to exportation by sea. On those, only, do the cases before the court depend; and it is obviously incumbent on a judge to confine himself to the actual case, presented for trial, and its inseparable incidents, and to avoid pronouncing premature decisions on extraneous questions. The prohibition of exportation by land, can, properly, come into view, only as it may tend to explain those provisions, on which I am called to decide, and to indicate their character. In the whole course of the interesting argument on this great question, and in all my reflections upon the subject, I have been deeply sensible of the solemn weight and magnitude of the inquiry. The unusual press of business, at this term, and the application of the recent acts to the numerous cases presented for trial, must have given full occupation to the mind, if supposed to be solicitous for a correct discharge of duty; and I could have wished, that this paramount question of constitutionality, when gentlemen had determined to rely on it, should have been reserved for the higher tribunals of the nation. But, on this subject, it was not for me to choose. A comparison of the law with the constitution is the right of the citizen. Those who deny this right, and the duty of the court resulting from it, must regard with strange indifference, a precious security to the individual, and have studied, to little profit, the peculiar genius and structure of our limited government.

Objections to an act of congress, on the ground of constitutionality, may be referred to the following heads: (1) A repugnancy to some of the exceptions or restrictions to the legislative authority, expressed in the constitution of the United States. (2) A repugnancy to some of the affirmative provisions, in

the constitution. (3) A want of conformity to the powers vested in the legislature, by the constitution; or that the act in question is not authorised by any of those powers.

As an instance under the first head, we may suppose an act, contravening the restrictive clause in the constitution, "No bill of attainder or ex post facto law shall be passed." An act repugnant to the declaration that, "the trial of all crimes, except in cases of impeachment, shall be by jury," would afford an example under the second head. Contraventions of this description, when clearly described and determined, could be of no legal effect; and it would appear to be the duty of the national courts, conformably to their specified authority by the constitution, and pursuant to the oath of office, to regard the acts, containing such repugnancies, to be so far void. It does not appear, nor is it, as I recollect, contended, that the acts under consideration, are liable to objections of this description. They contravene none of the exceptions or restrictions, expressed in the constitution, nor is it made to appear, that they are repugnant to any of its affirmative declarations. At least, this is true of the primary provisions. If any of the auxiliary regulations, in the supplementary acts, applying to the coasting trade, are liable to objections of this nature, they will be separately considered. Some of those regulations, it is argued, contravene that restriction on the powers of congress, which provides, that "vessels bound to, or from, one state, shall not be obliged to enter, clear, or pay duties in another." If this objection be available, it equally applies to the regulations in the coasting act, early adopted after the organization of the government; and which have since been in uniform operation, without meeting an objection of this sort. There is a degree of ambiguity in the expression, which seems to countenance the construction suggested in the argument; but the true construction avoids the objection. It was intended, as I understand it, to prevent vessels bound to, or from, a port, in any state, being obliged to enter, clear, or pay duties in any state, other than that, to, or from which, they should be proceeding. One of the amendments proposed by the state of North Carolina, suggests the following substitute for the clause we are now considering. "Nor shall vessels, bound to a particular state, be obliged to enter or pay duties in any other; nor, when bound from any one of the states, be obliged to clear in another." This reading would give a clearer expression of, what must be considered, the true meaning of the clause as it now stands. The objections, on the ground of unconstitutionality, to the acts in question, are thus limited to the third head; a defect of constitutional power, in the congress of the United States, to enact them. On this ground has the argument proceeded, and it is contended, that congress have not power or authority, by the constitution of the United States thus to interdict commercial intercourse with foreign nations. On this head, a preliminary inquiry, of material importance, presents [itself]: What is the power or authority of the court, relative to an objection of this description? Or, in other words, is a mere exceeding of the powers of congress, in legislation, without a repugnancy to express provisions of the constitution, among the proper objects of cognizance in the federal judiciary?

In the consideration of this preliminary question, I shall first recur to judicial determinations and opinions for light and guidance. In the year 1792, congress passed an act, relative to the claims of invalids, for pensions, which required the intervention, in a qualified manner, of the circuit courts. [1 Stat. 243.] The judges of three of the circuit courts declined the execution of the act, and assigned their reasons, to the president of the United States. The objections were, that the business, assigned to the courts by the act, was not of a judicial nature; and that their judgments, or opinions, (which they considered as judgments) were, by the act, subjected to revision and controul by the legislature, and by an officer of the executive department. Though they declined acting as courts under the act, they expressed a willingness, for the accommodation of applicants, to consider themselves as commissioners; but congress, at a subsequent session, repealed the objectionable clauses, and made other provision, for determining the claims of applicants for pensions. [Hayburn's Case] 2 Dall. [2 U. S.] 410. In the case of Vanhorne's Lessee v. Dorrance [Case No. 16,857], in the circuit court of Pennsylvania, April term 1795, Judge Paterson pronounced an act of Pennsylvania, called, the "Quieting and Confirming Act," to be null and void, as repugnant to the constitution of that state. In the supreme court of the United States, February term, 1796, in the case of Hylton v. U. S. [3 Dall. (3 U. S.) 171], the constitutionality of the act, "laying duties on carriages," was discussed and determined. The point, in controversy, depended on the meaning of the terms "direct tax," in the constitution. It was contended, by the counsel for the plaintiff in error, that the tax on carriages was a direct tax, and, not being laid according to the census, as direct taxes are, by the constitution, required to be laid, that the law was void. The court were, unanimously, of opinion, that the tax on carriages was not a direct tax; of course, the question of the validity of an act, repugnant to an express clause in the constitution, was not determined. Judge Paterson, however, gave his opinion, on this point. "If it be a direct tax, it is unconstitutional; because it has been laid pursuant to the rule of uniformity, and not to the rule of apportionment." Judge Chase observed: "As I do not think the tax on

carriages is a direct tax, it is unnecessary, at this time, for me to determine, whether the court constitutionally possesses the power to declare an act of congress void, on the ground of its being made contrary to, or in violation of the constitution; but if the court have such power, I am free to declare, that I will never exercise it but in a very clear case." Justices Iredell, Wilson and Cushing all concurred with their associates, that the tax on carriages was not a direct tax, but gave no intimation of their opinions, if it had been of that denomination. [Hylton v. U. S.] 3 Dall. [3 U. S.] 171. In the same court, August term, 1798, in the action Calder v. Bull, Id. 386, the question was, as to the validity of an act of the legislature of Connecticut, setting aside a decree of a court of probate, and granting a new hearing. It was contended, that it was an ex post facto law, and, as such, prohibited by the constitution of the United States. The court were of opinion, that the law in question was not an ex post facto law, and, of course, there was no contravention of the constitution. Judge Chase avoided giving an opinion, whether the court had jurisdiction to decide, that any law made by congress, contrary to the constitution of the United States, be void. Judge Iredell was more explicit. "It has been the policy," said he, "of all the American states, which have individually framed their state constitutions, since the Revolution, and of the people of the United States, when they framed the federal constitution, to define, with precision, the objects of the legislative power, and to restrain its exercise, within marked and settled boundaries. If any act of congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that, as the authority to declare it void, is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case." The last case, which I shall cite, is U. S. v. Callender [Case No. 14,709], in the circuit court in Virginia, May term, 1800, on the additional act "for the punishment of certain crimes against the United States," commonly called the sedition law. The counsel for the traverser offered to argue to the jury, that the law was unconstitutional. In overruling this motion, and in assigning his reasons, Judge Chase made the following observations, which appear to be pertinent to the present inquiry: "No citizen of knowledge and information, unless under the influence of passion or prejudice, will believe, without very strong and indubitable proof, that congress will, intentionally, make any known violation of the federal constitution and their sacred trust. I admit, that the constitution contemplates that congress may, from inattention, or error in judgment, pass a law prohibited by the constitution, and, therefore, it has provided a peaceable, safe, and adequate remedy. If such a case should happen, the mode of redress is pointed out in the constitution, and no other mode can be adopted, without a manifest infraction of it. Every man must admit, that the power of deciding the constitutionality of any law of the United States, (or of any particular state) is one of the greatest and most important powers the people could grant. Such power is restrictive of the legislative power of the Union, and also of the several states, not absolute and unlimited, but confined to such cases only, where the law in question shall clearly appear to have been prohibited by the federal constitution, and not in any doubtful case." The immediate question that the learned judge was then considering, was, whether the power of determining the constitutionality of the law belonged, exclusively, to the court, or whether it could be rightfully exercised by a jury. His remaining observations, appearing in the published account of the trial, more especially apply to that question.

None of these cases decide the point now under consideration. By one of them, we have a decision against a state law, produced as a ground of title, as being repugnant to the constitution of the state. In another, we have the opinion of Judge Paterson, that a law of the United States, would, upon a certain construction, be repugnant to the constitution, and void. In the Connecticut case, we have Judge Iredell's opinion, that an act of congress, or of the legislature of any state, may be declared void by the court, if it violate constitutional provisions. Judge Chase, in those cases, speaks with great caution, on this head, it not being necessary to decide the point. In Callender's trial he is more explicit; and I understand him to admit the power of the court to disregard a statute, repugnant to the restrictions, in the constitution, on the authority of congress, and on that of the state legislatures. In none of the cases have we a decision, nor an opinion, as to the power of the court, where the objection to a statute is grounded, not on a repugnancy to express provisions, but on a supposed undue extension of a given power. The first case is of a peculiar nature, and no conclusive inference can be drawn from it, of the opinion of the court, relative to the point now under consideration. The law was not declared void, but the court declined acting upon it, except in a qualified manner, as commissioners. Their views and determinations on the subject, have reference to the nature of the judicial authority, and to the preservation of their constitutional independency, against encroachment.[1]

[1] Since this opinion was pronounced, it has been perceived, that two other cases should have been noticed, both of them in affirmance of the general doctrine, exhibited in the cases cited in the text.

Cooper v. Telfair, 4 Dall. [4 U. S.] 14. This case was in the supreme court of the United States, February term, 1800, in error, from the

Finding no direct judicial authority on the point, I shall next adduce opinions and reasonings from a less authoritative source, but still highly respectable. It is observed, by an eminent juridical writer, that "the scrupulous dignity of the law of England has not been accustomed to receive as authorities, any thing less than the opinions delivered by judges on the bench." (Reeves, Shipp.) This is doubtless a discreet and laudable reserve; and, most commonly, a strict adherence to the rule would still leave open to the inquirer, abundant means for a correct and satisfactory conclusion. But, in a case of this description, out of the ordinary range of legal discussion, we are compelled to resort to other sources; and the counsel on both sides have found it necessary, or convenient, to derive confirmation or illustration of their positions, from books and treatises, seldom seen or mentioned at the bar. The work to which I shall refer, is that admirable commentary on the constitution of the United States, intitled, "The Federalist," the author of which is pronounced by one of our learned judges, to be superior to Blackstone, or his successor Woodeson, for extensive and accurate knowledge of the true principles of government.[2] If we love and cherish that constitution, we shall highly esteem this excellent commentary on that precious instrument. If that great political temple command our admiration, we shall follow, with improvement and delight, this luminous guide, through all its fair apartments. In the eighty-third number, after observing, that the power of congress extends only to certain enumerated cases, and, that this specification excludes all pretensions to general legislative power, or authority, the writer proceeds: "In like manner, the judicial authority of the federal judicatures is declared, by the constitution, to comprehend cases particularly specified. The expression of those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction; because, the objects of their cognizance being enumerated, the specification would be nugatory, if it did not exclude all ideas of more extensive authority." In the seventy-eighth number, we have a more distinct exhibition of the author's views of a limited government, and of the power and office of the judiciary branch to secure it. "By a limited government, I understand one, which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice, no other way than through the medium of the courts of justice, whose duty it must be, to declare all acts, contrary to the manifest tenour of the constitution, void. Without this, all the reservation of particular rights or privileges would amount to nothing." We then have an interesting discussion on the necessity and foundation of this portion of judicial authority; it is illustrated by the usual exercise of judicial discretion, in discriminating between two contradictory laws, and a pertinent distinction is suggested, applicable to a supposed contravention of a constitutional provision. "Between the interfering acts of an equal authority, that, which was the last indication of its will, should have the preference. But, in regard to the interfering acts of a superior and sub-

circuit court for the district of Georgia. An act of attainder and confiscation of the state of Georgia, passed May, 1782, was pleaded in bar of the plaintiff's demand. In the replication, were set forth several articles of the constitution of that state. one of which requires, that "all matters of breach of the peace, felony, murder and treason against the state" shall be tried in the county where the crime may have been committed. The other articles, specified in the replication, relate to the separation of the legislative, executive and judiciary departments—the principles of the habeas corpus act—freedom of the press—trial by jury—and the confinement of the legislature, in making laws, to such, as should not be repugnant to the true intent and meaning of any rule or regulation, contained in the constitution. It was contended, that the act of attainder and confiscation was repugnant to the constitution of Georgia, and void. The court were unanimously of opinion, that the act was not repugnant to the constitution, and affirmed the judgment of the circuit court, which was for the defendant, who was sued on the confiscated demand. Washington, J., observed: "The constitution of Georgia, does not expressly interdict the passing of an act of attainder and confiscation, by the authority of the legislature."—"If the plaintiff in error had shown that the offence, with which he was charged, had been committed in any county of Georgia, he might have raised the question of conflict and collision between the constitution and the law; but, as that fact does not appear, there is no ground, on which I could be prepared to say, that the law is void. The presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly demonstrated. Judge Chase was of the same opinion, and for the same reason. He intimates, at the same time, his opinion of the validity of the law, on other grounds, and expresses a doubt, whether the power of the court, to declare an act void, can be employed to invalidate laws, enacted previous to the existence of the constitution of the United States. Judges Paterson and Cushing considered the act within the power of the legislature, there being no express provision in the constitution, devesting or transferring it; and the offender being beyond the reach of judicial process, when the law was enacted. "The constitutions of several of the other states," said Judge Paterson, "contain the same general principles and restrictions; but it was never imagined that they applied to a case like the present; and, to authorize this court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication."

In Marbury v. Madison, in the same court, February, 1803, the act of congress, authorising the supreme court to issue writs of mandamus, was considered as void, so far as it was repugnant to the specification of cases in the constitution, to which the original jurisdiction of that court is limited. The illustrative cases, supposed by the court, in their opinion, as pronounced by Chief Justice Marshall, are of similar description. 1 Cranch [5 U. S.] 137.

[2] Judge Chase [Calder v. Bull] 3 Dall. [3 U. S.] 391. "The Federalist" has frequently, in other instances, been quoted with respect, in the courts of the United States.

ordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule, as proper to be followed. They teach us, that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and, that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former. It can be of no weight to say, that the courts, on the pretence of a repugnancy, may substitute their own pleasure, to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen, in every adjudication upon a single statute." In the eighty-first number, when replying to arguments, or suggestions, against the judiciary, from their supposed power of construing the laws according to the spirit of the constitution, it is said; "this, upon examination, will be found to be altogether made up of false reasoning, from misconceived fact. In the first place, there is not a syllable in the plan, under consideration, which directly empowers the national courts, to construe the laws according to the spirit of the constitution; or, which gives them any greater latitude in this respect, than may be claimed by the courts of every state. I admit, however, that the constitution ought to be the standard of construction for the laws; and that, whenever there is an evident opposition, the laws ought to give place to the constitution." In the eightieth number, which exhibits a view of the judicial department, in relation to the extent of its powers, the general position is, that "there ought always to be a constitutional method of giving efficacy to constitutional provisions." Having laid down the principles, proper for the regulation of the federal judiciary, the writer proceeds to test, by those principles, the particular powers given to the judiciary, by the constitution. He then recites the first paragraph of the second section, of the third article, as constituting the entire mass of the judicial authority of the Union. Viewing it then, in detail, he proceeds to comment on the first part of the paragraph: "The judicial power shall extend to all cases in law and equity arising, under this constitution [and] the laws of the United States." "It has been asked," he observes, "what is meant by cases arising under the constitution, in contradistinction from those arising under the laws of the United States?" "The difference," he adds, "has been already explained. All the restrictions upon the authority of state legislatures furnish examples. They are not, for instance, to emit paper money; but the interdiction results from the constitution, and will have no connexion with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies concerning it would be cases arising under the constitution, and not upon the laws of the United States, in the ordinary signification of the terms. This may serve as a sample of the whole."

These extracts give a clear and satisfactory view of the opinions entertained by the writer, or writers, of those papers, on this topic; and it is evident, that the judicial authority, is, in their estimation, precisely limited, in regard to deciding on the validity of legislative acts; and that the power to declare them void exists, only, in cases of contravention, opposition or repugnancy, to some express restrictions or provisions contained in the constitution. The examples and the argument apply only to cases of legislative action, which their powers forbid; not to those, which their powers may be supposed not to authorize. This is further manifest from observations, variously interspersed, in those writings, relative to a supposed abuse or exceeding of powers, by the legislature; or, in other words, to an act of usurpation. In the first place, there is a strong conviction expressed, that no such case can or will occur, in a government so organized, and where such strong sympathies will exist, between the representatives and their constituents. That the government is in the hands of the representatives of the people, is pronounced to be, "the essential and only efficacious security for the rights and privileges of the people, which is attainable in civil society." But, should usurpation rear its head; should the unnatural case ever occur, when the representatives of the people should betray their constituents, we are referred, for consolation and remedy, to the power and vigilance of the state governments; to publick opinion; to the active agency of the people in their elections; to that perpetual dependence on the people, which is the primary controul on the government; "to the vigilant and manly spirit, which actuates the people of America, a spirit which nourishes freedom, and, in return, is nourished by it;" and, in case of desperate extremities, for which no system of government can provide, "to that original right of self-defence, which is paramount to all positive forms of government." In one passage, indeed, where the writer is speaking of the resort, in case of a supposed usurpation, we are referred to the judiciary and to the executive, as well as to the people, without any discrimination of the circumstances to which the different sources of remedy would be applicable. "In the first instance," says the writer, "the success of the usurpation will depend on the executive and judiciary departments, which are to expound and to give effect to the legislative acts; and, in the last resort, a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers." Volume 2, No. 44, p. 74. This passage may be so construed, as to be consistent with those

before cited; but, if irreconcilable, with the doctrines so clearly expressed in other places, we must account for any supposed diversity of sentiment, from the circumstance, that those valuable papers were not all from the same pen. Cases might be put, of acts, so manifestly without the sphere of objects, committed to the national government, that the judiciary branch might be competent to pronounce them invalid, not as repugnant to any particular clause of the constitution, but to its whole expressed design and tenour. "The propriety of a law," says the writer, "so frequently quoted, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority (which indeed cannot be easily imagined) the federal legislature should attempt to vary the law of descent in any state; would it not be evident, that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the state?" Here would be an obvious assumption of a new power, not to be found in the constitution, and it is distinguishable from an improper exercise, or undue extension, of a power given. "The national government, like every other," adds the writer, "must judge in the first instance, of the proper exercise of its powers, and its constituents, in the last. If the federal government should overpass the just bound of its authority, and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures, to redress the injury done to the constitution, as the exigency may suggest, and prudence justify." Volume 1, No. 33, p. 203.

It is a recommendation of these views of the constitutional powers of the judiciary, relative to legislative acts, that they reduce it to that precision and certainty, which is so desirable, in reference to judicial deliberations; and avoid those manifest grounds or occasions of irreconcilable collision, between the judiciary and legislative departments, which might otherwise prevail. Affirmative provisions and express restrictions, contained in the constitution, are sufficiently definite to render decisions, probably in all cases, satisfactory; and the interferences of the judiciary with the legislature, to use the language of the constitution, would be reduced to "cases," easily to be understood, and, in which the superior, commanding, will of the people, who established the instrument, would be clearly and peremptorily expressed. To extend this censorial power further, and especially to extend it to the degree, contended for in the objections to the act now under consideration, would be found extremely difficult, if not impracticable, in execution. To determine where the legitimate exercise of discretion ends, and usurpation begins, would be a task most delicate and arduous. It would, in many instances, be extremely difficult to settle it, even in a single body. It would be much more so, if to be adjusted by two independent bodies, especially if those bodies, from the nature of their constitution, must proceed by different rules. Before a court can determine, whether a given act of congress, bearing relation to a power with which it is vested, be a legitimate exercise of that power, or transcend it, the degree of legislative discretion, admissible in the case, must first be determined. Legal discretion is limited. It is thus defined by lord Coke, "Discretio est discernere, per legem, quid sit justum." Political discretion has a far wider range. It embraces, combines and considers, all circumstances, events and projects, foreign or domestick, that can affect the national interests. Legal discretion has not the means of ascertaining the grounds, on which political discretion may have proceeded. It seems admitted, that necessity might justify the acts in question. But how shall legal discussion determine, that political discretion, surveying the vast concerns committed to its trust, and the movements of conflicting nations, has not perceived such necessity to exist? Considerations of this nature have induced a doubt of the competency, or constitutional authority of the court, to decide an act invalid, in a case of this description. On the precise extent, however, of the power of the court, I do not give a definite opinion; my view of the main question, submitted by the counsel, in this case, rendered such a decision unnecessary. I now proceed to the examination of that question. It will be perceived, that some of the considerations, suggested under the last head, have an application to the remaining inquiry, and, it is acknowledged, that they had an influence in forming my determination.

It is contended, that congress is not invested with powers, by the constitution, to enact laws, so general and so unlimited, relative to commercial intercourse with foreign nations, as those now under consideration. It is well understood, that the depressed state of American commerce, and complete experience of the inefficacy of state regulations, to apply a remedy, were among the great, procuring causes of the federal constitution. It was manifest, that other objects, of equal importance, were exclusively proper for national jurisdiction; and that under national management and controul, alone, could they be advantageously and efficaciously conducted. The constitution specifies those objects. A national sovereignty is created. Not an unlimited sovereignty, but a sovereignty, as to the objects surrendered and specified, limited only by the qualifications and restrictions, expressed in the constitution. Commerce is one of those objects. The care, protection, management and controul, of this great national concern, is, in my opinion, vested by the constitution, in the congress of the Unit-

ed States; and their power is sovereign, relative to commercial intercourse, qualified by the limitations and restrictions, expressed in that instrument, and by the treaty making power of the president and senate. "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Such is the declaration in the constitution. Stress has been laid, in the argument, on the word "regulate," as implying, in itself, a limitation. Power to regulate, it is said, cannot be understood to give a power to annihilate. To this it may be replied, that the acts under consideration, though of very ample extent, do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the national government, to whom the subject appears to be committed? Besides, if we insist on the exact and critical meaning of the word "regulate," we must, to be consistent, be equally critical with the substantial term, "commerce." The term does not necessarily include shipping or navigation; much less does it include the fisheries. Yet it never has been contended, that they are not the proper objects of national regulation; and several acts of congress have been made respecting them. It may be replied, that these are incidents to commerce, and intimately connected with it; and that congress, in legislating respecting them, act under the authority, given them by the constitution, to make all laws necessary and proper, for carrying into execution the enumerated powers. Let this be admitted; and are they not at liberty, also, to consider the present prohibitory system, as necessary and proper to an eventual beneficial regulation? I say nothing of the policy of the expedient. It is not within my province. But, on the abstract question of constitutional power, I see nothing to prohibit or restrain the measure.

Further, the power to regulate commerce is not to be confined to the adoption of measures, exclusively beneficial to commerce itself, or tending to its advancement; but, in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; but, the national right, or power, under the constitution, to adapt regulations of commerce to other purposes, than the mere advancement of commerce, appears to me unquestionable. Great Britain is styled, eminently, a commercial nation; but commerce is, in fact, a subordinate branch of her national policy, compared with other objects. In ancient times, indeed, shipping and navigation were made subordinate to commerce, as then contemplated. The mart, or staple, of their principal productions, wool, leather and lead, was confined to certain great towns in the island, where foreigners might resort to purchase; and Englishmen were restrained from exporting those commodities, under heavy penalties. It was conceived, that trade thus conducted, would be more advantageous to the country, than if transacted by the English, on the continent. On this idea was made the statute of the staple. 27 Edw. III. (Vide Reeves' Hist. of English Law, 2, 393.) This may appear a strange regulation. It was evidently founded on erroneous views, and Selden, the learned commentator on Fortescue, remarks, "that all acts or attempts, which have been derogatory to trade, have ever been noted to be discouraged and short lived," in that nation. It is well known, how the views of their statesmen, and their commercial laws have changed, since that statute was enacted. The navigation system has long stood prominent. The interests of commerce are often made subservient to those of shipping and navigation. Maritime and naval strength is the great object of national solicitude; the grand and ultimate objects are the defence and security of the country. The situation of the United States, in ordinary times, might render legislative interferences, relative to commerce, less necessary; but the capacity and power of managing and directing it, for the advancement of great national purposes, seems an important ingredient of sovereignty. It was perceived, that, under the power of regulating commerce, congress would be authorized to abridge it, in favour of the great principles of humanity and justice. Hence the introduction of a clause, in the constitution, so framed, as to interdict a prohibition of the slave trade, until 1808. Massachusetts and New York proposed a stipulation, that should prevent the erection of commercial companies, with exclusive advantages. Virginia and North Carolina suggested an amendment, that "no navigation law, or law regulating commerce, should be passed, without the consent of two thirds of the members present, in both houses." These proposed amendments were not adopted, but they manifest the public conceptions, at the time, of the extent of the powers of congress, relative to commerce.

It has been said, in the argument, that the large commercial states, such as New York and Massachusetts, would never have consented to the grant of power, relative to commerce, if supposed capable of the extent now claimed. On this point, it is believed, there was no misunderstanding. The necessity of a competent national government was manifest. Its essential characteristics were considered and well understood; and all intelligent men perceived, that a power to advance and protect the national interests, necessarily involved a power, that might be abused. The Federalist, which was particularly addressed to the people of the state of New York, frankly avows the genuine operation of the powers, proposed to be vested in the general gov-

ernment. "If the circumstances of our country are such, as to demand a compound, instead of a simple, a confederate, instead of a sole, government, the essential point, which will remain to be adjusted, will be to discriminate the objects, as far as it can be done, which shall appertain to the different provinces, or departments, of power; allowing to each the most ample authority for fulfilling those, which may be committed to its charge. Shall the Union be constituted the guardian of the common safety? Are fleets, and armies, and revenues necessary for this purpose? The government of the Union must be empowered, to pass all laws, and to make all regulations which have relation to them. The same must be the case, in respect to commerce, and to every other matter, to which its jurisdiction is permitted to extend." Volume 1, No. 23, p. 146.

If it be admitted that national regulations relative to commerce, may apply it as an instrument, and are not necessarily confined to its direct aid and advancement, the sphere of legislative discretion is, of course, more widely extended; and, in time of war, or of great impending peril, it must take a still more expanded range. Congress has power to declare war. It, of course, has power to prepare for war; and the time, the manner, and the measure, in the application of constitutional means, seem to be left to its wisdom and discretion. Foreign intercourse becomes, in such times, a subject of peculiar interest, and its regulation forms an obvious and essential branch of the federal administration. In the year 1798, when aggressions from France became insupportable, a non-intercourse law, relative to that nation and her dependencies, was enacted; partial hostilities, for a time, prevailed; but no war was declared. I have never understood, that the power of congress to adopt that course of proceeding was questioned. It seems to have been admitted, in the argument, that state necessity might justify a limited embargo, or suspension of all foreign commerce; but if congress have the power, for purposes of safety, of preparation, or counteraction, to suspend commercial intercourse with foreign nations, where do we find them limited as to the duration, more than as to the manner and extent of the measure? Must we understand the nation as saying to their government: "We look to you for protection and security, against all foreign aggressions. For this purpose, we give you the controul of commerce; but, you shall always limit the time, during which this instrument is to be used. This shield of defence you may, on emergent occasions, employ; but you shall always announce to us and to the world, the moment when it shall drop from your hands."

It is apparent, that cases may occur, in which the indefinite character of a law, as to its termination, may be essential to its efficacious operation. In this connexion, I would notice the internal indications, exhibited by the acts themselves, relative to their duration. In addition to the authority given to the president to suspend the acts, upon the contingency of certain events, we have evidence, from the very nature of their provisions, that they cannot be designed to be perpetual. An entire prohibition of exportation, unaccompanied with any restriction on importations, could never be intended for a permanent system; though the laws, in a technical view, may be denominated perpetual, containing no specification of the time when they shall expire. In illustration of their argument, gentlemen have supposed a strong case; a prohibition of the future cultivation of corn, in the United States. It would not be admitted, I presume, that an act, so extravagant, would be constitutional, though not perpetual, but confined to a single season. And why? Because it would be, most manifestly, without the limits of the federal jurisdiction, and relative to an object, or concern, not committed to its management. If an embargo, or suspension of commerce, of any description, be within the powers of congress, the terms and modifications of the measure must also be within their discretion. If the measure be referred to state necessity, the body that is authorized to determine on the existence of such necessity, must, also, be competent so to modify the means, as to adapt them to the exigency. It is said, that such a law is in contravention of unalienable rights; and we have had quotations from elementary writers, and from the bills of rights of the state constitutions, in support of this position. The doctrines and declarations of those respectable writers, and in those venerable instruments, are not to be slighted; but we are to leave the wide field of general reasonings and abstract principles, and are to consider the construction and operation of an express compact, a government of convention. The general position is incontestible, that all that is not surrendered by the constitution, is retained. The amendment which expresses this, is for greater security; but such would have been the true construction, without the amendment. Still, it remains to be determined, and it is often a question of some difficulty, what is given? By the second article of the confederation, congress were prohibited the exercise of any power not expressly delegated. A similar qualification was suggested, in one of the amendments proposed by the state of New-Hampshire, to the new constitution. The phraseology, indeed, was strengthened; and congress were to be prohibited from the exercise of powers, not expressly and particularly delegated. Such expressions were not adopted. If they had been, as an intelligent writer justly observes, "Congress would be continually exposed, as their predecessors, under the confederation, were, to the alternative of construing the term, expressly, with so much rigour, as to disarm the government of all real authority whatever; or, with so much latitude, as to destroy, altogether the force of the restriction." It is wisely left as it is; and the true sense

and meaning of the instrument is to be determined by just construction, guided and governed by good sense and honest intentions. Under the confederation, congress could have no agency relative to foreign commerce, but through the medium of treaties; and, by the ninth article, it was stipulated, that no treaty of commerce should be made, whereby the legislative power of the respective states, should be restrained, from imposing such imposts and duties on foreigners, as their own people were subjected to, "or from prohibiting the exportation of any species of goods or commodities whatsoever." Here we find an express reservation to the state legislatures of the power to pass prohibitory commercial laws, and, as respects exportations, without any limitations. Some of them exercised this power. In Massachusetts, it was carried to considerable extent, with marked determination, but to no sensible good effect. One of the prohibitory acts of that state, passed in 1786, was for the express "encouragement of the agriculture and manufactures in our own country." The other, which was a counteracting law, had no definite limitation, but was to continue in force, until congress should be vested with competent powers, and should have passed an ordinance for the regulation of the commerce of the states. Unless congress, by the constitution, possess the power in question, it still exists in the state legislatures—but this has never been claimed or pretended, since the adoption of the federal constitution; and the exercise of such a power by the states, would be manifestly inconsistent with the power, vested by the people in congress, "to regulate commerce." Hence I infer, that the power, reserved to the states by the articles of confederation, is surrendered to congress, by the constitution; unless we suppose, that, by some strange process, it has been merged or extinguished, and now exists no where.

The propriety of this power, on the present construction, may be further evinced, by contemplating the operation of specific limitations or restrictions, which it might be proposed to apply. Will it be said, that the amendment, proposed by Virginia and North-Carolina, would be an improvement in the instrument of government? Such a provision might prevent the adoption of exceptionable regulations; but, it would be equally operative in defeating those that would be salutary; and would disable the majority of the nation from deciding on the best means of advancing its prosperity. To avoid such a system, as is now in operation, shall the people expressly provide, as a limitation to the power of regulating commerce, that it shall not extend to a total prohibition; or but for a limited time? Nothing would be gained by such restrictions. A prohibition might still be so nearly total, or extend to such a length of time, without violation of the restriction, as to be equivalent, in practical effect, to the present arrangement. Or will it be said, that the judiciary should then be called upon to decide the law void, though not repugnant to the terms of the restriction, and to consider exceptions from the prohibition, as, in the common case of a fraudulent deed, to be merely colourable? Loose and general restrictions would be ineffective, or, at best, merely directory. If particular and precise, they would evince an indiscreet attempt to anticipate the immense extent and variety of national exigencies, and would not be suitable appendages to a power, which, in its exercise, must depend on contingencies, and, from its nature and object, must be general. A particular mischief or inconvenience, contemplated in framing such limitations, might be avoided; but they would also injuriously fetter the national councils, and prevent the application of adequate provisions for the publick safety and happiness, according to the ever varying emergencies of national affairs. Let us not insist on a security, which the nature of human concerns will not permit. More effectual guards against abuse, more complete security for civil and political liberty, and for private right, are not, perhaps, afforded to any nation than to the people of the United States. These views of the national powers are not new. I have only given a more distinct exhibition of habitual impressions, cœval, in my mind, with the constitution. Upon these considerations, I am bound to overrule the objections to the acts in question, which I shall proceed to apply to the cases before the court, believing them to be constitutional laws.

I lament the privations, the interruption of profitable pursuits and manly enterprize, to which it has been thought necessary to subject the citizens of this great community. I respect the merchant and his employment. The disconcerted mariner demands our sympathy. The sound of the axe, and of the hammer, would be grateful music. Ocean, in itself a dreary waste, by the swelling sail and floating steamer, becomes an exhilarating object; and it is painful to perceive, by force of any contingencies, the American stars and stripes vanishing from the scene. Commerce, indeed, merits all the eulogy, which we have heard so eloquently pronounced, at the bar. It is the welcome attendant of civilized man, in all his various stations. It is the nurse of arts; the genial friend of liberty, justice and order; the sure source of national wealth and greatness; the promoter of moral and intellectual improvement; of generous affections and enlarged philanthropy. Connecting seas, flowing rivers, and capacious havens, equally with the fertile bosom of the earth, suggest, to the reflecting mind, the purposes of a beneficent Deity, relative to the destination and employments of man. Let us not entertain the gloomy apprehension, that advantages, so precious, are altogether abandoned; that pursuits, so interesting and beneficial, are not to be resumed. Let us rather cherish a

hope, that commercial activity and intercourse, with all their wholesome energies will be revived; and, that our merchants and our mariners will, again, be permitted to pursue their wonted employments, consistently with the national safety, honour and independence!

Case No. 16,701.

UNITED STATES v. The WILLIAM and SAMUEL.

[1 Hall, Law J. 482.]

District Court, D. Pennsylvania. Sept. 9, 1808.

VIOLATION OF EMBARGO LAWS—CONDEMNATION OF VESSEL AND CARGO.

Before PETERS, District Judge. This was a libel filed by Mr. Dallas, the district attorney, against the schooner William and Samuel [Joseph Lopes, master] and her cargo, captured by Lieutenant Biddle of the navy, for a breach of the laws relating to the embargo. The libel contained a variety of counts; and the vessel was claimed by Jacob Clarkson and Samuel Lowth, the owners; but no claim was filed for any part of the cargo. The claim alleged, that the vessel had been chartered to Joseph Burr; that she had received permission from the president, to proceed from Philadelphia to the Havanna for American property; and that the cargo was put on board, without the privity or approbation of the owners. The vessel, however, clandestinely took in goods, while in the port of Philadelphia, to a value exceeding 5,000 dollars. Samuel Lowth, one of the owners, sailed in her as a passenger, according to the entry in the manifest; and when she was seized by order of Lieutenant Biddle, after she had left the district of Pennsylvania, but still in the river Delaware, her hatches were battened down, &c.

Messrs. Ingersol, Hallowell and Milnor, were counsel for the claimants, and upon mature consideration, agreed to the condemnation of the vessel upon the last count of the information, which stated that goods exceeding the value of 400 dollars had been ladened on board without a permit from the proper officers. The cargo was condemned; no claim being filed, nor any objection made; reserving for the opinion of the court, the question whether the goods shipped under a permit were liable also to forfeiture.

Case No. 16,702.

UNITED STATES v. The WILLIAM ARTHUR.

[3 Ware, 276.] [1]

District Court, D. Maine. Oct., 1861.

"BLOCKADE" DEFINED — CIVIL WAR — MUNICIPAL REGULATIONS—ATTITUDE OF NEUTRALS—CONSTRUCTION OF STATUTES.

1. A "blockade," as that word is understood by the law of nations, is an investment of a town of one belligerent by the forces of another.

2. Every nation of common rights may declare what shall be ports of entry and delivery, and participate in trade by law, and enforce their laws by such means and penalties as she pleases. If she places armed ships before them, this does not constitute a blockade, as understood by public law, but is a mere municipal regulation, though familiarly called a blockade.

3. A neutral, or neutrality, always implies three parties, two belligerents and a third, a common friend, all acknowledged as independent nations. But in a civil war there is only one party, insurgents are not acknowledged as a nation, but to foreigners they are mere malefactors.

4. The laws of the United States, of July 13, and August 6, 1861 [12 Stat. 255, 319], are purely municipal regulations, with which foreigners have no concern.

5. Where an intent is charged in a statute as constituting part of a crime, it must be proved as a fact.

6. The words "aid, abet, and promote" used in the law of August 6, 1861, are words of uncertain meaning, as to their intent, and in this law are to be taken in their largest extent.

In admiralty.

Mr. Talbot, U. S. Dist. Atty.

Mr. Shepley, for respondent.

WARE, District Judge. The facts in these cases are, in substance, as follows: John Douglass Merrilees, the claimant, was born in Aberdeen, in Scotland, in allegiance to the crown of Great Britain, which he has never renounced, but for the last fifteen months preceding the seizure, has resided in Wilmington, N. C. He there had his place of business, and there his family resided. On the 7th of August last, he purchased, in Portland, a schooner called the "Sarah Ann Roe," since called the "William Arthur," for the sum of $3,000, and took out for her a temporary register, from the British consul, in this place, as a British vessel. Merrilees proceeded to load her with about one fourth or fifth of a cargo, and on the 23d of the month, cleared and sailed for the island of St. Thomas and a market; on the same day, as she was sailing out of port, she was seized by the collector. A libel was filed claiming a forfeiture of both vessel and cargo, under the late act of congress, of August 6, 1861, c. 60, called the confiscation act. Subsequently another libel was filed, claiming a forfeiture under the act of July 13, 1861, c. 3, prohibiting all commercial intercourse between the loyal and revolted states. The ground of the seizure was that St. Thomas was only her ostensible, but that Wilmington was her real and secret port of destination.

An argument is raised in limine, that one of these libels is fatal to the other. I do not feel the force of this argument. The same act may be a violation of both laws, and if so, the vessel may be liable under both or either. Such a cumulation of forfeitures is not unfrequent in the revenue laws, and one law was never supposed to repeal or make void.

[1] [Reported by George F. Emery, Esq.]

the other. If so, there may be a libel under either or both. There may be a difference in the distribution of the proceeds of the forfeiture, if the vessel is condemned, but in this the claimant has no interest and no voice.

The first question presented in this case is; did the "William Arthur" sail from this port on a voyage to St. Thomas according to her clearance, or did she, under cover of that, secretly sail on a voyage to Wilmington. The one was a legal voyage, the other was, or at least might be, under either libel, an unlawful voyage. To prove that the former was intended and was the true object of her destination, her clearance and all the usual and regular documents are produced and the sworn answer of the claimant that the vessel and cargo were purchased with that intent and purpose. This is sufficient prima facie evidence, and throws on the government the burthen of proving, to countervail it, the truth of their allegations, that though the vessel sailed ostensibly on a legal voyage, she in her secret intention sailed on an illegal voyage and to a prohibited port. This the attorney for the United States has endeavored to do, partly from circumstantial and partly by direct evidence, and this lies partly in written and partly in verbal testimony. The vessel was purchased on the 7th of August last. Merrilees had then to provide her a master and crew. He went himself as master, and as it appears, had, previous to the purchase of a vessel, engaged J. F. Miller Derickson as sailing master to any one he should purchase, and left it to him to procure a crew. On the third day of August, four days before the purchase of a vessel, Derickson, the sailing master, wrote to Godfrey, born in Maryland, but then in New York, to engage him as mate In this letter he directs him to bring with him a chart of the coast from Portland to Saint Augustine, and where to get it, if he had not one, and he would pay for it; to let no one see his letter, but burn it, and to direct to him at the United States Hotel, by the name of James F. Miller, and requests him to answer soon. Receiving no answer, he wrote again on the 7th, referring to his former letter, and requests him to answer as soon as he gets it, whether he will come without failing; directs him to call on G. E. A. Baker, to whose care his former letter was directed, where he will "see all," and to direct his answer to Jas. F. Miller. On the same day he wrote a third letter after he got an answer to his first, with a caution to let none of his letters be seen; directs him to stop at the Elm House, and not at the United States, to avoid suspicion, tells him his wages will be forty dollars a month, sends him twenty-five dollars and informs him that twenty-five more will be paid by Merrilees when he arrives in Portland, and urges haste. In all his letters Derickson gives no account of the voyage, but in his last, says that it is not a privateering enterprise. These letters have been verified by Derickson.

To this written evidence the attorney has added the parol testimony of Godfrey, who was mate of the vessel, and informer. He was a native of Maryland, but had sailed out of New York for eight or ten years, and came to Portland for the first time about four weeks ago, on the invitation of Derickson, whom he knew from his boyhood, they having been brought up near together. He signed mariner's articles to go in the Wm. Arthur. Derickson met him on the steps of the Elm House, whither he had gone to avoid suspicion, and then informed him that the voyage so mysteriously concealed in the letters was to Wilmington, North Carolina, but that they should take in part of a cargo and clear for St. Thomas. That at Wilmington they should take a cargo of naval stores and proceed to Nova Scotia. Derickson several times said that the blockade amounted to nothing, and was of no account. The same evening Derickson introduced him at the United States Hotel to Merrilees, and he apparently treating him (Godfrey) as a confidential man, informed him that the real voyage contemplated was to Wilmington. The witness does not remember that Merrilees ever named St. Thomas in connection with the voyage. Though in his cross-examination he is not certain that the destination of the vessel was first mentioned by Merrilees that evening, he adheres firmly and steadily through all his examination to this assertion, that he was informed of the destination of the voyage by Merrilees as well as by Derickson. This direct evidence is also confirmed by Hallowell, the hackdriver, who heard Merrilees say at the Ocean House, in Cape Elizabeth, that he came from Dixie land and was bound there, that he had bought a vessel at Portland, and was afraid it would be taken from him by the Yankees, and that Merrilees left the room cursing the abolitionists.

If, with the confirmatory testimony of Hallowell, Godfrey is to be believed, the intended voyage to Wilmington is proved. If such a voyage was intended, it of course would be masked under one that was legal. The claimant apparently feels this, and a regular attempt is made to break down the credibility of this witness. Nothing is offered against his general character for truth, but Derickson is offered to contradict him in the main fact. Derickson says that he never, at any time told Godfrey that a voyage to Wilmington was intended. Two witnesses, one of whom is Derickson, also swear that after the seizure, Godfrey said that Merrilees had better give him $500 or $1,000, to abscond and not appear as a witness in the case. Godfrey, on his reëxamination, declares that he never said so. This is the amount of the discrediting testimony. It all rests on a vive voce examination and the credibility of witnesses. Against this verbal testimony we have the letters written by Derickson preparatory to the voyage, and engaging Godfrey for it. These cannot deceive by falsehood. In these letters why does Derickson begin by changing his name,

thus bearing a speaking falsehood on his forehead? Men do not act without a motive, and if they have nothing else to hide they never conceal their names. Why does he, to avoid suspicion, tell him to come to the Elm House, and not to the United States Hotel, if there was nothing that he wished to keep out of sight? Why, when it seems the voyage was already determined on, when his letters contain liberal pecuniary offers, does he offer but one word of explanation, that this is not a privateering enterprise. It seems to me that a man must be not only gravel blind but stone blind, not to see that here was a secret expedition intended, and that the direction to bring with him a chart of the coast from Portland to St. Augustine, points directly to a voyage somewhere in "Dixie land,"—that is, in the slave or rebellious states.

Before considering the laws applicable to these cases, as they present questions both novel and important, as well as in deference to the learned and able arguments on one side and the other, something perhaps ought to be said by the court, on the law of blockade and the rights of neutrals. The United States as an independent nation, has a right to declare what places shall be ports of entry and delivery, and confine all maritime trade to them. This they may do of common right as a mere municipal regulation, and no foreign nation may interfere in the subject. They may enforce such regulations by such means and with such penalties as they please. If before the places not privileged as ports of entry or delivery, or of foreign and coasting trade in order to enforce this regulation, they choose to place armed vessels, this does not constitute a blockade in the language of the law of nations. The right of the United States to establish the embargo of 1808 [2 Stat. 453], indefinite as to time as it was, and closing all the ports of the country, was never questioned by foreign powers. To such an arrangement, the term blockade does not apply. That only exists where the forces of one nation encompass the ports of another. A third nation then standing by, which takes no part in the war, has certain rights of communication and trade which are allowed by the belligerents. A blockade interrupts this trade and communication. When it is a question whether a nation, or an individual of that nation, has violated that blockade, or whether this is real or only nominal, a question of law or fact may arise, which will be decided by the law of blockade. But in this case only our own ports are shut.

A neutral or neutrality, always supposes three parties, two nations, each having an organized government, acknowledged by other nations, and a third, a common friend of both. This third has certain rights allowed by the belligerents, and if these are violated in respect to the nation or an individual, redress may be claimed under the law of nations. But in the present case, there is but one party known to international law, one party whose existence is acknowledged by all nations, viz. the United States. There is indeed here an insurrection. But insurgents do not, in international law, constitute a party having the rights of a nation. Foreign nations do not acknowledge them. Towards them they are simply violators of the laws, and are legally entitled to no more rights than other criminals. In the law of nations they are only malefactors. If Guernsey or Jersey, or any of the Channel Islands, much more if Yorkshire or Lancashire, which form part of the main land of the British empire, should abrogate all the laws of England, and set themselves up as an independent nation, would England consider them as having equal rights with herself, or as revolted subjects, guilty of the crime of treason, the highest crime known to her laws, and punished with the highest penalty? If a high functionary of another nation should acknowledge an equality, and offer to treat them as an independent nation, having the same rights in the commonwealth of nations as herself, especially if this was done immediately and in hot haste, would she consider this a doubtful or equivocal act, or as taking part with a revolted province? Let her own acts in the war of 1776 with this country answer this question. We at that time formed a part of the British empire and commenced a civil war to resist intolerable grievances, not so much in the amount of the grievances as in the principles advanced. France, with sharp eyes, looked on, and in the course of three years, so says the British cabinet, "formed connections, first secret and afterwards avowed, with the revolted colonies of America, and according to the acknowledged law of nations these connections may be regarded as a breach of the peace between the two crowns, and as a declaration of war on the part of the most christian king.[2]

This declaration emanated from the British cabinet, of which Lords Thurlow and Loughborough constituted a part, and clearly shew that in her understanding of the laws of nations, that revolted subjects are not acknowledged as a nation under that law, I think correctly. The practice of nations I know is not in all cases in harmony with the law. Rome extended her empire not by just war, as we now understand it, but by seeking on all occasions to take part with the minority against the majority, and finally reducing both to slavery, and perhaps some may think that England has followed the same policy in the East. But this I believe to be the law of the Christian world in the West. Believing this, the rights of blockade and neutrality have no application in these cases. The laws of July

[2] Response a la Expose de la Cour de France, written by Gibbon in French, for circulation on the continent of Europe. 3 Gibbon's Miscellanies, p. 295, and 1 Gibbon's Miscellanies, p. 156. This answer was generally admired for the terseness of the style and the solidity of the argument, and was attributed at the time to Lord Stermont.

13, and of August 6, are purely municipal regulations; as such I shall treat them. It is true that, in this country, an insurrection exists de facto, and upon its issue may depend the question whether North America will be one nation or be cut up into many. If we continue one, we shall give law not only to the continent and its adjacent waters, but shall have an equal, if not a controlling voice in giving maritime laws to the two great oceans that border upon us, and this may be a reason why the nations of Europe may look upon what is going on in America with more than common interest, and even with fear and jealousy. But the magnitude of the interests depending cannot alter the law.

On the evidence before detailed somewhat at length, the attorney for the United States has filed a libel under the act of August 6, 1861, c. 60, for a forfeiture of the vessel and cargo. The act is entitled, "An act to confiscate property used for insurrectionary purposes." In the operative words of the first section, it is provided that when "the laws of the United States are opposed by combinations of men too powerful to be suppressed in the ordinary modes, if any person shall purchase or acquire, sell or give any property of whatsoever kind or description with intent to use or employ the same, or suffer the same to be used or employed in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person engaged therein; or if any person or persons being the owner or owners of such property shall knowingly use or employ, or consent to the use or employment of the same as aforesaid, all such property" is declared subject to seizure as prize, and as such will be subject to forfeiture for the uses declared in the act. If I understand the testimony in this case right, this vessel was intended for Wilmington, North Carolina, one of the places where the laws of the United States are opposed, and their execution obstructed by combinations too powerful to be suppressed by the ordinary means employed for that purpose. Merrilees, the claimant, was the owner of that property, both vessel and cargo. Some evidence was offered to show that one Blossom, of Wilmington, was the real owner, and Merrilees was a mere man of straw, and ostensible owner only, But the evidence is, I think, insufficient, and for the purposes of this trial, Merrilees must be considered as the real owner. And whether intended to be used in aiding, abetting, and promoting the insurrection is the only question which is open in the libel.

Merrilees, the claimant, was born in the dominions of the crown of Great Britain, and owes to that a natural allegiance. He there has his domicil of origin, but has acquired a commercial one in Wilmington. A commercial easily gives place to a natural domicil, and it has been argued that where one has been acquired, the first movement of a party to put off his acquired and resume his domicil of birth, the natural one takes the place of one which is purely artificial. It is said that Merrilees had taken such steps, and that his rights, if they may be affected, are to be considered as those of a neutral. But without repeating what has been before said on the subject of neutrality, it may be remarked, that Merrilees had acquired a commercial domicil at Wilmington, that the vessel was purchased and loaded before he left the country, that the evidence of an intention of change of domicil is insufficient, and that he is to be treated as an American. If questions of neutrality arise in this case, he could have no advantage from them. The intention of a person can only be known from his declarations and acts. In the want of declarations, every one is presumed in law, as well as in common sense, to intend what will be the natural consequence of his acts. The legal intention, therefore, must have been that the vessel was to go to Wilmington, and there sell her cargo, consisting of consumable articles, and, as this is not proved to be a garrisoned town or place of arms, to have gone into the consumption of that place and the vicinity, and that the vessel herself was to go into any trade which was there offered, unless we take the specific evidence, that she was to take a cargo of naval stores for Nova Scotia. This is the intention which the law would impute.

The only question raised as to the intention, is whether sending goods of this nature into a vicinage included in the insurrection was intended within the meaning of the law to aid, abet, and promote the prevailing insurrection. These words "to aid, abet, and promote," are of cognate significance, and like all words of a general nature, are of large and somewhat indefinite meaning. They may be used in a stringent or restricted sense, and not only admit but require interpretation. When this is the case, we in the first place look to the law itself, to learn in what sense they are used. But this contains no word of particular limitation or general description to enlarge or restrict their scope. For a second rule, if the law is founded on the relations of things themselves, in other words, on the law of God, and is calculated merely to enforce the law of nature, and contains words of ambiguous or indefinite import, which require interpretation, we recur to the laws of nature, to the rules and precepts of natural equity to explain them. But if the law is purely arbitrary, if it does not command or prohibit what is right or wrong, in itself, intrinsically, but is so only under particular circumstances, we look to the will of the legislature itself, which is the sole judge of the expediency of suspending the laws of nations in this particular case. No other department of government has a right to interpose its judgment in this matter, and particularly the judiciary has not. Its simple duty is to explain the law, if necessary, and execute it according to the will of the legislature. This is a plain and obvious rule, and besides its intrinsic reasonableness, is confirmed by the wisdom and moderation

of the sage Domat. Lois Civilis, Liv. Preliminaire, tit. 1, § 3. To come within the law, an intent must be shown, for this is a substantive part of the law—and as before remarked, there is no evidence on this record that Wilmington was a besieged, blockaded, or garrisoned town, or that there was any assemblage there to oppose the execution of the laws of the United States. The cargo was, therefore, intended there to be sold, and to go into the consumption of that town and that vicinity. Was this to aid, assist, and promote the insurrection? The attorney of the United States must defend the affirmative of the proposition, for the intent, as before observed, is a substantive part of the law. It was not the purpose of the law to interfere with private charity, or acts of beneficence, and if supplies, of whatever kind, were sent to meet the wants of a relative or friend, it is not prohibited by the law. This is the interpretation which is natural and will be generally given.

If the legislature have made use of general terms, which require interpretation, and have used no words in the law itself, which will aid us in this, the first rule is that we must look into laws in pari materia for their interpretation, especially if these laws are recent; (2) to the mischiefs intended to be overcome or prevented, or the good to be obtained; or (3) we may look at the surrounding circumstances of historical notoriety, for without the aid of particular testimony the court is supposed to know these.

1. In recurring to laws in pari materia, the first law which occurs, is that of July 13, 1861, passed at the same session of congress, and very shortly before this. By this law all commercial intercourse between the loyal and the insurgent states is prohibited. If we are to take this as an indication of the meaning of the legislature, we should be inclined to take these words in the largest extent. The general character of the laws passed at this session, and particularly the large grants of men and money for carrying on hostilities, lead to the same conclusion. All laws relating to the same subject-matter would dispose us to give to these words the natural, and not a restrictive meaning.

2. The second medium of interpretation is the mischief to be suppressed, or the good to be obtained, for every law ought naturally to be interpreted so that the object of it should be accomplished and not defeated. The object of this law is to put an end to the insurrection. And this insurrection is against all the laws of the United States, and not one only. The insurgents deny the whole authority of the United States. They deny the rightful power of the government itself. The struggle is not then pro aris et foris, to have possession of them, but whether we shall have altars and hearths to contend for. When insurgents have thrown off all laws and all authority of government, they are not scrupulous as to the means of executing their purpose. They avail themselves of any means in their power which will serve their turn, and those who oppose them must draw the sword and throw away the scabbard. What made even legitimate wars in ancient times so fierce and bloody? It was because the combatants knew that they were fighting not only for national independence, but for everything valuable that personally belonged to themselves, for their hearths and homes, for their wives and children, for their own liberty. Everything was spoils for the victors. The insurgents have no public treasury to go to to pay their followers. They pay only in promises, and their purpose must be that the conquered shall redeem these promises. The rich harvest of Philadelphia, New York, and Boston, would go far towards this. So the fillibusters, or buccaneers, as we are informed, being without resources of their own, promised their followers to reward them with the plunder and plantations of Cuba. In such case it is always vae victis woe to the conquered.

Nor did the legislature rely on the superiority of wealth or men in the loyal states. They had learned that William of Normandy, with 60,000 adventurers, subdued the whole of England, seized the wealth of the inhabitants, enriched his followers, and reduced the whole people to slavery. Three or four hundred years were hardly sufficient to raise the Saxons to the condition of free cultivators, and the nobility coming from the Norman law still continued a privilege class. In war, and especially in civil war, boldness and audacity is very apt to be successful. In civil war insurgents seize on every opportunity that God and nature put in their way to make advantage of it. If a legitimate government will not do something of the same kind, the people must take the consequences. Congress, after pouring all the resources of the country into the lap of the executive, both of men and money have shown a disposition to apply all legitimate means to put down the insurrection. The confiscation acts operating on the field where the insurgents recruit their armies, is a part of the means to curb and put an end to this insurrection, and the mischief which the law was intended to meet would not lead us to curtail it of any of its efficiency. It would rather tend to give those words their largest meaning.

3. A third mode of explaining law which is of doubtful meaning, is the surrounding circumstances. These which may be known by all, may by the court, without special evidence to prove them. The insurgent states raise for export, large quantities of cotton, less tobacco, and some rice and sugar. None of these, especially the first two, are food or drink, and of the last two the export is not great. But of provisions they seldom raise enough for their consumption, and of manufactures they have scarcely any. The deficiency of these supplies must be severely felt, and the obvious object of this act is not only to cut off the supplies of munitions of war for

men in arms, but of necessaries for the people at large.

On the common and well established principles and rules of construing restrictive laws, I can see no reason for taking these words, "to aid, abet, and promote," in a limited sense. All the reasons gathered from laws in pari materia, from the evils to be corrected by the operation of the law and historical circumstances, lead to giving them their fair and legitimate scope, and I do not feel authorized to affix a limitation to their meaning, when the legislature have given none. If words are to be taken in their natural and ordinary sense, condemnation of the vessel and cargo under this libel follows as a necessity.

A second libel has been filed against this vessel, founded on the acts of July 13, 1861. This act prohibits all commercial intercourse between the loyal and revolted states fifteen days after the president has issued his proclamation declaring that an insurrection exists. The president's proclamation bears date August 16, and this seizure was made on the 23d of that month. It is drawn on the assumption that the sixth section does not limit the fifth, but the former goes into immediate operation. But as I condemn the vessel under the first libel this makes an examination of the cause of forfeiture under the twenty-fifth section unnecessary.

Case No. 16,703.

UNITED STATES v. The WILLIAM POPE.

[1 Newb. 256.] [1]

District Court, D. Missouri. March, 1852.

STEAM VESSELS—REGULATIONS FOR SAFETY OF PASSENGERS—LICENSE AND ENROLLMENT—FERRY BOATS—COASTING TRADE.

1. The act of July 7, 1838 [5 Stat. 304], "To provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," was not intended by congress to apply to all steamboats, but only to such as before the passage of that act were required to be enrolled and licensed for the coasting trade.

2. Under the laws of congress enacted prior to that of 1838, ferry boats were not required to be enrolled and licensed.

3. The words, "coasting trade," mean, the trade along the shore, and the business of a ferry boat is not included therein.

[Cited in Ravesies v. U. S., 35 Fed. 919.]

4. A license from the United States, and a license from a state, are not both necessary to authorize the owners of a steamboat to employ her in ferrying.

5. The laws of the United States contain no regulations for ferries as such, while the states have exercised the right to license and regulate ferries from the commencement of the government to this day.

[Cited in U. S. v. The Seneca, Case No. 16,251; distinguished in The Daniel Ball, Id. 3,564.]

In admiralty.

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

John D. Cook, Dist. Atty., and Lyman D. Norris, for the United States and informers.

Benjamin F. Hickman, for owners of boat.

WELLS, District Judge. A libel was filed against the William Pope for a violation of the act of congress, approved July 7, 1838, to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam. The particular violation of the act charged in the libel, was navigating the Mississippi and transporting goods, wares and merchandise, &c., without first obtaining a license therefor, as provided in the second section of said act. The answer of the owners admitted that no license had been obtained from the United States, denied that any was necessary, and alleged, as their defence, that the boat was employed no otherwise than as a ferry boat across the river at St. Louis, under proper licenses, obtained from the state authorities of Illinois and Missouri. To the answer, the district attorney filed a demurrer; and the case was submitted on bill, answer and demurrer. This court held, in the case of U. S. v. The James Morrison [Case No. 15,465], that the act of 1838, above cited, did not apply to ferry boats. The opinion in that case was published; the case was taken, by appeal, to the circuit court; and the decree of the district court was affirmed. In delivering the opinion of the circuit court, the learned judge said that he affirmed the judgment, and altogether concurred in the opinion delivered by the district court; and that three of the judges of the supreme court had made, in their respective circuits, similar decisions, in cases, too, which were ferries over waters separating states. It was urged by the district attorney, in the argument of this case, that the act of 18th February, 1793, for enrolling and licensing ships or vessels to be employed in the coasting trade, &c., required licenses to be obtained only by vessels to be employed in the coasting trade or fisheries; but in regard to steamboats, the act of 1838 went further, and required licenses to be obtained by all steamboats, over twenty tons burden, navigating the waters of the United States, whether employed in the coasting trade, or in any other business, saying at the same time, that he did not controvert the decision in the case of The James Morrison, which was a steamboat employed in ferrying wholly within the limits of the state.

I think I might rest this case upon the argument contained in the opinion in The Morrison case; and upon the authority above mentioned; but I will give, briefly, my views upon the point made by the district attorney, in addition to what is said in that case. Does the act of 1838 require licenses to be obtained by all steamboats over twenty tons burden, employed on the navigable waters of the United States? If this question be answered in the affirmative, then the case of The Morri-

son was erroneously decided; yet the district attorney does not controvert that decision. If a steamboat were employed solely in carrying gravel from the Osage river for the streets of St. Louis, or employed solely in carrying railroad iron from manufactories on the Missouri, or Osage, to other points in the state, there to be laid on our own railroads, it would, if his proposition be true, have to obtain a license from the United States; and yet it is expressly declared by the supreme court of the United States, in the case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 194, that the completely internal commerce of a state is reserved to the state alone; all that commerce which is wholly within the state, and does not affect other states, or foreign countries, is of that description, and congress has no right to regulate it. It must be recollected that the power of congress extends only to the regulation of "commerce with foreign nations, among the several states, and with the Indian tribes." No one will contend that the employment of the steamboat above mentioned could constitute any part of that commerce, the regulation of which is intrusted to congress. It will also be noticed that there is no separate and distinct grant to congress of the power to regulate navigation. That is claimed as necessarily belonging to the power to regulate commerce. If congress has not the power to regulate the particular commerce, it can have no power to regulate the navigation employed in carrying on that commerce.

The above observations are made to show that the language employed in the act of 1838, should not receive a construction so comprehensive as that contended for; as it would involve a violation of the constitution by congress, which no court can presume to have been intended. It is true, that there are words used in the act of 1838, which are comprehensive enough to include all steamboats over twenty tons burden employed on the navigable waters of the United States. Thus it says: "It shall be the duty of all owners of steamboats"—"that it shall not be lawful for the owners, master or captain of any steamboat." But in looking at other parts of the act I think it will be apparent that it was not the intention of congress to apply the provisions of that act to all steamboats, but only to apply them to such as were before that time required to be licensed as coasting vessels. It provides that these vessels shall make a new enrollment. How could this be, if there had been no old enrollment? And shall obtain a new license. How could this be if there had been no old license? They shall make a new enrollment under existing laws, referring to the act of 18th February, 1793 [1 Stat. 305], for enrolling and licensing ships and vessels, which was the existing law. This new license is to be "under such conditions as are now (then) imposed by law, and as shall be imposed by this act." Again in section second, it provides that it shall not be lawful for the owners, &c., of any steamboats to transport any goods, &c., after the 1st October, 1838, without having first obtained from the proper officer a license under the existing laws, and without having complied with the conditions imposed by this act. These provisions, I think, show that it was not the intention of congress to require by the act of 1838, any vessels to be enrolled and licensed, except those which were, before that, required to be enrolled and licensed; and that they should be required, before this new license was granted, to conform to the provisions of that act—such as having their hulls and boilers inspected, &c. Under the laws enacted previous to that of 1838, ferry boats were not required to be enrolled and licensed. Gibbons v. Ogden, 9 Wheat. [22 U. S.] 203; 2 Story, Comm. 515; 1 Kent, Comm. 437; 3 Cow. 754. The license required to be granted by the act of 1838, is a license to carry on "the coasting trade;" such are the licenses now actually granted, and no other. The coast is the shore. To coast is to navigate along the shore. "The coasting trade" is the trade along the shore. How absurd would it be to require a license to carry on the coasting trade, for a vessel that was engaged in no trade at all, and certainly in no coasting trade. A vessel that merely crosses the river as a ferry boat, can in no proper sense be said to be engaged in any trade; nor can it be said to coast or be employed in the coasting trade. A ferry I deem nothing but a continuation of a road. I admit that congress might, constitutionally, regulate the transit on roads and over ferries, so far as it is necessary to regulate the "commerce with foreign nations, among the several states, and with the Indian tribes," but no further. To regulate such transit, a variety of provisions not contained in the act of 1838, or in any other act of congress, would be necessary. Congress have not yet undertaken to separate the purely internal trade and intercourse of the people of a state on its roads, from the commerce among the several states. They have not yet undertaken to regulate, either on the roads or over the ferries, the passage of every market man with his chickens and pigs; or a man going to mill or to church, although passing from one state into another state.

The acts of congress require vessels engaged in the coasting trade, or in parts of the coasting trade, to prepare and exhibit manifests of their cargoes, or of parts of their cargoes, every voyage or trip. This would apply to ferry boats, in some parts of the United States, if they are considered vessels engaged in that trade, and to be licensed under the act of 1838. Some ferry boats cross as often as once in every ten minutes; they would have to inspect the contents of every wagon, and make out

a manifest every trip, night and day. If the act of 1838 applies to ferry boats, they would all have to visit St. Louis twice a year to have their hulls or boilers and machinery inspected. Some of these boats would have to go some five hundred miles and back, making a voyage of one thousand miles; some of them would never get back, being unable to stem the current. Whilst they were absent, another set of boats would be required to supply their places, or the ferries be without boats. A license from the United States and a license from a state cannot both be necessary to do the same thing; they cannot both be necessary to authorize the owners of a steamboat to employ her in ferrying. In the above cited case of Gibbons v. Ogden, the supreme court says: "The word 'license' means permission or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize." If, then, the United States have authority to grant a license, and under and by virtue of the laws of the United States such license be granted, then any license from the state to do the same thing would be wholly nugatory and inoperative. If the state has authority to grant a license, and does grant one, then a license from the United States would be wholly nugatory and inoperative. A license conveys the right to do the thing or it conveys no right; if it conveys the right to do the thing, then no other or further conveyance from any person can be necessary. A license from the United States to carry on the coasting trade, it is urged, is necessary for a steam ferry boat. If this be so, then a license from the state would be of no avail, and need not be obtained. The states have exercised the right to license and regulate ferries from the commencement of the government to this day.

The laws of the United States contain no regulations for ferries as such; they provide only for the security of the revenue of the United States, and against explosions of boilers, bad hulls, &c. The laws of the states contain a great number of regulations of ferries, as such, deemed highly essential, if not absolutely necessary, none of which are contained in the laws of the United States; they are also the subjects of taxation by the states. Thus the laws of Missouri provide: (1) A ferry must be necessary, and not so near as to conflict with another ferry. (2) The person applying for license must be a suitable person to be intrusted with a ferry. (3) He must pay the tax—it may amount to $500. (4) He must give bond, with sufficient security, conditioned for the faithful performance of his duties. (5) The rates of ferrying must be fixed, and he is not allowed to exceed them. (6) He is to keep good and suitable boats, and sufficient hands to attend on all occasions. (7) He is to give due attendance. (8) He is made liable for damages. (9) He is to keep the rates of ferriage posted up at the ferry. (10) Fines for various acts and omissions are specified, and the manner of collecting them, with a variety of other provisions. All these provisions are abrogated, if the new doctrine be true, and none made to supply their place. If, as alleged, inspection of hulls and boilers be necessary, the states are competent to require it.

Congress has been careful not to encroach upon the jurisdiction or prerogatives of the states; and I think the court is not authorized, from anything in the act of 1838, to say that congress has made this great inroad into the ancient and hitherto undisputed jurisdiction of the states, and done so by mere implication—there not being one word in the act of 1838 about ferries or ferry boats. For a more full discussion of some points involved in the consideration of this case, I must refer to the opinion delivered in the case of U. S. v. The James Morrison [supra], a copy of which is filed herewith.

For the above reasons, the demurrer to the answer is overruled, this libel dismissed, and the bond given by the owners canceled, and a decree for costs against the informers.

Case No. 16,704.

UNITED STATES v. WILLIAMS.

[See Case No. 17,708.]

Case No. 16,705.

UNITED STATES v. WILLIAMS.

[4 Am. Law J. (N. S.) 486.]

District Court, E. D. Pennsylvania. Feb., 1852.

FUGITIVE SLAVE LAW.

[1. The fugitive slave law (section 7) makes it a criminal offense knowingly and willfully to frustrate or retard the attempted recapture of a fugitive slave by his master, whether it be by force, active or passive, or stratagem.]

[2. The offense being a misdemeanor, one aiding or abetting another to commit it, whether he be absent or present, is guilty as a principal.]

[This was an indictment against Samuel Williams under the seventh section of the fugitive slave law.]

KANE, District Judge (charging jury). The case derives all its interest, and almost all its importance, from circumstances that can have no bearing upon its determination. It is immaterial what was the character or what were the consequences of the Christiana outrage, so far as this trial is concerned, provided it involved the crimes laid in the indictment. Equally immaterial is it, what may be the feelings, whether of sympathy with the prisoner or of indignation against him, that may obtain in this

community, or elsewhere,—or what may be the criticisms with which our judgment is hereafter to be visited. We have nothing to do with external opinion, present or prospective. There has been thrown upon my table, since this trial began, a somewhat censorious commentary on the action of our circuit court in the recent treason case.[1] It emanates professedly from the executive department of one of the states; though its tone and spirit, its misapprehensions of the adjudication it condemns, the inconsequence of its logic, and the want of comity if not of self-respect which it manifests, might assert for it a less dignified authorship. But whatever may be its pretensions to notice from others, I have no purpose to reply to it. I have learnt long since, that he, whose aim or whose hope it is, to satisfy that miscalled public sentiment, which flames so fiercely and briefly in the pyrotechnics of party controversy, must admit a versatility of principle, inappropriate to the functions of the bench. I have learnt, too, that there is a higher public sentiment, less variable and more enduring, that vindicates for official fidelity and honor their just recompense of fame; and I am convinced, that for a causeless assault upon judicial character or bearing, there is no rebuke so appropriate or so pungent as that which is administered by silence. I abstain carefully therefore from any defence of my colleague who presided in that cause. A man so pure, so learned, so indefatigable, so fearless, in all regards so eminent as he is, cannot need a defender any where. And, as to his rulings throughout the trial, and the views that were expressed in the charge, I am too well content to share in the responsibilities that may attach to them, to invite from me a single remark in support of their correctness. I should not have adverted to this distasteful circumstance at all, but as this cause grows out of the same transaction with the case of Hanway, and is watched with something of the same feeling, I am anxious to caution you, however needlessly, against yielding in the slightest degree to apprehensions of censure, or the more insidious influences of popular favor. We cannot look around the court-room, without seeing that this prosecution has enlisted conflicting opinions and wishes in our community. However we may decide, there will be some to approve our action,—more, probably, to condemn it. We have but one path to follow,—it is the easiest, and in the long run the safest,—that which is pointed out by a disciplined and fearless conscience.

The questions for you to try are two: (1) Was there on the occasion referred to, a criminal infraction of the seventh section of the fugitive slave law [9 Stat. 464]? (2) Was the defendant one of the guilty parties to that infraction? The descriptive words of the section are as follows: "That any person who shall knowingly and willingly obstruct, hinder, or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her, or them, from arresting such a fugitive from service or labor, either with or without process as aforesaid—or shall rescue or attempt to rescue such fugitive from service or labor, from the custody of such claimant, his or her agent or attorney, or other person lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared—or shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforesaid—or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from labor or service as aforesaid;"—shall, &c., &c., &c. The power of congress to legislate upon this subject is derived from the second section of the fourth article of the constitution: "No person held to service or labor in one state under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such labor or service may be due." As the provisions of the law must be understood of course with reference to the authority under which it was enacted; and as the constitution provides only for the case of fugitives escaping from one state into another, and there claimed: it is plain that the act of aiding a slave to escape from the domestic custody of his master, however reprehensible such an act may be, is not an offence within the meaning of the fugitive slave law. The action which it forbids is of a subsequent time, when the slave has passed beyond the limits of the state under whose laws he was held: and it must be such action as tends to make the master's claim of recaption ineffective, or to molest him in its exercise. Beyond this the act does not go.

Bearing this in mind, we may distribute the subjects of this section under four titles, two of which relate to offences that may be committed before the arrest, and two to offences that may be committed after it: (1) The harboring or concealing a fugitive, after knowledge or notice that he is such, so as to prevent his discovery and arrest; (2) the knowingly and willingly obstructing, hindering, or preventing the claimant or his representative from arresting the fugitive; (3) the rescuing or attempting to rescue a fugitive after arrest; and (4) the aiding, abetting or assisting him to escape from the claimant or his representative after recaption. I repeat it; for in

[1] See Judge Grier's opinion in U. S. v. Hanway [Case No. 15,299.]

other cases, though not perhaps in this, the remark may be important: the "escape," to which this part of the section refers, is an escape after recaption. As I have already shown, the constitutional provision, under which alone congress has power over the subject, has no application to the original escape from the master's homestead; and there can be no second escape until after recaption. Not that it is lawful to abet or assist the slave, after he has passed into our state, in frustrating or eluding the claimant's pursuit. But this is not the offence of assisting him to escape, though it may be included appropriately in that of obstructing, hindering, and preventing the arrest. There is then but one form of offence in question here; for there is no evidence of harboring, and none of attempted rescue or escape after arrest. The only part of the section which we have to consider, is that which speaks of obstructing, hindering or preventing an attempted arrest. "Obstruct, hinder, prevent;" these words as commonly used are synonyms, and are given as such in the dictionaries. But they are of different roots, and are employed conventionally to express varying shades of meaning. Speaking etymologically; to obstruct, "ob-struo" (Lat.), is to build or set up something in the way; to hinder, "hind" (Anglo-Saxon), as in "behind," "hindmost," is to pull back; to prevent, "prævenio," (Latin), is to come before, to thwart by anticipating. In a more critical acceptation, "obstruct" implies opposition without active force, and does not imply that the opposition was in the end effective; "hinder" implies action, and to some extent effectiveness; to "prevent" is to be effective, but not necessarily by force, either active or inert. Thus, it may be, that an officer of the law was obstructed in his duty, and hindered perhaps for a time, but not finally prevented from performing it. So too, he may have been obstructed; but surmounting or avoiding the obstruction, he may have been not even hindered. Again, he may be prevented by stratagem, though stratagem alone can neither hinder, or obstruct him; and yet, should the success of the stratagem involve action, as it would almost necessarily, it might be very questionable whether the act ought not to be regarded as a hindrance.

These distinctions are, however, the appropriate subjects of scholastic, rather than juridical disquisition. Statutes defining crimes, unless the phraseology they employ has been itself legally defined, must be interpreted as their language is understood by mankind at large,—according to the every day import of the words. I shall, therefore, charge you, that the words "obstruct," "hinder," and "prevent," in the act before us, mean substantially the same thing; and that it is accordingly criminal, knowingly and willfully to frustrate or retard the attempted recaption of a fugitive slave by his master or his representative, whether it be by force, active or passive, or by stratagem. And I further charge you, that, the offence being a misdemeanor, he who aids, abets, or assists another to commit it, whether he be present or absent at the consummation of the deed, is himself guilty as a principal. But the aiding, abetting, and assisting, must have reference both to the principal wrong-doer and to his crime. It is not every act, which contributes to or facilitates the perpetration of an offence, that is regarded in law as accessorial to it; even though the act be in itself immoral or unlawful. It must be something that is connected with the particular offence, and that supposes some degree of complicity in it with the principal offender. To convict one as accessory to a felony, or to involve him in the guilt of a misdemeanor for an act in which he participated indirectly, it must be shown that he was privy to its commission by others, or at least that there was a concert of purpose and of act between him and them in regard to it. So, in the case of Rex v. Bingley (before the twelve judges), Russ. & R. 448, while it was held not to be necessary that all should be present at the consummation of the crime, but that all might be guilty, though each had contributed his part towards it separately from the rest, yet the conviction was sustained on the ground that the act of each was "in pursuance of a common plan." And there is cardinal good sense in all this. For while, on the one hand, it would be a mockery of justice, if criminals could elude conviction, by ingeniously distributing the parts of their drama,—on the other hand, no man could be safe in rendering the commonest offices of friendship or charity, if he were held liable to share all the guilt which his kindness towards others might enable them to commit. An act innocent in purpose, and innocent in fact at the time, cannot be made unlawful by the acts of others.

I believe these few and simple propositions embody all the views which I need present to you of the law of this case. So far as they relate to the statute under which the defendant is indicted, you will perhaps agree with me that they do not justify the obloquy with which that statute has been assailed. It is not true, as I read its history and its provisions, that it strikes at the justly regulated sympathies of manhood; for the first sympathies of every man should be with his country, her safety, and her honor, and these exact as indispensable a ready and abiding fidelity to the constitutional compact. It does not violate the domestic charities; you may give rest to the weary, food to the hungry, clothing and a home to the necessitous —yes, and speed him on his way, whether he be bond or free; if your motives be honest, your purpose ingenuous, if you have not sought to wrong the master under cover of charity to the slave, this law does not condemn you. But you shall not, because you

disbelieve in the wisdom, or the safety, or the justice of the institutions, which the people of other states have made for their own government, and while your faith stands pledged to them that their institutions shall be respected, and while you are receiving the benefits which they plighted to you in return, you shall not justify the forfeiture of your pledge by appealing to your conscience. You shall not, under pretext of exercising charities or indulging sympathies, stand between your neighbor and his covenanted rights, make inroads upon his estate, or endanger his fireside. You shall not harbor and conceal a fugitive, whose arrest is authorized by the constitution under which you live; you shall not obstruct, or resist, or prevent the man, who with lawful authority seeks to arrest him; you shall not seek to rescue him when arrested; or make the arrest futile by ministering to his escape. Such, as I understand it, is the fugitive slave act, an act called for, as I have always thought, by the exigencies of the time, in accordance with the constitution, both in principle and terms, and to be construed by it; an act, which can be held up to popular censure, only by expanding its provisions beyond their object and import, and thus violating the fundamental rules of legal interpretation.

There are several questions of law that have been raised by the counsel for the defence, to which I have not thought it necessary now to advert, some of them grave ones. Should your verdict make them important, they can be discussed hereafter. If you believe the evidence, it is in proof that the crime of obstructing, hindering, and preventing the claimant of a fugitive from making the arrest of his fugitive has been committed within the meaning of the act of congress. It is on the other hand admitted, that this defendant was not, at the time when the offence was committed, personally present at the place of its commission. The question, to be answered by your verdict, is whether he so was connected with the perpetration of the crime as to share the guilt of the immediate actors? The answer to this question involves two inquiries, on both of which you must pass: (1) What connection in point of fact? and (2) what community of purpose, or in the words of the twelve judges, what "common plan" does the evidence establish between Williams and the men who assembled at Parker's house, to obstruct, hinder, or prevent the arrest or capture of Mr. Gorsuch's slaves? For, such a connection in fact, and such a community of purpose, must be established in proof, or your verdict must be one of acquittal.

The evidence that bears on these inquiries is in a small compass. It is before me, as reported with admirable accuracy by the phonographic reporters, and I will with much pleasure read over to you such parts as any of you may judge material. As I understand the facts supposed to be proved, they are, on the part of the prosecution, these: That the defendant went up in the cars on the night of the 9th of September (the outbreak near Christiana being on the morning of the 11th,) as far as Penningtonville, arriving there about 2 o'clock in the morning of the 10th, that he was recognized there by one of the officers who had been employed by Mr. Gorsuch; and that when this officer afterwards proceeded on in a wagon, he saw a person whose dress appeared in the dim light to resemble the defendant's, following the wagon for a time at a distance; that the defendant went after day-light on the morning of the 10th to the house of a witness, whom he did not know, some three miles from Parker's house, saying that he had mistaken it for the house of another man, whom he wished to inform that he had come up in the cars with several men who were after slaves, and he requested the witness to let the slaves know; that he said one of the slaves was named Nelson, and that the names of three others were on a paper that he had left at Christiana, but without saying with whom, or where the slaves were to be found; that he parted with the witness to go back to the railroad; and that he got into the cars about 9 o'clock in the morning, and returned to Philadelphia; and that when arrested for treason some five days afterwards, he said to the officer who arrested him, in the hearing of the witness, an assistant officer, that he had conveyed the news to Christiana, and would do so again if he was at liberty, and that he considered it his duty to do so.

On the part of the defence, the defendant's visit to Penningtonville, was explained by the fact that he went there to demand payment of a note which was due to him from a colored person living there; and it was argued that the bearing of the officer at Penningtonville, as well as his imputed character, was such as to justify the suspicion that he was on an illicit errand; that there having been anxieties and alarm for some weeks before among the colored population of the neighborhood, in consequence of attempts made to kidnap free persons near them, some of which had been successful, as was proved, and the defendant being himself a colored man, he would naturally, and might lawfully desire, that what he had seen and what he suspected should be known to the parties endangered; and the officer who arrested him, who had made a minute at the time of the defendant's language, swore that he spoke of kidnappers and kidnapping, and not of the reclamation of slaves. Besides this, the defendant has proved by several witnesses of standing among us, that he has for many years been known as a meritorious and law-abiding man.

If these are the facts, it will be for you to say, whether they establish any connection whatever between the defendant and the lawbreakers at Parker's house; and whether, if so, they establish a complicity on his part in

any of the transactions that occurred there, any combination with the principal wrongdoers, any community of purpose and of plan. You are not to presume guilt; but if you have reasonable doubts, they are to make for the defendant. On the other hand you are not to require direct proof of that, which from its very character can only be reached by inference from attending circumstances. The question of fact is for you, not for the court to pass upon. I leave it with you, satisfied that you will render an honest and impartial verdict.

Verdict not guilty.

Case No. 16,706.

UNITED STATES v. WILLIAMS.

[4 Biss. 302.] [1]

District Court. D. Indiana. Feb., 1869.

INDICTMENT—PLEADING—FELONIOUS POSSESSION OF FORGED NATIONAL BANK NOTES.

1. An indictment for the felonious possession of a forged national bank note need not aver that the forged instrument purported to be a note of any designated national bank, if the instrument be copied into the indictment, and if by the terms of such copy it purports to be such a note.

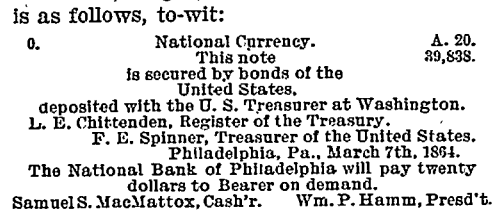
2. In an indictment for the felonious possession of a forged national bank note it is not necessary that the indictment should aver that the bank is a legal corporation. The national courts will judicially take notice of the existence of all national banks.

A. Kilgore, U. S. Dist. Atty.

W. W. Leathers, for defendant.

McDONALD, District Judge. At the present term of the court, the prisoner [Charles Williams] was found guilty on an indictment for the felonious possession of a counterfeit national bank note. And he now moves in arrest of judgment on the ground of certain supposed defects in the indictment.

The indictment charges that, on the 30th of October, 1868, in the district of Indiana, the prisoner "unlawfully, feloniously, and knowingly did then and there have and keep in his possession, and conceal, with intent then and there to pass, utter, and publish as true to some person or persons to the grand jurors aforesaid unknown, one certain false, forged and counterfeit national bank note; which said false, forged, and counterfeit bank note is as follows, to-wit:



—With intent then and there thereby to defraud some person or persons to the grand jurors aforesaid unknown, he, the said Charles Williams, then and there well knowing the said national bank note to be false, forged and counterfeit, contrary to the form of the statute," &c.

The indictment contains a second count; but it is in all respects substantially the same as the one above copied.

1. It is objected to this indictment that it does not contain what is called "the purport clause." It is common in charging felonies relating to forged bank notes, to allege that the forged instrument purported to be a note on a designated bank. And in indictments on statutes which employ this language, such an allegation may be necessary. But where no such language is found in the act on which the indictment is framed, it is, to say the least, more doubtful, whether the allegation is necessary. The indictment in question is founded on the tenth and thirteenth sections of the act of congress of June 30, 1864 (13 Stat. 221, 222). The tenth section of this act, so far as it relates to the case at bar, simply provides that every person, who "shall have or keep in possession, or conceal, with intent to utter, publish, or sell, any false, forged, counterfeited, or altered obligation or other security of the United States," shall be punished, &c. And the thirteenth section enacts that "the words 'obligation or other security of the United States,' used in this act, shall be held to include and mean all bonds, coupons, national currency," &c. In these sections there is not a word about forgeries purporting to be national currency or anything else. So far, therefore, as the language of the act on which the indictment is founded is concerned, there is clearly nothing in it requiring the insertion of the "purport clause" in the indictment.

Let us, then, inquire whether any principle in criminal pleading requires the insertion of the clause in question in describing a forged instrument in an indictment. It is a general rule that all the facts necessary to constitute the crime should be plainly stated, and that nothing else is requisite to a good indictment. In all indictments relating to forgery, the general rule is that the pleading must copy the forged instrument. The copy, therefore, being in the indictment and being part and parcel of it, speaks for itself. Of course, it purports to be what its language expresses. Thus in the present case, the copy set out in the indictment plainly purports to be a copy of a bank note executed by the National Bank of Philadelphia. On the face of the indictment, this is unquestionably the purport of the forged instrument. And the copy indicates its purport more certainly and satisfactorily than any mere allegation of its purport could possibly do. Of what use, then, could be an averment in the indictment that the forged instrument purported to be a national bank note? Certainly none at all.

I conclude, therefore, upon principle and reason, that in no case of an indictment describing a forgery and setting out the forged

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

instrument in hæc verba, is it necessary to superadd the "purport clause." In the forms given by Archbold of indictments for forging and uttering Bank of England notes, the "purport clause" is omitted. Archb. Cr. Pl. & Ev. 534 et seq. And that the clause is unnecessary, seems to be the opinion of a learned American writer on criminal law. 2 Bish. Cr. Proc. § 431. On the whole, I am satisfied that the omission of the "purport clause" in this indictment does not vitiate it.

2. It is contended that the indictment in question is bad, because it does not aver that the National Bank of Philadelphia is a body politic and corporate. It is certain that the act of June, 1864, providing for the incorporation of national banks, is a public act of which all courts must take judicial notice. But it is not so certain that courts must take judicial notice of the organization and incorporation of every national bank existing under that law. If, in fact, there never existed any corporation known as the National Bank of Philadelphia, it is clear that the prisoner ought not to be punished under the indictment. For in that case he could not be guilty of the felonious possession of a forged national bank note, but only of the possession of a spurious note, against which there is no law. It should seem to follow, that unless this court can take judicial notice that what is called the National Bank of Philadelphia is a corporation under the act authorizing the incorporation of national banks, the indictment is bad for not averring that the National Bank of Philadelphia is a corporation under that act.

In the case of a public act incorporating a single designated body politic, there can be no doubt that courts must judicially take notice of the existence of the artificial person thereby created. But the case of the national bank act is somewhat different. It did not of itself create any corporation. It merely provided, under certain conditions, that an indefinite number of voluntary associations might become incorporations under that act. In the case of an act establishing a single corporation, however, its mere passage does not usually ipso facto create the corporation. To effect that there must generally be afterwards an organization under the act; and the thing does not become a body politic till such organization is complete. Now, if the act of congress had only provided for the incorporation of one bank, no one would doubt that when such bank was fully organized, its corporate existence should judicially be noticed by all courts. Can the fact that the act provided for the organization and incorporation of an indefinite number of banks make any difference? I am inclined to think that it cannot. And I am the more strongly impelled to this conclusion by the consideration that the act puts all these national banks under governmental control and supervision; that their articles of association must be deposited among the national archives; that their capital consisting of registered bonds must be deposited with the treasurer of the United States; that before the bank enters upon the transaction of business, a certificate of the comptroller of the currency, to the effect that the bank has fully complied with the provisions of the act so as to become a corporation, shall be published in the newspapers; that every such bank shall make quarterly reports to the government; and that these banks may be made fiscal agents of the United States. In fine, the various and numerous provisions of the act providing for the incorporation of national banks indicate that they are to be regarded as public institutions of the existence of which all the departments of government must officially take notice.

Therefore, as it is a rule that neither in civil nor criminal pleading is it necessary to allege any fact of which the court will judicially take notice, I conclude that no averment in this indictment of the existence of the National Bank of Philadelphia as a corporation was necessary. The motion in arrest is overruled.

Case No. 16,707.

UNITED STATES v. WILLIAMS et al.

[1 Cliff. 5.] [1]

Circuit Court, D. Maine. April Term, 1858.

MURDER ON HIGH SEAS—INDICTMENT—NEW TRIALS—CONFESSIONS—PROOF OF CORPUS DELICTI.

1. An indictment for murder on the high seas is sufficient, although it describe the grand jury as "jurors of the United States."

2. Circuit courts of the United States have power to grant new trials, after conviction, for good cause shown, both in misdemeanors and felonies.

[Cited in Ex parte Lange, 18 Wall. (85 U. S.) 204; Sparf v. U. S., 156 U. S. 175, 15 Sup. Ct. 321.]

3. Whether the accused, in making confessions before the finding of the indictment, believed themselves to be speaking under oath or not is a question of fact for the jury.

[Cited in U. S. v. Stone, 8 Fed. 255.]

4. Where it is impossible to discover the body, the fact of death may be proved by other means.

[Cited in St. Clair v. U. S., 154 U. S. 152, 14 Sup. Ct. 1009.]

[Cited in Matthews v. State, 55 Ala. 187.]

5. When not made under oath, confessions of the accused are admissible in evidence, although the proof that the crime has been committed, is not, independent of the confessions, plenary.

Indictment for murder on the high seas. It appeared from the evidence that the prisoners sailed from Portland in the brig Albion Cooper, on the 7th of July, 1857, on a voyage to Cardenas, in the island of Cuba. The ship's company consisted of seven persons,—the master, two mates, and four seamen, including the cook and steward. After they sailed, nothing further was heard of the per-

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

sons on board until the 2d of September following the time of their departure from Portland. On that day, in the open sea, on the Bahama Banks, Captain Chase Bryant, of the bark Black Squall, being on a voyage from Philadelphia to Havana, fell in with an open boat in which were three men. He took the boat and men on board his vessel, and continued on his way to Havana. The three men were Peter Williams, Abraham Cox, and Thomas Lahey. Cox and Williams told Captain Bryant that the rest of the ship's company were washed overboard in a squall, while the three survivors were below; that the vessel was so much damaged as to be unmanageable; and that they three, collecting such things as they could from the ship, took to the boat to save their lives. In the boat were found a quantity of provisions and water, a compass and register belonging to the brig, one or two chests of clothing, proved to have been the property of the first and second mates, and a watch, proved to have belonged to the master. On the arrival of the Black Squall at Havana, the defendants and Lahey (who died before the trial) were arrested by the American consul in consequence of information given by Captain Bryant. Cox and Williams were first separately examined upon oath before the consul, and their statements reduced to writing, when their stories were substantially the same as those which they told to Captain Bryant. Lahey was subsequently examined, and his statements implicated Cox and Williams, who thereupon, in the presence of several persons, confessed the murder of the missing members of the ship's company, and described in detail the manner and circumstances of the crime. Their confessions were also taken in writing by the consul, signed by the prisoners, and were offered in evidence, together with proof of the facts already recited.

On this state of facts, the district judge instructed the jury as follows:—"It is true that in our jurisprudence the accused cannot be convicted on their own confessions, without some corroborating proof of the corpus delicti. There must be some proof that the crime has been committed independent of the confessions, but it is not necessary that it should be plenary proof. There must be evidence tending or conducing to prove the fact; and if it has that tendency, it is proper to be submitted to a jury, and if not, it ought to be excluded as irrelevant." The jury returned a verdict of guilty against both the accused. A motion in arrest of judgment was filed, because it did not appear in and by the indictment upon which the prisoners were tried that said indictment was found by a grand jury duly drawn and impanelled, the inquest being therein described as "the jurors of the United States." New trial was also asked, on the ground that there was not, independent of the confessions, such proof of the corpus delicti as would warrant a conviction.

George Evans and T. H. Talbot, for defendants.

The indictment is bad, because it does not show on its face that it is found by a grand jury. The final authority upon this point is the constitutional provision. Const. U. S. Amend. art. 5. There is no intervening statute, and if there were the indictment must conform to the constitution. It has never been decided that an indictment in the present form answers the constitutional requirements. The usage in Maine and Massachusetts may lend its sanction to this indictment; but the usage, however old, cannot make it good. Its age is objectionable, and makes it out of date, being older than the constitution. Low's Case, 4 Greenl. 443. But the usage is not uniform. Thacher, Cr. Cas. 284. It is not enough that the court knows that the indictment has been found by a grand jury; the prisoner has a right to know, and his information must come, if at all, through the indictment. A confession is not admissible if given under oath. 1 Greenl. Ev. § 225; 1 Archb. Cr. Law, 411; 2 Russ. Crimes, 649; 2 Starkie, Ev. 36; 4 Hawk. P. C. bk. 2, c. 46, § 37. If the record offered shows that the confessions were given under oath, parol evidence cannot be introduced to contradict it. Reg. v. Wheeley, 8 Car. & P. 250. The record does show that the confessions were given under oath. The prisoners were first sworn to tell the truth about the loss of the Albion Cooper; and in their confessions there was no change of subject, and no purgation from the oath. The following are the English cases: Berwick's Case, Fost. Crown Law, 10; Francia's Case, 1 East, P. C. 133; Lambe's Case, 2 Leach, 552; Thomas' Case, Id. 637; Wheeling's Case, 1 Leach, 311, note; Rex v. Eldridge, Russ. & R. 440; Rex v. White, Id. 508; Rex v. Tippet, Id. 509; Rex v. Falkner, Id. 481; 1 Phil. Ev. 535; 1 Archb. Cr. Law, 126. These do not support the rule in Badgley's Case, 16 Wend. 53. The American decisions agree with the text-books in laying down the rule of law, that in capital cases the corpus delicti cannot be proved by confessions, but must be proved, before the jury can convict, by independent testimony, by proof aliunde. In 1 Greenl. Ev. § 217, is to be found the full and accurate statement of the law upon this point, and his high authority is supported by other writers of unquestioned accuracy. Cowen & Hill's Notes of 1 Phil. Ev. 532; Whart. Cr. Law, § 683; 2 Russ. Crimes, 824, 825, note, and 826. The American cases are not numerous. 15 Wend. 147; 16 Wend. 63. The earlier of these, Hennessey's Case, is one in which the facts and results favor the motion of the prisoners. The verdict was set aside for want of evidence aliunde. In Badgley's Case the conviction was confirmed, and thus the two cases move in opposite directions. State v. Aaron, 1 South. [4 N. J. Law] 231; State v. Guild,

5 Halst. [10 N. J. Law] 163; Stringfellow's Case, 26 Miss. 157.

George F. Shepley, U. S. Dist. Atty.

It is not necessary that the word "grand" should precede the word "jurors" in the indictment. Whart. Prec. 14, note a. The court knows, from its record in the case, that the bill has been brought into the court by the grand jury, and that the signature of the foreman is that of the foreman of the grand jury. Com. v. Read, Thacher, Cr. Cas. 180. The words "the jurors for the said United States" as clearly show they were the grand jurors as in the English indictments the words "the jurors for our Lady the Queen." This is in accordance with the form invariably used in the federal courts in Maine and Massachusetts from the adoption of the federal constitution. U. S. v. Bird [Case No. 14,597]; U. S. v. Hobart (not reported). From the time of the finding of these indictments, the one the first capital case after the adoption of the constitution, the other the first in the federal courts in Maine after the separation, the practice has been uniform, and the same form of commencement in this respect has been observed in the federal courts as in the state courts in Maine and Massachusetts. Process Act, 4 Stat. 478. If there was any doubt upon the question whether the confessions were or not made under oath, the prisoners have had the benefit of that, for the court instructed the jury that if they believed the confessions to have been under oath, or if they believed even that the persons supposed themselves to have been under the influence of an oath, and that these confessions were induced by the influence of that belief, they should disregard them. The reason for excluding confessions is not that one is less likely to tell the truth under oath than not under oath, but it is that one under examination charged with crime is not bound to criminate himself. Consequently, if the examining magistrate puts him under oath when he is charged with crime, what he says while under oath is not deemed a voluntary statement. He is supposed to have been required to answer instead of having volunteered his statement.

There has been no invasion of the right of a person charged with crime not to be compelled to give evidence against himself. But at the same time, what a person has testified to under oath while being examined as a witness in favor of or against other parties, or before a grand jury, or before a coroner's inquest, before he was himself charged with crime, has been received. People v. McMahon, 2 Parker, Cr. R. 663–672; People v. Hendrickson, 1 Parker, Cr. R. 396; Wheater's Case, 2 Moody, Crown Cas. 45. In Rex v. Wilkinson, 8 Car. & P. 662, the confession of the prisoner was received, though not signed by himself or the magistrate who wrote it; and the statements read to the jury. The general principle is, that a voluntary confession is one of the strongest proofs of guilt, and the highest species of evidence. 2 Starkie, Ev. 36; 1 Phil. Ev. (7th Ed.) 110, 111; 2 Russ. Crimes, c. 4, § 1, 824; Rosc. Cr. Ev. 37; Gilb. Ev. 137; 1 Greenl. Ev. § 215; Warickshall's Case, 1 Leach, 263. Hence the maxim, "Habemus optimum testem confitentem reum." Confessions are divided into two classes,—judicial and extrajudicial. 1 Greenl. Ev. p. 273, § 216. A judicial confession, voluntarily made and regularly proved, is sufficient, if the jury believe it, to convict the prisoner without any corroborating evidence. 2 Hawk. bk. 2, c. 46, § 29; 1 Phil. Ev. (4th Am. Ed.) 541; Starkie, Ev. pt. 4, 53; Guild's Case, 5 Halst. [10 N. J. Law] 186. An extra-judicial confession, not subject to any imputation of having been induced by the torture of fear, or the flattery of hope, furnishes sufficient ground for conviction when confirmed by corroborating circumstances. It is not necessary that such corroborating testimony should afford plenary proof of the corpus delicti. Greenleaf, while admitting the law in England to be as contended for, claims that a different rule obtains in the decisions of the courts of the United States, and that, before a conviction can be based upon a confession, there must be independent proof of the corpus delicti. 1 Greenl. Ev. § 217. The only cases referred to as sustaining this position are State v. Long, 1 Hayw. (N. C.) 455,—a per curiam opinion overruled in State v. Broughton, 7 Ired. 96, and Guild's Case, 5 Halst. [10 N. J. Law] 163, in which it is expressly decided that it is only necessary that the confession should be corroborated. 2 Hawk. c. 46, § 36, is also referred to. But, so far from sustaining the position laid down in 1 Greenl. § 217, both the thirty-sixth section and section thirty-ninth will be found to state a proposition diametrically the opposite. If by the word "proof" Greenleaf is to be understood as meaning "plenary proof," his statement is entirely unsupported on principle, or by any authority. The only explanation that can be made is, that the word "proof" was used by him to mean "evidence" merely. People v. Hennessey, 15 Wend. 147; People v. Badgley, 16 Wend. 53. Full proof of the body of the crime, the corpus delicti, independently of the confessions, is not required by any of the cases; and in many of them slight corroborating facts were held sufficient. People v. Badgley, 16 Wend. 59. The prisoners, and the prisoners only, know the fact of the death absolutely and with certainty. Shall they not be allowed to prove by their oft-repeated and voluntary and corroborated statements a fact against themselves, of which their evidence would have afforded plenary proof against any other person? and if so, upon what principle may they not admit against themselves, and against their interest, and the prompt-

ings of every motive, a fact which might have been proved by another person with no better knowledge of the facts, and with less of guaranty that his evidence was not distorted by interest, passion, or prejudice?

CLIFFORD, Circuit Justice. The indictment in this case was drawn upon the eighth section of the act of congress of the 30th of April, 1790 [1 Stat. 112], which provides, among other things, that if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which, if committed within the body of a country, would by the laws of the United States be punishable with death, every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted shall suffer death. The charge is in effect that the prisoners, Peter Williams and Abraham Cox, on the 29th of August, 1857, piratically, feloniously, wilfully, and of their malice aforethought, assaulted and murdered one Quinton D. Smith, an American citizen, on board a certain vessel called the Albion Cooper, upon the high seas and out of the jurisdiction of any particular state, and within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court; and that the prisoners were apprehended and first brought into this district after committing the offence. After verdict and before judgment, the prisoners duly filed two motions for the consideration of the court, —one in arrest of judgment, and one for a new trial, upon the ground that improper evidence had been admitted against them, and also upon the ground that the jury had been misdirected in matters of law by the judge who presided at the trial. These motions were argued before this court at a special term held for that purpose on the 15th of March, 1858, and the questions arising under the motions were held under advisement. In stating the conclusions to which we have come, we will follow the order of the argument at the bar, and commence with the motion in arrest of judgment. The only cause assigned in the motion is, that "it does not appear in and by the indictment, upon which the prisoners were tried, that the same was found by a grand jury duly drawn and impanelled." A brief reference to the act of congress, of the 8th of August, 1846 [9 Stat. 72], and to the record in this case, will show that the persons who served as grand jurors, and who found the indictment, were regularly summoned, impanelled, and sworn. The third section of that act provides, that no grand jury shall hereafter be summoned to attend any circuit or district court of the United States, unless the judge of such district court or one of the judges of such circuit court shall in his own discretion, or upon a notification of the district attorney that such jury will be needed, order a venire to be issued therefor, provided that nothing herein shall prevent either of said courts in term from directing a grand jury to be summoned and impanelled, whenever in its judgment it may be proper to do so, and at such time as it may direct. It appears by the record in this case, that the circuit court met according to adjournment on the 3d of October, 1857, when, on the written request of the district attorney of the United States for this district, it was ordered by the court that venires issue for the return of twenty-two grand jurors to attend at the United States court-room in Portland, in the district of Maine, at an adjourned session of said court, there to be holden at ten of the clock in the forenoon of Tuesday, the 3d of November, 1857, from the towns and cities, and in the proportions therein named. And the venires were accordingly issued on the same day; and the record further states, that the court met again on the 3d of November, 1857, pursuant to the last adjournment, when the venires were duly returned, and the persons drawn as grand jurors appeared and were duly impanelled and sworn, and the name of each grand juror, including that of the foreman who was duly appointed, was entered in the record of the case. These proceedings were regular in form, and they show beyond controversy that the jurors were summoned, impanelled, and sworn as a grand jury of the United States of America for the First circuit and district of Maine, and in strict compliance with every requirement of the law in such cases made and provided. Act of congress, July 20, 1840 [5 Stat. 394],—Rev. St. Me. c. 135, §§ 10–20. And it also appears from the record, that the same jury, on the 5th of November, 1857, came into court and returned the indictment under consideration, with three others, as true bills against the prisoners at the bar, and the indictments were received by the court and duly filed and entered of record. None of these proceedings are called in question by the counsel of the prisoners, and yet it is contended in their behalf that the indictment itself is defective, because the words used therein, as descriptive of the jurors by whom it was found, are not the same as those employed in the fifth article of the amendments to the federal constitution. That article provides that no person shall be held to answer for a capital or otherwise infamous crime (with certain excepted cases) unless on a presentment or indictment of a grand jury; and the argument proceeds upon the ground that the words, "the jurors of the United States of America," which are the words employed in the indictment, are not equivalent to the words "grand jury," as contained in that provision; and it is insisted that the judgment should be arrested on account of that defect in the indictment. No other exception is taken to the indictment, except that the word "grand" is omitted before the word "jurors" at the commencement; and it is very properly admitted that the indictment is, in this par-

ticular, drawn in perfect accordance with the general practice and precedents in this district, and in all, save one, of the states included in the First circuit.

Nearly seventy years have elapsed since the judicial system of the United States was organized under the act of congress, passed on the 24th of September, 1789 [1 Stat. 73]; and throughout the entire period, since that time, the form of indictments in this district, so far as respects the particular in question, has been the same as the one adopted in this case. While Maine remained a part of Massachusetts, the district court had jurisdiction in all cases cognizable in a circuit court, except appeals and writs of error, and was authorized to proceed therein in the same manner as a circuit court; and as early as the first day of June, 1790, the records of that court furnish an example of an indictment for the crime of murder, in form like the one against the prisoners at the bar; and shortly after Maine was admitted as a state, the records of this court furnish another example to the same effect; and in the case first named, the prisoner was convicted, sentenced, and executed. We have examined these indictments, and are satisfied they were drawn from the precedents in general use in the state composing the district. They are in substance and legal effect the same as the precedents in general use in England immediately prior to the separation of the colonies from the parent country; and in all formal particulars, including the one in question, they are in exact conformity to the most approved precedents of indictments, used in all the courts of the commonwealth of Massachusetts, when the judiciary act was passed. A formal indictment, in criminal cases, is as necessary in the federal courts as in the criminal jurisprudence of the states; and yet, when the federal system of the United States was organized, the form of indictments was not prescribed; and there is nothing contained in any act of congress, directly referring the matter to any standard, by which their precise requisites can be ascertained. That system was organized, as before remarked, under the act of 1789; and the eleventh section provides, among other things, that the circuit courts shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts, of the crimes and offences cognizable therein; and it is provided by the twenty-ninth section, that in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors shall be summoned from thence. And the section then goes on to declare the manner in which juries shall be formed in the federal courts, and prescribes their qualifications; and we refer to those provisions as furnishing a clear and decisive indication as to the rule of decision, to which it was the intention of congress to refer all matters connected with the accusation and trial of offenders in the federal courts, not otherwise provided for in the constitution and laws of the United States. The forming of juries is expressly referred to the practice in the state where the trial is had, and to the laws of the state as they existed at the time when the judiciary act was passed; and, by necessary implication, the qualification of jurors was to be determined by the same rule. Some of the provisions of the act of 1790, called the crimes act, furnish further confirmation of the proposition, that all matters respecting the accusation and trial of offenders not otherwise provided for were referred to the usages and laws of the states. That act prescribes the punishment, annexed to all the principal crimes against the United States, including treason, misprision of treason, murder, piracy, manslaughter, forgery, and perjury and subornation of perjury, and yet it is silent in regard to the form of indictments in every one of the crimes enumerated in the act, except the two last named; and the provision made in respect to them we think deserves a particular examination. It is contained in sections nineteen and twenty. Section nineteen provides, in effect, that it shall be sufficient, in an indictment for wilful and corrupt perjury, to set forth the substance of the offence, and by what court or before whom the oath or affirmation was taken, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, otherwise than as aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed; and the twentieth section contains a similar provision in regard to the rule of pleading in an indictment for subornation of perjury. These provisions were not the work of supererogation. On the contrary, they were obviously designed to subserve a useful purpose, and, beyond question, had the effect to modify some existing rule of decision, which would have continued to operate, if those provisions had not been enacted; and the inquiry is, What was that rule of decision which congress intended to modify by those enactments? It could not have been any rule previously established by an act of congress, as the national legislature had never before passed any act upon the subject; and certainly it could not have been the rule prevailing in England at that time, as her laws were then foreign laws, and of course they could have no effect in the federal courts; and still it is obvious that it was the purpose of the act to modify some

acknowledged and well-known rule upon the subject, so as to relieve the prosecutor from the strictness in pleading which had previously been required in respect to those offences; and as there is no other rule which congress could have had in view, we are led to conclude it must have been the common law prevailing in the jurisprudence of the states, and, if so, it affords strong ground for presumption that it was the intention of congress to refer all the matters not otherwise provided for in respect to the accusation and trial of offenders to the same source for their solution. No other provision was made either in the act of 1789 or the crimes act of 1790, respecting the form of indictments, and none whatever in regard to the mode of conducting the trial after the jury are sworn, or the rules of evidence by which the guilt or innocence of persons accused of offences was to be ascertained or determined. Matters of such moment could not have been overlooked, for the reason that, without some regulation upon the subject, the system itself would have been imperfect and useless; and as there is no other standard by which they can be determined, it is clear that they must be referred to the laws of the states and the usages and customs of the courts at the time when the judicial system of the United States was organized. U. S. v. Reed, 12 How. [53 U. S.] 761. The motion in arrest of judgment is therefore overruled.

Several propositions are embraced in the motion for a new trial, which we will now proceed to examine in the order in which they were presented by the counsel of the prisoners. Before doing so, however, we desire very briefly to notice a preliminary question, whether this court, under the constitution and laws of the United States, possesses the power to grant a new trial in a capital case, as it would be useless to consider the merits of the motion, if there is no power conferred upon the court to grant it. It was held by Judge Story, in U. S. v. Gibert [Case No. 15,204], that a new trial could not be granted in a case very much like the present. That conclusion was based chiefly upon the ground that a second trial, though allowed at the request of the accused, would be a violation of that provision of the constitution which provides in effect that no person "shall be subject for the same offence to be twice put in jeopardy of life and limb." Judge Davis dissented at the time, and held that the prohibition was intended for the security and benefit of the accused, and as such, that it might be waived and relinquished; and such is now the settled doctrine in all the circuit courts of the United States, and in every state court where the subject has been considered. Since the date of that decision, the point has been discussed in twenty of the states of this Union, and in every instance it has been held that a new trial may be granted on the application of the accused. Many of the cases are collected in People v. Morrison, 1 Parker, Cr. R. 625, to which we refer for a summary of the authorities upon the subject. They are also to be found in 2 Benn. & Heard Lead. Cr. Cas. 464, where the whole subject is very satisfactorily reviewed. New trials were unknown in the ancient common law, either in civil or criminal cases; and after the power of courts in this behalf was fully established in the time of Lord Mansfield, it was seldom and perhaps never exercised in criminal cases above the grade of misdemeanors. In later times, new trials are granted in England in felonies as well as in the lower offences, whenever the error is one which cannot be satisfactorily corrected in any other way. Reg. v. Scaife, 2 Denison & P. Crown Cas. 281.

Errors will sometimes occur in a jury trial, and there must be, as there always has been, some mode by which they can be corrected; and no reasoning can be satisfactory, whatever may be its basis, which would deprive courts of justice of the power to set aside a verdict at the request of one who had been illegally convicted; and accordingly, we hold that this court has the power to grant a new trial, after conviction, for good cause shown, both in misdemeanors and felonies.

The first cause assigned for a new trial is that the court permitted evidence to be given to the jury, against the objection of the prisoners, which was not by law admissible. That complaint has reference to certain statements, made and signed by the prisoners on the 9th and 10th of September, 1857, before Thomas Savage, acting vice-consul of the United States for the port of Havanna, and it is insisted that those statements were made when under oath, and, therefore, were not voluntarily made. Judge Ware sustained the doctrine contended for by the counsel of the prisoners, that confessions made under oath were not admissible, and the depositions were not introduced.

We have examined both the depositions and the statements subsequently prepared, and on the face of the papers, we think, it is clear that the latter were not made under oath, just as clear as it is that the former were so made.

On this point there can be no doubt, and yet it is insisted that the statements might have been made by the prisoners under the impression that they were speaking under oath, and if so, that they were not voluntarily made and ought not to have been received. That difficulty was suggested to the judge at the trial and was fully obviated by him in the instructions given to the jury. The jury were told that if the prisoners, when they made those statements, believed that they were speaking under oath, then the statements ought to be laid out of the case; and we think the instruction was sufficiently favorable to the prisoners, and furnishes to them no ground of complaint whatever. Whether confessions, when made un-

der oath, are or are not admissible, it is not necessary now to determine, as the ruling on this point was in favor of the prisoners, and, therefore, we forbear to say more upon the subject.

The second cause assigned in the motion for a new trial is, that there was not sufficient proof that the statements were ever read to the prisoners or either of them before they were signed. Whether those papers were or were not read to the prisoners was a question of fact for the jury, and must have been found in the affirmative; and their finding ought not to be disturbed, unless it was against the evidence or, at least, against the weight of the evidence in the case. Two witnesses, Savage and Bryant, testify positively that the statement of Williams, which was first offered, was read to him; and in respect to the other, it does not appear that any such objection was taken to it at the trial, and it is now said in argument for the United States that witnesses were present by whom the fact could have been proved, and were not called because the objection was not made.

Another answer to this ground of complaint arises from what does satisfactorily appear in the report of the case. Cox was present when Williams made his statement, and, as one of the witnesses says, "kept putting in a word," while the consul was reducing it to writing. That statement was read to Williams, and, of course, in the hearing of Cox, as he was present, and must have been well understood by both; and as Cox's statement is substantially the same, and was only omitted till the following day for want of time to take it, we are unable to perceive any reason to doubt that it was understandingly made and signed. It bears his signature, and there is not a word of proof tending to show that it was unfairly obtained or that he did not fully understand its contents.

Another cause assigned in the motion for a new trial is that there was not sufficient legal evidence to authorize the jury to find that Quinton D. Smith had come to his death in any manner, and none to find that he had come to his death by violence; and the same questions are raised under a fourth proposition in various forms, alleging that the jury were misdirected by the presiding justice at the trial in matters of law.

Motions for a new trial in the federal courts are usually drawn up by the counsel of the party who is dissatisfied with the verdict, and in general are not required to be submitted either to the opposite counsel or to the court for revision until the hearing, and no serious inconvenience has resulted from the practice, as all such motions are addressed to the discretion of the court, and are made and filed subject to revision, and where they contain any errors in the recital of the facts or the instructions of the court, they are, as a matter of course, expected to be corrected.

There being no authentic report of the evidence, the facts of the case must be determined from the minutes of the judge who presided at the trial.

(At this point the court recapitulated the facts disclosed in the evidence and the confessions of the prisoners, and also quoted that part of the charge of the district judge applicable to these facts. The portion of the charge thus recited is given above.)

The counsel do not contend for the proposition that a conviction can in no case be had without a discovery of the body of the person alleged to be murdered, although there are some decided cases which at first reading seem to favor that view of the law; and such undoubtedly is the general rule in the law of felonious homicide, and it is one which ought always to be enforced whenever direct proof exists and it is practicable to obtain it. Lord Hale said he would never convict any person of murder or manslaughter, unless the fact was proved or the body found dead. Cases, however, have occurred, and it is greatly to be feared may hereafter occur, where the application of this rule would secure impunity to the murderer, and therefore would be unreasonable, as it would be in the highest degree prejudicial to the course of criminal justice. A murderer would only have to consume the body by fire, or decompose it by chemical means, or sink it in the depth of the sea, and the laws of society would be powerless to punish the offender.

That question was very satisfactorily considered by Judge Story, in U. S. v. Gibert [Case No. 15,204], where he said, when speaking of the application of that rule in a case very much like the case at bar, that "it certainly cannot be admitted as correct in point of common reason or of law, unless courts of justice are to establish a positive rule to screen persons from punishment who may be guilty of the most flagitious crimes. In cases of murder upon the high seas, the body is rarely if ever found, and a more complete encouragement and protection for the worst offences of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas."

It follows, therefore, that in cases where the discovery of the body after the crime. is impossible, the fact of death may be proved by other means. Burrill, Circ. Ev. 679; Rex v. Hindmarsh, 2 Leach, 569; Best, Pres. 204, 205.

Many other cases might be cited to the same effect, but we deem it unnecessary, as the law appears to be well settled upon this point, and it is not controverted by the counsel of the prisoners. Assuming, then, that where it is impossible to discover the body, the fact of death may be proved by other means, the inquiry is, by what other means may that proof be made? Must it in all cases be direct proof, or may it be proved by strong and unequivocal circumstances which render

it morally certain and leave no reasonable doubt that such is the fact? Not a doubt is entertained by this court, that it may in the case supposed be proved in either of the modes suggested; that is, it may be proved by direct evidence, or where such does not exist, it may be proved by cogent circumstances, provided they are sufficient to produce conviction on the mind of the jury and to exclude every reasonable doubt. It must be so, else the laws for the punishment of felonious homicide are insufficient to reach the secret offender, provided he has the opportunity and employs the means to destroy the body.

We are not aware that the principles thus far advanced are denied in behalf of the prisoners; and yet it is insisted that "a confession is not sufficient to justify a conviction in capital cases, unless the corpus delicti be proved by independent evidence"; which in effect, as we understand the proposition, denies that it is admissible at all until the corpus delicti is first proved, and then only as it respects the agency of the accused. Confessions are never admissible unless they were freely and voluntarily made; and when so made they are in general regarded as strong proof of guilt, as it is not reasonable to suppose that a person really innocent would voluntarily subject himself to infamy and punishment. 2 Starkie, Ev. 36; 1 Phil. Ev. (10th Ed.) 110, 111.

"Confessions are received in evidence or rejected as inadmissible," said Eyre, C. B., "under a consideration, whether they are or are not entitled to credit. A full and voluntary confession is deserving of the highest credit, because it is presumed to flow from a strong sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." Warickshall's Case, 1 Leach, 263. Confessions, in order to be of any weight, should be deliberately and understandingly made, and it ought also to appear that they are founded upon a full knowledge of the facts to which they relate. Suppose a seaman should confess that he drowned his captain by throwing him into the sea, and it should appear that it was done in the darkness of the night, and that other vessels were near, or that it was near the shore, all would agree that the confession should have but little or no weight to prove that death actually ensued, as the admission would not be founded on knowledge; and the testimony of a witness under the same circumstances and to the same facts would be entitled to no greater weight for the same reason; because neither the seaman who threw the man overboard, nor the witness who saw it, could know that death actually took place. That distinction was well taken in Rex v. Hindmarsh, 2 Leach, 569, and it is one which ought never to be overlooked in this species of evidence. In that case it appeared that while the ship was lying off the coast of Africa, where there were several other vessels, the prisoner was seen in the night to take the captain up in his arms and throw him into the sea, after which he was never seen or heard of; but that near the place on the deck where the captain was seen was found a billet of wood, and the deck and parts of the prisoner's dress were stained with blood. On these facts it was objected, that the corpus delicti was not proved, as the captain might have been taken up by some of the other vessels. But the court, while admitting the rule, left it to the jury to say, whether the deceased was killed before his body was cast into the sea; and the jury found in the affirmative, and the prisoner was convicted, and on a case reserved the conviction was approved by all the judges.

According to the statements of the prisoners in this case, Quinton D. Smith was dead before he was sewed up in old sails with weights and thrown overboard. His death is certain if the confession is true; whereas, in the case above supposed, everything confessed might be true, and yet the captain might have been alive. A careful attention to this distinction, and to the facts of each case, will explain what may otherwise seem to be an inconsistency in several of the authorities cited at the bar. The confessions in this case were free and voluntary, and are so comprehensive as to make it certain, if they are true, that death actually ensued, through violence inflicted by the prisoners, many hours before the body was thrown overboard; and having been made in respect to a case where the discovery of the body is impossible, and where the death, therefore, according to the well-settled rule of law, may be proved by other means, why are they not admissible, and, if admissible, who shall judge of the credit to which they are entitled except the jury? There can be but one answer to the question, when viewing it merely in the light of principle; and yet courts of justice in such cases are required to act with the greatest caution, and ought not to shut their eyes to the fact that a too ready credence of confessions has sometimes led to improper convictions; and in view of experience, perhaps it would be safer in every case, where there are no corroborative circumstances, to recommend an acquittal.

"Confessions," says Mr. Greenleaf, "are divided into two classes, namely, judicial and extra-judicial. Judicial confessions are those which are made before the magistrate or in court in the due course of legal proceedings, and it is essential that they be made of the free will of the party and with full and perfect knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations taken in writing by the magistrate pursuant to statutes, and the plea of guilty made in open court to an indict-

ment. Either of these is sufficient to found a conviction, even if to be followed by a sentence of death; they being deliberately made with the deepest solemnities, under the advice of counsel and the protecting caution and oversight of the court. * * * Extra-judicial confessions are those which are made by the party elsewhere than before a magistrate or in court, and they embrace not only explicit and express confessions of crime, but all those admissions of the accused from which guilt may be implied." All confessions of this kind, it is admitted by the learned author, are receivable in evidence, being proved like other facts, and are to be weighed by the jury: and where it appears that they were freely and voluntarily made in respect to facts within the knowledge of the accused, we have no doubt that the rule, as stated, is correct; and if so admissible, it is difficult to say that the jury are not the sole judges of the credit to which they are entitled. And yet it has been gravely questioned whether such confessions, when uncorroborated by any other proof of the corpus delicti, are of themselves sufficient to warrant a conviction in a capital case. Mr. Greenleaf strongly doubts their sufficiency, though he admits that they are receivable in evidence; and he adds emphatically, that in the United States a prisoner's confession, where the corpus delicti is not otherwise proved, has been held insufficient for his conviction; and in support of the proposition he refers to the following authorities. Guild's Case, 5 Halst. [10 N. J. Law] 163; Long's Case, 1 Hayw. (N. C.) 524; Hawk. P. C. bk. 2, c. 46, § 18. Considering the language employed by that author, it is somewhat doubtful how far he would carry the doctrine; and if it is to the extent that the corpus delicti must be fully proved independently of the confession, we are not prepared to adopt it, as in that view the admission of the confession would be useless, except to prove the agency of the accused, and would operate as an exclusion of the confession for any other purpose; whereas, if freely and voluntarily made, it is clearly admissible as evidence in support of any element in the charge to which it applies.

Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required, says Nelson, C. J., in People v. Badgley, 16 Wend. 59, by any of the cases; and in many of them slight corroborating facts were held sufficient. The cases cited by Mr. Greenleaf do not assert a different doctrine; the one first cited distinctly affirms the same principle, and Long's Case, when carefully examined, is to the same effect. It merely asserts that naked confessions, unattended by circumstances, are not sufficient to warrant a conviction; but the court admit that where the circumstances related in the confession are proved to have already existed, that the confession may be evidence sufficient to authorize the jury to find the prisoner guilty. Hawkins says (book 2, c. 31, § 1), that an express confession is where a person directly confesses the crime with which he is charged, which is the highest conviction that can be, and may be received after the plea of not guilty recorded, notwithstanding the repugnancy. Russell says, that the highest authorities have now established that a confession, if duly made and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroborating evidence. 2 Russ. (7th Ed.) 824. And it must be admitted that the cases cited in support of the text sustain the proposition. Wheeling's Case, 1 Leach, 311, note; Rex v. Eldridge, Russ. & R. 439; Rex v. Falkner, Id. 481.

While we admit that the cases cited appear to sustain the proposition, we still think that the proposition itself admits of essential qualifications, without which we should not be prepared to adopt it. A corpus delicti is always made up of two elements, in respect to which there is an important distinction, which should never be overlooked in an investigation of this kind. In felonious homicide they consist, first, of the fact of death; and, secondly, of other facts or circumstances showing the criminal agency of another: and in all cases the former constitutes the basis of the latter inquiry, and in general ought to be first proved. And even supposing that a free and voluntary confession may, under some circumstances, be sufficient, as where the body has been destroyed by fire, or consumed by chemical means, or sunk in the sea after life was extinct, yet it could only be so where the particulars given in the confession itself furnish the most satisfactory proof that the party confessing had full knowledge that death had actually taken place through his own acts. No such question arises in this case, and therefore we forbear to pursue the inquiry. Where the fact of death is fully proved by other evidence, no reason is perceived why the free and voluntary confession of the party, if deliberately made, may not be sufficient to establish the other element of the corpus delicti, provided it satisfactorily appears that other evidence does not exist.

The best proof of the corpus delicti, as well as the most effectual means of ascertaining its cause, is the finding and the inspection of the dead body, and a resort to other evidence, in respect to either element of which it is composed, ought never to be allowed except in cases where the discovery of the body is impossible. Where the body cannot be found, the fact of death may be proved by cogent and unequivocal circumstances, provided they are sufficient to establish the fact beyond every reasonable doubt. Whether, under any circumstances, a free and voluntary confession, deliberately made, would be sufficient without corroboration, it is not necessary now to decide, and therefore we forbear to express any decided opinion upon the subject, as no such question is raised in the instructions given to the jury, and none

such arises on the evidence reported by the judge who presided at the trial. Many facts and circumstances were proved at the trial, independently of the confessions, tending to show that the crime had been committed; and some of the circumstances thus proved were of a character strongly to implicate the prisoners in the transaction. It was proved that the prisoners left Portland on the 7th of July, 1857, in the same vessel with Quinton D. Smith and the other men supposed to have been murdered, and that neither Smith, the other men, or the vessel have ever since been seen or heard from except through the confessions of the prisoners and of Lahey, who died before the trial. Neither the vessel nor the officers or men ever arrived at the port of destination or returned to the home port. At the time, or about the time, when the vessel should have arrived at Cardenas, the prisoners were picked up in a boat in the open sea, which boat was subsequently brought home and identified, and proved to be the only boat of the vessel in which they sailed. It was tarred inside in a manner to indicate that they had not left the vessel without preparation, and that fact was still more strongly indicated by the circumstance that they had in the boat the ship's compass, and a supply of water and provisions. They had in their possession also the watch of the captain, and the clothing of the murdered men, and all these articles were fully identified at the trial, as was the ship's register, which was also in their possession. After they were picked up, they gave contradictory and false accounts of what had occurred before they left the vessel, and persisted in the falsehood until Lahey disclosed the truth; and when they saw that detection was certain, they freely and voluntarily confessed their crimes. All these facts and circumstances were fully proved at the trial before the confessions were admitted, and we think they were of a character to be regarded as tending to prove, not only that the crime had been committed, but that it had been committed by the prisoners; and in that view of the case we are satisfied that the instructions given to the jury were correct. There is no decided case, either English or American, which asserts a contrary doctrine. It was supposed by the counsel at the argument that the Mississippi case constituted an exception, but we think it does not. The question there was, whether the extra-judicial confessions of a prisoner charged with a capital felony is sufficient without any proof whatever of the corpus delicti, independent of the confession; and it was held that the confession was not sufficient. Stringfellow v. State, 26 Miss. 169. See, also, State v. Cowan, 7 Ired. 239; State v. Aaron, 1 South. [4 N. J. Law] 231; People v. Hennessey, 15 Wend. 147; Burrill, Circ. Ev. 495; Best, Pres. § 257, p. 382. Other cases to the same effect might be cited; but these already referred to we think are sufficient to show the state of the law in the United States, and it will be seen that they do not sustain the doctrine that the corpus delicti must be fully proved by evidence independent of the confession. It is doubtful whether Mr. Greenleaf intended to lay down any such rule, and if he did we are not prepared to adopt it, as it does not appear to have the sanction of any decided case either in England or the United States. All that can be required is, that there should be corroborative evidence tending to prove the facts embraced in the confession; and where such evidence is introduced, it belongs to the jury, under the instructions of the court, to determine upon its sufficiency.

The motion for a new trial, therefore, is overruled, and there must be judgment on the verdict.

Case No. 16,708.

UNITED STATES v. WILLIAMS.

[1 Cranch, C. C. 174.] [1]

Circuit Court, District of Columbia. July Term, 1804.

CRIMINAL LAW—ACCESSORIES.

There cannot be an accessory at common law to an offence which does not amount to a felony.

Indictment [against Stuart Williams] for feloniously receiving, harboring, and maintaining one Daniel Hennessee, who had been convicted, under the act of congress of 1790 (1 Stat. 112), of stealing a pair of silver candlesticks. The indictment did not state that Hennessee had been convicted of feloniously stealing.

Motion in arrest of judgment: (1) Because it does not appear in the indictment that D. Hennessee was convicted of any felony, but only of a misdemeanor, and there could be no accessory to the offence of which Hennessee was convicted. (2) That D. Hennessee, the principal, is stated to have been convicted of stealing one pair of candlesticks, one saddle, and one bridle. Whereas the record and conviction, produced in evidence, only find him guilty of stealing the candlesticks, and not the other articles charged in his indictment.

P. B. Key, for defendant. (1) D. Hennessee was convicted of a trespass only, under the act of congress. And although the act gives an indictment against accessories after the fact, yet Williams, not being indicted under the statute, cannot be punished under the statute. The indictment against Hennessee does not state the act to have been done feloniously. Where the indictment does not state

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

the act to have been done feloniously, it is only a trespass. 4 Tuck. Bl. Comm. 306. No circumlocution can supply the word "feloniously" (felonicé). 2 Hawk. P. C. 320. Hennessee is only charged with an offence which is a trespass at common law. It is said that felony is derived from "fee," which signifies the feud or land, and "lon," forfeiture. Hence, felony is a crime which forfeits land. Cr. Cir. Comp. (6th Ed.) 95, 96, 104. This indictment against Hennessee, is a good indictment under the act of congress. At common law, there can be no accessory after the fact, except in felony. 4 Tuck. Bl. Comm. 37, 38. And the felony must be completed at the time the assistance is given. 1 Stat. 114. The indictment against Williams is not under the statute. The statute has made it less than felony; it gives no forfeiture of lands or goods. The indictment against Williams is at common law, and states that Williams, well knowing that Hennessee had committed the said theft, &c. 4 Tuck. Bl. Comm. 37, 38. If indicted at common law, he cannot be punished under the statute. The statute judgment cannot be given upon a common law indictment. 2 Hawk. P. C. 357. Where clergy is taken away expressly by any statute, the offence must be laid in the indictment against that very statute, and the words of it, or the offender shall have his clergy. 1 Hale, P. C. 529; Fost. Crown Law, 356, 357; Kelyng, 104. See Cr. Cir. Comp. 412, "Larceny."

Mr. Mason, U. S. Atty. The act of congress speaks of it as a felony, "larceny aforesaid." Stealing is felony at common law. The facts stated in the indictment against Hennessee amount to felony. It was not necessary, in the indictment under the statute, to charge the act to have been done "feloniously," to obtain a judgment under the statute. Every offence which produced a forfeiture of lands or goods, was, at common law, a felony. It is sufficient to show, that Hennessee's offence was felony at common law. The jury say he did feloniously harbor, and receive, &c. It is a good indictment under the statute, though not contra formam statuti. Cr. Cir. Comp. 412. As to the second point, the variance between the allegation and the evidence; it ought to have been made at the trial. It is now too late.

Mr. Key. The United States may waive the felony, and indict for the trespass. The act of congress makes it an intermediate offence between trespass and felony. It is the punishment only that makes a felony. The act of congress gives this court the power to punish it more severely than if it was a mere trespass, and not so severely as by common law. The act of congress is not to be lightly construed to create a felony.

Judgment arrested. Because the indictment against the principal did not charge him with a felony.

KILTY, Chief Judge, absent.

Case No. 16,709.

UNITED STATES v. WILLIAMS et al.

[1 Cranch, C. C. 178.] [1]

Circuit Court, District of Columbia. July Term, 1804.

COUNTERFEITING BANK NOTES—LIST OF WITNESSES AND JURORS—WITNESS FEES.

1. A prisoner, indicted for counterfeiting a note of the Bank of the United States, is not entitled to a list of witnesses and jurors two days before pleading, although the statute makes it felony.

[Cited in U. S. v. Coppersmith, 4 Fed. 202.]

2. A witness may be allowed his fees although not regularly summoned.

[Cited in Cummings v. Akron Cement & Plaster Co., Case No. 3,473; Re Williams, 37 Fed. 326; Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 281.]

The prisoners [Philip Williams and Jacob Ray] being brought up to be arraigned for counterfeiting a bank-note of the United States for fifty dollars,—

Mr. Key, counsel for prisoner, observed that the act of congress (1 Stat. 573) has made it felony, and the act of April 30, 1790, § 29 (ut sup. 118) entitles the prisoners to a copy of the indictment and a list of witnesses in all capital cases. Every felony at common law is a capital offence. He therefore demanded for the prisoners a list of witnesses and jurors, and a copy of the indictment two days before pleading.

Mr. Mason denied that congress, by making it felony, had made it a capital offence. It was not a felony at common law, and the act, at the same time that it makes it a felony, prescribes a punishment less than death.

THE COURT (KILTY, Chief Judge, absent), was of opinion, that the prisoners were not entitled, under the act of congress of April 30, 1790, § 29 (1 Stat. 118), to a list of witnesses, jurors, &c., but ordered them to be furnished with a copy of the indictment, and gave them reasonable time to plead. A witness from Philadelphia, who was not summoned, was allowed to prove his attendance to testify to the grand jury in this case, having been requested by the attorney for the United States to attend.

A venire facias was ordered for the 3d Monday in September.

Case No. 16,710.

UNITED STATES v. WILLIAMS.

[2 Cranch, C. C. 438.] [2]

Circuit Court, District of Columbia. Nov. Term, 1823.

MURDER AND MANSLAUGHTER—KILLING CONSTABLE MAKING DISTRESS FOR RENT.

1. A constable, in levying a distress for rent in the county of Alexandria, is not acting in the

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

discharge of his official duty, within the principle of the law which makes the killing murder, when it would not have been murder if he had not been an officer; and the constable can justify by those acts only which would have justified the landlord if he had personally distrained.

2. A distress for rent is not lawful, unless there was an express contract for a certain rent.

3. If a tenant kill a constable who comes to make an unlawful distress, the jury may, according to the circumstances of the case, find their verdict for manslaughter.

This was an indictment charging the prisoner [Elizabeth Williams, alias Betsy Chinguapin] with murder by killing one Elijah Chenault, a constable, who came to the house occupied by the prisoner to levy a distress for rent, under a written order from one Holbrook, the landlord, in these words: "Alexandria, 31st July, 1823. Betsy Williams to Abiel Holbrook, Dr. To rent, two months and fifteen days, $6.25. Mr. Chenault: Distrain for this rent, and compel Williams to quit the premises immediately."

Upon the trial, Mr. Taylor, for the prisoner, prayed the court to instruct the jury: (1) That the order did not purport to be an authority to him to act as constable; (2) that, if it does so import, it is not a warrant to which the prisoner was bound to yield implicit obedience, and that it is not evidence of a right to distrain, or to dispossess the tenant; and (3) that the order was illegal on its face.

Mr. Swann, Attorney of the United States, contra. The law contemplates that distresses will be made by a sheriff or other officer. Their fees for levying a distress are regulated by law. It is not necessary in the order to call him "constable," if he were in fact a constable. It is generally understood in Virginia that a distress can only be made by an officer. The order to distrain is not vitiated by the order to turn the tenant out of possession.

THE COURT (THRUSTON, Circuit Judge, absent) instructed the jury that Chenault, in executing the order to distrain, was not acting in the discharge of his official duty, within the principle of law which makes the killing murder when it would not have been murder in case of the killing of a man who was not an officer, because he was executing a private authority only, and not acting in the public administration of justice; and that Chenault could only justify his act by the same facts which would have justified the landlord if he had personally distrained.

THE COURT also instructed the jury, at the prayer of the prisoner's counsel, that the distress was not lawful, unless there was an express contract for a certain rent.

THE COURT also was of opinion that it was competent for the jury, upon this indictment, to bring in a verdict of manslaughter, although they should be satisfied that Chenault was not then in the execution of his official duty when he was killed.

Verdict, guilty of manslaughter.

Case No. 16,711.

UNITED STATES v. WILLIAMS.

[3 Cranch, C. C. 65.] [1]

Circuit Court, District of Columbia. Dec. Term, 1826.

TRANSPORTATION OF SLAVE—INDICTMENT.

In an indictment under the 19th section of the Maryland act of 1796, c. 67, for aiding and advising the transportation of a slave, there must be an averment of transportation from the District.

Indictment [against Abraham Williams] under the 19th section of the Maryland act of 1796, c. 67, for aiding, assisting, encouraging, and advising the escape of a female slave of W. L. Brent, "by means whereof she was put into a stage to be transported out of the District." The words of the act are: "Any person who shall be found to assist by advice, donation, or loan, or otherwise, the transporting of any slave, or person held to service, from this state, or by any other unlawful means depriving a master or owner of the service of his slave or person held to service; for every such offence the party aggrieved shall recover damages in an action on the case against such offender, and such offender also shall be liable upon indictment to be fined a sum not exceeding $200."

THE COURT said there must have been a transporting of the slave out of the District or the offence was not complete.

Verdict, "Not guilty."

Case No. 16,712.

UNITED STATES v. WILLIAMS.

[4 Cranch, C. C. 372.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

CIRCUIT COURT D. C. — SPECIAL CRIMINAL SESSIONS—ATTACHMENTS FOR WITNESSES.

1. The circuit court of the District of Columbia has power to hold special sessions for the trial of criminal causes; and has jurisdiction, at a special session, to try offences committed between the time of ordering and the time of holding such session; and its jurisdiction is not limited to such causes of federal jurisdiction as may be tried in a circuit court of the United States sitting in a state.

2. The circuit court of the District of Columbia, has all the powers which, by law, were vested in the circuit courts of the United States on the 27th of February, 1801, and, among others, the power to send attachments into any other district, for witnesses in criminal cases.

[Cited in Ex parte Pleasants, Case No. 11,225.]

[Cited in U. S. v. Burdick, 1 Dak. 142, 46 N. W. 572.]

Indictment [against Christiana Williams] for keeping a house of ill fame, found at the special session in September last, and continued over, by law, to this term.

Mr. Dandridge, for defendant, moved the

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

court to quash the indictment, because this court, at this term, has not jurisdiction of the cause, there being no power to continue causes from the special session to this term.

The judiciary act of 1789, § 5 (1 Stat. 73), gives the power to the circuit courts of the United States in these words: "And the circuit courts shall have power to hold special sessions for the trial of criminal causes at any other time, at their discretion, or at the discretion of the supreme court." It does not provide for a continuance of causes from a special to a stated session of the court. That power is given by the act of March 2, 1793 (1 Stat. 333), but it is only given to special sessions appointed in the manner directed by that act, by a justice of the supreme court and a district judge. This court is not a circuit court of the United States. It is the circuit court of the District of Columbia. It can only exercise the powers of a circuit court of the United States in cases within the jurisdiction of a circuit court of the United States. This court had no authority to call a special court, because there were no causes to try when the special session was ordered. The power given to the circuit courts of the United States is to hold special sessions for the trial of criminal causes, not to institute new prosecutions; for the trial only of causes existing at the time of ordering the special session, and for the trial of which the special session is ordered. See Hamilton's Case, 3 Dall. [3 U. S.] 17, and U. S. v. Insurgent [Case No. 15,442].

THRUSTON, Circuit Judge, said his opinion was that a special court could only be holden for the trial of causes existing at the time of calling the special court; not of causes arising between the order for calling the special court and the actual session of the court.

Mr. Dandridge. It was for the benefit of the prisoners.

THRUSTON, Circuit Judge. And that they might have a speedy trial.

Mr. Dandridge. There is no case where a special court has been called when there were no causes to try. The act of 1793, repeals the provision in the act of 1789, for holding special sessions of the circuit courts. See Mr. Justice Story's opinion in U. S. v. Cornell [Case No. 14,868]. If this court has power to hold special sessions, it is only in federal cases.

THRUSTON, Circuit Judge, said he looked upon the power as only given for existing causes. He approved Judge Brockenbrough's opinion as to his distinction between federal and municipal jurisdiction; and was of opinion that this court has power to hold special sessions for federal offences only; and that only for causes existing at the time of calling the court, and in which indictments had not been found at a stated term.

Mr. J. Dunlop, contra. If Judge Brockenbrough's opinion is law, and is to be carried out in all its consequences, we must be in a deplorable condition; the right of appeal must be confined to federal cases.

THRUSTON, Circuit Judge. One consideration bears out Judge Brockenbrough. The leading motive of exclusive jurisdiction was the security of congress from insult; and congress cannot extend jurisdiction beyond the district.

Mr. Dunlop. So also the 30th section of the act of 1789, authorizing the taking of testimony, would be confined to cases of federal jurisdiction.

Mr. Dandridge admitted that in Cohen's Case [6 Wheat. (19 U. S.) 264] the supreme court of the United States decided that congress, in legislating for the District of Columbia, legislated in its national character.

Mr. Dunlop. This court is not a double-faced court. It is altogether federal; created for federal purposes; for the benefit of the national government, and of the people of the whole United States; for the protection of all. Congress had a constitutional right to prescribe the jurisdiction of this court, and to give it all the powers necessary for the exercise of that jurisdiction. They have done so. The same act (27th February, 1801) gives the jurisdiction and the powers. The jurisdiction is given by the 5th section, and the powers by the 3d.

THRUSTON, Circuit Judge. Have the circuit courts of the United States a right to try assault and battery? If they have no such power, then we have no such power.

Mr. Dunlop. If they had jurisdiction to try assault and battery, they would have power to exercise that jurisdiction. This court has the jurisdiction, and therefore has the power to exercise it. But it is said, that the special court had no jurisdiction of causes not existing at the time of calling the session. The power to hold a special session in some cases, is admitted. Then, is there any thing in the laws of the United States to limit it to causes existing at the time of ordering it? It is also said that the act of 1793, continuing the causes to the next stated session, does not apply to a special session holden under the act of 1789.

THRUSTON, Circuit Judge. The special court, mentioned in the act of 1793, must be called by a judge of the supreme court of the United States.

Mr. Dunlop. The act of 1793, regards the place of holding the special session; but the words authorizing the continuance of causes, are general, and apply to all special sessions. If the words are broad enough, its provisions must be applied to all cases within the reason.

THRUSTON, Circuit Judge. The words are, "for the trial of criminal causes;" meaning causes then existing. There must be a cause existing. The probability that causes may arise, will not justify the call of a special court.

Mr. Dunlop. Causes arising after the order for calling, and before the session of the special court, are within the reason and the words of the law.

Mr. Brice, in reply. This court has no right to hold a special session, under any circumstances. The act of 1789, relates only to the circuit courts created by that act. Congress only gave to this court the general powers of the circuit courts of the United States; not the special powers given to particular courts; and those general powers can only be used in cases of general federal jurisdiction. No special session can be called but by a judge of the supreme court of the United States. The act of 1793, either repeals the act of 1789, on this subject, or it appoints and limits the mode in which the power, given by the act of 1789, shall be exercised; so that no special session can be called but according to the mode prescribed by the act of 1793. This is not a circuit court of the United States. The act of 1793, is not applicable to this district, because there is no place nearer to the place where the offence was committed than the regular place of session. The clause of the act of 1793, respecting the return of process, is conclusive that the only causes to be tried at the special session, are causes existing at the time of calling it.

CRANCH, Chief Judge, delivered the opinion of the court, as follows: (THRUSTON, Circuit Judge, contra.)

This is an indictment, for keeping a house of ill-fame, &c., found at the special session of this court, holden in September last, for the trial of criminal causes, under an order of this court made at the stated March term. A motion is now made by the defendant's counsel to quash the indictment, upon the ground: 1st. That no proceeding, or cause which was pending at the special session in September, was, or could be by law continued or removed to this stated term of the court. 2d. That the court had no power to hold a special session for the trial of criminal causes; but if it had, the power was confined to the trial of criminal causes of a purely federal character, such as would be cognizable by a circuit court of the United States, sitting in a state; and such as had arisen and were existing at the time of the order for holding the session. That the special session had no jurisdiction of an offence against what is supposed to be the municipal law of this district; such as the offence is, which is charged in this indictment.

1. The first question is, whether the business depending for trial at the special session in September was, at the close thereof, removed to this stated term of the court. The answer to this question may be given in the words of the 3d section of the act of congress of the 2d of March, 1793 (1 Stat. 333), "That all business depending for trial at any special court, shall, at the close thereof, be considered as of course removed to the next stated term of the circuit court." But in order to show that this cause was so removed, it must appear that the special session had jurisdiction of the cause; that it was depending for trial at that session, and that the session was lawfully holden. This brings us to the second question, namely: 2. Whether the court had authority to hold such a special session for the trial of criminal causes; and whether it had jurisdiction of this cause, the prosecution of which was in no manner commenced until after the special session was opened, nor until the grand jury had, at that session, found a presentment upon their own motion. By the 3d section of the act of the 27th of February 1801 (2 Stat. 103) by which this court was established, it is enacted, "That the said court, and the judges thereof shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States." This section does not confer any jurisdiction upon this court; it gives only the powers necessary for the exercise of its jurisdiction. That jurisdiction is given by the 5th section; and in giving it, no distinction is made between cases of a purely federal character, and those of what might be called a municipal character; nor is such a distinction even suggested. The jurisdiction is given in very simple and comprehensive terms, namely: "That the said court shall have cognizance of all crimes and offences committed within said district; and of all cases in law and equity between parties both or either of which shall be resident, or shall be found, within said district; and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising, or accruing under the laws of the United States." Its criminal jurisdiction is of "all crimes and offences committed within the district," whether against an act of congress applicable to the whole United States, or against an act confined in its operation to the District of Columbia. They are equally offences against the sovereign power of the United States, and are equally of federal jurisdiction. When this court was created it was formed upon the model of the other circuit courts of the United States, established by a previous act of the same session, passed on the 13th of February, 1801 (2 Stat. 89), by which the United States were divided into six circuits, and a circuit court, consisting of three judges, provided for each circuit. The circuit court of this district was to have all the powers which by that act were given to the other circuit courts. We are, therefore, referred to the act of the 13th of February, 1801 (2 Stat. 89), for our powers; but not for our jurisdiction. That act expressly conferred upon the circuit courts which it es-

tablished, all the powers theretofore granted to the circuit courts of the United States, in addition to certain other powers expressly given by the same act. It had been enacted by the judiciary act of 1789, § 5 (1 Stat. 73), after fixing certain days for holding a circuit court in each district, "that the circuit courts shall have power to hold special sessions for the trial of criminal causes, at any other time, at their discretion," and this clause is reënacted in the act of the 13th of February, 1801 (2 Stat. 89), nearly in the same words. On the 27th of February, 1801, it is clear, therefore, that the circuit courts of the United States, had, by law, power to hold special sessions for the trial of criminal causes at their discretion; and on that day it was enacted that this court should have all the powers by law vested in the circuit courts of the United States. This court, therefore, had the power to hold special sessions for the trial of criminal causes at its discretion. The special session of September was ordered by this court on the 18th day of May, 1833, being the last day of the stated March term. There were at that time persons either in jail or bound by recognizance, upon whose cases the grand jury, which had been discharged, had not acted. It was presumed by the court, from the experience of former years, that in the long vacation of more than seven months which would intervene before the next stated term in November, many persons would be committed to gaol upon criminal charges, some of whom might be innocent, and all of whom the law would presume to be so until found guilty upon trial. With the view, therefore, of diminishing the term of their imprisonment, and of preventing unnecessary expense to the United States in maintaining them in prison, the court deemed it proper to order the special session, as it believed it had power to do. But it is now objected, that if this court has power to order a special session for the trial of criminal causes, it has only the same power which a circuit court of the United States sitting in a state would have; and as such a court would have authority to order it only for the trial of offences against those laws of the United States which are to operate equally throughout the United States by virtue of the general powers vested in congress by the constitution, this court can only order it for the trial of like offences; and not for the trial of offences against what are supposed to be the municipal laws of the District of Columbia.

In support of this objection the counsel for the defendant cited the opinion of a very respectable state judge in Virginia, who has recently discharged upon habeas corpus a person attached by a process from this court sitting in Alexandria for not attending as a witness in a criminal prosecution, then pending before the court. Whether that opinion be cited as authority, or as containing matter of argument, it justly deserves great consideration from this court. It was cited to support the position, that the powers conferred upon this court by the 3d section of the act of the 27th of February, 1801 (2 Stat. 103), which refers to the powers of the circuit courts of the United States, can only be exercised in the same cases in which they could be exercised by a circuit court of the United States sitting in a state; and that as such a court could not exercise them in a case of state municipal jurisdiction, this court cannot exercise them in a case supposed to be of district municipal jurisdiction. This seems to be the main ground on which that decision was made; and although we cannot consider it as authority, we wish it to have all the effect which the reasoning, upon which it is founded, ought to have. It is admitted in the opinion, (which has been published in the public gazettes,) that, "if the commitment be made by a court having jurisdiction to commit, that court," (that is, the court in Virginia,) "ought not to discharge, although the judgment of the committing court be erroneous." The judge then proceeds to inquire whether this court had power to send an attachment into Virginia for a witness who had failed to obey a subpœna, previously served on him. He admits that the constitution of the United States does vest in congress the power of arming their courts with those powers which are necessary to enable them to discharge their duties; and that in one case it imperatively requires that the courts should exercise those powers; for the sixth amendment declares, "that in all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor." The judge also admits that, "before the establishment of the constitution, it was well known in every state of the Union what was the nature and character of the compulsory process by which the commands of the courts were enforced." That "the process of attachment was a well-established process for that purpose, and when the constitution vested congress with the power of establishing courts, the 17th clause of the 18th section," (of the 1st article,) "may be fairly understood as vesting them with the power of authorizing those courts to issue attachments, or other process, necessary to carry their orders into effect." The judge further observes: "In our state courts there is no doubt of the existence of the power. We are in the daily habit of imposing fines, or attaching witnesses who refuse to obey the process of subpœna; and I do not see how courts of justice can perform the business before them without the existence of this or some equivalent power." "But," continues the judge, "I have not yet seen any law of congress which authorizes the circuit courts of the United States in any case to issue attachments to run into another district or state than that in which they are hold-

ing their courts. It was deemed necessary to give an express authority by the act of 1793 (1 Stat. 89), to the courts to issue subpœnas into another district or state. The act did not follow up this grant by authorizing attachments to run into another state, in case of disobedience of the process of subpœna. The service of any kind of process from one state in another state was at that time unusual, and if it was necessary that a law should be passed to sanction that practice, it is much more necessary that the more searching and more compulsory process of attachment should be authorized by law. If this case then rested here, I am of opinion that I should be justified in discharging the petitioner, unless some act of congress can be shown authorizing a circuit court of the United States to issue attachments into another state than that in which it is sitting. But the investigation which has taken place here will probably justify, if it does not require, that I should examine the question whether the circuit court of the District of Columbia has a right to issue the process of subpœna beyond the territory of the district, in a case arising under the municipal laws of the district." It is the argument of the judge upon this point which has been urged upon this court in the present cause. As we understand it, it is to the following effect. In each state there are two sets of courts,—federal courts and state courts. The federal courts can only exercise the jurisdiction expressly granted by the constitution of the United States. All other jurisdiction is to be exercised by the state courts. The federal courts had power, by the act of 1793, to send their subpœnas into other districts than that in which they should sit. The state courts had no power to send their subpœnas into the other states. In all cases of municipal jurisdiction, therefore, no subpœna could go out of the state. Congress, in organizing the District of Columbia, might have established two sets of courts in the district, one to exercise the federal jurisdiction, and one to exercise that portion of the municipal jurisdiction which was exercised by the state courts at the time of the transfer of jurisdiction to the United States. If it had done so, one set of the courts would have had power to send its subpœnas out of the district, and the other would not; because, when congress assumed the jurisdiction over this district, and adopted the laws of Virginia and Maryland as the laws of this district, they also took with them the principle, that no state process could run beyond the limits of the state. Congress, however, established only one court in the district. "But still," the judge observes, "they kept up the distinction between federal judicial power, and municipal, or quasi state judicial power; although they conferred both kinds of power on the same court. Thus, in the first section, they enacted that the laws of the state of Virginia should continue to be the law of one part of the district, and the laws of Maryland of the other." Those were the municipal laws of Maryland and Virginia, disrobed of the judicial powers which had been conferred exclusively on the federal tribunals; and connected with the principle just mentioned, "that the process of their courts should not issue beyond their territory; and, consequently, the process of the courts of the district, so far as it was required to carry into effect those laws, could not issue beyond the territory of the district." "Congress," (the judge proceeds,) "in thus prescribing for the district a code of municipal laws, intended to act for them in the same character that the legislatures of the several states act towards the people of their states. They had previously provided for them a set of federal laws in common with the rest of the United States." "Thus the people of the district were immediately provided with two sets of laws, municipal and federal." "It then became necessary to provide a court or courts to carry into effect, within the district, as well the federal as the municipal laws. They created one court for the whole district, and vested it with all the powers by law vested in the circuit courts of the United States." Section 3. "The power conferred by this third section, on the circuit courts of Columbia, is the same with that conferred on other circuit courts, and not greater. What, then, were the powers quoad hoc conferred on the other circuit courts? To issue subpœnas into another district, in cases before them of which they had cognizance; that is, in federal, not municipal cases; of these latter they have no jurisdiction, and, therefore, cannot, in such cases, issue subpœnas into another district. But the circuit court of Columbia has the same powers with those of the other circuit courts, that is to say, they have the power in federal cases to issue subpœnas to another district; but, in municipal cases, in cases arising under the laws of Virginia and Maryland, they have no such power. To allow them the power in such cases, is not to give them merely all the powers belonging to the other circuit courts, but more than all; which cannot be allowed." The judge subsequently observes: "This power (the power of exclusive legislation,) consists of two parts: First, the specific given power of federal legislation; and, secondly, the residuum of legislative power, which, in other cases, is reserved to the states. This residuum is surely as much local as is the legislative power of the states. Congress stands, to the district, in the same relation that the state legislatures do to the respective states. And as a state legislature can only legislate for its own state, and cannot enforce its laws beyond its own limits; so neither can congress, in legislating for the district, cause its district laws to be carried into effect in the states, without their con-

currence. In taking this view of the constitution, I should say that congress has no right to pass any law directing the process of the courts of Columbia to run into any of the states for the purpose of enforcing the merely municipal laws of the district, though these municipal laws should be enacted or adopted by congress itself. I do not, however, think that they have, as to this matter, passed such a law."

One of the principal errors of this argument seems to us to have arisen from confounding the powers of a court with the jurisdiction of a court; from using the terms "powers," and "jurisdiction," as synonymous; and affirming of one what is only true of the other. No two ideas can be more distinct than power and jurisdiction. The powers of a court are the means by which it is to exercise its jurisdiction. Power, in the sense in which it is used in the several judiciary acts of congress, and in the third section of the act of 27th February, 1801, which establishes this court, is not jurisdiction, nor is jurisdiction power; and in the acts of congress the powers, and the jurisdiction of the courts, are often given in different sections. In the judiciary act of 1789, which was drawn up by Mr. Ellsworth, then a member of congress, and afterwards chief justice of the United States, the powers of the courts of the United States, are given in sections 3, 5, 7, 14, 15, 17–20, 23, 26, 30–33; but the jurisdiction of the respective courts is given in sections 9–13, 21, 22, and 25.

So in the act of the 13th of February, 1801, (to which this court is referred for an enumeration of its powers,) the powers of the respective courts are given in sections 2, 7, 8–10, 15, 18, 24, 26, 30, 31; but their jurisdiction is given in sections 11–14, 16, 20, 33, and 34. In the fifth section of the act of 29th of April, 1802 (2 Stat. 456), "to amend the judicial system," the powers and jurisdiction of the circuit courts constituted by that act, are given in the same section, and the same sentence; but the words "power," and "jurisdiction," are both used. The language is, "And the circuit courts, constituted by this act, shall have all the power, authority, and jurisdiction, within the several districts of their respective circuits, that before the thirteenth day of February, one thousand eight hundred and one, belonged to the circuit courts of the United States." By thus using both terms, it is evident that congress did not consider either of them alone as sufficient to convey the ideas included in both; and that the word power, as applied to a court, did not necessarily include the idea of jurisdiction; nor the word jurisdiction, that of power. Still less does the word "powers," (in the plural,) which is the term used in the grant of the powers of this court, imply jurisdiction, particularly, if the jurisdiction of the court, as in the present case, be expressly given in a separate and distinct section. In the seventh section of the act of the 29th of April, 1802, it is enacted, that the district courts thereby directed to be holden, "shall, respectively, have and exercise, within their several districts, the same powers, authority, and jurisdiction, which are vested by law in the district courts of the United States." The act of the 24th of February, 1807 (2 Stat. 420), authorizes the appointment of a sixth associate justice of the supreme court of the United States, and constitutes a seventh circuit, consisting of the districts of Kentucky, Tennessee, and Ohio; in which circuit courts are erected, and by the third section it is enacted, "That all the authority, powers, and jurisdiction, vested in the several circuit courts of the United States, or the judges thereof, or either of them, shall be, and hereby are vested in, and may be exercised by the several circuit courts of the seventh circuit, and the judges thereof." And by the first section it is enacted, "That so much of any act or acts of congress as vests in the district courts of the United States in the districts of Kentucky, East and West Tennessee, and Ohio, the powers, authority, and jurisdiction, of the circuit courts of the United States, shall be, and the same is hereby repealed." And by the fourth section it is enacted, that "all the authority, powers, and jurisdiction, vested in the several district courts of the United States, and the judges thereof, in those districts in which circuit courts are now held, shall be retained, and may be exercised, by the several district courts of Kentucky, East and West Tennessee, and Ohio, and the several judges thereof." By the act of the 31st of January, 1797 (1 Stat. 496), which first established a district court of the United States in the district of Tennessee, it is enacted that the judge of that district "shall, in all things, have and exercise the jurisdiction and powers, which by law are given to the judge of the district of Kentucky." By the act of February 19, 1803 (2 Stat. 201), erecting a district court of the United States in the district of Ohio, the same jurisdiction and powers are given in the same words. The same jurisdiction and powers are given in the same words to the district court of the district of Orleans, by the act of the 26th of March, 1804 (2 Stat. 283). And to the district court of the district of Louisiana, by the act of the 8th of April, 1812 (2 Stat. 701). And to the district court of the district of Indiana, by the act of the 3d of March, 1817 (3 Stat. 390). And to the district court of the district of Mississippi, by the act of the 3d of April, 1818 (3 Stat. 413). And to the district court of the district of Illinois, by the act of the 3d of March, 1819 (3 Stat. 502). And to the district court of the district of Alabama, by the act of the 21st of April, 1820 (3 Stat. 564). And to the district court of the district of Missouri, by the act of the 16th of March, 1822 (3

Stat. 653). There are several other acts of congress respecting the courts of the United States, in which the distinction is clearly kept up between the powers and the jurisdiction of the courts.

Two courts, having the same powers, may have very different jurisdictions. A power, given to a court of limited jurisdiction, to issue all writs and process necessary for the exercise of its jurisdiction, is as large as a like power given to a court of more extensive jurisdiction; and if given in the same words, would be the same power. The powers given to a court are given to enable it to exercise its whole jurisdiction, not a part only. It cannot be understood that congress intended to give this court the identical power which it had given to the other circuit courts; for that was a power to be exercised elsewhere, in the other districts of the United States, and not here. And if the word "same," which is relied upon, means identical, as it must, to support the argument, there is as much reason to limit the power to the territorial districts for which it was given, as to limit it to the subjects of jurisdiction for which it was given. The powers given to the circuit courts of the United States were given to enable them to exercise their jurisdiction, in their respective districts. And the powers given to us were given to enable us not to exercise their jurisdiction in their districts, but our own jurisdiction in our own district. In order to give effect to the evident intention of congress, the powers of the circuit courts of the United States must be coextensive with their jurisdiction, and the powers of this court coextensive with our jurisdiction. If the powers which are given to this court are only applicable to that class of cases of which a circuit court of the United States, sitting in a state, would have jurisdiction, we have no powers by which to exercise the residue of our jurisdiction. We have no power to issue a writ in a suit between two citizens of the district; nor, in such a case, to summon a jury; nor to compel the attendance of witnesses; nor to issue execution. The laws of Maryland and Virginia, giving powers to their courts of various descriptions, confer no powers on us. Many cases, indeed, arise under those laws, of which we have cognizance; not, however, by virtue of any power or jurisdiction conferred by those laws upon the courts of Virginia and Maryland, but solely because the grant of powers and jurisdiction to those courts gave rights to parties, out of which cases arise, under the adopted laws, of which this court has cognizance by virtue of the jurisdiction given to this court by the acts of congress. It cannot be supposed, then, that congress intended to give that restricted sense to the words "all the powers," which would limit the exercise of those powers to that class of cases of which a circuit court, sitting in a state, would have jurisdiction, and leave us entirely without power to exercise by far the larger portion of the jurisdiction which it conferred upon us. Such an idea has never been suggested in this court, either from the bar or the bench, for the thirty-three years during which this court has existed.

It has been before observed, that in the argument we have been considering, the terms power and jurisdiction are used as synonymous, and that the error appears to us to have arisen from affirming of one, what is only true of the other.

That the terms were considered as synonymous, and used promiscuously throughout the argument, is evident to any one who reads it. Taking it, therefore, for granted, that they were synonymous, and that what was true of one, might be affirmed of the other, the argument is, in effect, this: The jurisdiction of the circuit courts of the United States is confined to a certain class of cases. The power of the circuit court of the District of Columbia, is the same as that of the circuit courts of the United States. Therefore, the power of the circuit court of the District of Columbia is confined to a certain class of cases. It is evident, that this argument cannot be valid, unless the powers and jurisdiction of a court are identical, and were so understood by the legislature when they passed the act of the 27th February, 1801. That this was not their understanding, is evident, not only from what has been before observed, but because, after giving the powers in the 3d section, they proceed to give the jurisdiction in the 5th; and that jurisdiction is very different from the jurisdiction given to the circuit courts of the United States. If the argument were sound, it would equally prove that the jurisdiction of this court is confined to what have been called federal cases. The argument would then stand thus: The jurisdiction of the circuit courts of the United States is confined to federal cases. The power of the circuit court of the District of Columbia, is the same as that of the circuit courts of the United States. Therefore, the jurisdiction of the circuit court of the District of Columbia is confined to federal cases. But it is admitted in the argument, that the jurisdiction of the circuit court of the District of Columbia is much more extensive than that of the other circuit courts. An argument which leads to admitted false conclusions, cannot be valid. We are satisfied, that it was not the intention of congress to limit our powers by the jurisdiction of the circuit courts of the United States, nor to confine the exercise of those powers to that class of cases which was within the jurisdiction of those courts; but to give us powers coextensive with our jurisdiction. If we have power to issue a subpœna for a witness in any case, we have power to issue it in every case within our jurisdiction. If the other circuit courts have power to send a subpœna in a criminal case, beyond their districts, we have power to send one beyond our district. If they have power to send their process of attachment beyond their districts, so have we to send an attachment beyond ours. If they have power

to hold special sessions for the trial of criminal causes, so have we. The act of congress of the 2d of March, 1793, c. 22, § 6 (1 Stat. 333), declares: "That subpœnas for witnesses who may be required to attend a court of the United States in any district thereof, may run into any other district, provided that in civil causes, the witnesses living out of the district in which the court is holden, do not live at a greater distance than one hundred miles from the place of holding the same." And by the judiciary act of 1789 (1 Stat. 73), it is enacted, "that all the before-mentioned courts of the United States," (including the circuit courts,) "shall have power to issue writs of scire facias, habeas corpus, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;" clearly indicating that the powers granted, were the means by which they were to exercise their respective jurisdictions, and that those powers should extend to every case within their jurisdictions.

The authority of the courts of the United States, in criminal causes, to send subpœnas for witnesses into any district, is unlimited; the exception of civil causes, confirms the general rule in criminal causes. And, by the 17th section of the said act, power is given to all the said courts of the United States, "to grant new trials," &c., and to punish by fine or imprisonment, at the discretion of the said courts, all contempts of authority in any cause or hearing before the same." If a criminal cause be pending before a circuit court of the United States in any district, it cannot exercise its jurisdiction, and try the cause, without witnesses. It cannot obtain witnesses without issuing a writ of subpœna. That writ is necessary to enable it to exercise its jurisdiction, and is agreeable to the principles and usages of law. The court, therefore, has power to issue it. It is a writ commanding the marshal to summon the witness to attend the court. If he refuses to obey the summons, he is thereby guilty of a contempt of the authority of the court. But as the court cannot exercise its jurisdiction without his attendance, another writ becomes necessary; and the only writ agreeable to the principles and usages of law, in such a case, is the writ of attachment founded upon the contempt of the authority of the court, and the power of the court to fine and imprison for that contempt; for, in order to fine and imprison the party guilty of a contempt, he must be brought before the court. The court, therefore, has power to issue the writ of attachment; and it is the only writ applicable to the case, and agreeable to the principles and usages of law. And it is the duty of the court to issue it, whenever it is necessary, to enable the court to exercise its jurisdiction. It is the right of the party, whether that party be the United States, or an individual, to have compulsory process for his witnesses. And so important was that right deemed, that an amendment of the constitution of the United States was obtained to secure it to the accused in criminal prosecutions. And by the act of the 30th of April, 1790 (1 Stat. 112), it is enacted, that "every such person, or persons, accused or indicted of the crimes aforesaid, shall be allowed and admitted in his said defence, to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them." Wherever the witness is in contempt for not obeying the subpœna, the writ of attachment must reach him, or the express command of the constitution will be nugatory. The words of the 6th amendment of the constitution, in relation to this subject, are, "In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor." This amendment was intended to secure the enjoyment of the right to the accused, as some doubt might arise, inasmuch as it was not enjoyed in England; but nobody ever doubted the right of the United States to have compulsory process for their witnesses. The subpœna would be nugatory, if it could not be followed by an attachment; and it cannot be supposed that congress intended to authorize the court to issue a command, the obedience to which it could not enforce. It is clear that the accused has a right to a subpœna to run into any district in which his witness may be, and that he has a right, under the constitution, to have compulsory process for obtaining that witness. It cannot be supposed that an act of congress is necessary to give him that right; for that would be to give congress power to withhold a right solemnly granted by the constitution itself. No act of congress was necessary to give validity to the right, and no act of congress could prevent the accused from enjoying it. If, however, an act of congress was necessary, the 28th section of the act of the 30th of April, 1790 (1 Stat. 112), is such an act. But although it seems to be admitted that the accused has the right, yet it is denied that the United States have it. This seems to be so unreasonable a doctrine, that the law ought to be very plain that should justify it. One would hardly believe that the construction of the constitution, and of the act of congress which could lead to such a conclusion, could be correct. The argument in support of it, is this: The act of 1793, which provides that subpœnas for witnesses may run into any other district, &c., is evidence that they could not so run before that act; and as an act of congress was necessary to enable them so to run, an act of congress is equally necessary to enable writs of attachment for disobedience of such subpœnas to run into any other district, &c. But this is not a necessary consequence. In one case, an act might be necessary to remedy an evil, or to supply a defect, or to remove a doubt; but, in the oth-

er, there might be no evil to be remedied, no defect to be supplied, and no doubt to be removed. The evil to be remedied by the 6th section of the act of 2d of March, 1793 (1 Stat. 333), was the uncertainty whether the circuit court could lawfully summon a witness who resided out of the district in which the court sat; and whether, if summoned, the witness was bound to obey the summons. But there was no uncertainty, whether, if the witness were lawfully summoned, and bound to obey the summons, the court could compel him to attend. There was a reason, therefore, for passing an act ascertaining the power of the court to send its summons out of its district, and the consequent obligation of the witness to obey it; but none for giving further powers to the court to compel obedience to its lawful commands. If the act of 1793 is evidence that an act of congress was necessary to enable the court to send its subpœna into other districts, the omission of congress, to pass an act authorizing the court to follow up its subpœna, by an attachment, for not obeying it, is equally evidence that no such act was necessary, and that the court already possessed the power. All that the court wanted was lawful authority, in a criminal cause, to command the attendance of a witness who resided out of the District. It had already all the power necessary to enforce its lawful commands. But, it is said, that, when congress organized this District, there were, in each state, two sets of courts, namely, federal courts, exercising federal powers, and state courts, exercising municipal powers. That the federal courts had the power to send subpœnas beyond the limits of the state, but the state courts had not. That the distinction between the subjects of jurisdiction of these courts was in view of congress, when they were adopting a system of laws for the District. That "it was in their power to have two sets of courts, as in every other part of the United States; that is, one court to be vested with federal powers, another court, with municipal powers. But, that the size of the territory and the number of people did not require such a division of courts, and that considerations of economy, probably, forbade the appointment of so many judges; and that they therefore decided on having only one court. But still, (it is said,) they kept up the distinction between federal judicial power, and municipal, or quasi state judicial power; although they conferred both kinds of power on the same court." The fact relied upon to support the assertion, that congress, in granting jurisdiction to this court, still kept up the distinction between its federal and its municipal jurisdiction, is, that congress adopted the laws of Maryland and Virginia, as they then existed, as the laws of this District. "That it was a fixed principle of those laws, that the process of their courts should not issue beyond their territory;" "that, when those laws were adopted, that principle was adopted with them, and, consequently, that the process of the courts of that District, so far as it was required to carry into effect those laws, could not issue beyond the territory of the District."

It has been before observed, that this court derives no part of its powers or jurisdiction from the laws of Virginia or Maryland, thus adopted; nor can those laws, in any manner, limit or abridge the powers or jurisdiction of this court. If that be the case, there is no pretence for saying, that congress, in granting powers and jurisdiction to this court, "kept up the distinction between federal judicial power, and municipal, or quasi state judicial power." The terms in which our powers and jurisdiction are given, and which have been already recited, indicate no such distinction; nor is it intimated or suggested in any subsequent act of congress. Nor could it be; for no such distinction exists in this District. That distinction is only applicable to the federal powers, as exercised within the states. Here it is all federal power and federal jurisdiction. In the states there is federal jurisdiction and state jurisdiction, and it is necessary to keep up the distinction, and draw the line between them. But here there is no danger of collision. Here are no conflicting state rights. Here is no government but that of the United States; no executive but that of the United States; no legislature but that of the United States; and no judiciary but that of the United States. All the powers, authority, and jurisdiction exercised here, are as much, and as purely federal, as the powers, authority, and jurisdiction exercised by the United States, within the respective states. This District is wholly federal. It is the creature of the constitution of the United States. It is the seat of the government of the United States. The reasons for providing such a district are to be found in the history of the congress of the confederation, who found, by experience, that they could not rely upon a state government for protection from insult, and who felt themselves degraded by being obliged to sue for protection to the state authorities. The framers of the constitution, therefore, provided for a national district, to be under the sole and exclusive legislation of congress, where every member might feel that he was standing upon his own ground: where the officers of the national government might be protected by the national power; where every citizen of the United States who may have business to transact with the national government, or its officers, may be sure of protection, and where all the citizens of the United States may meet upon a common ground, and feel that they have equal rights. The constitution of the United States gave to congress the exclusive legislation; and the states of Virginia and Maryland ceded the territory. No portion of the state sovereignty or jurisdiction remained in or over the ceded district. The only sovereignty in the District is that of the United States. The only laws that are or can be of force in the

District, are the laws of the United States. The laws of Maryland and Virginia, which were adopted by the act of congress of the 27th of February, 1801 (2 Stat. 103), do not operate here proprio vigore, but solely by virtue of the act which adopted them in mass, instead of enacting them totidem verbis. Such of those laws only can be considered as adopted as were applicable to the circumstances of the District; such as were local in their nature and operation; and such as were applicable only to state officers, or state courts, could not operate here, because the subjects upon which they were to operate did not exist here. That congress did not understand that the court could derive any powers from the laws of Virginia and Maryland, which granted powers to their state courts, is evident, from their having, by the act of the 3d of March, 1801 (2 Stat. 115),—only six days after passing that of 27th of February, 1801 (2 Stat. 103) which adopted those laws,—expressly enacted, "That the circuit courts for the District of Columbia shall be, and they are hereby invested with the same power respecting constables, inspectors, and the inspection of tobacco and flour, surveyors, mills, highways, and ferries, for the county of Alexandria, as have heretofore been invested in the county courts of Virginia, and for the county of Washington, the same power and authority as have been heretofore exercised by the county and levy courts of the state of Maryland, with power to appoint to all other offices necessary for the said District, under the respective laws of Maryland and Virginia." And by the 3d section of the same act of the 3d of March, 1801 (2 Stat. 115), it is enacted, that "the circuit court for the said county of Alexandria shall possess and exercise the same powers and jurisdiction, civil and criminal, as is now possessed and exercised by the district courts of Virginia." These provisions show clearly that this court could not derive powers or jurisdiction from the laws of Virginia and Maryland, granting powers and jurisdiction to their courts; and, it seems to follow, that our powers and jurisdiction could not be limited or abridged by any law of either of those states, limiting or abridging the power or jurisdiction of their own courts. If, therefore, there had been any law of the state of Virginia expressly forbidding its courts to send its subpœnas for witnesses beyond the limits of the state, it would impose no restriction upon the power of this court to issue its subpœnas beyond the limits of the District. There is, however, no such express law of Virginia. That state has laid no such restraint upon herself. It is a restraint imposed upon her by other sovereign states. But it is said to be "a fixed principle of those laws," (that is, of the municipal laws of Virginia and Maryland,) "that the process of their courts should not issue beyond their territory." It is not, however, a principle of the municipal laws of Virginia, except so far as the law of nations may be considered as a part of those municipal laws. It is a restriction imposed upon sovereigns, by the law of nations, and results from the principle of equality among sovereign states. The rule is, that all sovereigns are equal, and that no one can exercise any authority within the territory of another, without his consent. It is the mutually repellent power of each that supports the rule, and not the municipal law of either. It was not a principle which could be applied to the District of Columbia, unless that District were a sovereign co-equal with Virginia, (which is not the case.) The sovereign of the District of Columbia is the United States; and if the principle is applicable at all, it must apply to the United States and Virginia, not to the District of Columbia and Virginia. But Virginia, by adopting the constitution of the United States, has given permission to the courts of the United States to send their process into Virginia, in all cases of which the judicial power of the United States has cognizance; and it is admitted, in the argument, that a circuit court of the United States, sitting in another district, composed of another state, has power to send its subpœna into the district of Virginia; but it is denied that a circuit court of the United States, sitting in the District of Columbia, has any such power, except in cases supposed to be of purely federal jurisdiction; and we are thus brought back to that point, a part of the argument in support of which has been already considered. It seems clear to us, that it cannot be supported upon the principle, that the process of one state cannot run into another; because the District of Columbia is not a state; and because, as between the state of Virginia and the United States, the principle is yielded by Virginia as to all the jurisdiction given to the United States by the constitution. Nor is it supported by any supposed distinction between our powers in relation to our supposed federal and municipal jurisdiction; for it is all federal. It is admitted in the argument that this court has the power to send its subpœna into another district "in federal cases;" and among the admitted federal cases are "all cases arising under the constitution and laws of the United States;" and "controversies to which the United States shall be a party."

Mr. Chief Justice Marshall, in delivering the opinion of the supreme court of the United States in Cohen's Case, 6 Wheat. [19 U. S.] 379, says, "a case in law or equity consists of the right of the one party as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either." All cases arising in the District of Columbia are cases arising under the constitution and laws of the United States; for there are no other laws in force in the district than the laws of the United States; no other sovereignty to be offended than that of the United States. All crimes and offences committed in that district are

offences against the United States, and every prosecution therefor is a controversy to which the United States is a party. Every case therefore arising in the district, is a federal case, and therefore, according to the admission of the argument, this court has a right to send its subpœna into another district in all cases. In criminal cases to any distance; in civil, to the extent of one hundred miles. And such has been the unquestioned practice of this court ever since its establishment in 1801.

But there is another ground taken in the argument, which also deserves consideration. It is said that "congress stands to the district in the same relation that the state legislatures do to the respective states; and as a state legislature can only legislate for its own state; and cannot enforce its laws beyond its own limits, so neither can congress, in legislating for the district, cause its district laws to be carried into effect in the states, without their concurrence." This proposition might be admitted; for the power claimed is not to enforce in Virginia the laws enacted for the District of Columbia, but to enforce them within that district; and so far as regards the necessary means of so enforcing them, Virginia has given her consent by adopting the constitution of the United States which, it is admitted in the argument, "does vest in congress the power of arming their courts with those powers which are necessary to enable them to discharge their duties." "And when the constitution vested congress with the power of establishing courts, the seventeenth clause of the eighth section" (of the first article,) "may fairly be understood as vesting them with the power of authorizing those courts to issue attachments, or other process necessary to carry their orders into effect." But it cannot be admitted that congress in legislating for the district is, in relation to the states, restricted by that rule of the law of nations which prevents one sovereign from sending his process into the territory of another. If such be the law a governor of Virginia may visit the seat of government of the United States. He may be waylaid by some enemy from Virginia, and insulted, or beaten, or murdered in the District of Columbia; and in five minutes, the offender and the witnesses may escape into Virginia; where, if such be the true construction of the constitution, the offender can neither be arrested nor tried, and from whence, the witnesses cannot be compelled to come and testify in the only tribunal that has cognizance of the offence. The same thing would happen, in places purchased by the consent of a state legislature for a fort or magazine, an arsenal or a dock-yard, over which congress has the same power of exclusive legislation that it has over this district. Every fort and dock-yard would be a petty sovereignty, and restricted by the law of nations from sending its process into the neighboring states, although its sovereign was the United States. But it has been decided by the highest tribunal in the United States that "this power" (of exclusive legislation over the district,) "like all others which are specified, is conferred on congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the District they necessarily preserve the character of the legislature of the Union; for it is in that character alone that the constitution confers on them this power of exclusive legislation." "The clause which gives exclusive legislation, is unquestionably a part of the constitution, and as such binds all the United States." This is the language of Chief Justice Marshall in delivering the unanimous opinion of the supreme court of the United States in Cohen's Case, 6 Wheat. [19 U. S] 424. After answering an argument drawn from the analogy, of the double power of legislation (as it was supposed to be) vested in congress, to the double jurisdiction of a court which exercises jurisdiction at common law and in equity, the chief justice proceeds thus: "Since congress legislates in the same forms, and in the same character, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire whether there be any thing in the nature of this exclusive legislation which necessarily confines the operation of the laws, made in virtue of this power, to the place with a view to which they are made. Connected with the power to legislate within this district, is a similar power in forts, arsenals, dock-yards, &c. Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed in any of the states. In the act for the punishment of crimes against the United States, murder committed within a fort, or any other place, or district of country under the sole and exclusive jurisdiction of the United States, is punished with death. Thus congress legislates in the same act, under its exclusive and its limited powers. The act proceeds to direct that the body of the criminal, after execution, may be delivered to a surgeon for dissection; and punishes any person who shall rescue such body during its conveyance from the place of execution to the surgeon to whom it is to be delivered. Let these actual provisions of the law, or any other provisions which can be made on the subject, be considered with a view to the character in which congress acts when exercising its powers of exclusive legislation. If congress is to be considered merely as a local legislature, invested, as to this object, with powers limited to the fort, or other place, in which the murder may be committed, if its general powers cannot come in aid of these local powers, how can the offence be tried in any other court than that of the place in which it has been committed? How can the offender be conveyed to, or tried in any other place? How can he be executed elsewhere?

How can his body be conveyed through a country under the jurisdiction of another sovereign, and the individual punished, who, within that jurisdiction, shall rescue the body? Were any one state of the Union to pass a law for trying a criminal in a court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation. If congress be not equally incompetent, it is because that body unites the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first; or because the power, of exercising exclusive legislation, draws after it, as an incident, the power of making that legislation effectual; and the incidental power may be exercised throughout the Union, because the principal power is given to that body as the legislature of the Union. It is clear that congress cannot punish felonies generally; and of consequence cannot punish misprision of felony. It is equally clear that a state legislature, the state of Maryland, for example, cannot punish those who in another state, conceal a felony committed in Maryland. How then is it that congress, legislating exclusively for a fort, punishes those who, out of that fort, conceal a felony committed within it? The solution, and the only solution, of the difficulty, is, that the power vested in congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the state in which the act has been committed, the government cannot pursue him into another state and apprehend him there, but must demand him from the executive power of that other state. If congress were to be considered merely as the local legislature for the fort or other place in which the offence might be committed, then this principle would apply to them as to other local legislatures; and the felon who should escape out of the fort, or other place in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know that the principle does not apply; and the reason is, that congress is not a local legislature; but exercises this particular power, like all its other powers, in its high character as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution." See, also [Kendall v. U. S.] 12 Pet. [37 U. S.] 619, 636, 648. Nothing need be added to the force of this reasoning, and nothing can impair it. Being the unanimous opinion of the highest judicial tribunal of the country, it conclusively settles the law upon that point. If it were not so; if congress has not the necessary power to carry into effect its exclusive legislation over this District, but is limited to the powers of a local municipal legislature, what security has the government here, more than it would have in one of the states? Every member of the executive department whose duties require his residence in the District; every member of congress; every judge of the supreme court; and every citizen of any of the states, who may visit the seat of government, is liable to every sort of personal injury and insult, with little prospect of redress, if the offender or the witness is disposed to step over the line of the District. Such a construction of the constitution would defeat the great object which the people of the United States had in view when they provided for a seat of the national government; and, therefore, cannot be correct.

We have thus examined what we understand to be the argument to support the position, that the powers given to this court by the third section of the act of congress of the 27th of February, 1801 (2 Stat. 103), can only be exercised in that class of cases which is within the jurisdiction of a circuit court of the United States, sitting in one of the states; and are satisfied that the foundations of that argument are not sustainable. We are satisfied that congress, in exercising its exclusive power of legislation over this District, does not act in the character of a mere local legislature, and is not restrained by any rule of state legislation, or municipal legislation, from giving full effect to that power, by all the means which are within its general powers of legislation on the other matters submitted by the constitution to its jurisdiction. We are satisfied that all the powers of this court are equally applicable to all cases within its jurisdiction; that all cases within its jurisdiction, are cases arising under the constitution and laws of the United States. And that all criminal prosecutions for offences committed in this District, are controversies to which the United States is a party; and, therefore, are strictly of federal cognizance. We are, therefore, satisfied that the power of this court to hold special sessions for the trial of criminal causes, is equally applicable to all criminal causes arising in the District, whether they consist of offences against laws of the United States applicable to the whole territory of the United States, or against laws applicable only to the District of Columbia.

There has been, however, another objection urged by the defendant's counsel to the jurisdiction of the court in this case. It is, that the court, at a special session, can try those causes only which existed at the time of the order for holding it. The terms in which the power is given do not indicate such a restriction. The words in the fifth section of the judiciary act of 1789, are, "And the circuit courts shall have power to hold special sessions for the trial of criminal causes, at any other time, at their discretion." But it has been argued from the nature of the power,

that there must be causes to try at the time of the order for holding the court, or it might happen that there would be none to try when the court should be held; and that if the order be founded upon the existence of causes at the time of the order, it should be limited to the trial of those causes only. This construction of the law, is said to be corroborated by the terms used in the third section of the act of the 2d of March, 1793, which authorizes the supreme court, or a justice thereof and the district judge, "to direct special sessions of the circuit courts to be holden for the trial of criminal causes at any convenient place within the District, nearer to the place where the offences may be said to be committed, than the place or places appointed by law for the ordinary sessions, and requires the clerk to give thirty days' notice of the time and place for holding the same; and provides, "that all process, writs, and recognizances, of every kind, whether respecting juries, witnesses, bail, or otherwise, which shall relate to the cases to be tried at the said special sessions, shall be considered as belonging to such sessions in the same manner as if they had been taken in reference thereto." The act of 1789 (1 Stat 73) only authorized the circuit court when in session, to order special sessions. The act of 1793 (Id. 333) authorized the supreme court, or a judge thereof, and the district judge, out of court, to order them. The act of 1789 only authorized them to be holden at a different time. The act of 1793 authorized the holding of them at a different place, and that place was to be nearer to the place where the offences may be said to be committed. The place, therefore, where the offences were said to be committed, must (it is said) be ascertained before the order for a special session can be made under this act; and, of course, the offences must have been committed. Subsequent offences, committed after the order for such a special session, may not have occurred at the same place, but, perhaps, at a place as far removed from the ordinary place of session in an opposite direction; and it is said that it can hardly be supposed that it was the intention of congress to give the special session jurisdiction of such subsequent case; and if not of such a subsequent case, it cannot be presumed that they meant to give it jurisdiction of any subsequent case; for it would be impossible to draw the line; and the court could not say how near to the place of session the subsequent case must have occurred, to bring it within the jurisdiction of the session, unless that line should be prescribed by law. The provision, in the same section, that the process, writs, recognizances, &c., "which relate to the cases to be tried at the said special sessions, shall be considered as belonging to such sessions in the same manner as if they had been issued or taken in reference thereto," it is said, supposes a definite number of cases, and that the process, writs, recognizances, &c., had been issued or taken before the order for the special session; for if issued and taken after that order, and if the special session had cognizance of them, they would be issued and taken in reference thereto. It is said, also, that the provisions of the fifth section of the act of 1789 (1 Stat. 73), and the third section of the act of 1793 (Id. 333), respecting the power of ordering special sessions, being in pari materia, should have a similar construction; and as the power given by the act of 1793, seems to be confined to special sessions for the trial of causes existing at the time of making the order for holding them, the power given by the act of 1789, should be confined in the same manner. The answer to this argument is not difficult.

The special session in the present case, was ordered under the act of 1789, and not under the act of 1793. Those two acts, are not in pari materia, so far as relates to the cases which may be subject to the cognizance of the special sessions which may be holden under each law respectively. A special session under the act of 1789, has cognizance of criminal causes arising in any part of the district; but a special session under the act of 1793 has cognizance only of offences committed in a part of the district nearer to the place of special session than to the place of ordinary session. Although it may be necessary, as well under the act of 1789 as under that of 1793 that there should be criminal causes for trial at the time of making the order for a special session, yet there is nothing in the act of 1789, as there seems to be in the act of 1793, from which an inference can be drawn, that the circuit court, when holding a special session under the act of 1789, cannot exercise its general jurisdiction over all criminal causes arising within the district, and existing at the time of holding the same, whether existing or not at the time of making the order for the special session. The act of 1793 provides only for cases in a certain part of the district, remote from the ordinary place of trial; and although it may be necessary, under that act, that some such cases should exist at the time of making the order for the special session, yet it does not follow, that if like cases should arise in the same part of the district after the order and before or during the special session, the court would not have power and jurisdiction to try them at the same special session. Such cases would fall within the reason of the act; which, undoubtedly, was the promotion of the mutual convenience of all the parties, jurors, and witnesses, and the saving of time and expense; and the provisions of the act, that the writs, process, recognizances, &c., should be considered as belonging to such special sessions in the same manner as if they had been issued and taken in reference thereto, will be fully satisfied by applying it to the writs, &c., issued in the cases existing at the time of the order for the special session; and cannot be applicable to cases arising after such order, because the writs, &c., in such cases would be issued and taken in ref-

erence to the special session. If the case arose nearer to the place appointed for the special session than to the place of ordinary session, it would be a case for the trial of which a special session might be ordered; and as a special session was already called for the trial of like causes, there could be no reason why that special session should not have cognizance of the cause. If the case arose further from the place of special session than from the place of ordinary session, it might be that such special session would not have cognizance of it for that reason; but it would not follow that such special session would not have cognizance of a case arising nearer to the place of such special session than to that of the ordinary session. There is nothing therefore in either of the two acts of congress, which prohibits a special session holden under either of them to take cognizance of criminal causes arising after the making of the order for holding such special session. Nor is there anything in the act of 1789 which prevents a circuit court, when holding a special session under that act, from exercising its jurisdiction over all offences arising within the district, excepting those for which prosecutions had been commenced and were pending in a previous stated session; which causes, so pending in a previous stated session, this court, as well as other courts of the United States, have decided were not cognizable in a subsequent special session. The clause of the act of 1789, which gives to the circuit courts power to hold special sessions, is the last sentence of the 5th section; the whole preceding part whereof is occupied in designating the times and places of holding the circuit courts in the respective districts. After prescribing the days on which they should be holden in each district, the words are, "And the circuit courts shall have power to hold special sessions for the trial of criminal causes at any other time, at their discretion, or at the discretion of the supreme court."

The court, when sitting on any day prescribed by the act, could undoubtedly exercise its whole jurisdiction over all criminal causes arising within the district up to the very day of, and even during its session. The clause which gives the power to hold special sessions only authorizes the court to add a session to those previously designated in the same section, without in any manner abridging its powers or jurisdiction when so holden. It has, indeed, been suggested that the clause of the act of 1789, giving the power to hold special sessions, is repealed by the act of 1793. But there is no ground to support such a suggestion. Both acts may well stand together. There is no repugnancy between them. The act of 1789 regards only the time; that of 1793, the place. By the former a special session could be ordered by the court only; by the latter, it may be ordered by judges out of court. The act of 1793, so far from disclosing any intention of repealing that of 1789, on this subject, expressly declares "that the district courts of Maine and Kentucky shall have the like power to hold special sessions for the trial of criminal causes as hath been heretofore given, or is hereby given, to the circuit courts, subject to the like restrictions and regulations."

It has also been objected that thirty days' notice was not given, by the clerk, of the time and place of holding the special session in September. But that is only necessary when the place of holding the session is changed, and the session is ordered by the supreme court, or by a judge thereof and the district judge. That provision does not apply to the special sessions ordered by the circuit court itself under the act of 1789.

Upon the whole, we see no reason to doubt of the jurisdiction of the court in the present case. The motion to quash the indictment is therefore overruled.

Case No. 16,713.

UNITED STATES v. WILLIAMS.

[5 Cranch, C. C. 62.] [1]

Circuit Court, District of Columbia. Nov. Term, 1836.

PHYSICIANS—PRACTICING WITHOUT LICENSE—INDICTMENT—EVIDENCE—BOARD OF EXAMINERS—CHARTER OF MEDICAL SOCIETY.

1. In a prosecution for practising in the medical art, and receiving payment therefor, in the District of Columbia, without having first obtained a license from the medical board of examiners of that district, or producing a diploma, the court will not compel a witness to produce the medicine which he received from the defendant.

2. In such a prosecution the court will not permit the United States to examine witnesses as to any specific instances of which previous notice has not been given.

3. The application, by an oculist, of a liquid to the eyes, is not the practice of medicine, but rather of surgery.

4. In such a prosecution, it is competent for the defendant to show that the charter was vacated by nonuser, and that there was no board of examiners de jure.

5. A board of examiners, not elected and continued in being by filling up vacancies, but elected annually, is not a legal board.

6. It is incumbent upon the United States to show that the medical society had a corporate existence at the time when, &c.; that the board of examiners was originally elected by, at least, seven of the members of the society; and that the officers were duly appointed; and that, although the minutes of the proceedings of the society should be lost, the United States must prove their contents, and show that at the time when, &c., there was a competent board of examiners de jure.

7. An information in the nature of a quo warranto will not be issued at the suit of an individual alone, to try the validity of a private corporation. But, upon an indictment for a violation of the charter, the defendant may show that the charter was vacated.

8. A license to practise medicine is not necessary, if there be no board of examiners de jure.

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

In this case there were five indictments successively found against the defendant [John Williams]. (1) The first, in general terms, charged that the defendant, on the 15th of December, 1836, at, &c., "did practise, within the county and district aforesaid, in the medical art, and receive payment for his services, without first having obtained a license from the medical board of examiners of the District of Columbia, and without the production of a diploma; against the form of the statute," &c. (2) The second was like the first, excepting that it charged that he received payment for his services, "to wit, the sum of fifty dollars from John Mitchell, and the sum of fifty dollars from Joseph S. Wilson."

The jury were first sworn upon these two indictments; and upon the trial, Mr. Key, for the United States, asked Peach, the witness, to produce the two phials of wash or eye-water which the defendant had prescribed for the eyes of his daughter. But the witness objected that he had made a solemn promise to the defendant not to suffer the wash to be examined.

Mr. Brent, for the defendant, cited Starkie, Cr. Pl. 73.

THE COURT (MORSELL, Circuit Judge, contra), refused to compel the witness to produce the wash, considering the ingredients as immaterial, this not being a prosecution for fraud or malpractice; and THRUSTON, Circuit Judge, said the defendant had a right to his secret

Mr. Key then offered evidence of a specific instance of practice and receiving payment, not stated in the indictment, and of which no notice had been given, and contended that as all the instances of practice before the finding of the indictment constitute but one offence, he had a right to give in evidence any specific instance upon the general count, without notice.

But THE COURT (MORSELL, Circuit Judge, contra), rejected the evidence.

By the act of congress of February 16, 1819 (6 Stat. 221), entitled "An act to incorporate the Medical Society of the District of Columbia" (section 1), certain physicians therein named, "and such persons as they may, from time to time, elect, as their successors," are declared to be a corporation, by the name of "The Medical Society of the District of Columbia," and may hold property, not exceeding $6,000, and apply the same "to such purposes as they may judge most conducive to the promoting and disseminating medical and surgical knowledge." By the second section they are to hold four stated meetings every year, namely, on the first Mondays in January, April, July, and October. The officers are to consist of a president, two vice-presidents, one corresponding and one recording secretary, one treasurer, and one librarian, "to be appointed on the second Monday of March, 1819, and on the annual meeting in January forever thereafter, (not less than seven members being present at such meeting.)" By the third section it is enacted, "that it shall and may be lawful for the said medical society, or any number of them attending (not less than seven), to elect by ballot five persons, residents of the district, who shall be styled 'The Medical Board of Examiners of the District of Columbia,' whose duty it shall be to grant licenses to such medical and chirurgical gentlemen as they may, upon a full examination, judge adequate to commence the practice of the medical and chirurgical arts, or as may produce diplomas from some respectable college or society." And by the fifth section it is enacted, "that after the appointment of the aforesaid medical board, no person, not heretofore a practitioner of medicine or surgery within the District of Columbia, shall be allowed to practice within the said district, in either of the said branches, and receive payment for his services, without first having obtained a license, testified as by this law directed, or without the production of a diploma as aforesaid, under the penalty of fifty dollars for each offence, to be recovered in the county court where he may reside, by bill of presentment and indictment; one half for the use of the society, and the other for that of the informer."

THE COURT was of opinion that the giving of advice and the application of external remedies to the eyes was not the practice of the medical, but rather of the chirurgical art, and if it was an offence at all should have been so charged in the indictments.

Verdict, not guilty, on these indictments.

The grand jury then brought in a new indictment, containing four counts: (1) The first count charged that the defendant, not having been a practitioner of medicine or surgery within the District of Columbia before the 16th day of February, 1819, did, on the 15th of December, 1836, practise, within the county and district aforesaid, in the medical art, and receive payment for his services therefor, without first having obtained a license, &c., against the form of the statute, &c. (2) The second count was like the first, except that it charged him with practising in the chirurgical art. (3) The third charged him with practising in the medical art, and receiving payment for his services therefor, namely, fifty dollars from John Mitchell, fifty dollars from Joseph S. Wilson, and fifty dollars from Samuel Peach. (4) The fourth was like the third, except that the charge was for practising in the chirurgical art. At the bottom of the indictment was this notice: "Bill of Particulars. Under this indictment the United States attorney will offer evidence of the traverser's practising in the medical art, and in the chirurgical art, and receiving money therefor from the following persons: John Mitchell, $50, Samuel Peach, $50, Joseph S. Wilson, $50, Samuel Carr, $50. F. S. Key, United States Attorney."

Upon the trial upon this indictment, Mr.

Brent and Mr. Hoban, for defendant, contended that the act only required a license to practice the whole medical art, or the whole surgical art, and did not apply to those who practised only in particular diseases, or in respect of particular organs, such as aurists, dentists, oculists, cuppers, bleeders, &c. The branches mentioned in the statute are not branches of the medical art, or branches of the chirurgical art, but the whole medical art is one branch, and the whole surgical art is the other, of the two great branches into which the ars medicatrix is divided; the one using internal medicines, the other external applications.

F. S. Key and John R. Key, for the United States. The statute intended to prevent the practice of any branch either of the medical or the surgical art, by unskilful and unlearned men, whether they pretended to practise for particular diseases, or particular organs, as general physicians or surgeons.

THE COURT (THRUSTON, Circuit Judge, contra) was of opinion that the statute was applicable to every branch of medicine and surgery.

Mr. Brent, for the defendant, having contended that the charter of the medical society had been surrendered, or abandoned, and the society dissolved, obtained a rule to show cause why an information in the nature of a writ of quo warranto should not be filed to try the question, and it was agreed that it should be heard as part of the present case.

The counsel for the United States contended that such an information cannot be issued at the suit of an individual alone. 2 Kent, Comm. 313; Ang. & A. Corp. 473; Com. v. Union Fire & Marine Ins. Co. in Newburyport, 5 Mass. 230; Wallace v. Anderson, 5 Wheat. [18 U. S.] 291; Ang. & A. Corp. 76, 77, 470. The government may waive the forfeiture. And a judgment of forfeiture now entered would not relate back to the time of the defendant's practice.

Mr. Brent, Jr., admitted that on the ground of abuse there can be no quo warranto without leave of the government, but for non-user there may. There is a difference between declaring a forfeiture of the charter and the non-existence of the corporation. They do not pray the court to dissolve the charter, but to declare it dissolved. They cannot kill the corporation without a quo warranto, but may show it to be dead, and a surrender may be presumed from the non-user. Slee v. Bloom, 19 Johns. 456.

John R. Key, in reply. A mis-user, or non-user, does not destroy the charter.

THE COURT (MORSELL, Circuit Judge, contra) refused to permit the information to be filed; but decided (CRANCH, Chief Judge, contra) that it is competent for the defendant to show in this trial that the charter was vacated.

The grand jury having, during the trial, brought in two more indictments against the defendant, the petit jury was, by consent, sworn upon them also. One of them contained five counts, all charging the defendant with fraud, in obtaining money by false pretences.

1. The first charged that the defendant, being an evil-disposed person and common cheat, did fraudulently personate a certain John Williams, who had been known and esteemed as a doctor of medicine and oculist, and who had deservedly acquired great reputation for his learning and skill, intending to deceive and defraud the good people of the United States, in the county of Washington, in the District of Columbia, and more particularly one Samuel Peach, of his moneys, and by such false pretence, unlawfully, knowingly, and deceitfully obtained from him a large sum of money, to wit, the sum of fifty dollars, with intent to cheat and defraud, and did then and there cheat and defraud the said Samuel Peach of the same, &c.

2. The second count charged that the defendant, being an evil-disposed person and a common cheat, as aforesaid, and contriving and intending unlawfully, fraudulently, and deceitfully to cheat and defraud a certain Samuel Peach of his moneys, did knowingingly, fraudulently, and falsely pretend to the said Samuel Peach that he, the said John Williams, (the defendant,) was a doctor of medicine and an oculist, whereas in truth and in fact the said John Williams was not then a doctor of medicine, and was not an oculist, as he did then and there so falsely pretend to the said Samuel Peach; by which false pretences he then and there unlawfully, knowingly, and deceitfully obtained from the said Samuel Peach a large sum of money, to wit, the sum of fifty dollars, with intent then and there to cheat and defraud, and did, then and there, thereby cheat and defraud the said Samuel Peach of the same.

3. The third count charged that the defendant, being an evil-disposed person and common cheat, with intent, &c., as aforesaid, did knowingly, fraudulently, and falsely pretend to the said Samuel Peach that he, the defendant, was a person well skilled in curing the diseases of the eyes, and that he could cure the disease then existing in the eyes of Mary Ellen Peach, daughter of the said Samuel Peach; whereas in truth and in fact the said John Williams was not a person well skilled, &c., and could not cure the disease then existing in the eyes of the said Mary Ellen, as he so falsely pretended; by which false pretences last aforesaid the defendant did unlawfully, &c. obtain from the said Samuel Peach a large sum of money, to wit, the sum of fifty dollars, with intent then and there to cheat and defraud, and did then and there cheat and defraud the said Samuel Peach of the same.

4. The fourth count was for cheating the said Samuel Peach of fifty dollars, by pre-

tending to give advice and medicine that would cure the disease of his daughter's eyes, whereas, &c.

5. The fifth count was for cheating Peach of fifty dollars, under the false pretence that the defendant was an oculist, and was competent to give, and for fifty dollars to be advanced, would give advice and medicines fit and proper to be administered to cure the disease of his daughter's eyes, and by such false pretence prevailed on Peach to pay him the sum of fifty dollars; whereas in truth and in fact he was not an oculist, and was not competent to give and did not give such advice and medicines; but the advice and medicines which he did give were unfit and improper, &c.

The other new indictment brought in by the grand jury charged that the defendant publicly and falsely pretended that he was an oculist, and offered himself to the good people of the United States in the county of Washington, to be consulted and employed in diseases of the eyes, and was by great numbers of people so consulted and employed; and did offer and sell to divers, to wit, fifty of the said good people, for large sums of money, for his own wicked gain, unlawfully, fraudulently, and deceitfully, certain prescriptions and medicines, falsely pretended by him to be remedies for certain diseases of the eyes, with which the said persons were then and there afflicted, as good and proper remedies for the said diseases, and did so offer and sell and deliver, among others, to Samuel Peach, John Mitchell, Samuel Carr, and Joseph S. Wilson, the said pretended prescriptions and medicines as good and proper remedies, &c., whereas in truth and in fact the said prescriptions and medicines were not good and proper, &c., but unfit and improper, &c., and were well known to the said John Williams not to be good and proper, &c., but unfit and improper; by means of which said false pretences the said good people so consulting and employing the said John Williams, and the said persons so hereinbefore named as aforesaid, were cheated and defrauded of large sums of money, &c.

Mr. Key, for the United States, produced a release by the medical society to Rowland, the informer, of all the society's interest in the penalty; and then offered to examine as a witness, Doct. Sewall, one of the members of the society.

THE COURT (nem. con.) was of opinion that Doct. Sewall was a competent witness in the trial of the issue upon the two last indictments, but not in the prosecution for practising without a license, inasmuch as the court (CRANCH, Chief Judge, dissenting) had decided that it was competent for the defendant to show, in his defence, that the charter was vacated by the non-user.

R. J. Brent, for the defendant, prayed the court to instruct the jury, that if they should believe from the evidence that the board of examiners, acting at the time of the alleged offence, was not elected upon the first Monday or January, 1836; or if, for the last several years the said board has been annually elected, and not constituted by filling vacancies in the same from time to time, as they occurred; or if the times and places for the meeting of the said acting board, were not fixed by the said supposed society, or if the acting president, secretary, and treasurer, or either of them, were not elected upon the first Monday of January, 1836, then the said board of examiners were not authorized (de jure) by law to grant licenses, and the traverser is entitled to a verdict of acquittal. And also, if the jury should find from the evidence, that the officers of the supposed medical society, were not elected by seven members present on the first Monday of January, 1836, as directed by the charter, the said medical society was not in operation, and the defendant is entitled to a verdict of acquittal. And also, if the jury believe from the evidence that from the date of the charter up to the year 1834, there was no medical board elected by at least seven members of the said society, then the right to elect the said medical board, no longer existed in law, and all subsequent elections of said board were illegal and void; and, by consequence, could not authorize them to grant licenses, and the defendant is therefore entitled to a verdict. And also, if the jury believe from the evidence that the election of the different officers of the medical society was not made by at least seven members present, as directed by the charter, on the second Monday of March, 1819, and on the annual meeting in January, from that time to the first Monday of January, 1836, inclusive, then the defendant is entitled to a verdict of acquittal, also, if the jury believe that a resolution was passed by the said supposed society, to pay the debts of the said society, and to divide the funds; and that a division of said funds actually took place, and that for several years there were no operations whatsoever of the said society; and that members of the said society declared they had abandoned it, and considered it dissolved, then the jury may presume a surrender of the said charter, and the defendant is entitled to a verdict of acquittal.

Mr. Brent contended that by the neglect to choose its officers annually, the society is extinct de jure. 2 Kent, Comm. 295. The Case of the Corporation of Banbury, 10 Mod. 346; Rex v. Pasmore, 3 Term R. 238; St. 11 Geo. I. c. 4. The old officers could not hold over after the year. If it were a principle of the common law that they could, the statute of 11 Geo. I. c. 4, would not have been necessary. State v. Wayman, 2 Gill & J. 278; Philips v. Wickham, 1 Paige, 590, confirms 10 Mod. 346; Rex v. Mayor & Burgesses of Tregenny, 8 Mod. 127. That there was no board of examiners de jure.

The board was not, by the charter, to be chosen annually, but to be kept alive by filling vacancies as often as they should occur. See the 7th section of the charter. See, also, Foot v. Prowse, 1 Strange, 625; Hall v. Gough, 1 Har. & J. 122; Bank of Michigan v. Williams, 5 Wend. 478; Rex v. Hughes, 4 Barn. & C. 368, 377, 378; Symmers v. Regem, Cowp. 507; Rex v. Mein, 3 Term R. 598; Rex v. Hebden, 2 Strange, 1109; S. C. Andrews, 388; Rex v. Grimes, 5 Burrows, 2601; Rex v. Peacock, 4 Term R. 686, per Ashhurst, J.; Anon., 1 Barnard, 345; and Ang. & A. Corp. 76, 77. That it was incumbent on the society to fix the times and places for the meetings of the board of examiners, and to fill up vacancies in the board. That there is no evidence of a user of the corporate rights until 1834; no minutes of their proceedings; no lawful president to sign the licences; no notice of meetings; but there is evidence of their breach of trust in dividing among the individual members the corporate funds, which by the charter they were to apply exclusively to the promotion of medical and surgical knowledge. They are bound to show their authority, and must be strictly confined to their charter. 2 Kent, Comm. 299.

John R. Key, contra. Now, user or misuser is not a dissolution of the corporation. It can only be dissolved by a proceeding against the corporation itself. 2 Kent, Comm. 312; 1 Bl. Comm. 485; Bac. Abr. "Corp." 3. Even a forfeiture is not a dissolution until a judgment is pronounced, and all its acts, up to that time are valid. And the judgment must be upon a scire facias, or a quo warranto. The dissolution of a corporation can not be inquired into and ascertained collaterally in a suit against others. U. S. v. Amedy, 10 Wheat. [23 U. S.] 392; Bac. Abr. "Corp." F. or G.

THRUSTON, Circuit Judge, and MORSELL, Circuit Judge, being of opinion against Mr. Key on that point, he said he would abandon it. But he contended that the corporation was, in fact, still in existence de jure and de facto, until a judgment against it. 2 Kent, Comm. 310; Slee v. Bloom, 19 Johns. 456; Rockville Turnpike Co. v. Van Ness [Case No. 11,986], in this court; Mechanics' Bank v. Minor [Id. 9,-385], also in this court. As to annual election of officers, Mr. Key cited 2 Kent, Comm. 295.

THE COURT neither refused nor granted the instructions prayed by Mr. Brent, but (CRANCH, Chief Judge, contra) instructed the jury, that if they should be of opinion from the evidence, that at the time when, &c., there was no board of examiners de jure, the defendant is not guilty under the statute, and that if they should be satisfied by the evidence, that the board was not elected and continued by filling up vacancies, &c., but was, for the last two or three years, elected annually, &c., then there was no legal board of examiners, &c.

MORSELL, Circuit Judge, expressed an opinion that the prosecution was not sustained. That the indictment ought to have averred that there was such a corporation; that the board of examiners was appointed by at least seven of the members; and that the United States must show that the officers were duly appointed; and that although the minutes of the proceedings of the board were lost, yet the United States must prove their contents; and must show that, at the time when, &c., there was a competent board of examiners de jure. And that "if the jury find from the evidence that the election of the board of examiners was by a less number than seven members of said association; that then there was a neglect to elect an integral part of said corporation, and that it was thereby entirely incapable of performing the principal purpose for which the charter was granted, that they could not so restore their power as to make any subsequent legal election of said board of examiners; and that even if it amounts not to a forfeiture, yet by a consequence of law, said corporation is dead; and that if such was the state of this (society) at the time of the offence committed, as charged in the indictment, then they ought to find the traverser not guilty." He said also that he was willing to give the jury the following instruction: "If the jury believe from the evidence that the medical association omitted intentionally to elect the president, vice-president, secretary, and treasurer of the said society for several years after the organization of the society, at the times directed by the charter, and neglected to fill up the vacancies which occurred in the said medical board; and that one or more of the members of the said association withdrew themselves therefrom, declaring that they considered the said corporation as dissolved; and, further, that the said association determined, by resolve of the board, to divide the property and effects of the said society among the individual members thereof; that then the jury may find that there was a surrender of the corporate franchises and privileges of said society, and that the said corporation was dissolved. And if the aforegoing state of things existed, at the time charged in the said indictments when the offence was committed, they ought to find the traverser not guilty."

In this opinion, THRUSTON, Circuit Judge, seemed to acquiesce, and added that in his opinion the society, by its charter, was only authorized to license students, and those who were about to commence the practice, not those already in the practice.

In consequence of this opinion of the court, Mr. John R. Key, in opening his argument to the jury upon the evidence, said he should abandon the prosecution for practising with-

out license, but not on the ground of defect of evidence. The jury after being out two days and one night, returned with a verdict of acquittal upon all the indictments.

Case No. 16,714.

UNITED STATES v. WILLIAMS.

[5 Cranch, C. C. 400.] [1]

Circuit Court, District of Columbia. March Term, 1838.

MARSHAL OF DISTRICT OF COLUMBIA—ACTION ON BOND—FAILURE TO RETURN EXECUTION.

An action will not lie upon the official bond of the marshal of the District of Columbia for not returning an execution, unless he has been required by the rule of court to return it, and has failed so to do.

Debt on the official bond of the marshal of the District of Columbia. The declaration was in the usual form for the penalty of $20,000, with a profert of the bond, the condition of which, upon oyer, appeared to be, "that if the said Henry Ashton" (the marshal) "do and shall, by himself, and his deputies, well and faithfully perform and fulfil all the duties of the said office of marshal of the said District of Columbia, in pursuance of, and according to, the acts of congress in such case made and provided," then the obligation to be void, otherwise of full force and virtue in law; dated February 7, 1831.

The defendant [James Williams] pleaded general performance. The plaintiffs replied specially, setting forth, as breaches of the bond, that sundry executions, particularly described, being writs of fieri facias, issued in favor of the Chesapeake and Ohio Canal Company, against divers individuals, for divers sums of money; and averring as to each execution, that it "was delivered into the hands of the said Henry Ashton, as marshal aforesaid; that the said Henry Ashton ought to have made a true and lawful return thereto; but the plaintiffs aver he wholly neglected so to do, and that the said judgment is still wholly unsatisfied and unpaid to the said company, contrary to the form and effect of the said condition of the said writing obligatory." To this replication the defendant demurred generally.

Mr. Bradley, for defendant, contended that the marshal is not liable to an action upon his bond for not returning an execution, unless he has been ruled by the court to return it, and amerced for not returning it, according to the law of Maryland, 1794, c. 4, § 1, which is in force in this county. That the statute is not cumulative, but exclusive. It is the only mode of proceeding against the marshal; and if a rule is necessary to charge the marshal; a fortiori to charge the surety. The default of the marshal must be judicially ascertained, to justify an action upon his bond. Wats. Sher. 63, 64, 82, 198, 203; 2 Inst. 452, Cheasley v. Barnes, 10 East, 73; Alldred v. Halliwell, 1 Starkie, 117; People v. Spraker, 18 Johns. 391.

R. J. Brent, contra. This question depends on the 27th section of the judiciary act of 1789. The oath of the marshal makes it his duty to make true returns of all lawful precepts to him directed; and the statute gives an action upon the bond for every breach of his duty. The act of Maryland, 1794, c. 54, is only applicable to the sheriffs of Maryland. 1 Com. Dig. (Am. Ed.) tit. "Action for Misfeasance," A, 2; Hinman v. Brees, 13 Johns. 531; Maccubbin v. Thornton, 1 Har. & McH. 194; Barton v. Webb, 8 Term R. 459; People v. Birdsall, 20 Johns. 298.

Mr. Bradley, in reply. No action will lie against the marshal for not making the money, nor for a false return, until the execution is returned; nor for not returning it until called on by the court to return it, and failing so to do, and his default entered upon the record. A fieri facias is not a returnable writ. Wats. Sher. 203; Moreland v. Leigh, 1 Starkie, 388.

THE COURT (nem. con.) gave judgment for the defendant on the demurrer, upon the ground that the marshal is not liable upon his bond for not returning a fieri facias, unless he has been called upon by the court to return it, and has refused.

[See Case No. 16,715.]

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

Case No. 16,715.

UNITED STATES v. WILLIAMS.

[5 Cranch, C. C. 619.] [1]

Circuit Court, District of Columbia. Nov. Term, 1839.[2]

MARSHAL OF DISTRICT OF COLUMBIA—ADVANCES OF MONEY—LIABILITY ON OFFICIAL BOND.

1. The president of the United States has authority to order advances of money to be made by the secretary of the treasury to the marshal of the District of Columbia; and such advances may be presumed to have been made under the special direction of the president; and the sureties of the marshal are liable therefor.

2. The marshal of the District of Columbia and his sureties are liable to account for all common-law fines and forfeitures received by the marshal, whether on execution or otherwise. But he is not liable upon his bond for executions not returned; nor, in this action, for escape of persons taken and in his custody on ca. sa., for fines, &c., whether prayed in commitment in execution or not.

Debt on the official bond of Henry Ashton, late marshal of the District of Columbia. [See Case No. 16,714.]

The breaches assigned were, first, for not accounting for the sum of $6,455.16, advanced to him as marshal; second, for not accounting for certain common-law fines

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

[2] [Affirmed in 1 How. (42 U. S.) 290.]

and forfeitures received by him; third, for not executing certain writs of fi. fa. and ca. sa. put into his hands; fourth, that he suffered certain persons, taken and in his custody on ca. sa. for fines, &c., to escape.

R. S. Coxe, for defendant, contended that by the "Act concerning the disbursement of public money," 31st January, 1823, c. 9 (Pamph. p. 7), all advances of money are prohibited, except to "disbursing officers of the government," "under the special direction of the president of the United States;" and then only so much "as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfilment of the public engagements." That the marshal was not such a disbursing officer as is contemplated by the act. The only money he is to disburse is for the expense of holding the courts, &c., which, by the act of May 8, 1792, § 4 [1 Stat. 277], is to be paid to the marshal at the treasury, after having been examined and certified by one of the judges of the court, after which he is to "pay over" the same to the persons entitled thereto. That act does not contemplate any advance of money to the marshal. Besides, there is no evidence of any special direction of the president to make this advance. It was, therefore, money illegally advanced, and the sureties are not liable therefor.

Mr. Key, for the United States, contra, admits that there is no paper in the departments showing the order of the president to advance money to the marshal, but the order of a head of a department is to be considered as the order of the president. It was in fact made by the secretary of the treasury, whose acts must be presumed to be lawful until the contrary appears. The marshal is clearly a disbursing officer. It could never be expected that he should himself advance all the expenses of holding the courts in the district, and the uniform practice, ever since the commencement of the government, has been to advance money to the respective marshals, to be accounted for at the treasury.

THE COURT (nem. con.) was of opinion that the order of the secretary of the treasury may be presumed to be under the special direction of the president; that the advance was legally made, and that the sureties were liable.

THE COURT also (nem. con.) decided that the marshal and his sureties were liable, on his bond, for all common-law fines and forfeitures received by him, whether upon execution or without execution. See the Maryland law of 1795, c. 74, and the act of congress of March 3d, 1801 (2 Stat. 103).

THE COURT also decided that the marshal was not liable upon his bond, for writs of fi. fa. paid into his hands against persons who had goods, &c. sufficient, &c.; and writs of ca. sa. against persons able to pay; the executions not having been returned.

THE COURT also decided, that the defendant is not liable in this action for the escape of persons taken and in custody on ca. sa. for fines, &c., whether prayed in commitment in execution or not.

Verdict and judgment for the plaintiff.

Both parties took bills of exception.

[A writ of error was sued out from the supreme court, where the judgment of this court was affirmed. 1 How. (42 U. S.) 290.]

Case No. 16,716.

UNITED STATES v. WILLIAMS.

[1 Dill. 485.] [1]

Circuit Court, D. Minnesota. 1871.

CRIMINAL LAW—PLEA IN ABATEMENT—QUALIFICATION OF GRAND JUROR—PRACTICE.

1. Pleas in abatement to an indictment are dilatory pleas; and not being favored, the law requires that they shall be pleaded with strict exactness. (Arguendo.)

[Cited in U. S. v. Hammond, Case No. 15,294.]

[Cited in State v. Duggan, 15 R. I. 415, 6 Atl. 597.]

2. A plea in abatement construed to mean that the indictment should not be further prosecuted because an interested person caused himself and others to be nominated and placed upon the grand jury which found the bill.

3. Whether such a plea is good, quere? Authorities cited.

4. Distinction suggested between disqualification of a juror, absolutely pronounced by statute, such as alienage, non-residence, &c., and which would constitute cause of principal challenge, and a disqualification arising from bias, interest, and the like, which would constitute simply cause of challenge to the favor. (Arguendo.)

[Cited in U. S. v. Hammond, Case No. 15,294.]

[Cited in State v. Easter, 30 Ohio St. 342.]

5. Where a prosecutor, without any agency of his own, is drawn by lot from a large number of names to serve as a grand juror, and is sworn on the panel without objection, and prefers a charge, testifies, and takes part in the deliberations concerning it, and a bill is found, *held* (construing the acts of congress relating to grand juries, and the statutes of the state respecting the qualification of grand jurors), that the mere fact that the prosecutor was a member of the jury, and participated in its proceedings would not be good ground for a plea in abatement to the indictment.

[Cited in U. S. v. Clune, 62 Fed. 800.]

[Cited in Com. v. Woodward, 157 Mass. 518, 32 N. E. 939; Lascelles v. State, 90 Ga. 347, 16 S. E. 949; Lawrence v. Com., 86 Va. 573, 10 S. E. 842; State v. Sharp, 110 N. C. 604, 14 S. E. 504.]

6. The act of congress, of July 20, 1840 (5 Stat. 394), as to the "qualification" of grand jurors in the courts of the United States, discussed, and the opinion, arguendo, expressed that the word qualification, as there used, referred to general qualifications, such as age, citizenship, &c., and not to bias, interest, and the like, which do not disqualify generally, but only at the instance of the party concerned, and where the effect of a challenge, if sustained, is, not to exclude the juror from the panel, but only

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

from acting in the case of the defendant who interposed the challenge.

[Cited in State v. Hamlin, 47 Conn. 106.]

7. Reasons drawn from the history of the grand jury, for requiring more jurors to be summoned than are necessary to concur in finding a bill, stated.

8. Upon the verdict of a jury against a plea in abatement to an indictment, judgment was entered overruling the plea, and allowing the defendant to plead not guilty.

The indictment charges the defendant, late deputy collector of internal revenue, with the embezzlement of certain public money. The bill was found in the district court, without any preliminary examination, before a magistrate; and after plea in abatement, and replication filed, the case was transferred to this court. It is stated in the indictment that it is found by a grand jury of seventeen jurors. On the bill appears this indorsement: "Names of Witnesses: J. N. Hall, D. L. How." No other witnesses are named in the indorsement on the bill.

The plea in abatement, after the formal part, is in these words: "The United States ought not further to prosecute the said indictment, because the defendant says that three of the grand jurors of the panel which found the indictment and acted thereon, namely, D. L. How, J N. Hall, and J. W. Senserbox were incompetent to act or sit thereon, for that the said D. L. How was then and there surety for this defendant as such deputy collector of internal revenue, and the said J. N. Hall was the collector of internal revenue under whom this defendant was such deputy; and the said D. L. How was then and is the prosecutor and prosecuting witness along with the said J. N. Hall, upon the accusation set forth in the indictment, and all said three persons became members of said grand jury at the instance and denomination of said D. L. How." Here follows the formal and proper conclusion to such a plea.

These allegations are traversed by the replication, which asks that the issues thereby made be inquired of by the country.

At the June term, 1870, of the circuit court, a jury was called to try the issues made by the replication to the plea in abatement, and both parties produced testimony. The court submitted to the jury the following special questions, which the jury answered as below stated:

(1) Special Issues to the Jury: Did the said How, Hall and Senserbox, named in the plea, serve on the grand jury which found the bill of indictment against the defendant, and were they present at, and did they participate in, the proceedings on the charge against the defendant; and were they present when the vote was taken on the finding of the bill? The jury answer, "Yes."

(2) Was the said Hall collector of internal revenue, and said Williams his deputy, and said How the surety of the said Williams? The jury answer, "Yes."

(3) Were the said Hall and How, or either of them, the prosecutor in the charge against the said Williams before the said grand jury at the term when the bill was found? The jury answer, "No."

(4) Did said Hall or How testify before the said grand jury as witnesses on the charge against the said Williams? The jury answer, "Yes."

(5) Did the said Hall or How become members of the said grand jury which found the bill at the instance, and on the nomination, of the said How? The jury answer, "No."

No evidence was given on the trial as to the said Senserbox named in the plea, except that he was a member of the grand jury, at the term at which the bill was found.

After the special verdict above given was found, the defendant moved for a new trial upon the third special interrogatory on two grounds, to-wit: (1) The finding of the jury that neither Hall nor How was the prosecutor of the charge against the defendant before the grand jury, was against the evidence delivered on the trial. (2) Upon the ground of newly discovered evidence, viz: A letter from How to the defendant, dated sometime before the bill was found, stating that if the latter did not "make good the amount of money he had embezzled as deputy collector, and settle with Mr. Hall, I shall cause criminal proceedings to be commenced against you as an embezzler," &c. An affidavit of the defendant is filed showing that this letter had escaped his recollection, and was accidentally found after the trial, when searching for the contract between him and Hall, his principal. An affidavit of the defendant's attorney is also filed stating his ignorance until after the trial of the existence of this letter. It is this motion for a new trial which is now before the court for determination. In 1866, the court "ordered that in actions at law, the practice and pleadings now existing in the district courts of the state of Minnesota be adopted in the circuit court of the United States for this district,"—but the order did not extend to criminal cases or proceedings.

The statutes of Minnesota, after prescribing the qualifications and number of grand jurors in the state courts, and how these shall be obtained, provides that "a person held to answer a charge for a public offence, may challenge the panel of the grand jury, or any individual juror, before they retire, after being sworn and charged by the court." Rev. St. 1866, p. 637, § 13. It limits challenges to the panel to three causes, all referring to irregularities in the drawing of the names from the grand jury box. The statute then enacts that "a challenge to an individual juror may be interposed for one or more of the following causes only: (1) That he is a minor. (2) An alien. (3) Insane. (4) That he is a prosecutor upon a charge against the defendant. (5) That he is a witness on the part of the prosecution, and has been served

with process, or bound by a recognizance as such. (6) A state of mind which satisfies the court that the juror cannot act impartially, and without prejudice to the substantial rights of the party challenging." Rev. St. Minn. 1866, pp. 637, 638.

A subsequent section in the same chapter provides that a grand juror is not to be questioned for his action as such juror, "except for perjury, of which he may be guilty in making an accusation, or giving testimony to his fellow jurors." Id. p. 640.

By the judiciary act it is provided that jurors to serve in the courts of the United States "shall have the same qualifications as are requisite for jurors by the laws of the state of which they are citizens, to serve in the highest courts of law of such state." 1 Stat. 88, § 29. By the act of congress, July 20, 1840, it is provided that "jurors to serve in the courts of the United States, in each state respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter, from time to time, have and be entitled to, &c. 5 Stat. 394, § 1. By the act of congress of March 3, 1865, it is provided that grand juries in the national courts, "shall consist of not less than sixteen and not exceeding twenty-three persons; * * * and whenever a challenge to an individual grand juror is allowed, and there are not other jurors in attendance to complete the panel, the court shall make an order to the marshal to summon a sufficient number of persons for that purpose. No indictment shall be found without the concurrence of at least twelve grand jurors." 13 Stat. 500, § 1.

What constitutes a sufficient cause for a challenge to an individual grand juror is not prescribed by this act, but by another act it is provided that certain disloyal practices shall be grounds of challenge of grand jurors and petit jurors. 12 Stat. 430.

The motion for a new trial was argued by

Chatfield & Warner, for the motion.

C. K. Davis, Dist. Atty., contra.

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

DILLON, Circuit Judge. It is essential to a proper disposition of the motion for a new trial to determine the nature of the plea in abatement. The language of the plea appears above. After carefully considering it, our opinion is that the gravamen of the plea is that the parties named (sustaining the relation to the defendant described therein) "became members of the grand jury which found the bill, at the instance and denomination of the said D. L. How." All that precedes this averment is introductory, and intended to show why it was improper, and prejudicial to the rights of the defendant that these parties should have served on the grand jury which indicted him.

It is not believed that it was the purpose of the pleader improperly to set forth in one plea three distinct matters in abatement, to-wit: (1) That How was the prosecutor. (2) That he was the prosecuting witness along with Hall. (3) That the three parties named became grand jurors at the instance of How; but rather that it was the purpose to set forth the one ground above stated.

Pleas of this character are dilatory, and not being favored, the law requires that they shall contain all essential averments, pleaded with strict exactness. O'Connell v. Reg., 11 Clark & F. 155, 9 Jur. 25; Com. v. Thompson, 4 Leigh, 601; State v. Newer, 7 Blackf. 307; Wilburn v. State, 21 Ark. 198; Hardin v. State, 22 Ind. 347; Lewis v. State, 1 Head, 329.

The plea in abatement seems to be drawn as if founded upon the celebrated and ancient statute of 11 Hen. IV. c. 9, passed in 1410, and which may be found set out in Bac. Abr. "Juries," A, 233. This statute, after reciting the abuses which led to its enactment, declares: "Henceforth no indictment shall be made by any such (improper) persons, but only by inquests of the king's lawful liege people * * * returned by the sheriff * * * without any denomination to the sheriff, by any person of the names which by him should be impannelled, except it be by officers sworn and known to make the same; * * * and if any indictments be hereafter made in any point to the contrary, that the same indictment be also void, revoked, and forever holden for none."

The plea then, in this case, is to be taken as setting forth that the indictment should not be prosecuted, because the persons mentioned in the plea were, by an interested party, viz., Mr. D. L. How, caused to be placed on the grand jury which found the bill.

The question is not now directly before us whether such a plea is good in the federal courts. Undoubtedly such an objection is good if taken by a person under prosecution, or who has been held to answer, by way of challenge, before the jury is sworn or the indictment found.

Whether in the case of a person not previously bound over it may be taken after a bill found by plea in abatement or motion to quash, the authorities are not entirely agreed. As tending to show that it must be taken before indictment is found, see Bac. Abr. "Juries," A, 233; People v. Jewett, 3 Wend. 314, 6 Wend. 386; Com. v. Smith, 9 Mass. 107. Compare Com. v. Parker, 2 Pick. 563; State v. Rickey, 5 Halst. [10 N. J. Law] 83; Thayer v. People, 2 Doug. (Mich.) 417; Baldwin's Case, 2 Tyler, 473; Rex v. Sheppard, 1 Leach, Crown Cas. 101.

But in many, indeed, from an examination of the authorities, I may say that in most of American states it is held that where a party has not been recognized to answer, he may plead in abatement, if done seasonably, the want of statutory qualifications, such as want

of citizenship, &c., in grand jurors who found the bill. Hardin v. State, 22 Ind. 347; Wilburn v. State, 21 Ark. 198; State v. Cole, 17 Wis. 674; Kitrol v. State, 9 Fla. 9; Stanley v. State, 16 Tex. 557, and other cases cited; Whart. Cr. Law (2d Ed.) pp. 172, 173; and in State v. Ostrander, 18 Iowa, 435, note.

In the federal courts the sufficiency of pleas in abatement, in the absence of legislation by congress touching the question or authorized rules of court, must be tested by the principles of the common law. And by the common law it is undoubtedly true as stated by Mr. Wharton, that "if a disqualified person is returned as a grand juror it is good cause of challenge." Whart. Cr. Law (2d Ed.) 170; 1 Chit. Cr. Law, 309. Mr. Chitty at the place just cited states the doctrine thus: "If a disqualified juror be returned he may be challenged by the prisoner before bill presented; if the disqualification is discovered afterwards, the defendant may plead it in avoidance and answer over to the felony." And see, also, Hawk. P. C. bk. 2, c. 25, § 16.

But the disqualification thus referred to is such as is pronounced by statute, and which absolutely disqualifies, such as alienage, nonresidence, want of free-hold qualifications, where that is required, &c., and which would constitute cause of principal challenge as distinguished from challenge to the favor arising from bias, interest, and the like. See on this point, State v. Rickey and People v. Jewett, before cited.

But it is not necessary further to pursue the discussion of the subject in this place, for if the gravamen of the plea in the case at bar be such as we have above indicated, the fifth special finding of the jury is the material one, and by that the jury have negatived the truth of the plea by saying that neither Hall nor How became members of the grand jury, which found the bill, at the instance or on the nomination of How. The finding of the jury on this point is not questioned by counsel, no motion for a new trial is made with respect to it, and it is to be taken as conclusively correct. Thus taken, it is to be presumed that both Hall and How were properly selected to serve on the grand jury, and that they did not become members of it at the instance or by the procurement of How. In this view of the case, the third finding, concerning which the motion for a new trial is made, is, under the plea, immaterial; and if so, a new trial should not be granted thereon, even though the court should be, as it is, of opinion that the verdict of the jury on this issue was against the evidence.

The foregoing view is based upon the construction above given to the plea in abatement. But suppose, as the jury might have found from the evidence, or might yet find if a new trial should be granted as asked in the motion under consideration, that How was the prosecutor or prosecuting witness against the defendant, and suppose the plea be taken as intended to set this forth as the ground of abatement of the indictment, would the plea then be sufficient in law to work this result? This question must, in my opinion, for the reasons which I proceed to state, be also answered in the negative. By the act of congress referred to in the statement, jurors in the federal courts are required to "have the like qualifications and are entitled to like exemptions as jurors" in the highest courts of the state; by the statute of Minnesota it is provided that "all persons who are qualified electors of this state are liable to be drawn as grand jurors, except as hereinafter provided." Rev. St. 1866, p. 636, § 3. The examinations consist of certain public officers, followers of certain professions and avocations, persons over a specified age, infirm persons and such as have been convicted of an infamous crime. The grand jury is directed to be selected by lot from a jury box containing names procured in a designated manner. Then follow the provisions referred to in the statement of the case authorizing any person held to answer for a public offense to challenge for the causes specified in the panel of the grand jury any individual juror.

Among the grounds of challenge to an individual grand juror is, "that he is a prosecutor upon a charge against the defendant;" and also, "that he is a witness on the part of the prosecution, and has been served with process, or bound by a recognizance as such."

The statute provides that: "If a challenge to the panel is allowed, the grand jury are prohibited from inquiring into the charges against the defendant by whom the challenge was interposed; if they should, notwithstanding, do so, and find an indictment against him, the court shall direct it to be set aside." Rev. St. 1866, p. 638, § 18. The next section enacts that, "If a challenge to an individual juror is allowed he cannot be present at, or take part in, the consideration of the charge against the defendant who interposed the challenge, or the deliberation of the grand jury thereon. The grand jury shall inform the court of a violation of this provision, and it is punishable by the court as a contempt." Id. §§ 19, 20.

The only other section of the Minnesota statute bearing upon the present inquiry, is the one which provides that a grand juror shall not be questioned for his acts as such, "except for a perjury, of which he may be guilty in making an accusation, or giving testimony to his fellow-jurors." Id. p. 640, § 42.

Now we have seen, by the act of congress of July 20, 1840, that whoever is qualified to serve as a grand juror in the state courts is qualified to serve as such in the courts of the United States The argument on behalf of the defendant, based upon the act of congress just cited and the above-mentioned provisions of the Minnesota statute, is, that by the state statute a prosecutor or prosecuting witness is not qualified to serve as a grand juror in the state courts, and hence not qualified to serve in the courts of the United States.

Now what does the word "qualification" mean in the act of July 20, 1840, by which jurors in the federal courts are required to have the like qualifications, and are entitled to like exemptions, as jurors, in the state courts? In my opinion, the word refers to the general qualifications as to age, citizenship, &c., not to special reasons which at the instance of a party accused and bound over may at his election amount to a disqualification to sit in his case, but which, if they exist, do not exclude the juror from the panel, but only preclude him from acting in the particular case. He is, nevertheless, if the challenge be sustained, a member of the grand jury (see State v. Ostrander, 18 Iowa, 435, 441), the only effect being that he shall not "take part in consideration of the charge against the defendant, who interposed the challenge."

I am aware that a different view on this point seems to have been taken by a most distinguished judge (Nelson, J., in U. S. v. Reed [Case No. 16,134]), from whose opinion I differ with the most unaffected distrust of the correctness of my own judgment.

But suppose I am mistaken on this point, yet I think it clear that when all the provisions of the Minnesota statute are considered, it is manifest that where there has been no previous holding of the party to answer, the statute as to challenging jurors does not apply, and that the statute itself contemplates that a grand juror "may make an accusation, or give testimony to his fellow-jurors."

The jury in the case under consideration have found that How (who in the view we are now taking of the question may be admitted to be the prosecutor or prosecuting witness) did not procure himself to be placed upon the panel. He is to be regarded as having been legally selected and summoned to serve on the grand jury. Being thus properly on the grand jury, without any agency or intervention of his own, suppose he knows of a public offence having been committed within the jurisdiction of the court, and of a nature cognizable by the jury of which he is a member; can he not disclose it to his fellow-jurors? Is it not, indeed, his duty to do so? If he knows any material fact may he not be sworn as a witness before the jury? Indeed, is it not his duty, in such a case, to be sworn, especially if required to do so by the jury? These questions must all, I think, be answered affirmatively. And in my opinion it does not alter the matter, or vitiate the indictment, if the juror should happen to be the party injured, and hence the prosecutor or prosecuting witness, always assuming that he was selected and put upon the jury without any improper act or influence of his own.

That such a grand juror is not disqualified within the contemplation of the statute, is a fair if not necessary inference from the provision before cited, exempting a grand juror from liability for his acts as such, "except for a perjury, of which he may be guilty in making an accusation, or giving testimony to his fellow-jurors." This language clearly presupposes that a juror may make an accusation, and may testify as a witness concerning it.

In England, it is said that a grand jury may find a bill on their own knowledge (Reg. v. Russell, 1 Car. & M. 247); how much better to find it upon the sworn evidence of one or more of their own number.

Other considerations fortify the above views. At common law the grand jury may consist of any number between twelve and twenty-three; but to find a bill there must at least twelve of the jury agree. 4 Bl. Comm. 302, 306; and cases and authorities cited, 18 Iowa, 442.

By the act of congress of March 3, 1865 (13 Stat. 500), it is provided that grand juries in the courts of the United States "shall consist of not less than sixteen and not exceeding twenty-three persons, * * * and that no indictment shall be found without the concurrence of at least twelve grand jurors." The earlier authorities show that the accusing body now called the grand jury originally consisted of twelve persons, and all were required to concur. The number was subsequently enlarged to twenty-three, which was the maximum. See authorities cited, 18 Iowa, 442. Undoubtedly one reason why both at common law and by act of congress more jurors are required to be summoned, and by the act of congress to be impannelled than are necessary to find a bill, is to prevent, on the one hand, the course of justice from being defeated if the accused should have one or more friends on the jury; and on the other hand, the better to protect persons against the influence of unfriendly jurors upon the panel.

In any view which I have been able to take of the case the motion for a new trial must be denied; and on the verdict of the jury a judgment will be entered overruling the plea in abatement, and allowing the defendant to enter a plea of not guilty.

NELSON, District Judge, concurs in the view taken of the construction of the plea in abatement; but is of opinion that if a prosecutor, who is a member of the grand jury, should take part in the finding of the indictment, it would vitiate it.

Motion denied.

Case No. 16,717.

UNITED STATES v. WILLIAMS et al.

[15 Int. Rev. Rec. 199.]

Circuit Court, S. D. Ohio. 1872.

WITNESSES—CRIMINATING QUESTIONS.

As under the act of congress approved February 25, 1868 [15 Stat. 37], the testimony offered by a witness can in no way be used against him, he is no longer privileged to refuse to answer.

[Cited in U. S. v. McCarthy, 18 Fed. 89.]

[This was an action at law by the United States against A. P. Williams and others under the internal revenue laws.]

During the progress of the trial of the above named case before Hon. P. B. SWING, the plaintiff called Thomas R. Roberts, inspector of spirits during the year 1867, as a witness on its behalf and W. M. Bateman, district attorney, proceeded to question him as to the amount of spirits he had inspected at the plank-road distillery. The witness declined to answer because his answer would tend to criminate himself and M. A. Sayler, Esq., his attorney insisted upon his right to refuse to give answer and asked the court to so instruct him. District Attorney Bateman denied the existence of the privilege and insisted that the act of congress, approved February 25, 1868 (15 Stat. 37), abolished it.

The court took it under advisement, and at a subsequent day in the trial delivered the following opinion:

SWING, District Judge. The witness through his counsel claims, that by the law he is not compelled to answer any question which will have a tendency to expose him to a penal liability, or to any kind of punishment, or to a criminal charge, and that he may, by order of the court, be privileged from answering any such question. That such was the privilege of the witness at common law cannot be denied. While there exists a difference of opinion among judges and law writers as to the origin of the privilege, or the foundation and reason upon which it rests, they all agree that such privilege existed. Mr. Starkie says that the rule has its foundation in humanity and policy; in humanity, that no man should be compelled to give evidence which might be used to convict him; of policy, because no man should be placed in a position in which he would be under the strongest temptations to commit perjury. Let us see whether these reasons or either of them exist in this case. It is claimed, on behalf of the government, that the act of congress of the 25th of February, 1868 (15 Stat. 37), removes the reasons upon which the rule originally rested, and in which, indeed, it originated. If that be so, we can see no good reason for the existence of the rule. It is claimed, however, that it was evidently not intended by congress to compel the witness to testify; because the act is entitled "An act for the protection of certain persons making disclosures, or persons testifying as witnesses." I think congress, in the passage of this act, may have had in contemplation cases where parties might voluntarily make disclosures or give testimony; but if what the legislature has done completely protects the parties from the use of their disclosures, or the use of their testimony, we apprehend that that result cannot be controlled, because the enacting clause is entitled one for the protection of the witness.

The act reads: "No answer, or other pleading, of any party, and no discovery or evidence obtained by means of any judicial proceeding from any party or witness in this or in any foreign country, shall be given in evidence, or in any manner used against such party or witness." Now if it cannot be given in evidence, or if it cannot in any manner be used against a witness, where is the reason upon which his protection rests against the disclosure? It has no existence. It may be said that, although the answer or disclosure of a witness may not be used, yet, as has been argued, there may be incidental facts elucidated by the testimony which would put the prosecutor upon the track of the discovery of other testimony by which the facts could be proved, but the act says that it shall not be "in any manner" used against the party. This is a very broad and comprehensive expression. If the testimony or admission cannot be used by giving it directly in evidence to the jury as an admission, or if it cannot, in any manner, be used against the party, then it seems to me the great reason upon which the protection of the witness rests has ceased to exist; and it is a well settled principle, too old to be combated or denied, that where the reason of a law or rule ceases, the law or rule itself ceases also.

As to the other reason, that of public policy: If the party cannot be prosecuted, if the testimony cannot be used against the witness as laying the foundation for a prosecution, complaint, or information against him, he is freed from any inducement to commit perjury; for no proceeding based upon his admission or disclosures can be brought against him, and the testimony itself can in no manner be used against him in any criminal prosecution. From the reason of the law ceasing, it seems to me that the law fails with it. But I am not alone in my views in this respect. We have the authority of our writers upon the law of evidence. Mr. Greenleaf (volume 1, p. 501) says: "If for any cause the testimony cannot be used against the witness, he is not privileged." It is true that Mr. Greenleaf, in stating this rule, cites 24 N. Y. 83, and it is claimed by counsel for witness that that was upon a different statute from this. Admitting that it was so, if that statute compels the party to testify, it only indemnifies him so far that it provides that the testimony given in the case shall not be used against him, but does not indemnify against prosecution. But the judge does not rest his decision upon the compulsory provisions of the statute, but places it upon the broad principle that the reason of the privilege having ceased the party is no longer entitled to its protection, "for," says the learned judge, "if the case is so situated that a repetition of it (the

testimony or disclosure) on a prosecution against him is impossible, or where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged." Not only have we the rule laid down by Mr. Greenleaf, but we have it as strongly stated by Mr. Taylor in his treatise on Evidence, whose work is the highest authority in England and America, and justly commends itself to careful examination and consideration. On page 1265, vol. 2, the author says: "Or, if, in any other way, the reason for the privilege has ceased, the privilege itself will cease also, and the witness will be bound to answer."

In addition to the statement of this rule by this learned authority, we have the rule supplied by two district judges, in the construction of the statute now before us, and while, as has been well observed by counsel, these decisions are not binding upon us, and could not be followed if we supposed them wrong, yet when courts of equal jurisdiction with ours, or even of inferior jurisdiction, have been called upon to construe the statute before us, we will look to them as the utterances of men more or less learned in law, whose duty it was to examine the same questions to give it a proper construction. The first case is that of In re Phillips [Case No. 11,097]. In speaking of the statute, Judge Underwood says: "That being so, the respondent, by any answers he may give to the interrogatories, cannot thereby be subjected to a criminal prosecution, since his answers cannot be used against him. If it be said that, although his answers cannot themselves be used against him, they may nevertheless point to other information not otherwise to be obtained, which, when obtained, may be used against him, it is to my mind, a sufficient reply to quote the court of appeals of New York. But neither the law nor the constitution is so sedulous to screen the guilty as the law supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent, or at least capable of proof, though his account of the transaction should never be used as evidence, it is the misfortune of his condition, and not any want of humanity in the law. The refusal, therefore, of the respondent to answer the interrogatories is not sustained by any sufficient ground." The second case is that of U. S. v. Brown [Id. 14,671]. Judge Deady says: "By the act of February 25, 1868 (15 Stat. 37), it is provided that no evidence of a party obtained in a judicial proceeding shall be used against such party in any court of the United States, in any criminal proceeding, to enforce a forfeiture or penalty. As the law stood before the passage of this act, a witness could decline to answer a question when the answer would tend to criminate himself, but now he may be compelled to answer, when the inquiry is pertinent to any judicial proceeding, because it may be necessary to the ends of justice as to others, and can not be used against himself. If this is not the object and effect of the act, I confess I do not know what is."

This array of authorities in favor of the proposition that the witness is not privileged from answering, and no authorities having been produced which show that where, under the legislative act, the disclosures and testimony can in no manner be used against the witness to procure an information or indictment against him, nor upon the trial against him, I do not feel myself at liberty to give this statute any other construction than the one I have placed upon it. The reason of the privileges having ceased, the privilege itself cannot exist, and the witness will be compelled to answer.

The witness then proceeded to testify as to the fraudulent duplication of certificates and serial numbers in connection with the removal of spirits from the distillery.

After fourteen days of trial the jury rendered verdict against four of defendants for $300,000.

Case No. 16,718.

UNITED STATES v. WILLIAMS.

[See Case No. 13,515.]

Case No. 16,719.

UNITED STATES v. WILLIAMS.

[4 McLean, 236.] [1]

Circuit Court, D. Michigan. June Term, 1847.

LEVY ON JUDGMENT DEBT OF PARTNERSHIP — PARTNERSHIP AND INDIVIDUAL CREDITORS — AUTHORITY OF SHERIFF — SALE — RIGHTS OF PURCHASER.

1. A judgment against one of the partners of a firm, will authorize the sheriff or marshal to levy on the right of the judgment debtor in the goods.

[Cited in Newhall v. Buckingham, 14 Ill. 408.]

2. But the debts of the partnership must be first paid, before the partnership property can be applied in payment of the individual debts of either partner.

[Cited in Re Corbett, Case No. 3,220.]

3. If the officer shall deem it safe, he may make an arrangement with the partner to sell the goods, and account for the proceeds, after paying the debts of the partnership.

4. And where it is necessary for the security of the officer, he may take possession of the entire property, and sell the interest of the partner against whom judgment has been entered.

5. But this proceeding ought not to be had, as it breaks up the partnership, and leads to great uncertainty, unless it be necessary.

6. The purchaser of the right sold becomes a substituted partner, in lieu of him whose property is sold.

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

Mr. Norvell, U. S. Dist. Atty.

Fraser, Howard, Gould & Romeyn, for defendant.

McLEAN, Circuit Justice (charging jury). This is an indictment [against B. O. Williams] for resisting process. By the 22d section of the act of April 30, 1790 [1 Stat. 117], it is provided, if any person shall knowingly obstruct, resist, or oppose, any officer of the United States, in serving any legal or judicial writ or process whatsoever, or shall assault, beat or wound any officer or other person duly authorized, in serving or executing any writ, he shall be imprisoned, etc. A judgment having been obtained in this court by Sheldon and others against Castle and McGilvers, an execution was issued, which was levied on the goods of a store owned by McGilvers and Williams, the defendant in partnership. Thompson was deputy marshal. The execution being offered in evidence to the jury, was objected to, on the ground that it was not sufficiently described in the indictment. The names of the parties are stated, and the judgment, which, the court think, sufficiently describe the execution; and it was read in evidence. And the deputy marshal states that he levied it on the goods of the store. He proposed to set off McGilvers's interest; but the defendant said he could not permit the goods to be taken. After taking advice, witness returned to the store, and informed the partners, as they refused to give up McGilvers's interest, it was his duty to take possession of the whole of the goods. The defendant then made two propositions: (1) That the marshal might advertise and sell McGilvers's interest, subject to all the debts of the concern. (2) Place a clerk in the store, and see that an account was kept; and finally, the levy to be held subject to the debts of the partnership, and whatever remained of McGilvers's interest could be sold. Being about to leave the store, witness asked Williams if he refused to permit him to take possession of the whole or any part of the goods. And he answered that he did refuse, on which the witness left the store. Afterward, on the 30th of January, witness took six individuals, and entered the store. Defendant said he would not permit the goods to be touched, and if witness made the attempt to take them, he would put him out of the store. Witness replied that he was deputy marshal, referred to the process, and commanded all present to assist him if resisted. The defendant then said, if any one touched the goods, it should be done at his peril. Johnson counted shovels, etc., and Williams pulled his hands off. Other persons, in attempting to remove the goods, were resisted by Williams, the defendant. A general scuffle ensued; defendant took hold of witness, ordered the door to be opened, and requested him to leave the place. Witness did not attempt to remove the goods out of doors, but claimed the right to remove them, should he not consider them safe. Williams was willing that witness should sell the right of McGilvers in the goods; but that debts were due by the firm, and McGilvers owed the firm, the amount of which he could not immediately ascertain. Witness claimed the right to take exclusive possession of the goods, and sell McGilvers's interest, unless that interest should be set off.

Under a fieri facias against one of two partners, the sheriff or marshal may seize the goods of both, and sell the defendant's moiety in them; in which case the vendee will be tenant in common with the other partner. 2 Doug. 650; Com. 217; 1 Salk. 392; 3 Bos. & P. 254, 288; 24 Wend. 393-398; U. S. v. Lukins [Case No. 15,639]. Unless the officer levying the execution can make an arrangement satisfactory and safe to himself, in regard to the partnership goods, he has a right to take the whole of them into his possession, until the sale of the interest of the partner levied on. But this need not be done where there is no necessity for it. The partnership debts must be paid, before the interest of either partner can be applied in satisfaction of any individual debt. And the extent of this interest, where debts are owing by the firm, must be more or less uncertain. Even the most accurate statements, made out from the books of the partnership, can be nothing more than an approximation to the true amount. Debts are to be collected, and goods are to be sold. From these sources, far less than the nominal value may be realized. To take possession of the entire goods, must seriously affect the credit of the firm of the partner, who is answerable for all the partnership debts. It is desirable, therefore, that in such cases the officer should make a reasonable arrangement with the partner, so as to have the goods safely kept until the day of sale. The purchaser will enter as a partner in the firm, in the place of the judgment debtor.

It is proper that I should remark to you, gentlemen of the jury, that the defendant showed no disposition to prevent the sale of McGilvers's interest in the partnership. He seemed to be only desirous of protecting his own interest, and the interest of the creditors of the firm, and the propositions he made were fair, if the officer could trust him with the goods. The clerk which it was proposed to put into the store, would seem to afford security against the illegal acts of the active partner.

Upon the whole, gentlemen, it will be for you to determine whether the defendant is guilty of resisting the process of the court, as he stands charged in the indictment. Where an individual arrays himself against the authority of the officer, he incurs a serious responsibility, and if convicted, must suffer the penalty provided. You will con-

sider the mitigating circumstances of this case, as shown by the testimony, and find the defendant guilty or not guilty, as your judgments shall dictate.

The jury found the defendant not guilty.

Case No. 16,720.

UNITED STATES v. WILLIAMS.

[4 McLean, 567.] [1]

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

CLAIMS AGAINST UNITED STATES — DAMAGE BY TROOPS—ALLOWANCE BY CONGRESS—LACHES AGAINST GOVERNMENT.

1. Congress having acted upon a claim for damages, done to the farm of the defendant, from its occupancy by the troops of the United States, no further allowance can be made.

2. Some proceedings were made, under a former law, for damages, and it seems the commissioners appointed to examine the premises estimated the damages much higher than was allowed by the late act, but no allowance was made under such procedure, and they can not now be considered.

3. No laches are imputable to the government.

4. No presumption of payment, from the lapse of time can be raised against it.

[This was a suit by the United States against John R. Williams for foreclosure of a mortgage.]

Mr. Norvell, U. S. Dist. Atty.

Mr. Bachus, for defendant.

McLEAN, Circuit Justice. This is a bill to foreclose a mortgage. On the 27th of June, 1812, the defendant executed four several bonds, each for $800, payable annually, with interest. To secure the payment of these bonds a mortgage was executed on 267 23-100 acres, on the purchase of which from the United States, the above bonds were given as the consideration. This bill was filed on the 7th of February, 1844. At the June term of this court, 1845, the cause was continued to give him an opportunity to obtain the action of congress on defendant's claim for damages committed by the United States troops, on the premises in 1813. On the 8th of August, 1846 [9 Stat. 670], an act was passed directing the secretary of the treasury to credit the defendant in this cause as on the 15th of January, 1814, on his bonds and mortgage for $3200, with interest till paid, that being the amount of the purchase money of a farm, etc., two thousand dollars, for damages done to his farm by the troops of the United States occupying it. The defendant in his answer admits the purchase, the bonds and mortgage, and the occupancy of the farm by the troops of the United States, by which he avers the farm was ruined, by the destruction of the improvements on it, which constituted its chief value.

Under the act of 9th of April, 1816 [3 Stat. 261], which provided for the appointment of commissioners to take testimony in cases like the above, by the commissioner of claims at Washington, the judgment of such commissioner in behalf of a claimant, was a sufficient authority for the payment of the money by the treasury. In 1818 [3 Stat. 466], an act was passed transferring the papers of the commissioner of claims to the third auditor's office. And the defendant claims that damages to the amount of $4000 were done to the premises by the troops, and that the damages were so estimated by commissioners of the United States in the fall of 1817. Which claim was presented to the treasury in 1831 and rejected. And he claims the same now as a set off. It is a sufficient answer to this claim to say, that whatever steps may have been taken under the act of 1816, that no sum was awarded by the United States to the defendant under that act. And the late application to congress and the passage of the act allowing the defendant two thousand dollars, to be deducted as in 1814, is conclusive of the defendant's claim for damages. Congress having all the facts before it, acted upon the subject, and no allowance can be made beyond that, by the judiciary.

The defendant, in his answer, relies upon payment from the lapse of time. But there is nothing in the case to render such a fact probable. All the circumstances go to show that payment has not been made. If, therefore, the case stood between two individuals, and the presumption of payment from the lapse of time might be made, we suppose that no such presumption can be raised against the government. Laches can not be charged to it, under the statute or in any other form.

It is alleged by the defendant that the bonds were usurious. But it is clear there was no usury in the case. The interest was calculated, or to be calculated, and paid from the time of the purchase, such being the contract. The bonds and mortgage were not executed until several months after the contract, and it was proper and legal that the interest should be paid from the time of the purchase.

Upon the whole, the court will refer the account to a master to state the amount due, and decree a foreclosure, etc.

[For the final hearing in this cause, see Case No. 16,721.]

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

Case No. 16,721.

UNITED STATES v. WILLIAMS.

[5 McLean, 133.] [1]

Circuit Court, D. Michigan. June Term, 1850.

USURY — SET-OFF — UNLIQUIDATED DAMAGES—ALLOWANCE OF DAMAGES BY CONGRESS—LIMITATIONS.

1. It is not usury, where the writings are not executed at the time of the contract, to charge interest from that date.

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

2. An unliquidated demand cannot be offset against the government, or between individuals.
[Cited in Clyde v. Knight, 12 R. I. 195.]

3. The action of congress, in the allowance of damages, is conclusive on the judiciary.

4. It cannot revise the facts on which congress acted.

5. The statute of limitations does not run against the government, nor is it chargeable with delays, so as to raise a presumption of payment.
[Cited in U. S. v. Thompson, 98 U. S. 488; U. S. v. Little Miami, C. & X. R. Co., 1 Fed. 701; U. S. v. Southern Colorado Coal & Town Co., 18 Fed. 279.]
[Cited in Mayrhofer v. Board of Education, 89 Cal. 112, 26 Pac. 646. Cited in brief in U. S. v. San Pedro & Canon Del Agua Co. (N. M.) 17 Pac. 338.]

Mr. Norvell, U. S. Dist. Atty.
Mr. Backus, for defendant.

McLEAN, Circuit Justice. This is a bill in equity, to foreclose a mortgage. [See Case No. 16,720.] On the 27th of June, 1812, the defendant [John R. Williams] executed four several bonds, each for eight hundred dollars, one bond payable annually, with interest. These bonds were given in payment of a tract of land, 267 23-100 acres, in Spring Wells, secured by a mortgage on the premises. The defendant, in his answer, admits the purchase and the mortgage, but alleges that the premises purchased, were, in the fall of 1813, occupied and used by the troops of the United States, and that they destroyed the houses, barns, out-houses, fences and orchards on said premises, and that these constituted the chief value of the premises. To this answer, the complainants replied, that congress has investigated the alleged damages done by the troops, on the farm, and that, by an act in 1846 [9 Stat. 670], an allowance was made, which was deemed ample for the injury done to the farm, amounting to the sum of two thousand dollars, with interest from the time the injury was done. That this act was passed upon a full investigation of the facts, as proved by the defendant. From the time of the purchase, the defendant has been in possession of the premises, enjoying the rents and profits. At various times, different acts of congress were passed, to provide for the payment of damages done to private property by the troops of the United States; and a commissioner was appointed to take evidence, and report to the commissioner of claims, who was authorised to act on such claims. Under these laws, it appears that evidence was taken in the case now before us, with the view of making compensation to the defendant. But it does not appear that there was decisive action taken on the claim of the defendant. And it was not until after the commencement of this suit, when a continuance of the cause was procured, to enable the defendant to apply to congress for the adjustment of his claim, that the act of 1846 was passed.

The defendant attempts to set up, as an offset, the incomplete procedure of the commissioner, by which the amount of damage done appears to be larger than the allowance afterwards made by congress. The action of congress is conclusive on the subject. No imperfect procedure, by the officers of the government, can modify or affect that allowance. Without such action, the claim was unliquidated, and could not be admitted as an offset in a suit by the government, or between individuals. If the act of 1846 has not done full justice to the defendant, his only remedy is by another application to congress for a higher compensation. The judicial power cannot revise the action of congress in this respect. The answer sets up that the bonds given were usurious. It seems, the sale was made before the writings were fully executed, and the interest on the bonds was made to run from the time of the contract. This is not usury, nor is there any unfairness in the act. It is also set up, as matter of defence, that from the lapse of thirty years which have transpired since this mortgage was executed, there having been no payment of interest within twenty years, the court will presume the mortgage to have been satisfied. If this rule applied to the government, the facts in the case show that the money has not been paid. This clearly appears from the acts of the defendant, in applying to congress, and in the preparation made to establish the offset to the mortgage. But laches are not chargeable to the government. The statute of limitations does not run against it; and on the same principle, the lapse of time affords no presumption of payment against the state.

Judgment may be entered on the mortgage bonds, with interest, deducting therefrom the credit, under the act of 1846 and the payments that have been made.

Case No. 16,722.

UNITED STATES v. WILLIAMS.

[N. Y. Times, March 24, 1860.]

Circuit Court, S. D. New York. 1860.

CRIMINAL LAW — ALIBI AS A DEFENCE — BILL OF EXCEPTIONS—STAY OF PROCEEDINGS.

[1. While the experience of courts has led them to look upon the defense of an alibi with great suspicion, it is yet the duty of the jury to consider the evidence in relation thereto and give it whatever weight they think it deserves.]

[2. The court will not grant a stay of proceedings after verdict to enable counsel to prepare a bill of exceptions, where all the exceptions taken are based upon the merest technicalities, and there are none which go to the merits.]

[This was an indictment against James S. Williams for taking a letter from the post office contrary to law.]

SMALLEY, District Judge, in charging the jury, said there was no variance between the evidence and the indictment, and that the objections of the prisoner's counsel to the indictment, that there could be no conviction on the charge of having tak-

en from the post-office a letter containing a promissory note, because the note was not sufficiently described in the indictment, was not a valid one in this case. It was necessary, in order to convict the respondent, to prove that, at some time previous to the filing of the indictment, and within two years, he took a letter from the post-office, not addressed to himself, and in violation of the law. In the first place, it was necessary for government to prove that such a letter was mailed and in the post-office, and regularly under the charge of the officers of that department. In the second place, it was necessary to prove that it was taken from the office in violation of law and without right, and, in the third place, it was necessary to satisfy the jury that this respondent was the person who thus took the letter. All the evidence introduced subsequent to that period was only important as tending to fix the offence on the respondent. It was proved that a note for $3,000, was made by F. A. Williams, indorsed by Charles Johnson, payable at three months, which was mailed to the Bank of Norwalk on the 12th or 13th of December, or sent by express. There was little doubt that it was received at the bank. There was no conflicting evidence on that point. It was proved that the note was re-mailed to F. A. Williams, with a letter telling him that the bank could not discount the note at three months, but if it was changed to a two months note the bank would; and that a letter with the words "From the Norwalk Bank" printed on it, was received in the post-office in this city, and laid out to be advertised, and that a letter directed to F. A. Williams was advertised on the 23d of December, as charged. It was proved that some one brought a note, altered from a three to a two months' note, to Adams Express Company, and wrote some lines on a sheet of paper, signed it "F. A. Williams," and sent it by the express to the bank; that the letter and note were received; that the net receipt of the note, after deducting discount and expenses—$2,971—was, on the 27th of December, sent by the express company to the address of F. A. Williams, New York; that it was delivered to the same person who had called before, and his receipt taken; and that neither F. A. Williams nor Charles Johnson took a letter containing the note from the post-office, or saw it after it was inclosed to Norwalk. Therefore, the conclusion would seem to be irresistible that some one tortiously took the letter containing the note from the post-office, and probably there would be as little doubt but that the person who presented the note on the 24th of December, at the express office, and received the money package on the 28th, was the same person who tortiously took the letter from the post-office. So that it probably came down to this point: Who was the person who presented that note to the express office on the 24th of December, and obtained the money on the 28th? The judge recalled the evidence upon which the prosecution rested,—the testimony that the respondent was in the habit of examining the list of advertised letters; that he frequently inquired at the post-office for letters directed to men named Williams, with different Christian names from his own; that he had received one letter there not addressed to him; and that he was the man who took the note to the express office. He presented the evidence brought by the respondent to meet some of this testimony, and commented upon the absence of evidence for the defence in some cases. The court then adverted to the proof of handwriting, going to identify that on the paper written by the person who called at the express office on the 24th of December with the handwriting of Britton and Simpson (now acknowledged to be the same with the respondent), and to the circumstance that Williams on the 5th of January deposited $1,000 in the Citizens' Bank, in the name of James Simpson, and $1,500 in the Bowery Bank, on the 30th of December, in the names of John Britton, Henry Britton, and Mary Britton. The reason for using feigned names was stated by the respondent's counsel to be that he had received this money from lottery offices and for electioneering purposes, which being contrary to the law of the state, he feared he would lose the money if deposited in his own name. Of this reason the jury should judge, as also of the testimony of Lawson and Doyle, lottery dealers, that they had each paid him in the neighborhood of $500 about this time. These men kept no accounts, and had no means of fixing the time, except from recollection. The jury were to consider whether the defendant had explained in a satisfactory manner his possession of this large sum of money in December and January,—he being shown to have worked as a carver for from $6 to $9 a week. Lastly the court received the testimony of Messrs. McMenomy and Hewlet, to prove an alibi; and the evidence of the government in rebuttal. While the experience of courts had led them to regard that species of defence with great suspicion, yet it was the duty of the jury to consider it and give it whatever weight they thought it deserved. They were to say, from all the evidence, whether they were satisfied, beyond reasonable doubt, that the respondent took the letter, as charged, from the post-office; and if they came to that conclusion it was their duty to find him guilty.

After the jury had retired, some discussion arose as to whether the exhibits in the cause should be handed to the jury for inspection. THE JUDGE decided that they should, except one or two, which he thought improper to go to them.

The jury returned after half an hour's absence, with a verdict of guilty.

Later in the day Mr. Dwight moved for sentence in the case of Jas. S. Williams. Mr. Ridgeway, the only one of his counsel who was present, stated to the court that Mr. Busteed was then in the middle of a trial in one of the other courts, and that Mr. Clinton had left court after the jury retired, and he did not know where he was; that there had been no consultation among the counsel for the defence as to what course was best to be pursued, but he moved the court for a stay of proceedings for ten days to enable them to prepare a bill of exceptions.

THE JUDGE said that there were no exceptions taken except upon the merest technicalities; that if there had been any exceptions going to the merits at all, he should feel justified in granting the delay, but as it was, if a motion was to be made for a new trial, he was ready to hear it at once, and would delay five minutes to send for the other counsel.

Mr. Ridgeway said it was not possible to get a counsel in to argue the motion on the spot, and he was not ready to do so himself, and again urged the stay of proceedings, which THE JUDGE refused.

Case No. 16,723.

UNITED STATES v. WILLIAMS et al.

[1 Paine, 261.] [1]

Circuit Court, D. Connecticut. April Term, 1814.

TARIFF ACTS—WHEN LAW TAKES EFFECT.

1. An act laying duties on goods imported, "from and after the passage of the act," takes effect the beginning of the day on which it is passed, and not from the time of its being signed by the president.

[Disapproved in Salmon v. Burgess, Case No. 12,262. Cited in Smith v. Draper, Id. 13,037; American Wood-Paper Co. v. Glen's Falls Paper Co., Id. 321a.]

[Cited in brief in Kennedy v. Palmer, 6 Grey, 316.]

2. But, in case of a prosecution for a forfeiture? Quere.

[Error to the district court of the United States for the district of Connecticut.]

At law.

H. Huntington, Dist. Atty., for appellants.

S. J. Hosmer, for respondents.

LIVINGSTON, Circuit Justice. The declaration is in debt on a bond dated the 1st of July, 1812, which the defendants executed to the United States of America, in the penal sum of four thousand four hundred dollars—the condition of which was, that the same should be void, if they or either of them, on or before the first day of October, then next, paid to the collector of the customs, for the district of New-London, for the time being, two thousand two hundred dollars, or the amount of the duties to be ascertained as due, and arising on certain goods entered by them, as imported in the brig Lydia, from St. Bartholomews, as per entry, dated the 1st July, 1812. The defendants pleaded, that at eight o'clock in the forenoon of the said 1st day of July, 1812, the brig Lydia arrived at a wharf in New-London, and that at the same time, she and her cargo were duly entered at the custom-house there; that the single duties on her cargo amounted to two thousand three hundred and six dollars ninety-two cents, for the security of one-half whereof, amounting to one thousand one hundred and fifty-three dollars forty-six cents, the said bond was given pursuant to law; and on the same day the defendants executed their bond for the payment of the other half of said duties in six months; that the law imposing an additional duty of one hundred per cent. was passed at Washington, and received the president's approbation on the said 1st day of July, 1812 [2 Stat. 768]. As to the said sum of one thousand one hundred and fifty-three dollars and forty-six cents, they plead a tender and refusal on the day when it became payable—and pray judgment, whether the United States ought to have judgment, &c. The United States demur, and the defendants join in demurrer. On these pleadings judgment was rendered by the district court in favour of the defendants [case unreported], and from this judgment an appeal has been prosecuted to this court.

Whatever other points may be presented by the pleadings in the cause, one only having been argued and brought to the consideration of the court, that alone will be disposed of, without, however, precluding the defendants from urging any other matter in support of the judgment of the district court, provided it be done during the present term.

On the part of the defendants, it has been contended, that the act imposing an additional duty of one hundred per cent. did not go into operation until the 2d day of July, 1812—that if this interpretation be not adopted, the court will have to decide either that it was in force the whole of the first day of July, although, probably, it was not signed until some late hour of that day, and most likely after the entry of the Lydia's cargo at New-London—or that it will have to ascertain at what particular hour of the day it received the president's sanction, to prevent its operating retrospectively in this case, if the entry in question were precedent in point of time. These difficulties, it is supposed, can be avoided only by rejecting the first day of the month altogether, and by giving the act a commencement only from the day following. To give this law the construction which is set up by the defendants, is asking of the court to exercise a discretion in a case where the words of the law are imperative and admit of no doubt whatever. The additional duties are to take place from and after the passing of the act—that is, from and after the 1st day

[1] [Reported by Elijah Paine, Jr., Esq.]

of July, 1812. In other words,—if any other words can render the intention of the legislature more evident,—all goods imported on or after that day, are to pay double duties. From the impracticability of deciding at what particular moment of time the president gives his seal to a bill, we have never heard of such inquiry being made, and the least which courts have ever said on such occasions, is, that where an act is to take place from the day of its passing, as is the case here, it must embrace the whole of that day. Here, emphatically, no fractions of a day should be allowed; otherwise the commencement of a law, would in such cases, not be matter of record and uniform, but depend on evidence as to the time of signature, and would vary in different courts, according to the testimony which might be offered, as to that fact.

The suggestions of hardship and retrospection which have been so much pressed, would apply with equal force to every vessel which arrived on the second, third, or fourth of July, as on the morning of the first day of that month; for in none of those cases, would a master arriving from abroad, know of the law —and even where arrivals were much later, the merchant would have the same reason to complain of the ex post facto operation of the law, as the profits of his adventure would have been, no doubt, calculated on the basis of his paying the duties in force at the time of its commencement. This would prove, if any thing, that the government had no right to alter the duties on importations, without a previous notice of sufficient length to enable our merchants to calculate accordingly. But nothing of this kind, it is presumed, would be seriously urged.

Upon the whole then, in a case where no latitude is allowed for construction, and where there is no attempt to punish for an offence, or to exact a forfeiture, which may have been committed, or incurred on the very day of passing a law, the court thinks it best to adhere to the letter of the act of congress, which most manifestly subjects to the additional duty, thereby imposed, all goods imported on the 1st day of July, 1812, without any regard to the time of the day when such importations were made. The judgment of the district court, therefore, must be reversed, and judgment entered for the United States.

Case No. 16,724.

UNITED STATES v. WILLIAMS et al.

[1 Ware, (175) 173.] [1]

District Court, D. Maine. Feb. Term, 1830.

DEMURRER TO EVIDENCE — PAYMENT OF DUTY BONDS—BANK CHECKS—COLLECTOR'S RECEIPT —ESTOPPEL—CANCELLATION OF BOND.

1. In a demurrer to evidence, the party who demurs is held to admit every fact which a jury, in the exercise of a fair and reasonable discretion, could infer from the evidence, but he is not bound to admit forced and violent inferences.

2. A collector of the customs is not authorized to receive any thing in payment of a duty bond, but the lawful money of the United States, or foreign gold or silver coins, made current by law. If he receives a check upon a bank, this is not payment of the bond until the check is paid.

3. When a general agent is acting under special instructions, which are known to the person with whom he is dealing, he cannot bind his principal by any act which violates his instructions. In such a case there is no difference between the authority of a general and special agent to bind his principal.

4. A receipt of a collector upon a duty bond, acknowledging payment and satisfaction of the bond, does not operate as an estoppel. It is open to explanation, and is no bar to a suit on the bond if it be not paid.

5. The cancellation of a bond does not, per se, destroy it when it is cancelled through fraud or evident mistake, but it may be declared upon as a good and subsisting obligation.

This was a case of demurrer to evidence.

Mr. Shepley, U. S. Dist. Atty.

Mitchell & Randall, for defendants.

WARE, District Judge. The declaration in this case is on a bond alleged to be lost, which is in the penal sum of $10,000. The defendants have pleaded the general issue, non est factum, and also a special plea of payment, and in this plea have set forth the bond with the condition, which is to secure the payment of $739.56, being the amount of duties on certain merchandise imported into the port of Bath, in the brig Elizabeth. The case comes before me on a demurrer to the evidence by the plaintiffs. The effect of a demurrer to evidence is to take the case from the jury, and substitute the court in their place, not only to decide the law, but to determine the facts. This is a course of proceeding to which a party has a right to resort, but it is unusual, and not favored by the courts, because it withdraws the consideration of the evidence from the appropriate tribunal for the decision of all matters of fact. In proceedings at common law the jury are the legal and proper judges of weight of evidence, of the credit of witnesses, and of the force of circumstantial and presumptive proofs, where the effect of presumptions is not settled by the rules of law. When they have ascertained and settled the facts in controversy, it is the office of the court to decide the law. By this proceeding, the jury in the particular case are superseded in their regular and appropriate office, and the whole duty of settling both the law and facts, is referred to the court. If a party chooses to adopt this mode of proceeding, the court will, in a proper case, admit him to his demurrer, but will exact of him, as a condition, a distinct admission, on the record, of every fact which the evidence proves. If the evidence is loose and inde-

[1] [Reported by Hon. Ashur Ware, District Judge.]

terminate, and such as may be pressed with more or less effect upon a jury—or if it consists of circumstances which lead to the belief of other facts beyond those which are directly in proof, the court will require him to admit the truth of the facts which stand on this doubtful or uncertain proof, and the existence of those ulterior facts which the presumptive and circumstantial evidence renders only probable, and which a jury, in the exercise of a reasonable discretion, might either admit or reject. These principles were settled in the case of Gibson v. Hunter, 2 H. Bl. 187–211, the leading case on this subject, and have never since been considered as open to controversy. In the most correct practice, the facts are settled and entered on the record under the immediate direction of the court, and this will usually be required, when insisted on by the adverse party, before the court will require him to join in the demurrer. 2 H. Bl. 187; 2 Tidd, Prac. 794. The facts will then appear stated as in a special verdict, and the court will apply the law to the facts in the same manner in the one case as in the other. If, however, the adverse party joins the demurrer without insisting on the facts being thus previously ascertained and stated, but will refer the whole evidence, in the form in which it is offered in court, to its decision, the court will proceed, in adjudicating upon the case, on the same principles in judging of the evidence as it would in making up the statement of facts before the joinder of the demurrer. It will not go to work critically to ascertain on which side lies the balance of conflicting testimony, nor scrutinize with severity and strictness the credit of witnesses, but will generally take the facts sworn to, as true, so far at least as they make in favor of the party joining the demurrer. It will infer from loose and circumstantial testimony all the facts that could be found by a jury in the exercise of a reasonable and fair discretion. It was argued by the counsel for the defendant that the court is bound to admit every fact which can possibly be inferred by a jury. But this is stating the principle too strongly. The court will not draw such inferences from the evidence as are manifestly unreasonable and capricious. The true rule is stated by Chief Justice Marshall. Pawling v. U. S., 4 Cranch [8 U. S.] 221. "The party demurring admits the truth of the testimony to which he demurs, and all the conclusions of fact which a jury may fairly draw from that testimony, but forced and violent inferences he does not admit."

The facts in this case are not numerous, and few of them are controverted. The defendants, on the 12th of May, were indebted to the United States on the duty bond which is the subject of this action, payable "on or before the 8th of June" to the collector of the port of Bath for the time being. In the month of April, Mr. Swanton, the collector, was removed from office, and Mr. King appointed in his place. Mr. Swanton was notified of his removal, by a letter from the comptroller of the treasury, dated April 26, and ordered to deliver all the public property in his hands to his successor, on his application. Mr King did not apply for it until the 15th of May, and Swanton continued to act as collector till the close of that day. On the 12th of May the defendant called for his bond, due the 8th of June. It was cancelled by J. B. Swanton, Jr., the deputy collector, and delivered to him, and the deputy received a check on the Lincoln Bank in payment, and gave him a receipt in full for the bond. There is no certain proof whether this check was in the common form, or was a memorandum check. Swanton says he preferred memorandum checks, because the bank would pay them only to the payee named in the check, and would not pay to the bearer. But in the absence of positive proof, as the court is bound to make every reasonable inference from the evidence in favor of the defendants, this may be presumed to be a check in the ordinary form, payable, on demand at the bank, to the bearer. It must also be presumed that it was received by the deputy collector as payment and satisfaction of the bond. It was never presented at the bank, but the collector having kept it in his possession for several weeks, it was returned to the drawer, who gave him, in exchange, his promissory note payable to the collector. Swanton says he thinks this note was payable to his order, but is not certain; but according to another witness, Williams, the maker, declared it was not payable to order. This note Swanton assigned to Riggs, one of the sureties, as an indemnity for his liability on his bond, some time in the latter part of June, or the beginning of July, and of course after the duty bond became payable. It was also proved that duty bonds in that office were usually paid by checks on the bank.

Such are the material facts in the case. The question whether Swanton, after he was notified of his removal, and of the appointment of his successor, could legally act as collector until his successor was qualified and took possession of the office, and whether his acts within that period were binding on the United States, was waived at the argument, and it was assumed on the one side, and not contested on the other, that Swanton was, during this time, collector de jure as well as de facto. The question which has been elaborately and learnedly argued at the bar is, admitting Swanton to have had the authority to act as collector until his successor took possession of the office, whether the facts in proof amount to a payment of the bond, or otherwise present a legal bar to the right of the United States to recover on the instrument. It is expressly provided by statute that duties shall be payable only in the mon-

ey of the United States, that is, in the gold and silver coins of the United States, or in such foreign coins as are made current by law and are a legal tender in the payment of other debts (Laws U. S., Act March 2, 1799, c. 128, § 74 [1 Story's Laws, 635; 1 Stat. 680, c. 22]), or in the bills of the Bank of the United States (Act April, 1816). It is not pretended that a check drawn by a private merchant, on a banking corporation, comes within the words of the statute. Had it been presented for payment, and actually paid, this would without doubt have been payment of the bond; or if it had been carried to the credit of the collector, the bank being solvent, I do not think it could well be maintained that it was not payment of the bond. But this check was never presented for payment at the bank, nor payment of it demanded. But it is argued that a check, being a negotiable security, is held by the local law of the state to be a constructive payment. The principles of the local law that a negotiable security, given in consideration of a pre-existing debt, is presumed to be an extinguishment of that debt, is, as I understand it, confined to debts due on simple contract. Maneely v. McGee, 6 Mass. 143; Thacher v. Dinsmore, 5 Mass. 299. It does not apply to a debt secured by an instrument of a higher nature, as by bond. But I am not prepared to say that this rule of the local law, being a departure from the principles of the general law merchant of the country, would be applicable to a debt due to the United States, upon a contract made by their debtor directly with them, and that more especially when the positive injunctions of the statute just referred to are considered. But there is no doubt that a negotiable security is payment, when the creditor receives it as such (Sheely v. Mandeville, 6 Cranch [10 U. S.] 264), and the evidence in the case is such that a jury might easily infer that his check was taken in payment of the bond. That the deputy considered the bond as paid, is evident from his cancelling it. And the intention of the collector to extinguish the rights of the United States, under the bond, appears to be clearly indicated by his subsequent conduct. His keeping the check for so long a time without presenting it for payment, his afterwards exchanging it for a new security, and finally transferring this new security in pledge to a third person, a month or six weeks after the bond became due, all show that he considered the paper which he had taken as a satisfaction of the bond. If Mr. Swanton were himself the creditor, and had been acting for himself, it would be very difficult, on this demurrer, to render judgment in his favor. Swanton, however, was not acting for himself. He was merely an agent, acting in this business at least under a limited authority, and express and positive instructions. He had no authority to compromise or compound the debts of the United States, or exchange their securities. He was merely authorized to receive payment, and that in a way particularly pointed out, and his instructions must be presumed to be known to the defendants, as they were written in the public laws of the country. Admitting, then, that he would himself have been bound if it had been his own private debt, it by no means follows that he has bound his principal. When a man contracts with another, acting as the agent of some third person, he knows that he cannot bind his principal beyond the authority under which he acts. A prudent man will therefore ascertain the extent of his authority before he enters into the contract. The very fact that the person is acting under a derived authority, is a warning to him to inquire into its extent and limitation, and if he contracts without first ascertaining them, he does it at his own peril, for the principal may disavow the acts of his agent if they transcend his authority.

If the agent is intrusted to transact all the business of the principal, or all his business of a particular kind, or at a particular place, he is called a general agent, and in order to execute his agency he must necessarily be intrusted with a general authority to transact the business in the ordinary and authorized mode, and to bind his principal in all cases in which it is necessary to carry his agency into effect. Paley, Prin. & Ag. 162, 163. Whether a man, in any particular case has been constituted a general agent, is a question of fact, which may be established by direct proof, or inferred from circumstances. The fact being established, the presumption of law is that he has the authority to transact the business of his principal in the usual and customary mode in which such business is ordinarily transacted. It is on this presumption that the public trusts him, and his acts will bind his principal while he confines himself within the general scope of his agency, and they are free from fraud or collusion, although he may have acted in violation of his private instructions. 2 Kent, Comm. p. 484; Whitehead v. Tuckett, 15 East, 400. This presumption stands on plain and obvious reasons of public policy; it is a necessary principle to prevent fraud and encourage confidence in trade. Those who deal with such an agent, do it in reliance on his general authority, and they cannot be presumed to be acquainted with any private restrictions on this general authority. But if the knowledge of any such particular instructions is brought home to any individual who deals with him, the principal will not be bound unless the act of the agent is strictly within his authority. The force of the legal presumption yields to proof of the contrary. A special agent is one intrusted to do a particular act, or certain specified acts, and binds his employer only when he strictly pursues his power. It is the business of the party who deals with him to ascertain the extent of his authority, otherwise he trusts him at his own peril. 2 Kent, Comm. 484; Paley, Prin. &

Ag. 164. When a general agent acts under specific instructions, and these are brought home to the knowledge of the person who deals with him, then upon plain principles there can be no difference between his authority to bind his principal, and that of a special agent. And when these instructions are found in the general and public laws of the country, every person is presumed to be acquainted with them, and all the presumptions of law in favor of a general power are removed.

In the present case, therefore, the question which was discussed at the bar, whether a collector of the customs is to be considered a general or special agent of the United States, is wholly immaterial. In either case he was bound by his instructions, and these being as well known to the defendants as to himself, he cannot upon well-established principles, bind the United States beyond the precise limits of his power. These were, to receive in payment of the bond only such money as was a legal tender in payment of debts, or bills of the Bank of the United States. If, therefore, it was the intention of the parties that this check should be received as payment of the bond, it was an illegal intention, and not binding on the United States. It was in direct violation of a public law, which must be presumed to be known to both parties.

In the next place, it is said the deputy collector's receipt, acknowledging satisfaction of the debt, is a bar to any suit on the bond. A receipt does not operate as an estoppel to bar a right, without a satisfaction. It is merely evidence of payment, not conclusive, but always open to explanation or contradiction. Harden v. Gordon [Case No. 6,047]; Stackpole v. Arnold, 11 Mass. 32; Wilkinson v. Scott, 17 Mass. 257; Ensign v. Webster, 1 Johns. Cas. 145; Tobey v. Barber, 5 Johns. 68. A party denying its validity may always inquire into the consideration, and show what it in fact was, and impeach it on the ground of fraud, mistake, accident, or surprise. If the view which has been taken of the case is correct, the receipt can be no bar to this action. The consideration of the receipt was the check, and admitting that the collector received this as payment, as this was unauthorized and contrary to law, it is not binding on the United States. Whether the objection taken to it be fraud or mistake on the part of the collector or of his deputy, it is equally fatal. But it is said that the act of cancelling, by its own intrinsic virtue, annihilated the bond as a legal instrument, even if it was not paid, so that no action can be maintained upon it. The ancient doctrine certainly looks that way. The forms of pleading formerly rendered it necessary to make a profert of the deed, and without such profert the declaration was incurably defective. East India Co. v. Boddam, 9 Ves. 466. For so tenacious were the courts in former times of mere artificial and technical rules, which are professedly devised as subsidiary to justice, by promoting its regular and orderly administration, that the plainest claims of right were sacrificed rather than deviate from the forms of proceedings which had been sanctioned by long usage. If a bond was lost by time or accident, the obligee had no remedy at law, simply because no profert could be made of it; and if it were cancelled by fraud or mistake, it would seem also necessarily to follow, from this rule of pleading, that the remedy upon it would be gone, because, when produced, it would not support the declaration. The good sense of modern times has overcome this difficulty, and the obligee of a bond which has been accidentally lost or destroyed, can now recover upon it at law, as a good and subsisting obligation, without a profert. If the entire destruction of a bond does not present any insuperable obstacle to a recovery upon it, it will be difficult to show, by any rational and sensible distinction, why an action may not be maintained on a bond that has been cancelled, or from which the seal has been torn off, if it be shown that it was cancelled by fraud or mistake, without its having been paid or satisfied. The cancellation is certainly nothing more than the total destruction of the bond. If the collector, instead of cancelling this bond, had thrown it into the fire there would be no difficulty, on proof of the facts, in maintaining this action, as upon a lost bond; and why the remedy should be taken away, when instead of burning up the paper, he has, under the same state of facts, cancelled it by marks made with a pen, is more than I can reconcile with any principles of justice or common sense. In my opinion, no such absurdity can be imputed to the law. The cases of Cutts v. U. S. [Case No. 3,522], and U. S. v. Spalding [Id. 16,365], are conclusive to the point that the mere cancellation of the bond, if done animo cancellandi, will not destroy its validity. Neither of these cases were precisely like the case at bar. In the first, it was decided that a deed was not avoided by the seal being torn off by the obligor, whether he did it fraudulently or innocently; and in the latter, that if the obligee is induced to tear off the seal, or annul the bond, by the fraud or imposition of the obligor, the bond may still be declared on as a subsisting obligation. The mere fact of cancellation itself does not, therefore, annul the obligation of the bond. The circumstances under which it was cancelled may be inquired into, and these cases appear to me, in their spirit, to lead to the conclusion that a deed which has been cancelled by mistake or fraud, without being paid or otherwise satisfied, will support an action under the same circumstances as those upon which a recovery can be had on a bond lost or destroyed. My opinion on the whole case is, that judgment must be rendered for the plaintiffs.

Case No. 16,725.

UNITED STATES ex rel. WHEELER v. WILLIAMSON.

[12 Leg. Int. 198, 199;[1] 3 Am. Law Reg. 729; 3 Liv. Law Mag. 595; 5 Pa. Law J. Rep. 365; 1 Quart. Law J. 70.]

District Court, E. D. Pennsylvania. July 27, 1855.

HABEAS CORPUS PROCEEDINGS—FUGITIVE SLAVES.

[On habeas corpus proceedings to obtain slaves who have been abducted from relator, one to whom the writ is addressed, and who both organized and supervised the abduction, is in contempt if his return merely denies that he had control at any time over the movements of the slaves, or that he knows their whereabouts; this being in effect false and evasive.]

[2] [On the 18th day of July last, the Hon. John H. Wheeler, U. S. minister to Nicaragua, made application to the United States court for this district for a writ of habeas corpus, to be directed to one Passmore Williamson. The petition of Mr. Wheeler, verified by affidavit, was presented by his counsel, Mr. J. C. Vandyke, district attorney of the United States. The court allowed the writ, which was made returnable forthwith, and a hearing appointed for the following day, (the 19th) at three o'clock in the afternoon. On the 19th, no return being made, and it appearing that the party to whom it was directed was absent from the city, Mr. Wheeler's counsel applied for an alias writ, which was allowed, and made returnable on the following morning at 10 o'clock. On the following morning, Williamson appeared in court, attended by his counsel, Messrs. Hopper, Gilpin and Birney, and the following return was drawn up in the presence of the court:

["To the Hon. John K. Kane, the Judge Within Named. Passmore Williamson, the defendant in the within writ mentioned, for return thereto, respectfully submits, that the within named Jane, Daniel and Isaiah, or by whatever names they may be called, nor either of them, are not now, nor was at the time of the issuing of the said writ, or the original writ, or at any other time, in the custody, power or possession of, nor confined, nor restrained their liberty by him the said Passmore Williamson. Therefore he cannot have the bodies of the said Jane, Daniel and Isaiah, or either of them, before your honor, as by the within writ he is commanded. P. Williamson.

["The above named Passmore Williamson being duly affirmed, says, that the facts in the above return set forth are true. P. Williamson.

["Affirmed and subscribed before me, this 20th day of July, A. D. 1855. Chas. F. Heazlitt, U. S. Commissioner."

[Mr. Vandyke briefly stated the facts of the case, and asked leave to traverse the return. The facts appear in the testimony taken before the court. Mr. Hopper, one of the respondent's counsel, desired time to prepare testimony to prove the truth of the return, and asked for a continuance, for that purpose. The court could not agree to a continuance. If the facts were as stated by the counsel for the relator, there had been a cruel outrage of a criminal nature. Mr. Gilpin stated that the respondent wished to stand on the ground of utter negation of the possession of the servants at any time. No objection on the part of the respondent being made to the return being traversed orally, the counsel for the relator entered upon the examination of witnesses.

[John H. Wheeler, sworn: "I am a native of the state of North Carolina, and a citizen thereof. I am the owner of three colored persons, named Jane, Dan and Isaiah, and have been for some time; I hold them to labor under the laws of the state of North Carolina and of my country; I left Washington on Wednesday, the 18th; I was under orders from my government to proceed to the republic of Nicaragua forthwith; I have been the minister for one year, and had returned with a couple of treaties, and was upon my return to take passage from New York, in company with my three servants, whom I was taking to their mistress, who is now in Nicaragua. My wife is a native of Philadelphia, where I married her. I was forced to go to the residence of my father-in-law, Mr. Thomas Sully, to get some articles of Mrs. Wheeler's. I got a trunk from Mr. Sully's house containing these articles, proceeded to the wharf, but found the two o'clock boat gone. I had to wait until five o'clock for the next train. I spent the intervening time at the nearest hotel,—Bloodgood's, at Walnut street wharf. On going on board the boat at a little before five o'clock, I retired with my three servants to the hurricane deck to get out of the noise and bustle; shortly before five o'clock —the last bell had just rung, at five minutes before five—while I was reading the evening papers, an individual, whom I recognize as Mr. Passmore Williamson (looking at the respondent), came up to me and asked if he might speak to my servants. I replied that I could not imagine what business he could have with my servants, and that if he had anything to say I was the proper person to say it to; Mr. Williamson then pushed past me, and asked the woman (Jane) if 'she was a slave, and if she knew she was in a free country,' or something like it, and then, 'if they (the servants) would like to be free;' the woman replied that she knew with whom she was going, where and how she was going; the respondent then took her by the arm, and began to force her away; I interfered and said to Mr. Williamson, 'I wish you would go away.' Two colored fellows who had come up, then seized and held witness, and one of them said, 'if you make any resistance I will cut your

[1] [Reprinted from 12 Leg. Int. 198, 199, by permission.]

[2] [From 3 Am. Law Reg. 729.]

throat.' Do not know the proper names of the negroes who seized and held me; one of them is called Rabbit; by the interference of some gentleman, who seemed to be a traveller, the negroes released me, and I hurried down to the lower deck, and saw Williamson hurrying the woman off; and other colored persons with the boys, who were struggling to get away; went up to Williamson, and asked him what he was going to do with the woman; he answered that his name was Passmore Williamson that he could be found at Seventh and Arch streets, and that he would be responsible for any legal claim he (witness) might have on the slaves. By this time the colored persons with Mr. Williamson had got the servants off the wharf, and turning down the first street above the wharf (Front street) hurried them into a carriage which was standing about a square below Walnut street, in a large open space with large warehouses in it (Dock street); after the negroes had got off the boat, Mr. Williamson walked behind the crowd, and said something in a whisper to a large burly policeman, who was standing near. I spoke to the policeman in a whisper, asking him to observe the people who were committing the outrage, but the policeman refused to have anything to do with the matter, as 'he was not a slave-catcher.'" Cross-examined: "Mr. Williamson walked back with me from the carriage; he offered to write his name down, but I told him I could write it myself; he gave no directions to the driver; it was not a regular coach stand; there were no other carriages near; the people standing about the carriage, and who hurried the servants into it, were colored." Thomas Wallace, sworn: "I am an officer. I saw the occurrence on the avenue, but not on the boat; a crowd was coming down towards Dock street. I thought it was a fight, and went up; saw several negroes forcing along a colored woman, who was holding back with all her strength, and two boys, who were also struggling; they were all crying; four or five black fellows had the boys; they said they were slaves, whom they were taking away; the defendant was following the crowd; saw him do nothing but follow after the negroes; the negroes were pushing the woman and boys along; they all pulled back; I followed to Dock street, and saw the negroes put the woman and boys in a carriage; I knew the negroes; the defendant whispered to me, and said that they were slaves,—they were getting away,—and asked me to protect them; I said that I would have nothing to do with the matter." Robert T. Tumbleston, sworn: "I am a travelling agent between Philadelphia and New York; I was standing on the forward part of the boat, and saw a crowd; I went forward, and saw a colored woman and two boys being forced ashore by some colored men; I know two of the men, Custis and Ballard, who were very busy; they said the persons they had were slaves; Custis said to Mr. Wheeler, that if he interfered he would cut his throat from ear to ear; Custis had one of the boys in his arms; I followed a short distance, and then returned." William Edwards, sworn: "I take messages to the line and from it; I was on the wharf when this thing occurred; I saw two boys forced away by two colored men; the boy cried, and was struggling very hard to get away from those who held him; there were ten or fifteen negroes in the crowd." Capt. Andrew Heath, sworn: "Am in the employ of the Camden and Amboy Railroad Company; was on board of the boat; saw a negro bringing a small boy down the stairs of the boat; the boy cried murder; there were twelve or fifteen negroes forcing the woman and two boys along in a crowd; the boys and woman kicked and cried to get away from their assailants; they said they wanted to go with their master; I saw the defendant walking along with them."

[Mr. Vandyke rose, after the above testimony had been taken, and after remarking on the evidence and the return which had been made by the respondent, said that he had two motions to make: 1st. He moved for an attachment against the respondent, for contempt in making a false return to the writ. 2d. That he be held to bail in $5,000 to answer the charge of perjury.

[Mr. Gilpin asked whether the court would now hear the respondent on the question of contempt. He was instructed by his client to say, that evidence could be offered which would put a different complexion on the case.

[KANE, District Judge, said he would either hear counsel on the question as it now stands, or he would hear evidence for respondent.

[Mr. Hopper said the motion of the district attorney had taken himself and friends by surprise, and he would ask time for consideration.

[KANE, District Judge, said he understood that the respondent was willing to take the stand and swear that he had further evidence to offer. If the respondent would make oath that he had such evidence in prospect, the court would consider the application for a continuance.

[Passmore Williamson was then affirmed: "After the colored people left Dock street, in the carriage, I saw no more of them; I do not know where they are; have had no control over them, nor have I had any hand in their escape; my whole connection with the affair was this: I had heard that these three persons were in the city, and I felt anxious to inform them of their rights; for this purpose I went to Bloodgood's Hotel, where I saw a yellow boy; I asked him about the matter, and he told me where the party was; when I went upon the upper deck of the boat, I saw that man, (pointing to Mr. Wheeler); I approached the colored

woman, and asked her if she knew her rights, that by law she was free; Mr. W. asked me what I wanted. I told him my errand; he (Mr. W) kept interfering, and said she knew her rights and he did not want any interference with his affairs; Mr. W. reminded her of her children at home, and asked her if she wanted to leave them; she replied that she did not, but that she wanted to be free; Mr. Wheeler insisted that the woman did not want to go; there was an excitement, and the children cried. I saw them taken away; the object was secured of enabling them to act in accordance with their rights." Question by Mr. Vandyke: "Was it your object to take them from Mr. Wheeler? A.: 'It was, if they desired." Cross-examined: "William Still, a colored man, first informed me of the matter; he laid upon my desk a note containing the facts; I told him to go to the wharf and attend to it, that I was going out of town; I afterwards altered my mind, and went to the boat; I was there before William Still; I do not know who engaged the carriage; I don't know who had hold of Mr. Wheeler; I told Mr. Wheeler I would be responsible to him for any damage his rights might sustain." Question by Mr. Vandyke: "Did you say his 'rights,' or his 'legal rights?' A.: "I do not recollect which I said. No man has rights that are not legal rights. I told Still to get the names if he could, and if they went to New York, we would telegraph there; he said there was nothing in the way of their remaining here, if they wished; I told him to hurry down to the wharf and see that their wishes were complied with. My first idea was to get out a writ of habeas corpus here, but as there was no judge in town, I thought it best to telegraph; I was afraid that as the boat was about starting, we would not have time to accomplish anything. Still said nothing to interfere; when I went down to the boat, I saw him talking to Mr. Wheeler; he is clerk at the Anti-Slavery office, in North Fifth street. Still was the only person on board I knew. I saw him this morning; we had a conversation respecting this case. We conversed as to the safety of the party; he said they were safe, and that they would not return under any circumstances; he did not tell me where they were. I am secretary of the active committee of the old Pennsylvania Anti-Slavery Society. Mr. Still did not tell me at what time the party returned. I do not know who got into the carriage. I saw it drive off."

[Mr. Vandyke contended that the respondent's testimony was no testimony at all. His statement was not sufficient to contradict the positive evidence of disinterested witnesses. It was apparent that these slaves were within the control of the respondent. The latter, the district attorney contended, had disposed of this property, and that he could reach it, if he felt disposed. The respondent was the ringleader in robbing the owner of his property. He then leaves town, and this morning, early, he has a conference with his companion in crime. Mr. Vandyke went on to argue that the return to the writ was not only an evasion, but an absolute falsehood, and that the parties were under the control of the respondent. He urged, in conclusion, that the respondent had not purged himself of contempt, and that he was liable for it and for perjury. The respondent's counsel, after consultation, determined to leave the matter to the court for decision, without argument.

[KANE, District Judge, said, that the case was of so grave a character, and the consequences so great to the defendant, that he was desirous, before pronouncing an opinion, to take time to consider and examine the matter. In the mean time, the defendant must enter bail in the sum of $5,000, on the motion to hold him for perjury, to appear on next Friday morning for a further hearing, at which time he would deliver an opinion upon the subject. The motion for an attachment for contempt will go over, and be disposed of at the same time.

[The court then adjourned.] [3]

Mr. Vandyke, U. S. Dist. Atty.

E. Hopper and C. Gilpin, for defendant.

KANE, District Judge. Col. John H. Wheeler, of North Carolina, the United States minister to Nicaragua, was on board of a steamboat, at one of the Delaware wharves, on his way from Washington to embark at New York for his post of duty. Three slaves, belonging to him, were sitting at his side on the upper deck. Just as the last signal bell was ringing, Passmore Williamson came up to the party—declared to the slaves that they were free—and forcibly pressing Mr. Wheeler aside, urged them to go ashore. He was followed by some dozen or twenty negroes, who by muscular strength carried the slaves to the adjoining pier; two of the slaves at least, if not all three, struggling to release themselves, and protesting their wish to remain with their master; two of the negro mob, in the meantime, grasping Col. Wheeler by the collar, and threatening to cut his throat if he made any resistance. The slaves were borne along to a hackney-coach that was in waiting, and were conveyed to some place of concealment; Mr. Williamson following and urging forward the mob, and giving his name and address to Col. Wheeler, with the declaration that he held himself responsible towards him for whatever might be his legal rights, but taking no personally active part in the abduction after he had left the deck. I allowed a writ of habeas corpus at the instance of Col. Wheeler, and subsequently an alias; and to this last, Mr. Williamson made

[3] [From 3 Am. Law Reg. 729.]

return, that the persons named in the writ, "nor either of them, are not now, nor was at the time of issuing of the writ, or the original writ, or at any other time, in the custody, power or possession of the respondent, nor by him confined or restrained; wherefore he cannot have the bodies," &c. At the hearing I allowed the relator to traverse this return; and several witnesses who were asked by him, testified to the facts as I have recited them. The district attorney, upon this state of facts, moved Mr. Williamson's commitment (1) for contempt in making a false return; (2) to take his trial for perjury. Mr. Williamson then took the stand to purge himself of contempt. He admitted the facts substantially as in proof before; made it plain that he had been an advisor of the project, and given to his confederates sanction throughout. He renewed his denial that he had control at any time over the movements of the slaves, or knew their present whereabouts. Such is the case, as it was before me on the hearing.

I cannot look upon this return otherwise than as illusory—in legal phrase, as evasive, if not false. It sets out that the alleged prisoners are not now, and have not been since the issue of the habeas corpus, in the custody, power or possession of the respondent; and in so far, it uses legally appropriate language for such a return. But it goes further, and by added words, gives an interpretation to that language essentially variant from its legal import. He denies that the prisoners were within his power, custody or possession at any time whatever. Now, the evidence of respectable, uncontradicted witnesses, and the admission of the respondent himself, establish the fact beyond controversy, that the prisoners were at one time within his power and control. He was the person by whose counsel the so-called rescue was devised. He gave the directions, and hastened to the pier to stimulate and supervise their execution. He was the spokesman and first actor after arriving there. Of all the parties to the act of violence, he was the only white man, the only citizen, the only individual having recognized political right, the only person whose social training could certainly interpret either his own duties or the rights of others under the constitution of the land.

It would be futile, and worse, to argue that he who has organized and guided, and headed a mob to effect the abduction and imprisonment of others—he in whose presence and by whose active influence the abduction and imprisonment have been brought about—might excuse himself from responsibility by the assertion that it was not his hand that made the unlawful assault, or that he never acted as the gaoler. He who unites with others to commit a crime shares with them all the legal liabilities that attend on its commission. He chooses his company, and adopts their acts. This is the retributive law of all concerted crimes; and its argument applies with peculiar force to those cases in which redress and prevention of wrong are sought through the writ of habeas corpus. This, the great remedial process by which liberty is vindicated and restored, tolerates no language in the response which it calls for that can mask a subterfuge. The dearest interests of life, personal safety, domestic peace, social repose, all that man can value, or that is worth living for, are involved in this principle. The institutions of society would lose more than half their value, and courts of justice become impotent for protection, if the writ of habeas corpus could not compel the truth, full, direct, and unequivocal, in answer to its mandate. It will not do to say to the man, whose wife or whose daughter has been abducted: "I did not abduct her; she is not in my possession; I do not detain her, inasmuch as the assault was made by the hand of my subordinates, and I have foreborne to ask where they propose consummating the wrong."

It is clear then, as it seems to me, that in legal acceptance the parties whom this writ called on Mr. Williamson to produce, were at one time within his power and control; and his answer, so far as it relates to his power over them, makes no distinction between that time and the present. I cannot give a different interpretation to his language from that which he has practically given himself, and cannot regard him as denying his power over the prisoners now, when he does not aver that he has lost the power which he formerly had. He has thus refused, or at least he has failed, to answer to the command of the law. He has chosen to decide for himself upon the lawfulness as well as the moral propriety of his act, and to withhold the ascertainment and vindication of the rights of others from that same forum of arbitrament on which all his own rights repose. In a word, he has put himself in contempt of the process of this court and challenges its action. That action can have no alternative form. It is one too clearly defined by ancient and honorable precedent, too indispensable to the administration of social justice and the protection of human right, and too potentially invoked by the special exigency of the case now before the court to excuse even a doubt of my duty or an apology for its immediate performance.

The cause was submitted to me by the learned counsel for the respondent, without argument, and I have, therefore, found myself at some loss to understand the grounds on which, if there be any such, they would claim the discharge of their client. Only one has occurred to me, as perhaps, within his view; and on this I think it right to express my opinion. I will frankly reconsider it, however, if any future aspect of the case shall invite the review. It is this: that the

persons named in this writ as detained by the respondent, were not legally slaves, inasmuch as they were in the territory of Pennsylvania when they were abducted.

Waiving the inquiry, whether for the purposes of this question they were within the territorial jurisdiction of Pennsylvania while passing from one state to another upon the navigable waters of the United States—a point on which my first impressions are adverse to the argument—I have to say: 1. I know of no statute, either of the United States, or of Pennsylvania, or of New Jersey, the only other state that has a qualified jurisdiction over this part of the Delaware, that authorizes the forcible abduction of any person or any thing whatsoever, without claim of property, unless in aid of legal process: 2. That I know of no statute of Pennsylvania, which affects to divest the rights of property of a citizen of North Carolina, acquired and asserted under the laws of that state, because he has found it needful or convenient to pass through the territory of Pennsylvania. 3. That I am not aware that any such statute, if such an one were shown, could be recognized as valid in a court of the United States. 4. That it seems to me altogether unimportant whether they were slaves or not. It would be the mockery of philanthropy to assert, that because men had become free, they might therefore be forcibly abducted.

I have said nothing of the motives by which the respondent has been governed. I have nothing to do with them; they may give him support and comfort before an infinitely high tribunal; I do not impugn them here. Nor do I allude, on the other hand, to those special claims upon our hospitable courtesy, which the diplomatic character of Mr. Wheeler might seem to assert for him. I am doubtful whether the acts of congress give to him, and his retinue, and his property, that protection as a representative of the sovereignty of the United States, which they concede to all sovereignties besides. Whether, under the general law of nations, he could not ask a broader privilege than some judicial precedents might seem to admit, is not necessarily involved in the cause before me. It is enough that I find, as the case stands now, the plain and simple grounds of adjudication, that Mr. Williamson has not returned truthfully and fully to the writ of habeas corpus. He must, therefore, stand committed for a contempt of the legal process of the court.

As to the second motion of the district attorney, that which looks to a committal for perjury, I withhold an expression of opinion in regard to it. It is unnecessary, because Mr. Williamson being under arrest, he may be charged at any time by the grand jury; and I apprehend that there may be doubts whether the affidavits should not be regarded as extrajudicial and voluntary.

Let Mr. Williamson, the respondent, be committed to the custody of the marshal without bail or mainprise, as for a contempt of the court in refusing to answer to the writ of habeas corpus, heretofore awarded against him at the relation of Mr. Wheeler.

District attorney asked for warrant of commitment under the seal of court. Granted.

Mr. Gilpin, for defendant, asked leave to amend the return so as to conform to the views of this court.

KANE, District Judge, said he would give the defendant a full hearing upon any motion his counsel should choose to present.

The court then took a recess.

After the decision by the court, United States Marshal Wynkoop took the prisoner into custody, and conveyed him to Moyamensing prison, in a carriage, and handed him over to the keepers. A number of Williamson's friends requested the marshal to put the prisoner into the custody of one of his deputies, and thus avoid sending him to prison, but the marshal declined, by replying that he would comply strictly with the mandate of the court.

[Subsequently Messrs. Townsend & Read moved for a rule to show cause why the writ of habeas corpus should not be quashed, which application was refused. See Case No. 16,726.]

Case No. 16,726.

UNITED STATES ex rel. WHEELER v. WILLIAMSON.

[4 Am. Law Reg. 5; 5 Pa. Law J. Rep. 377.]

District Court, E. D. Pennsylvania. Oct. 12, 1855.

HABEAS CORPUS TO RELEASE SLAVES—MOTION TO QUASH—CONTEMPT.

1. The doctrines laid down in Case No. 16,725 reaffirmed.

2. Where a habeas corpus is issued by a master on behalf of slaves alleged to have been carried away by force from him, and the defendant is committed for a contempt in not making a proper return to the writ, the court will not entertain a motion to quash the proceedings upon the petition and suggestion of one of the negroes that she is and was absenting herself from her master voluntarily, and that she is not nor ever was in the custody, possession, power, or control of the defendant; such slave not coming or being brought personally within the jurisdiction, or before the court, in order to make the application.

[Cited in Ex parte Des Rochers, Case No. 3,824.]

After the proceedings in this case as reported [Case No. 16,725], no further steps were taken in this court on the part of the defendant, until Wednesday, October 3, 1855, when Mr. Townsend and Mr. John M. Read, presented to the court a paper purporting to be "the suggestion and petition of Jane Johnson;" on which they moved for a rule to show cause why the writ of habeas corpus, issued against Passmore Williamson, should not be quashed. The paper in question was in the following form:

"To the Honorable John K. Kane, Judge of the Aforesaid Court: The suggestion and petition of Jane Johnson, respectfully showeth: That she is one of the three parties named in the aforesaid writ of habeas corpus, and the mother of the two children Daniel and Isaiah, also named therein, and thereby required to be produced. That before the occurrences hereinafter stated, this petitioner and her said two children lived in Washington, in the District of Columbia, and were claimed and held by the said John H. Wheeler as his slaves, according to the laws and usages of that District. That on the 18th day of July, 1855, the said John H. Wheeler, voluntarily brought your petitioner and her two children from the city of Washington to the city of Philadelphia, passing through Baltimore, and reaching Philadelphia by way of the Philadelphia, Wilmington and Baltimore Railroad. Mr. Wheeler stopped at Bloodgood's Hotel, in Philadelphia, at the foot of Walnut street, and fronting on the Delaware river, and remained there with your petitioner and her said two children, from about 2 o'clock, p. m., until shortly before 5 o'clock, p. m., when he directed your petitioner to bring her children and accompany him on board a steamboat belonging to the railroad line to New York, which boat was then being attached to the pier in front of the said hotel; which direction was complied with, and your petitioner seated herself with her said two children, on the upper deck of the said boat, near Mr. Wheeler. Your petitioner was very desirous of procuring the freedom of herself and her children, and before she left Washington determined to make an effort to do so, if said Wheeler should take her north. While stopping at the hotel as aforesaid, Mr. Wheeler went to dinner; and while your petitioner was absent from his presence, she informed one of the waiters at the said hotel (a colored woman) that she and her children were slaves. A few minutes before 5 o'clock, while said Wheeler, your petitioner, and her children were on the upper deck of the steamboat as aforesaid, a white gentleman, whose name your petitioner has since been informed is Passmore Williamson, approached your petitioner, and informed her that she was free if she chose to claim her liberty, and asked her if she desired to be free. Your petitioner replied that she did wish to be free, as in truth and in fact she did; and said Williamson then further informed your petitioner that if she wished her liberty, she could go ashore and take her children with her, and that no one had a right to prevent her doing so; but that she must decide promptly whether she would go or stay, as the boat would soon start. Your petitioner being desirous to go on shore, rose to go, and was taken hold of by said Wheeler, who urged her to stay with him; but your petitioner refused to stay, and voluntarily and most willingly left the boat, aided in the departure by several colored persons, who took her children with her consent, and led or carried them off the boat, and conducted your petitioner and her said children to a carriage a short distance from the boat, which carriage they entered, and went away. Mr. Williamson did not accompany the colored persons who were assisting your petitioner to get away, but remained some distance behind; and your petitioner has never seen him since she left the steamboat as aforesaid. Your petitioner further states, that she was not at the time of her leaving Mr. Wheeler as aforesaid, or at any time since, in any way or manner whatever in the custody, power, possession or control of Mr. Williamson, nor has she received from him any directions or instructions, directly or indirectly, whither she should go. But claiming and believing that she and her children are free, your petitioner has ever since her leaving said Wheeler, exercised her right, as a free woman, to go whither she pleased, and to take her said children, and has not since that time been restrained of her liberty by any person whatever. Your petitioner is advised, and respectfully submits to your honor, that the said writ of habeas corpus ought to be quashed under the facts above stated, and for the following, among other reasons: First, the said Wheeler had no control over or right to the possession of your petitioner or her said children at the issuing of the aforesaid writ, they being then free; second, because the said writ was issued without the knowledge or consent of your petitioner, and against her wish; third, because in truth and in fact, at the issuing of the said writ and at all times since your petitioner left the company of said Wheeler as aforesaid, neither she nor her said children have been detained or restrained of their liberty by said Williamson or any other person whatever; fourth, because under the writ of habeas corpus, which is a writ devised and intended to restore freemen to liberty when unduly restrained thereof, the said John H. Wheeler seeks to reclaim and recover your petitioner and her said children, and reduce them again into slavery. Wherefore, your petitioner respectfully prays this honorable court, that the said writ of habeas corpus and all proceedings under it, may be quashed, and especially that the said Passmore Williamson may be discharged from his imprisonment.

her
Jane X Johnson.
mark.

"United States of America, District of Massachusetts: On this twenty-sixth day of September, A. D. 1855, the above named Jane Johnson, personally appearing, made solemn oath that the facts stated in the foregoing petition, so far as they are written of her own knowledge, are true, and all other facts therein stated, she believes to be true. Before me,

"C. W. Loring,

"Com. U. S. Court Dist. Massachusetts."

Upon the motion being made, Judge KANE expressed a doubt whether he could properly

entertain it, inasmuch as it did not appear that Jane Johnson had a status in the court. This question was then partially argued by Mr. Read; and on the Monday and Tuesday following, it was discussed very fully by both the counsel.

KANE, District Judge. Before entering upon the question immediately before me at this time, it is proper that I should advert to the past action of this court in the case of Passmore Williamson, and to the considerations that led to it. I do this the rather, because in some of the judicial reviews to which it has been submitted collaterally, after an ex parte argument it does not seem to me to have been fully apprehended. I begin with the writ which originated the proceeding.

The writ of habeas corpus is of immemorial antiquity. It is deduced by the standard writers on the English law from the great charter of King John. It is unquestionable, however, that it is substantially of much earlier date; and it may be referred without improbability, to the period of the Roman invasion. Like the trial by jury, it entered into the institutions of Rome before the Christian era, if not as early as the times of the republic. Through the long series of political struggles which gave form to the British constitution, it was claimed as the birthright of every Englishman, and our ancestors brought it with them as such to this country. At the common law, it issued whenever a citizen was denied the exercise of his personal liberty, or was deprived of his rightful control over any member of his household, his wife, his child, his ward, or his servant. It issued from the courts of the sovereign, and in his name, at the instance of any one who invoked it, either for himself or another. It commanded, almost in the words of the Roman edict,—"De libero homine exhibendo" (D. 43, T. 29),—that the party under detention should be produced before the court, there to await its decree. It left no discretion with the party to whom it was addressed. He was not to constitute himself the judge of his own rights or of his own conduct; but to bring in the body, and to declare the cause wherefore he had detained it; and the judge was then to determine whether that cause was sufficient in law or not. Such in America, as well as England, was the well known, universally recognized writ of habeas corpus.

When the federal convention was engaged in framing a constitution for the United States, a proposition was submitted to it by one of the members, that "the privileges and benefits of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended by the legislature except upon the most urgent and pressing occasions." See the Madison Papers (vol. 3, p. 1365). The committee to whom this was referred for consideration, would seem to have regarded the privilege in question as too definitely implied in the idea of free government to need formal assertion or confirmation; for they struck out that part of the proposed article in which it was affirmed, and retained only so much as excluded the question of its suspension from the ordinary range of congressional legislation. The convention itself must have concurred in their views; for in the constitution, as digested, and finally ratified, and as it stands now, there is neither enactment nor recognition of the privilege of this writ, except as it is implied in the provision that it shall not be suspended. It stands then under the constitution of the United States, as it was under the common law of English America, an indefeasible privilege, above the sphere of ordinary legislation.[1] I do not think it necessary to argue from the words of this article, that the congress was denied the power of limiting or restricting or qualifying the right, which it was thus forbidden to suspend. I do not, indeed, see that there can be a restriction or limitation of a privilege which may not be essentially a suspension of it, to some extent at least, or under some circumstances, or in reference to some of the parties who might otherwise have enjoyed it. And it has appeared to me, that if congress had undertaken to deny altogether the exercise of this writ by the federal courts, or to limit its exercise to the few and rare cases that might peradventure find their way to some one particular court, or to declare that the writ should only issue in this or that class of cases, to the exclusion of others in which it might have issued at the common law, it would be difficult to escape the conclusion, that the ancient and venerated privilege of the writ of habeas corpus had not been in some degree suspended, if not annulled. But there has been no legislation or attempted legislation by congress, that could call for an expansion of this train of reasoning. There was one other writ, which, in the more recent contests between the people and the king, had contributed signally to the maintenance of popular right. It was the writ of scire facias, which had been employed to vindicate the rights of property, by vacating the monopolies of the crown. Like the writ of habeas corpus, it founded itself on the concessions of Magna Charta; and the two were the proper and natural complements of each other. The First congress so regarded them. The protection of the citizen against arbitrary exaction and unlawful restraint, as it is the essential object of all rightful government, would present itself as the first great duty of the courts of justice that were about to be constituted. And if, in defining their ju-

[1] "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." Const. U. S. art. 1, § 9, par. 1.

risdiction, it were thought proper to signalize two writs, out of the many known to the English law, as within the unqualified competency of the new tribunals, it would seem natural that those two should be selected, which boasted their origin from the charter of English liberties, and had been consecrated for ages in the affectionate memories of the people as their safeguard against oppression. This consideration has interpreted for me the terms of the statute, which define my jurisdiction on this subject. Very soon after I had been advanced to the bench, I was called upon to issue the writ of habeas corpus, at the instance of a negro, who had been arrested as a fugitive from labor. It was upon the force of the argument, to which I now advert, that I then awarded the process; and from that day to this, often as it has been invoked and awarded in similar cases that have been before me, my authority to award it has never been questioned.

The language of the act of congress reflects the history of the constitutional provision. It enacts [1 Stat. 81] "that all the before mentioned courts of the United States" (the supreme, circuit and district) "shall have power to issue writs of scire facias, habeas corpus and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." I am aware that it has sometimes been contended or assumed, without, as it seems to me, a just regard to the grammatical construction of these words, that the concluding limitation applies to all the process of the courts, the two writs specially named among the rest; and that the federal courts can only issue the writ of habeas corpus, when it has become necessary to the exercise of an otherwise delegated jurisdiction; in other words, that it is subsidiary to some original process or pending suit. It is obvious, that if such had been the intention of the law-makers, it was unnecessary to name the writ of habeas corpus at all; for the simpler phrase, "all writs necessary, &c." would in that case have covered their meaning. But there are objections to this reading more important than any that found themselves on grammatical rules. The words that immediately follow in the section, give the power of issuing the writ to every judge, for the purpose of inquiring into the causes of a commitment. Now, a commitment presupposes judicial action, and this action it is the object of the writ to review. Can it be, that a single judge, sitting as such, can re-examine the causes of a detainer, which has resulted from judicial action, and is therefore prima facie a lawful one; and yet that the court, of which he is a member, cannot inquire into the causes of a detainer, made without judicial sanction, and therefore prima facie unlawful? Besides, if this were the meaning of the act, it might be difficult to find the cases to which it should apply. I speak of the writ of habeas corpus ad subjiciendum, the great writ of personal liberty, referred to in the constitution; not that modification of it which applies specially to the case of a commitment, nor the less important forms of habeas corpus, ad respondendum, ad faciendum, &c., which are foreign to the question. I do not remember to have met a case, either in practice or in the books, where the writ ad subjiciendum could have performed any pertinent office in a pending suit. There may be such, but they do not occur to me; and I incline very strongly to the opinion, that if the power to issue the writ of habeas corpus applies only to cases of statutory jurisdiction, outrages upon the rights of a citizen can never invoke its exercise by a federal court. If such were indeed the law of the United States, I do not see how I could escape the conclusion, that the jealousy of local interests and prejudice, which led to the constitution of federal courts, regarded only disputes about property; and that the liberty of a citizen, when beyond the state of his domicil, was not deemed worthy of equal protection. From an absurdity so gross as this, I relieve myself by repeating the words of Chief Justice Marshall, in Ex parte Watkins, 3 Pet. [28 U. S.] 201: "No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up on it." Whether, then, I look to the constitution, and its history, or to the words or the policy of the act of congress, I believe that it was meant to require of the courts of the United States, that they should dispense the privileges of the writ of habeas corpus to all parties lawfully asserting them, as other courts of similar functions and dignity had immemorially dispensed them at the common law. The congress of 1789 made no definition of the writ, or of its conditions, or effects. They left it as the constitution left it, and as it required them to leave it, the birthright of every man within the borders of the states; like the right to air, and water, and motion, and thought, rights imprescriptible, and above all legislative discretion or caprice. And so it ought to be. There is no writ so important for good, and so little liable to be abused. At the worst, in the hands of a corrupt or ignorant judge, it may release some one from restraint who should justly have remained bound. But it deprives no one of freedom, and devests no right. It could not give to Mr. Wheeler the possession of his slaves, but it might release them from the custody of a wrong-doer. Freemen or bondsmen, they had rights; and the foremost of these was the right to have their other rights adjudicated openly and by the tribunals of the land. And this right at least, Mr. Wheeler shared with them; he also could claim a hearing.

Unless these views are incorrect through-

out, the district court had jurisdiction of the case, which came before it at the instance of Mr. Wheeler. He represented in substance, by his petition under oath, that three human beings had been forcibly taken possession of by Passmore Williamson, without authority of law, within the Eastern district of Pennsylvania; and he prayed, that by force of the writ of habeas corpus, Mr. Williamson might be required to produce their bodies before the court, and to declare what was the right or pretext of right, under which he claimed to detain them. Whether Mr. Wheeler was in fact entitled to demand this writ, or whether upon a full discussion of the law the court might have felt justified in refusing it to him, is a question of little moment. Every day and in every court, writs issue at the instance of parties asserting a grievance, and very often when in truth no grievance has been sustained. The party assailed comes before the court in obedience to its process. He perhaps questions the jurisdiction of the court. Perhaps he denies the fact charged. Perhaps he explains that the fact, as charged, was by reason of circumstances a lawful one. The judge is not presumed to know beforehand, all the merits of the thousand and one causes that come before him: he decides when he has heard. But the first duty of a defendant, in all cases, is obedience to the writ which calls him into court. Till he has rendered this, the judge cannot hear the cause, still less pass upon its merits. Mr. Williamson came before the court; but he did not bring forth the bodies of his alleged prisoners, as the writ had commanded him. He did not question the jurisdiction of the court: he did not assert that the negroes were free, and that the writ had been applied for without their authority or consent: but he simply denied that they had ever been in his custody, power or possession, as Mr. Wheeler asserted. Witnesses were heard, and, with one consent, they supported the allegations of Mr. Wheeler, and contradicted the denial of Mr. Williamson. Mr. Williamson's counsel then asked time to enable them to produce witnesses who were material on his behalf; remarking that their client might desire to bring the negroes into court, to prove that they had not been abducted. The judge informed them, in reply, that upon Mr. Williamson making the customary affidavit that there were material witnesses whom he wished to adduce, the cause would be continued, as of course, till a future day. Mr. Williamson declined making the affidavit. He however asked leave to declare for himself what he had done, and why. He was heard, and, speaking under solemn affirmation, he not only verified all the important facts that had been sworn to by Mr. Wheeler and the witnesses, but added that immediately before coming into court with his return, he had called upon a negro who had been his principal associate in the transaction, to ascertain whether the negroes were "safe," and had been informed by him that they were "all safe." Two motions were then made by Mr. Wheeler's counsel; the first, that Mr. Williamson should be committed for a contempt of process, in that he had made a false return to the writ; the second, that he should be held to answer to a charge of perjury. He summed up the evidence, and referred to authorities in support of these motions. The counsel of Mr. Williamson then asked leave to consult together as to their appropriate course of action; and this being assented to by the court, they retired with their client for the purpose, from the court room. Returning after some time, they informed the court that they declined making any argument upon the questions which were before it. The case, which was in this manner thrown upon the court for its unaided adjudication, had assumed an aspect of grave responsibility on the part of Mr. Williamson. It was clearly in proof that the negroes had been removed by persons acting under his counsel, in his presence, and with his co-operation: his return to the writ denied that they had ever been within his possession, custody, or control. Under ordinary circumstances, this denial would have been conclusive; but being controverted by the facts in evidence, it lost that character. "The court," said Judge Story, in a case singularly analogous in its circumstances,—U. S. v. Green [Case No. 15,256],—"will not discharge the defendant, simply because he declares that the infant is not in his power, possession, control or custody, if the conscience of the court is not satisfied that all the material facts are fully disclosed. That would be to listen to mere forms, against the claims of substantial justice, and the rights of personal liberty in the citizen. In ordinary cases, indeed, such a declaration is satisfactory and ought to be decisive, because there is nothing before the court upon which it can ground a doubt of its entire verity, and that in a real and legal sense the import of the words 'possession, power, or custody,' is fully understood and met by the party. The cases of Rex v. Winton, 5 Term R. 89, and of Stacy, 10 Johns. 328, show with what jealousy courts regard returns of this nature. In these cases, there was enough on the face of the returns to excite suspicions that more was behind, and that the party was really within the constructive control of the defendant. Upon examining the circumstances of this case, I am not satisfied that the return contains all those facts within the knowledge of the defendant, which are necessary to be brought before the court, to enable it to decide, whether he is entitled to a discharge; or in other words, whether he has not now the power to produce the infant, and control those in whose custody she is." "There is no doubt," he adds, "that an attachment is

the proper process to bring the defendant into court." Anxious that this resort to the inherent and indispensable powers of the court might be avoided, the judge, in adjourning the case for advisement until the following week, urged upon Mr. Williamson and his associates, that if practicable, the negroes should, in the meantime, be brought before the court. But the negroes were not produced. They came forward afterwards, some of them, as it is said, before a justice in New York; and by a process of a Pennsylvania state court, they or some of them were brought forward again in this city, to testify for Mr. Williamson or some of his confederates. But before the court of the United States, sitting within the same curtilage, at the distance of perhaps a hundred yards, it was not thought necessary or expedient or practicable to produce them. Their evidence, whatever might have been its import or value, was never before the court, and could have no bearing upon its action. The decision was announced at the end of the week. It was, that Mr. Williamson's answer was evasive and untrue; that he, therefore, had not obeyed the writ of habeas corpus, and must consequently stand committed as for a contempt of it. The order to that effect having been made, a discussion arose between the counsel as to the propriety of certain motions, which on one side and the other they invited the court to consider. It was apparent, that the learned gentleman who at this time addressed the court on behalf of Mr. Williamson, as his senior counsel, was imperfectly prepared to suggest any specific action either for the bench, or for his client. His remarks were discursive; and when invited to reduce his motion to writing, according to the rules of practice, he found difficulty in defining its terms. This led to an intimation on the part of the judge, that, inasmuch as the opinion was in writing, and would be printed in the newspapers of the afternoon, it might be best for the counsel to examine its positions before submitting their motion. The intimation was received courteously. The question was asked whether the court would be in session on one or another of days that were named; and the reply was given, that upon a note being left at the clerk's office at any time, the judge would be in attendance to hear and consider whatever motions the counsel might see proper to lay before him. This was the last of the case. No motion was made; no further intimation given on the part of Mr. Williamson or his counsel, of a wish to make one.

Commitments for contempt, like the contempts themselves, may be properly distributed in two classes. Either they are the punishment for an act of misconduct, or it is their object to enforce the performance of a duty. The confinement in the one case is for a fixed time, supposed to be commensurate with the offending; in the other, it is without prescribed limitation, and is determined by the willingness of the party to submit himself to the law. In the case of Mr. Williamson, the commitment is for a refusal to answer; that is to say, to make a full and lawful answer to the writ of habeas corpus, an answer setting forth all the facts within his knowledge, which are necessary to a decision by the court, "whether he had not the power to produce the negroes, and control those in whose custody they were." He is now undergoing restraint, not punishment. Immediately after the opinion was read, he was informed, in answer to a remark from his counsel, that the commitment was "during the contempt:" the contempt of the party and the order of the court consequent upon it, determine together.

This is all that I conceive it necessary to say of the strictly judicial action in the case. The opinions, announced by the judge upon other points, may perhaps be regarded as merely dicta. But it had appeared from the defendant's declarations when upon the stand, that he supposed Mr. Wheeler's slaves to have become free, and that this consideration justified his acting towards them as he had done. It seemed due to him, that the court, believing as it did those views to be incorrect, should not withhold an expression of its dissent from them. Several succinct positions were accordingly asserted by the judge: two of which may invite a few additional remarks at this time. "I know of no statute of Pennsylvania," the judge said, "which affects to divest the rights of property of a citizen of North Carolina, acquired and asserted under the laws of that state, because he has found it needful or convenient to pass through the territory of Pennsylvania; and I am not aware that any such statute, if such a one were shown, could be recognized as valid in a court of the United States." The first of these propositions may be vindicated easily. By the common law, as it came to Pennsylvania, slavery was a familiar institution. Only six days after the first legislative assembly met in Philadelphia, and thirteen days before the great charter was signed, the council was engaged in discussing a law "to prevent the escape of runaways;" and four days later, it sat judicially, William Penn himself presiding, to enforce a contract for the sale of a slave. 1 Colonial Records, 63.[2] The counties

[2] "At a council, held at Philadelphia, ye 29th 1st mo., 1683. Present, William Penn, proprietary, and governor of Pennsylvania and counties annexed, Thos. Holmes, John Richardson, William Clarke, John Simcox, James Harrison, (and eight others.) The petition of Nathaniel Allen was read, shewing that he had sould a servant to Henry Bowman, for six hundred weight of beefe, with ye hide and tallow, and six pounds sterling, which ye said Bowman delayed to pay ye said petitioner, showing likewise that ye said Henry Bowman and Walter Humphrey hired a boat of the said petitioner only for one month, and kept the same boat 18 weeks from the petitioner to his great prejudice: Then it was ordered, that William Clarke, John Simcox and James Harrison should speak to Henry Bowman concerning this matter."—Page 62. The great charter was signed by William Penn,

of New Castle, Kent, and Sussex, which were at that time and for many years after annexed to Pennsylvania, and governed by the same law, continue to recognize slavery up to the present hour. It survived in our commonwealth, as a legally protected institution, until some time after the census of 1840; so cautiously did the act of 1780, for its gradual abolition among us, operate upon the vested interests of our own slave owners. That act excepted from the operation of its provisions the domestic slaves of delegates in congress, of foreign ministers, of persons passing through, or sojourning in the state, and not becoming residents therein, provided such slaves were not retained in the state longer than six months. The act of 1847 repealed so much of the act of 1780 as authorized masters and owners of slaves to bring and retain their slaves within the commonwealth for the period of six months, or for any period of time whatever. But it did not affect to vary or rescind the rights of slave owners passing through our territory. It applied to persons resident and persons sojourning, who brought and sought to retain their slaves here; for over such persons and their rights of property the state had lawful dominion: but it left the right of transit for property and person, over which it had no jurisdiction, just as it was before, and as it stood under the constitution of the United States and the law of nations.

This brings me to the second part of the position affirmed in the court's opinion, namely: the right of a citizen of one state to pass freely with his slaves through the territory of another state, in which the institution of slavery is not recognized. I need not say, that before the compact of union was formed between the states, each of them was an absolutely sovereign and independent community; and that, except so far as their relations to each other and to foreign nations have been qualified by the federal constitution, each of them remain so. As such, it is bound by that great moral code, which, because of its universal obligation, is called the "law of nations." What it could not do if freed from federative restrictions, it cannot do now: every restraint upon its policy, which duty to other states would in that case involve, binds it still, just as if the Union had been dissolved or had never been formed. All the statists unite in regarding the right of transit for person and property through the territory of a friendly state, as among those which cannot, under ordinary circumstances, be denied. Vattel, bk. 2, c. 10, §§ 132–134; Puffendorf, bk. 2, c. 3, §§ 5, 67, Ruth. Inst. bk. 2, c. 9; 1 Kent, Comm. 33, 35. It is true that the right is not an unqualified one. The state may impose reasonable conditions upon its exercise, and exact guaranties against its abuse. But subject to these limitations, it is the right of every citizen of a friendly state. The right is the same, and admits just the same qualifications, as to person and to property. The same argument, that denies the right of peacefully transmitting one's property through the territories of a state, refuses the right of passage to its owner. And the question, what is to be deemed property in such a case, refers itself necessarily to the law of the state from which the citizen brings it: a different test would sanction the confiscation of property at the will of the sovereign through whose territory it seeks to pass. If one state may decree that there shall be no property, no right of ownership in human beings; another, in a spirit of practical philanthropy only a little more energetic, may deny the protection of law to the products of slave labor; and a third may denounce a similar outlawry against all intoxicating liquids. And if the laws of a state can control the rights of property of strangers passing through its territory; then the sugar of New Orleans, the cotton of Carolina, the wines of Ohio, and the rum of New England may have their markets bounded by the states in which they are produced; and without any change of reasoning, New Jersey may refuse to citizens of Pennsylvania the right of passing along her railroads to New York. The doctrine is one that was exploded in Europe more than four hundred and fifty years ago, and finds now, or found very lately, its parting illustration in the politics of Japan. It was because, and only because, this right was acknowledged by all civilized nations, and had never been doubted among the American colonies—because each colony had at all times tendered its hospitalities freely to the rest, cherishing that liberal commerce which makes a brotherhood of interest even among alien states; it was because of this, that no man in the convention or country thought of making the right of transit a subject of constitutional guaranty. Everything in and about the constitution implies it. It is found in the object, "to establish a more perfect union," in the denial to the states of the power to lay duties on imports, and in the reservation to congress of the exclusive right to regulate commerce among the states. This last power of the general government according to the repeated and well considered decisions of the supreme court of the United States, from Gibbons v. Ogden, 9 Pet. [34 U. S.] 1, to the Passenger Cases, 7 How. [48 U. S.] 283, applies to intercourse as well as navigation, to the transportation of men as well as goods, of men who pass from state to state involuntarily, as of men who pass voluntarily; and it ex-

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2d day, 2d mo., 1683. See page 72. A practice analogous to the fugitive slave law of modern times seems to be referred to in the following minute, at page 147 of the same volume. "24th 5 mo., 1685. William Hague requests the secretary, that an hue and cry from East Jersey after a servant of Mr. John White's, a merchant at New York, might have some force and authority to pass this province and territories: The secretary indorsed it, and sealed it with ye seal of this province."

cludes the right of any state to pass laws regulating, controlling, or a fortiori, prohibiting such intercourse or transportation. I do not quote the words of the eminent judges who have affirmed this exposition of the constitution; but it is impossible to read their elaborate opinions, as they are found in the Reports, without recognizing this as the fixed law of the United States. It needs no reference to disputable annals, to show that when the constitution was formed in 1787, slaves were recognized as property, throughout the United States. The constitution made them a distinct element in the distribution of the representative power and in the assessment of direct taxes. They were known and returned by the census, three years afterwards, in sixteen out of the seventeen states then embraced in the Union; and as late as the year 1830, they were found in every state of the original thirteen. How is it possible then, while we assert the binding force of the constitution by claiming rights under it, to regard slave property as less effectively secured by the provisions of that instrument than any other property which is recognized as such by the law of the owner's domicil? How can it be, that a state may single out this one sort of property from among all the rest, and deny to it the right of passing over its soil—passing with its owner, parcel of his travelling equipment, as much so as the horse he rides on, his great coat, or his carpet bag? We revolt in Pennsylvania, and honestly no doubt, at this association of men with things as the subjects of property; for we have accustomed ourselves for some years—now nearly fifteen—to regard men as men, and things as things: sub modo, however; for we distinguish against the negro much as our forefathers did; and not perhaps with quite as much reason. They denied him civil rights, as a slave: we exclude him from political rights, though a freeman. Yet no stranger may complain of this. Our constitutions and statutes are for ourselves, not for others. They reflect our sympathies, and define our rights. But as to all the rest of the world; those portions especially, towards whom we are bound by the "supreme law" of the federal constitution; they are independent of our legislation, however wise or virtuous it may be; for they were not represented in our conventions and assemblies, and we do not permit them to legislate for us. Whether any redress is provided by the existing laws of Pennsylvania for the citizen of another state, whose slaves have escaped from him while he was passing through our territory, it is not my province to inquire. It is quite probable that he may be denied recourse to the courts, as much so as the husband, or father, or guardian, whose wife, or child, or ward, has run away. He may find himself referred back to those rights, which annex themselves inseparably to the relation he occupies, the rights of manucaption and detainer. These, I apprehend that he may assert and exercise anywhere, and with such reasonable force as circumstances render necessary. And I do not suppose that the employment of such reasonable force could be regarded as a breach of the peace, or the right to employ it as less directly incident to his character of master than it might be to the corresponding character in either of the analogous relations. In a word, I adopt fully on this point the views so well enforced by Judge Baldwin, in the case of Johnson v. Tompkins [Case No. 7,416]: "The right of the master to arrest his fugitive slave, is not a solitary case in the law. It may be exercised towards a fugitive apprentice or redemptioner to the same extent, and is done daily without producing any excitement. An apprentice is a servant, a slave is no more: though his servitude is for life, the nature of it is the same as apprenticeship or by redemption, which, though terminated by time, is during its continuance as severe a servitude as that for life. Of the same nature is the right of a parent to the services of his minor children, which gives the custody of their persons. So, where a man enters bail for the appearance of a defendant in a civil action, he may seize his person at his pleasure, and commit him to prison; or, if the principal escapes, the bail may pursue him to another state, arrest, and bring him back, by the use of all necessary force and means of preventing an escape. The lawful exercise of this authority in such cases is calculated to excite no sympathy: the law takes its course in peace, and unnoticed. Yet it is the same power, and used in the same manner, as by a master over his slave. The right in such case is from the same source, the law of the land. If the enforcement of the right excites more feeling in one case than the other, it is not from the manner in which it is done, but the nature of the right which is enforced, property in a human being for life. If this is unjust and oppressive, the sin is on the makers of laws which tolerate slavery: to visit it on those, who have honestly acquired, and lawfully hold property under the guarantee and protection of the laws, is the worst of all oppression, and the rankest injustice towards our fellow men. It is the indulgence of a spirit of persecution against our neighbors, for no offence against society or its laws, but simply for the assertion of their own in a lawful manner." "If this spirit pervades the country," he goes on to say: "if public opinion is suffered to prostrate the laws which protect one species of property, those who lead the crusade against slavery, may at no distant day find a new one directed against their lands, their stores, and their debts. If a master cannot retain the custody of his slave, apprentice, or redemptioner, a parent must give up the guardianship of his children, bail have no hold upon their principal, the creditor cannot arrest his debtor by lawful means, and he, who keeps the rightful owner of lands or chattels out of possession, will be protected in his trespasses. When

the law ceases to be the test of right and remedy; when individuals undertake to be its administrators, by rules of their own adoption; the bands of society are broken as effectually by the severance of one link from the chain of justice which binds man to the laws, as if the whole was dissolved. The more specious and seductive the pretexts are, under which the law is violated, the greater ought to be the vigilance of courts and juries in their detection. Public opinion is a security against acts of open and avowed infringements of acknowledged rights; from such combinations there is no danger; they will fall by their own violence, as the blast expends its force by its own fury. The only permanent danger is in the indulgence of the humane and benevolent feelings of our nature, at what we feel to be acts of oppression towards human beings, endowed with the same qualities and attributes as ourselves, and brought into being by the same power which created us all; without reflecting, that in suffering these feelings to come into action against rights secured by the laws, we forget the first duty of citizens of a government of laws, obedience to its ordinances."

There was one other legal proposition affirmed in the opinion of this court, but it cannot need argument. It was, that the question, whether the negroes were or were not freed by their arrival in Pennsylvania, was irrelevant to the issue; inasmuch as whether they were freed or not, they were equally under the protection of the law, and the same obligation rested on Mr. Williamson to make a true and full return to the writ of habeas corpus. Simple and obvious as this proposition is, it covers all the judicial action in the case. The writ required him to produce the negroes, that the court might pass upon his legal right to carry them off or detain them. What questions might arise afterwards, or how they might be determined, was not for him to consider. His duty then, as now, was and is to bring in the bodies; or, if they had passed beyond his control, to declare under oath or affirmation, so far as he knew, what had become of them. And from this duty, or from the constraint that seeks to enforce it, there can be no escape. See the argument of Sergeant Glynn, and the remarks of Mr. Justice Gould, Wilkes' Case, 2 Wils. 154.

The application immediately before me, hardly calls for these expanded remarks; though, rightly considered, they bear upon most of the points that were elaborated in the argument upon the question of its reception. It purports to be a suggestion and petition from a person now in Massachusetts, who informs the court that she is one of the negroes who escaped from Mr. Wheeler, that she did so by Mr. Williamson's counsel, and with the sanction of his presence and approval, but that he never detained her, nor has any one since, and that she has never authorized an application for the writ of habeas corpus in her behalf. Thereupon, she presents to me certain reasons, founded as she supposes in law, wherefore I ought to quash the writ heretofore issued at the relation of Mr. Wheeler. When application was made to me for leave to file this paper, I invited the learned counsel to advise me upon the question, whether I could lawfully admit the intervention of their client. My thanks are due to them for the ability and courteous bearing with which they have discussed it. But I remain unconvinced. The very name of the person who authenticates the paper is a stranger to any proceeding that is or has been before me.[3] She asks no judicial action for herself, and does not profess to have any right to solicit action in behalf of another: on the contrary, her counsel here assure me expressly, that Mr. Williamson has not sanctioned her application. She has therefore no status whatever in this court. Were she here as a party, to abide its action, she would have a right to be heard according to the forms of law; were she here as a witness, called by a party, her identity ascertained, she might be examined as to all facts supposed to be within her knowledge. But our records cannot be opened to every stranger who volunteers to us a suggestion, as to what may have been our errors, and how we may repair them. I know that the writ of habeas corpus can only be invoked by the party who is restrained of liberty, or by some one in his behalf. I know, too, that it has been the reproach of the English courts, that they have too sternly exacted proof, that the application was authorized by the aggrieved party, before permitting the writ to issue. But, as yet, the courts of the United States have, I think, avoided this error. The writ issues here, as it did in Rome,[4] whenever it is shown by affidavit that its beneficent agency is needed. It would lose its best efficiency, if it could not issue without a petition from the party himself, or some one whom he had delegated to represent him. His very presence in court to demand the writ would, in some sort, negative the restraint which his petition must allege. In the most urgent cases, those in which delay would be disastrous, forcible abduction, secret imprisonment, and the like, the very grievance under which he is suffering, precludes the possibility of his applying in person or constituting a representative. The American books are full of cases,—they are within the experience of every practitioner at the bar,—in which the writ has issued at the instance of third persons, who had no other interest or right in the matter than what every man concedes to sympathy with the oppressed. I need only to refer to the case I have quoted from,—U. S. v. Green [Case No. 15,256],—and the Case

[3] Neither the petition for the writ of habeas corpus, nor the writ itself, names Jane Johnson.

[4] "Interdictum omnibus competit—Nemo enim prohibendus est libertati favere."—Dig. bk. 43, tit. 29, § 9.

of Stacy, 10 Johns. 328, for illustrations of this practice. Of course, if it appears to the court at any time, that the writ was asked for by an intermeddling stranger, one who had no authority to intervene, and whose intervention is repudiated, the writ will be quashed. But it is for the defendant, to whom the writ is addressed, to allege a want of authority in the relator. The motion to quash cannot be the act of a volunteer. Still less can it come to us by written suggestion, from without our jurisdiction, in the name of the party who is alleged to be under constraint, and whose very denial that she is so may be only a proof that the constraint is effectual. I may add, that I have examined all the authorities which were brought before me by the learned counsel: with most of them I was familiar before. But there is not one among them, which in my judgment conflicts with the views I have expressed. The application to enter this paper among the records of the court, must therefore be refused.

Upon the reading of the above opinion, Mr. Cadwalader, as a member of the bar of the court not counsel or attorney in the original or subsequent proceedings, asked leave as amicus curiæ to suggest that, in the opinion of the court, an incident of the original proceeding, which has been publicly misrepresented, was not noticed. "It has been publicly reported," Mr. Cadwalader said, "that after the opinion of the court, which resulted in Mr. Williamson's commitment, had been read, his counsel applied to the court for leave to amend his return, which leave was refused. The present suggestion is made under the belief of the member of the bar who makes it, that this report was erroneous, and that what occurred was as follows. When the opinion in the original proceeding was read, the counsel of Mr. Williamson asked if a motion to amend the return would be received, and the court replied, that the motion must be reduced to writing, and that it could not be received until the court's order should be filed with the clerk and recorded; adding that the court would then receive any motion which the counsel for Mr. Williamson might desire to make. The court's order was then filed by the clerk, and entered on record; but no motion to amend was then or afterwards made, although the court paused to give an opportunity for making it, and invited the counsel then or afterwards, to make any motion which their client might be advised to make."

KANE, District Judge, said: The recollections of Mr. Cadwalader concur substantially with my own. There certainly was no motion made by the counsel of Mr. Williamson, for leave to amend his return. A wish was expressed to make such a motion, and the judge asked that the motion might be reduced to writing and filed. But the motion was not drawn out or presented for the court's consideration, and the court never expressed any purpose to overrule such a motion, if one should be presented.

[Vide Williamson's Case, 2 Casey [26 Pa. St.] 9; Williamson v. Lewis, 3 Wright [39 Pa. St.] 9.] [5]

Case No. 16,727.

UNITED STATES v. WILLING.

[4 Dall. 376, note.] [1]

District Court, D. Pennsylvania. 1804.[2]

CUSTOMS DUTIES—SUIT ON BOND—CONTINUANCE—AMERICAN VESSEL—SALE—NEW REGISTRY.

[1. In a suit on a bond, for the recovery of duties, the defendant, filing an affidavit stating that there was error in the liquidation of the duties, in that the vessel belonged to citizens of the United States, and not foreigners, is, under 1 Stat. 627, § 65, entitled to a continuance.]

[2. An American registered vessel, sold while at sea to resident citizens of the United States, without a bill of sale reciting her registry, and without any new registry until her arrival in the home port, loses her privileges as an American vessel until such new registry is made.]

Before the decision of the district court, on the principal question, a preliminary point, of some importance, was determined. By the 65th section of the impost law [1 Stat. 627], it is provided, that "where suit shall be instituted on any bond for the recovery of duties due to the United States, it shall be the duty of the court, where the same shall be pending, to grant judgment at the return term, upon motion, unless the defendant shall, in open court, the United States' attorney being present, make oath, or affirmation, that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district, prior to the commencement of the return term aforesaid. Whereupon, if the court be satisfied, that a continuance until the next succeeding term, is necessary for the attainment of justice, and not otherwise, a continuance may be granted, until next succeeding term, and no longer." In order to obtain a continuance of the cause, at the return term, the defendants filed the following affidavit: "Thomas W. Francis, one of the above defendants, being duly sworn, deposeth, that an error has been committed in the liquidation of the duties demanded on the above bond, for which this suit is brought, inasmuch as the sum of seven thousand seven hundred, and twenty dollars and forty-one cents is thereby demanded for duties on goods, per the ship Missouri, whereas the sum of seven thousand and eighteen dollars and seventy-three cents only was due for the same, the said ship, the Missouri, being a registered ship,

[5] From 5 Pa. Law J. 377.

[1] [Reported by A. J. Dallas, Esq.]

[2] [Reversed in Case No. 17,764. Judgment of circuit court affirmed in 4 Cranch (8 U. S.) 48.]

belonging to citizens of the United States, and not a foreign, or unregistered ship, or liable to foreign duties. And the said Thomas W. Francis further deposes, that the above errors have been notified in writing to the collector of the district of Philadelphia, before the commencement of this present term, being the return term to which the above action was brought, and that this deponent did, in behalf of himself and the other obligors in the said bond, on the sixteenth day of May last, tender to the cashier of the Bank of the United States, where the said bond was deposited for collection, the last-mentioned sum of money (seven thousand and eighteen dollars, and seventy-three cents) being as this deponent verily believes the whole amount thereon due: that the said cashier of the bank refusing to receive the same, this deponent, in behalf of the aforesaid, tendered the same sum of money to the collector of the district of Philadelphia, on the seventeenth day of the same month, being as soon as he could ascertain by inquiry that the said bond had been returned from the Bank of the United States to the collector. That the said collector also refused to receive the same; that this deponent afterwards, to wit, on the 7th of July last, did pay to the attorney of the district of Pennsylvania the said sum of 7018 dollars, 73 cents, say seven thousand and eighteen dollars and seventy-three cents, on the terms and conditions expressed in a receipt whereof a copy is hereunto annexed."

Dallas, Dist. Atty., insisted, that the cause assigned for a postponement of trial, in the affidavit, was not an error in the liquidation of the duties; for, the manifest policy and intent of the law, were to enforce a payment of the revenue, against every plea, or pretext, except a plain error in fact; and, here, no error in the calculation of figures, no accidental error in the rate of duties, was assigned; but a defence was suggested, upon a principle, which would equally apply to a charge of foreign duties, made in consequence of any other description of forfeiture, and disability, under the acts of congress; though the secretary of the treasury was vested with a special power of remission and mitigation in such cases.

After argument, however (Messrs. Rawle and Lewis being for the defendants), the district judge decided, that the cause assigned for a postponement, was within the terms and meaning of the act of congress.

PETERS, District Judge. This is a suit commenced on a custom-house bond, for one half the duties due to the United States, by the defendants Willings and Francis on goods imported in the ship Missouri from Canton. The bond is in the usual form, dated the 15th of November, 1802; and was given with other bonds for duties, as charged at the custom-house, amounting to 15,440 dollars 82 cents; being the sum chargeable on goods imported in a ship belonging to a foreigner. For the facts I refer to the pleadings on file. The real point in dispute is, "Whether the goods imported in the ship Missouri are liable to foreign or domestic duties?" There is no doubt, and by the joinder in demurrer it is allowed, that the ship, when the goods were laden and ever since, did belong to citizens of the United States. And if they had been the same citizens to whom the ship belonged at the time of her clearing out at the American custom-house, before her departure for Canton, only the domestic duties could have been charged. These would have amounted to 14,036 dollars, 73 cents, causing a difference in favour of the defendants, Willings and Francis, of 1404 dollars 9 cents. This sum only is in dispute, at this time, though, it is said, the defendants are affected by the point in controversy, to a considerable amount. But the difficulty is created by a transfer having been made by Willings and Francis the original owners to Jacob Gerard Koch, and others, also citizens of the United States, of a part of the ship Missouri while at sea and on her voyage. No bill of sale reciting the register of the ship was made till after her arrival at the port of Philadelphia. A parol sale was made, which, though legal, bona fide, and effectual, as between the parties, was not so conformable to the law of the United States, as to entitle the vendees to have their names inserted in a new register. Finally (after the sale by parol before mentioned and a resale to the original owners) a bill of sale was given agreeably to law, and the vessel obtained a new register, though the duties remained as at first charged at the custom house. T. W. Francis at the time of the entry disclosed all the circumstances, and the whole proceedings are bona fide and without fraud, or any improper intention. The amount having been liquidated at the custom house as for foreign duties, and the bond before mentioned, among others, given for their amount, a suit was commenced in this court thereon. At the return of the writ, the attorney of the district moved for judgment agreeably to the act of congress. The defendants filed an affidavit in legal form requesting, a trial or a continuance, because they alleged there had been an error in the liquidation of the account at the custom house, owing to foreign, instead of domestic, duties having been charged. On mature consideration, and after diligent and careful examination into the technical meaning of the word "liquidation," as explained by the best authorities, both legal and philological, I was of opinion that the court was bound to comply with the defendants' request. The authority of the court to give an opportunity for legal investigation, is grounded on the true meaning of this word "liquidation," which comprehends the principles, as well as arrangements, of accounts.

The cause has been ably argued on both sides. The whole controversy turns on the 14th section of the act entitled "An act concerning the registering and recording of ships and vessels," passed the 31st of December,

1792 [1 Stat. 287]. A very extensive range has been taken by the counsel on both sides of the question. The principles, intent, and policy, of the act, have been investigated with much ability and talent. I do not hesitate to say, that to me this question, on the words of the section, is difficult, though one of the counsel for the defendants seems to consider the case as perfectly clear. I do not give an opinion upon it with confidence, though my duty requires it, and I must decide. Were I in a situation to say what the law ought, in this case, to have been, I should have a clear conviction, and would, accordingly, decide in favour of the defendants. I should be warranted in this opinion by the law as it now is. The knotty part of the question, is that affected by the time when, in the 14th section. "When any ship or vessel, which shall have been registered pursuant to this act, or the act hereby, in part repealed, shall, in whole, or in part, be sold or transferred to a citizen or citizens of the United States, or shall be altered in form, &c." On the part of the defendants it is insisted, that the word "when" means any time after the arrival of the vessel, at the port where a new register can be legally obtained. And, according to Lord Coke's opinion, when one is bound to do an act, but no time fixed, the party has his whole life time allowed to perform it. Authorities were produced to show, that in the construction of even penal statutes, the spirit, and intent, and policy of the law might be called in aid, where words are doubtful. That it is impossible to procure the new register, until the certificate of registry is delivered up. That this cannot be done before her return from her voyage; and, until it is done, provided it be accomplished before her proceeding on another voyage, she is still to be considered as holding her original character; and, therefore, not subject to the disabilities attached to a foreign ship. That if it were otherwise, the law would be oppressive on our own citizens, although its policy is grounded in a system to serve them, while it prohibited foreign ships from trading, on terms so beneficial as those of our own nation. That if the word "when" could not be satisfied, but by a new register, procured at the time of the sale, it would amount to an unjust and burthensome exclusion of all sales to citizens, of our vessels, in whole, or in part, while at sea, or on their voyages; to the great injury of our commerce, and ruinous embarrassment of our merchants, whose necessities, or plans, required transfers of their vessels, either to relieve them from pressures, or enable them to form new speculations. That such a rigorous construction might be justifiable, when ships in port, were sold or transferred, because the certificates of registry were attainable. But as the law does not compel parties to impossibilities (lex non cogit ad impossibilia) it is otherwise when ships are at sea. It satisfies the law, if the new register is applied for when the temporary impracticability is removed. True it is, that foreigners can never obtain new registers, under transfers, or sales from American citizens. All the precautionary measures of the law are aimed at them. The oath at the time of entry must disclose the owners; or foreign character will be presumed. This shows that if the oath is taken, and no foreign ownership appears, it is all the law requires, to establish the American character. But the character of the vessel sold by one American citizen to another, was not even suspended, by the clause under consideration, until after her departure, from the port whereat she could have obtained a new register, on her arrival from the voyage, during which the sale or transfer was made. It is, therefore, concluded that domestic, and not foreign, duties should have been charged on the goods, imported in the ship in question. And that as to the law of the 3d March, 1803, it neither has nor should have any influence on a precedent transaction. It only fixes the time when a new register must be applied for, which was before uncertain. It also gives power to the secretary of the treasury to remit penalties and forfeitures and remove disabilities, in past as well as future cases.

On behalf of the United States it was contended, that as no time was fixed in the law for renewing the register, it must be done instanter. Where a disability is the consequence, it cannot be removed till the renewal is completed. If it cannot be done at the moment, owing to impediments not then to be overcome. the party labouring under them must suffer temporary inconveniences, which it was in his power to foresee. In England, where the character of the ship is not altered, an arrangement was made of sending information of the transfer immediately to the custom house. According to British authorities, though they relate only to the validity of the transfer as between the parties, it is said (2 East, 404) that "if the act of parliament (dictating this measure) were to be considered as giving an indefinite time (or even a reasonable time, after the execution) for the compliance with its requisites; it would enable a transfer of property to be made to foreigners, who might remain concealed owners, until the return of the vessel to her port, which might not be for a great length of time." No time being fixed in the 14th section, it must be instanter. A number of extracts from the laws of the United States were produced to show, that all these laws required the strictest attention to their injunctions, under the severest penalties and forfeitures. That it is not denied that one citizen may sell and transfer to another a ship at sea. But if it is done, the sale is subject to inconveniences on which the parties ought to calculate, or take the consequences. The law is or ought to be known to every body. Those who are shippers of goods should make themselves masters of the subject, both as it relates to sales to citizens and to foreigners, or suffer any inconveniences arising from want of caution. It was assert-

ed, that the fiscal officers had uniformly construed the law as it is now contended for. The congress passing this law meant to exclude sales at sea, to prevent the use of our vessels covertly by foreigners. The register of the Missouri was vacated on the 12th February, 1801. She was from that time subject to the disabilities of a foreign ship, till her character was revived. And that could not be done till after the 21st December, 1802, when the legal bill of sale was made. No subsequent transaction can by relation operate on the duties chargeable, though the character of the ship may be restored. If the foreign character of the vessel existed at the time of the liquidation, no ex post facto proceedings can alter the then existing circumstances. There is no distinction in the law between a sale in port, or one at sea. An immediate application for a new register is required in both cases. If it cannot be had on a sale at sea, it shows the law meant to exclude the vessel for the time from her American character: eo instanter, that the property is changed, her character ceases, or is suspended, according as she is sold to a foreigner, or a citizen. A number of British cases were produced; and said to be analogous, though in that country they related to change of property. In this the principles apply to change of character. 3 Term R. 406; 3 Brown, Ch. 571; 5 Term R. 710; 2 East, 399, 404; 1 Bos. & P. 483; Parker, 215. There is no distinction in the laws of the United States, as they relate to a sale either to a citizen or a foreigner, in the point of time, in which the American character ceases to operate. In both cases, the cessation is at the moment of sale. The citizen may revive it, but the foreigner never can.

The law of March, 1803 [2 Stat. 209], was produced to show a legislative construction. And the custom of the fiscal offices was said to be a contemporaneous and continued interpretation. Although I may not have done justice to the arguments of the counsel on either side, I have thought it proper to recite them in a summary way, to show the conflict of opinion, on the subject. For myself I declare, that, although the interpretation given on the part of the United States, is not consistent with my ideas of what the law should have been, I do not see that I am authorised judicially to pronounce that it was not, as on the part of the United States it is contended to have been, at the time of the transaction, which is the subject of discussion. It appears to me, that the congress, enacting the law of 1792, in their zeal to exclude foreigners, did not see, or chose to think lightly of, the inconveniences to which, in such cases, as the one now before me, they subjected our own citizens. It also seems to me a case omitted, either accidentally, or with design. The legislature alone were competent to remedy the defect. And they have done this in cases occurring after their act of March, 1803. In the department in which I am placed, I am not competent to give relief; or by interpretations of supposed spirit and intention, supply omissions, or add to the provisions of the then existing law. In cases attended with such unmerited penalties, it is consolatory that the laws of our country have not left the parties without protection. The congress of 1803, sensible of the hardships consequent on a rigid construction of the former law, have specially and clearly authorised the secretary of the treasury to remit "any foreign duties, which shall have been incurred," by reason of disabilities, happening under the former laws, recited in the act of March, 1803. There is no doubt in my mind, that this (the foreign duties having been incurred under the former laws, by a temporary disability and incapacity to obtain a new register) is a case proper for the deliberation of the officer vested with the power of mitigating or dispensing with the severity of fiscal laws. He may (if he so inclines under the circumstances stated to him) give the relief, which the austerity of judiciary duty disables a court from affording. Although this is my view of the subject I think it a hard case, and that it ought not to rest on my opinion. I shall deem myself bound to give every facility to an appeal. If other cases, depending on the same point, occur, I shall, on payment of the undisputed part of the demand, suspend judgment (or grant it on terms) for the contested sums, until the opinion of a superior court can be had; if the parties affected shall choose to take that course. Let judgment be entered for the sum now due to the United States. I understand that the domestic duties in part of the bond have been paid.

[On appeal to the circuit court the above judgment was reversed. Case No. 17,764. The judgment of the circuit court was affirmed by the supreme court in 4 Cranch (8 U. S.) 48.]

UNITED STATES (WILLING v.). See Case No. 17,764.

Case No. 16,728.

UNITED STATES v. WILLIS.

[1 Cranch, C. C. 511.] [1]

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

GAMING—COMMON-LAW AND STATUTORY OFFENCES.

Playing at any game, even for money, is not of itself an offence at common law. The offence is created by statute, and can only be punished as the statute directs.

[Cited in U. S. v. Rounsavel, Case No. 16,199; U. S. v. Helriggle, Id. 15,344.]

Mr. Taylor, for defendant, moved to quash the indictment, which was at common law, for assembling to the number of ten or more, and playing at "snap and rattle," or "in and out," to the corruption of the public morals, and to the common nuisance of all the good citizens of the county of Alexandria. Private vices are not indictable. 4 Bl. Comm. 41.

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

To play at any game is no crime at common law, even to play for money; therefore there can be no offence unless it be attended with such circumstances as would in themselves amount to a riot, or a nuisance, or to actual breach of the peace without the playing. 4 Bl. Comm. 171. All the penalties under the English law are statutory. If it were unlawful to play for money, no recovery for money won could be had at common law, yet such actions may be sustained, and the defendant even holden to bail. 2 Bac. Abr. 619, "Gaming," A; 11 Coke, 87b. And the statutes of England only prohibited playing to a certain amount. The act of Virginia of the 8th of December, 1792, § 5, p. 175, which creates the offence, declares how it shall be punished, viz. by fine of 20 dollars upon conviction before a justice of the peace.

Mr. Jones, for United States, admitted that he had no precedent for the indictment in all its parts, but contended that it is good as an indictment as a nuisance. It is sufficient to charge it to be to the nuisance of the citizens of the county of Alexandria. It is not necessary that it should be charged as a nuisance to all the citizens of the United States. He admitted that gaming is not per se indictable at common law. The Virginia law shows that gaming is a pernicious vice and a public evil. Every kind of public gaming is therefore unlawful; every unlawful act is not an indictable offence, but every unlawful act done in a public manner and tending to corrupt the general morals of the community is a misdemeanor at common law. He admitted that private vices are not punishable at common law. But public lewdness, bawdy-houses, eaves-droppers, communis rixatrix, and the like, are indictable misdemeanors. Gaming in England is lawful, yet the keeping of a common gaming-house is indictable at common law, because it is injurious to society. The statute of Virginia punishes all gaming at a public place, but does not describe particularly the offence charged in this indictment. The punishment ought to be proportioned to the offence, but the statute punishes all alike by a fine of 20 dollars. If the statute declares a punishment of a common-law offence, and contains no negative words, you may still indict and punish at common law. It has been so decided in this court.

THE COURT stopped the counsel on the other side who were about to reply, being of opinion that the indictment is not good at common law. The statute has created the offence and the punishment.

FITZHUGH, Circuit Judge, contrà.

Case No. 16,729.

UNITED STATES v. WILSON.

[Cited in U. S. v. Sprague, 48 Fed. 828. Nowhere reported; opinion not on file in clerk's office, with case.]

Case No. 16,730.

UNITED STATES v. WILSON et al.

[Baldw. 78.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1830.

CRIMINAL LAW—JOINT INDICTMENT — SEPARATE TRIALS—CHALLENGE OF JURORS—COMPETENCY OF WITNESSES — ADMISSIONS — ACCOMPLICES — ROBBERY — FORMER JEOPARDY — DANGEROUS WEAPONS—MAIL CARRIERS—PROVINCE OF JURY —INDICTMENT.

1. On a joint indictment it is not a matter of right to have the defendants tried separately, but it is discretionary with the court.

[Cited in Hawkins v. State, 9 Ala. 137; Jackson v. State, 104 Ala. 3, 16 South. 524; Maton v. People, 15 Ill. 539. Cited in brief in Com. v. James, 99 Mass. 439. Cited in State v. Doolittle, 58 N. H. 92.]

2. The United States may challenge a juror in the first instance peremptorily, till the panel is exhausted, after which they can only challenge for cause.

[Cited in U. S. v. Douglass, Case No. 14,989.]

3. It is a good cause of challenge that the juror has conscientious scruples about finding a verdict which may lead to capital punishment.

[Cited in Gates v. People, 14 Ill. 435; Gross v. State, 2 Ind. 330; State v. Greer, 22 W. Va. 809.]

4. If a juror is wrongly named on the panel he cannot be sworn.

5. Where there are separate trials on a joint indictment, it is no cause of challenge that a juror was sworn on the first trial and found a verdict of guilty, though it is good cause to submit his indifference to triers.

6. On a challenge for favour, without cause assigned, it will not be submitted to triers.

7. It is good cause for challenge if a juror does not stand indifferent on account of bias, prejudice, having made up his mind, or expressed an opinion touching the prisoner's guilt or innocence.

[Cited in Logan v. U. S., 144 U. S. 298, 12 Sup. Ct. 628.]

[Cited in Com. v. Dorsey, 103 Mass. 415.]

8. It is no objection to the competency of a witness, that a reward has been offered to be paid on conviction of the prisoner, to which witness may be entitled.

9. The admissions of a prisoner, though they are not in writing or given in his words, are admissible; but the whole of a connected conversation on the subject must be given.

10. A pardon granted by a governor of a state, under its great seal, is evidence, per se, without any further proof.

11. The evidence of an accomplice cannot be corroborated by his statements at another time, unless it has been impeached.

[Cited in brief in U. S. v. Neverson, 1 Mackey, 160.]

12. The acts of a co-defendant are evidence to show the connection between him and the prisoner in the same offence.

13. After a witness has been once examined, it is in the discretion of the court to permit him to be examined again on new matter, but not a matter of right.

14. The word "rob" in the act of congress of 1825, § 22 [4 Stat. 121], is used in its common law sense.

[Cited in U. S. v. Coppersmith, 4 Fed. 200.]

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

15. "Jeopardy," as used in this section, means a well grounded apprehension of danger to life, in case of refusal or resistance.

16. Pistols are "dangerous weapons;" the offer or threat to shoot with them comes within the law, without proof that they were loaded—the presumption is they were loaded.

[Cited in U. S. v. Small, Case No. 16,314; U. S. v. Williams, 2 Fed. 64.]

[Cited in brief in Gardiner v. State, 14 Mo. 98.]

17. Penal laws must be construed strictly to bring the case within the definition of the law, but not so as to exclude a case within its words, in their ordinary acceptation.

[Cited in U. S. v. Ragsdale, Case No. 16,113; Harrison v. Vose, 9 How. (50 U. S.) 378.]

[Cited in Shannon v. People, 5 Mich. 45. Cited in brief in Parker v. Com., 6 Pa. St. 508.]

18. It is not necessary to a conviction under the twenty-second section, that the carrier of the mail should have taken the oath prescribed by the second section of the act of 1825, or that the whole mail be taken.

19. All persons present at the commission of a crime, consenting thereto, aiding, assisting, abetting therein, or in doing any act which is a constituent of the offence, are principals.

[Cited in U. S. v. Libby, Case No. 15,597; Re Van Campen, Id. 16,835.]

20. In a criminal case a jury are so far judges of the law, that they may find a verdict according to their own opinion; but they are as much morally and legally bound by the law as the court. If they acquit against law, the court cannot set aside their verdict; but if the jury convict against law, no sentence will be passed by the court.

[Cited in Stettinius v. U. S., Case No. 13,387. Criticised in U. S. v. Morris, Id. 15,815. Cited in Sparf v. U. S., 156 U. S. 72, 15 Sup. Ct. 282. Quoted in dissenting opinion in same case, 156 U. S. 163, 175, 15 Sup. Ct. 317. 321. Approved in U. S. v. Taylor, 11 Fed. 472.]

[Cited in Hipp v. State, 5 Blackf. 151; Territory v. Kee (N. M.) 25 Pac. 926; Pierce v. State, 13 N. H. 565; Com. v. McManus, 143 Pa. St. 95, 22 Atl. 764.]

21. An indictment laying an offence in the words of the law creating it is sufficient, as a general rule.

[Cited in U. S. v. Quinn, Case No. 16,110.]

[Cited in Hopkins v. Com., 3 Metc. (Mass.) 465.]

22. It need not state the county in which the offence was committed; it is enough if it shows that the court had jurisdiction: cases of treason are exceptions.

The defendants were indicted under the 22d section of the act of the 3d of March, 1825, for robbing the mail of the United States with the use of dangerous weapons, and putting the life of the carrier in jeopardy. 3 Story 1992 [4 Stat. 121]. The indictment was as follows:

"Indictment. In the circuit court of the United States of America, holden in and for the Eastern district of Pennsylvania, of April sessions, in the year of our Lord one thousand eight hundred and thirty. Eastern district of Pennsylvania, to wit. The grand inquest of the United States of America, inquiring for the Eastern district of Pennsylvania, upon their oaths and affirmations respectively do present: That James Porter, otherwise called James May, late of the Eastern district aforesaid, yeoman; and George Wilson, late of the Eastern district aforesaid, yeoman; on the 6th day of December, in the year of our Lord one thousand eight hundred and twenty-nine, at the Eastern district aforesaid, and within the jurisdiction of this court, with force and arms in and upon one Samuel M'Crea, in the peace of God and of the United States of America then and there being, and then and there being a carrier of the mail of the United States of America, and then and there having the custody of the said mail, and then and there proceeding with said mail from the city of Philadelphia to the borough of Reading, feloniously did make an assault, and him the said carrier did then and there of the said mail feloniously rob, and in then and there effecting the said robbery did then and there, by the use of dangerous weapons, to wit pistols, put in jeopardy the life of the said Samuel M'Crea, he the said Samuel M'Crea then and there being as aforesaid the carrier of the said mail of the United States, and having then and there the custody thereof, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America. And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said James Porter, otherwise called James May, and the said George Wilson, afterwards, to wit on the same day and year aforesaid, at the Eastern district aforesaid, and within the jurisdiction of this court, with force and arms in and upon the said Samuel M'Crea, then and there being a carrier of the mail of the United States, and then and there having the custody of the said mail from the city of Philadelphia to the borough of Reading, feloniously did make an assault, and him the said Samuel M'Crea in bodily fear and danger of his life then and there feloniously did put, and the said mail of the United States, from him the said Samuel M'Crea, then and there, as aforesaid, a carrier of the mail of the United States, and then and there having the custody thereof, then and there feloniously, violently and against his will, did steal, take and carry away, and in then and there effecting the robbery so as aforesaid described, did then and there by the use of dangerous weapons, to wit pistols, put in jeopardy the life of the said Samuel M'Crea, then and there the carrier of the mail of the United States, and then and there having the custody thereof, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America. And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said James Porter, otherwise called James May, and the said George Wilson, afterwards, to wit on the same day and year aforesaid, at the Eastern district aforesaid, and within the jurisdiction of this court, with

force and arms, in and upon the said Samuel M'Crea then and there being a carrier of the mail of the United States, and then and there having the custody of the said mail feloniously did make an assault, and the life of him the said Samuel M'Crea, by the use of dangerous weapons, did then and there put in jeopardy, and the said mail of the United States from him the said Samuel M'Crea then and there, feloniously, violently, and against the will of him the said Samuel M'Crea, did steal, take and carry away, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America. George M. Dallas. Attorney of the United States for the Eastern District of Pennsylvania.

"True bill. Joseph Watson, Foreman.

"April 13, 1830."

Mr. James C. Biddle moved that the prisoners be tried separately, for which three reasons were assigned: 1. That evidence of the confessions of one of the prisoners will be given by the United States. 2. That they are desirous of examining the wife of one of the prisoners as a witness. 3. That the defence of one prisoner will implicate the other.

BY THE COURT. Whatever doubt may have been entertained before the Case of Marchant, 12 Wheat. [25 U. S.] 480, it is now settled that separate trials on joint indictments are matters of discretion in the court, and not of right. The court will not interfere where the counsel for the United States agree to separate trials. If, in his opinion, public justice requires a joint trial, the court will not direct a several trial without cogent reasons. As a general rule, the public prosecutor has the right to elect, and the courts are very unwilling to control it. Had he felt it his duty to oppose the motion, we may not have thought it a proper case for granting it; but as he has not done it, we think the third reason assigned a reasonable ground for allowing a separate trial, and direct it accordingly. Vide 5 Serg. & R. 60.

The jury were then called in the case of George Wilson. Caleb Coates was called and not challenged by the prisoner, but was challenged peremptorily by Mr. Dallas, the district attorney; his right to do so was denied by the counsel for the prisoner. Mr. Dallas contended that his right to challenge was peremptory, in the first instance, and that the juror might be set aside; but that if the panel was exhausted, he was then bound to show cause of challenge. [U. S. v. Marchant] 12 Wheat. [25 U. S.] 480; U. S. v. Johns [Case No. 15,481]; 2 Hawk. 388, c. 43; 1 Chit. Cr. Law, 533; 17 Serg. & R. 155.

Messrs. V. L. Bradford and Kane contended, that inasmuch as there were no peremptory challenges allowed in Pennsylvania, there could be none in this court, in which juries must be designated according to the laws of the state. 1 Story's Laws, 63, § 29, Judiciary Act [1 Stat. 88]. The United States may challenge, for cause, after the panel is exhausted. 17 Serg. & R. 163; 1 Story's Laws, 792 [2 Stat. 82], but the right now set up was never before claimed.

Mr. Dallas was about to reply, but was stopped by the court.

THE COURT observed, that they had known no case where the right now claimed had been allowed to the prosecution; that they would not be the first to do it in a capital case, unless it was clearly established; but that on examining the opinion of the supreme court in the case of U. S. v. Marchant, 12 Wheat. [25 U. S.] 480, 484, 485, they did not feel themselves at liberty to refuse the qualified right of challenges now claimed by the United States. The law as laid down by that court is, that in England, the crown had an acknowledged right of peremptory challenges before the statute of 33 Edw. I., which took them away, and narrowed the right down to those for cause shown; but that an uniform practice had prevailed ever since, down to the present time, to allow a conditional and qualified exercise of that right, if other sufficient jurors remained for the trial, by not compelling the crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through, so that it appears there will not be a full jury without the person challenged. That the right of peremptory challenges allowed the prisoner was not to select the jury who were to try him, but merely to reject such as he pleased, though he could assign no reason for so doing, and that the court would not inquire into what was the United States' prerogative, but simply what was the common law doctrine. The court considering the opinion of the supreme court as a recognition of the qualified right of the United States to challenge, directed the juror to be put aside till the panel was exhausted, declaring that if that should happen and the juror be called again, the United States could not challenge him without showing cause.

The panel being exhausted, Mr. Coates being again called, stated that he had conscientious scruples against giving a verdict which in its consequences might be the means of taking away the life of the prisoners, whereupon Mr. Dallas challenged him for this cause.

BY THE COURT. If the juror should act according to his declaration, his conscientious scruples, it would prevent him from deciding according to the evidence and his solemn affirmation: we should hold it a good cause of challenge if the question remained unsettled, but it has been so held in the circuit court of the First circuit,—U. S. v. Cornell [Case No. 14,868],—and the supreme court of the state,—Com. v. Lesher, 17 Serg. & R. 163. The challenge is allowed.

Before the exhaustion of the panel several jurors were called who had been returned on

the venire by wrong names. John Byrly had been returned by the name of John Byerly; Matthew Pennypacker in the name of Nathan Pennypacker; George H. Pauling in the name of George M. Pauling. The district attorney objected to their being sworn, the prisoners' counsel neither assenting nor objecting.

BY THE COURT. The jurors cannot be sworn. It would be a mistrial, if it should appear by the record, that the juror sworn was not the same person who was summoned and returned on the venire.

As other questions arose on challenges to jurors in the trial of Porter, it is thought best to notice them here, so that all the decisions of the court on the same subject may be taken in connection, rather than to separate them in reporting the cases distinctly.

In the case of James Porter, on the same indictment, after the jury had returned a verdict of guilty against Wilson, Mr. J. C. Biddle moved for a continuance, on the ground of the great excitement prevailing against Porter, which would prevent him from having an impartial trial.

THE COURT refused the application. They had no reason to believe that any excitement prevailed in the public mind, other than what arose from the trial of Wilson; had they been tried jointly, there could have been no foundation for any complaint of this kind, as the same jury would have passed on both prisoners. If the evidence given in Wilson's case has prejudiced the public mind against Porter on account of their connection in the crime charged upon him, it is the obvious consequence of separate trials, which the prisoner has brought on himself by his application to be tried separately. The motion was overruled.

On the jurors being called and questions being put to them touching their indifference as to the guilt or innocence of the prisoner, THE COURT laid down the rule to be: That it is a good cause of challenge to a juror that he has a bias or prejudice against the prisoner, and does not stand indifferent towards him touching his guilt or innocence of the crime with which he is charged. Or if he has made up his mind, or expressed an opinion on the subject. That having served on the jury in the case of Wilson was no cause of challenge, unless he had formed or expressed an opinion as to the case of Porter.

THE COURT directed the call of the jurors to be continued till two were sworn, to whom no objection was made. They then directed them to be sworn as triers of the indifference of the jurors who were objected to. The suspended jurors were examined on their voir dire, and sworn or rejected accordingly, as the triers reported to the court.

A juror was challenged for favour, but no cause assigned. The court thought this not a proper case to be submitted to triers. This ought only to be done where, from the answer of the juror to the cause of challenge, the court cannot ascertain his indifference; but on the agreement of the district attorney, it was submitted to the triers. The jurors who had served on the trial of Wilson were held to be exceptions from this rule, such service being deemed, in itself, sufficient cause for submitting their indifference to the triers.

The court declared the rule to be, to ask the juror whether he had made up his mind, or expressed an opinion on the supposed guilt or innocence of the prisoner. Vide 1 Burr's Tr. 414, 420.

A juror who had served on Wilson's trial, on being examined by the triers, was referred by them to the court; his answer was, "If the same evidence is to be adduced against this prisoner as we heard on the last, he is guilty; and so I think, unless evidence should appear to the contrary." It was held good ground for challenge.

If a juror answers that he had stated that if he had been on the jury in Wilson's case he would not have found him guilty of the capital charges, but not on account of any conscientious scruples, it is not cause of challenge.

The substance of the evidence on the part of the prosecution is as given by the stage driver.

Samuel M'Crea was driver of the Reading mail on the 6th of December last. "I left the city at half past two in the morning. There were nine inside, and one outside passenger. It was a post coach. When I got opposite Turner's Lane, the first thing I saw was a man starting out, who got my off leader by the head, and turned him around to the right. Two men then stepped up, one on each side opposite the box, and each of them presented a pistol at me, and ordered me to stop. They cried Stop! stop! or they would blow my damned guts out. I then threw the whip across my horses, and tried to get on, but couldn't. They then struck my lamps with their pistols, and broke them, and put them out. The lamp on the right did not go out directly. The man who was holding the horses' heads then let go, and ran round and put the other lamp out. He put a handkerchief round his face, and struck out the lamp with his pistols. One of them ordered me off the box, on the ground. They then demanded the money from the gentleman who was sitting by my side. The gentleman wanted to keep it, but he thrust his hands into his pockets, and took it out, and his watch, I believe. Then the other robbers took the gentleman's pocket handkerchief and tied his hands behind his back, then stepped up to the coach door and opened it, and told the passengers to come out, one at a time. They did so; and they robbed the nine passengers, one after another. While one did this, the other two stood guard. The two who stood guard were on each side of the coach; I saw one on the right hand; he had a pistol in each hand. I could not see the other. One

of them then jumped into the coach, and took the saddle bags and valises, and what he could find, and threw them into the road. There was one leather trunk, I remember. He then came round to me at the front part of the coach, and tried to unfasten the boot; but he did not know how. He then ordered me to do it. I unfastened the boot. He jumped up and got hold of the mails, and threw them into the road on the left hand side. In answer to a question by a juror, witness replied, that the man said, " 'Driver, open this boot.' The other man presented his pistols at me at the time, and I was afraid he would blow my brains out then, I didn't know what else to expect. The one on the left fell to cutting the mails open, and then jumped down on the right hand, and caught and tied me. He then put the whole ten passengers into the stage again, and ordered me to get up on my seat. I told him I could not; and then two of them took hold of me, one on each side, and threw me up on the foot board. One of them stepped round on the other side, and took me by the arms and set me on the seat. They then jumped down and took each leader by the head and led them to the fence. They then took the lead reins and tied the two horses to the fence. They then left the stage and walked over to where they had left the mails, as well as I could see in the dark. I suppose they examined them and cleared out. I didn't see them go. I rose up and tried to see or hear them go off, but could not, they went off so easy. We remained there some length of time; I cannot tell how long. Then one of the passengers came out of the coach and said, 'Driver, where are you?' and he took his knife and cut the handkerchief with which I was tied. I then jumped down, and got my horses loose and turned them into the road. I got the passengers in—they were all out when they were tied—and drove back to town. I believe my life was in danger—I do, or I should not have given up the mail. The one who tied me did not keep his pistol in his hands all the time he robbed the passengers. He had his coat buttoned up, and when he went to tie them he thrust his pistol into his breast. The others kept their pistols in their hands. Saw no other weapons but pistols. The mail bag was cut open after it was in the road. The stage was bound to Reading and Harrisburg. Witness had travelled on that road about two months. I believe none of the passengers were armed."

Cross-examined by Mr. Kane. "Q. Who employed you to carry the mail? A. I was employed by John Miltimore. Q. Had you ever carried the mail on any other route before? A. No, I never did. Q. Where does Mr. Miltimore live? A. In Harrisburg. Q. How did he hire you? A. He hired me to drive the stage by the month. Q. Did he tell you that you were hired to take the mail? A. No, he didn't say 'the mail.' Q. Did you give any security? A. No. Q. Did you take any oath? A. No. Q. How far did you drive the mail stage? A. I drove it to Barnhill, about eleven miles off, and then another driver took on. Q. What sort of a night was it? A. A very dark night. I could not see more than five or six yards off. I could not see exactly what the robber took from the outside passenger. Q. Where were you at the time? A. I was alongside of the passenger, with my whip and reins in my hand, when the robber took from him his money and his watch. Q. And where did this happen? A. This was on the right hand side of the stage; I was sitting on the right hand side; I drove. Q. And did you and your outside passenger get down on the same side? A. Yes, we did. Q. And you saw the robbers do all you have described? A. I was looking at them all the time but could not see much. Both the lamps were put out before I got down. Q. Now tell me when did you first consider your life in danger? A. I believed my life in danger when the man presented the pistol at me. I did not know at what moment he would blow me through. Q. And when did you first think your life out of danger? A. I thought my life no longer in danger after they were all gone, and I had got safe back to town."

The usual time for adjournment having passed, the counsel on both sides and the court consulted with the jury as to their wishes on that matter; some were for going on with the cause, others for an hour's adjournment, and others were for adjourning until the morning. At length it was agreed to adjourn until the morning, the jury in the meantime to be attended by officers who were to see that every proper convenience should be afforded them, and that they should not separate. The court then adjourned at half past three.

Third day, Wednesday, April 28th, 1830.

At the opening of the court this morning, Mr. Kane, one of the counsel for the prisoner, addressed the court, stating that it was with some regret he had read in a respectable morning paper (the United States Gazette), a a copy of which he held in his hand, a report of the trial which occupied the attention of the court yesterday, with a full detail of the evidence so far as it had been gone into. He was quite willing to bear testimony to its general correctness; it was not of misrepresentation that he complained.

HOPKINSON, District Judge. What then do you object to? If the report be a faithful one, it will only communicate to a greater number out of doors what they might have heard had they been here. A thousand, perhaps, witnessed our proceedings yesterday, and two or three thousand, it was likely, read the account in the paper. Have you any motion to make?

Mr. Kane. At present I do not mean to trouble the court with any motion, but I do object to the whole of it as a publication calculated to prejudice the minds of those out of

doors who may hereafter be called upon to sit as jurors on the other trials, nearly allied to that which now is occupying our attention. I do not attribute, in any degree, to the respectable editor of the paper in question, or to the gentleman who furnished him with the report, any intention whatever to frustrate the ends of justice, or to commit the mischief which the publication cannot but produce. He repeated, he had no motion to offer, but he trusted the observations he had dropped would produce a suspension for a day or two at least, of the determination which he gathered from a remark in the paper—that the report would be continued from day to day.

BALDWIN, Circuit Justice, said that the gentleman reporting the trial had behaved with much propriety. He had spoken to the bench yesterday of his intention to publish the proceedings daily. The court neither forbade his doing so, nor sanctioned the application with their consent. He trusted however, that if the counsel for either of the prisoners saw, or thought they saw, any mischief in the proceeding, that their wishes would be attended to.

Mr. Kane repeated his request—and the publication of the report in the papers was suspended until the conclusion of Porter's trial.

The trial now proceeded.

Samuel M'Crea re-examined. "I got the mail at the postoffice in Philadelphia that morning—both the leather and canvas were cut open—two of the mails I carried were cut open, two others were not. Two were in the front boot, and two behind; those in the fore boot were cut open."

Cross-examined by Mr. Bradford. "Q. Had you any conversation with the robbers, and when? A. Yes, when they were tying the passengers, one of them asked me, whether I didn't think it was rather a rough introduction, I told him I thought it was. He then asked me whether I made my living by stage driving, and I told him I did, and it was rather a hard life too, the way I was used. He said, 'This is the way we make our living, and it's hard with us sometimes.' Q. About what time in the morning was it when the mail was stopped? A. The clock struck three about the time they were tying the gentlemen who were outside. It struck four before we left the ground. Q. By Mr. Kane. Which of the persons was it with whom you had this conversation? A. I can't tell which 'twas. It was the one on the same side I was. Q. Was it the one who had been all the time on the left hand side? A. Yes. Q. Did they walk about much? A. The one who stood guard-like, walked up and down where they had the passengers in a row. Q. Were the passengers standing up? A. Yes. I was on the right hand side of the stage, the person talking was on the left. Q. How tall a man was he? A. I took him to be a small light man, but I couldn't see him exactly, in the dark. Q. By Mr. Dallas. How far from the tollgate was this? A. About a half a mile. It was just at Turner's lane."

A witness was called to prove the confessions of the prisoner, to which Mr. Kane objected on the ground of interest, a reward having been offered for the apprehension, to be paid on conviction; he also objected to any evidence of confession, unless it was in writing, or detailed in the words of the witness.

BY THE COURT. It is no objection to the competency of a witness that he may be entitled to a reward on conviction; public safety requires that rewards should be offered; and it has long been a settled rule of law, on grounds of public policy, that such an objection goes only to the credit of a witness. 1 McNally, Ev. 61, 63, and cases cited. The evidence offered is to prove the admissions of the prisoner of the facts laid in the indictment, not to have the effect of a confession, but as a circumstance for the jury. Such admission need not be in writing, or in the words of the prisoner; the witness may relate the conversation as he recollects it. If it was in detached parts, relating to different subjects, he need state only what relates to the matter in issue. If the conversation was one unbroken chain, the whole must be given.

Abraham Poteet, on being called as a witness, was objected to on the ground of his conviction in the Baltimore city court of several offences, two of which were for larceny, of which the records were produced. Mr. Dallas thereupon offered a pardon for the larcenies, granted by the governor of Maryland under the great seal of the state, which was objected to by the prisoners' counsel, who contended, that it must be shown that the person who signed the pardon was competent to grant it; that the constitution of the state conferred the power on the governor; that the act of pardon had passed through all the forms required by the laws of the state; that it had been judicially pleaded; and that the document must be proved in some mode prescribed by law, to make it admissible. In support of these positions they cited, 1 Story's Laws 93 [1 Stat. 122]; 1 Burr's Tr. 190; 4 Hawk. 55, 95; 4 Bac. Abr. 294; Craig v. Brown [Case No. 3,328].

BY THE COURT. The fourth article of the constitution of the United States makes the official acts of one state evidence in all others. The paper offered purports to be a pardon of the witness, granted by the governor of Maryland, under his signature and the great seal of that state. Every officer who certifies an official act, is presumed to be authorized to do the act he certifies. [Ex parte Bollman] 4 Cranch [8 U. S.] 130. The great seal of a state proves itself; and all acts to which it is affixed are evidence in all the courts of the Union: so are acts of foreign governments, certified under their great seal. [Church v. Hubbart] 2 Cranch [6 U. S.] 238. The affixing the seal to a document, is evidence of its being done by the officer who has its legal custody, and the seal itself authenti-

cates the act certified. [U. S. v. Amedy] 11 Wheat. [24 U. S.] 406, 407; [Doe v. Winn] 5 Pet. [30 U. S.] 241. A book or pamphlet, purporting to be printed by the public printer, is good prima facie evidence of a public law. [Young v. Bank of Alexandria] 4 Cranch [8 U. S.] 388. The objection must be overruled. Vide note at the end of the case.

The pardon having been read, Poteet, who was an accomplice, was sworn and examined. After he had given his evidence, he stated that he had stated the same facts to a justice of the peace in Baltimore; whereupon the counsel of the United States offered the justice to corroborate the evidence of Poteet, given at the trial, to which the prisoners' counsel objected.

BY THE COURT. The testimony of the witness has not been attacked on account of the want of credit to his statement, or the manner in which he has related the transaction, which must be done before corroborating evidence can be received. His general credit as a witness, on account of the situation in which he stands, is open to the jury and the remarks of counsel for defendant; but till some attempt to impeach it on other grounds, evidence in support of his credit is inadmissible.

On the trial of Porter, a witness was called to testify to the confession of Wilson, his acts, and declarations accompanying his acts.

BY THE COURT. The confessions of Wilson being offered merely to prove his own guilt, are not evidence against Porter, unless it is offered as the declaration of a confederate in the same crime, in which case it would be admissible on a joint trial against both. His acts are evidence which may conduce to prove the connection between him and Porter in the commission of the offence. As the district attorney waives the evidence of his declarations, we need give no opinion on their admissibility.

A witness, after being examined in chief, was called again to new matter not brought out by cross-examination, and objected to.

BY THE COURT. As a matter of right, the witness cannot be examined on new matter; it is however in the discretion of the court, which, in this case, we think it right to exercise by receiving the witness.

The trial of these cases was long and interesting. The prosecution was conducted with great ability by Mr. Gilpin and Mr. Dallas: the prisoners were defended with equal ability and great zeal; Wilson, by Mr. V. L. Bradford and Mr. J. K. Kane; Porter, by Mr. J. C. Biddle and Mr. J. R. Ingersoll. The questions of law being the same on both trials, Mr. Biddle was heard upon them on the trial of Wilson. As the arguments of counsel are contained in the pamphlet report of the cases, and as it would be difficult to separate the arguments on the questions of law from the view which counsel took of the evidence, they are not inserted in this report; they are sufficiently referred to in the charge of the court to explain the points of law on which the cases turned.

THE COURT (BALDWIN, Circuit Justice) delivered the following charge to the jury:

The prisoner on his trial before you is charged with a violation of the provisions of an act of congress for establishing and regulating the postoffice department, by robbing the carrier of the mail of the United States of the mail, and in effecting such robbery putting in jeopardy the life of the person having the charge thereof by the use of dangerous weapons. The offence consists in robbing the carrier of the mail or other person entrusted therewith, of the mail or of part thereof; the question of law which comes first under your consideration is what is a robbing of the carrier of the mail? The act of congress makes use of the word "rob" without defining it; but it is a word which long before the act of congress had received a settled construction, by the common law both of this country and that from which we derive our legal institutions. "The stealing or taking from the person of another, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the party to part with the property unwillingly." This is the true meaning and the judicial exposition of what the ancient writers of the law declare to be robbery. The felonious taking from the person of another, money or goods of any value, by putting him in fear. Foster, 128. It has been adopted by the supreme court as the sense in which the word robbery is used in the act of congress. United States v. Palmer, 3 Wheat. [16 U. S.] 630. And so it must be taken in this case as the rule of law by which you will inquire whether the carrier of the mail has been robbed.

You will perceive by this law that there are two species of robbery. 1. A robbery of the mail under such circumstances as amount to the offence by the principles of the common law. 2. A robbery effected by putting in jeopardy the life of the person having the custody of the mail, by the use of dangerous weapons. It is in these words. "Or if, in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy by the use of dangerous weapons, such offender or offenders shall suffer death." 3 Story's Laws, 1992 [4 Stat. 108]. To constitute this offence, three things must concur: The mail must be robbed, it must be effected by putting in jeopardy the life of the person who has it in custody, and this must be done with dangerous weapons. On the first the court have given you their opinion of the law by which you ought to be governed. If a robbery has been committed, then the all important question arises—was the life of the driver put in jeopardy? To judge correctly on this subject, our only safe rule is to be found in the law itself; the acts and words of the makers of our laws furnish

the best evidence of their meaning and intention, and that, when ascertained, is the law itself. The first act of congress, which punished this offence, was passed in February, 1792. By the seventeenth section it was punishable with death to rob the carrier of the mail of the United States of the mail—or robbing the mail of any letter or parcel, or stealing and taking from the mail or from any post-office any letter or packet. 2 [Bior. & D.] Laws, 251 [1 Stat. 237]. In 1794, a distinction was made between these offences: Robbing the carrier of the mail remained capital as before; the other acts were punishable by fine and imprisonment only, according to the aggravation of the offence. 2 [Bior. & D.] Laws, 399, § 17 [1 Stat. 361]. In 1799 another law was passed, in the same words as the present, except that for the first offence of robbing the carrier of the mail, the punishment of forty stripes was added to ten years imprisonment, and the word "much" was inserted before the word "wound." 3 [Bior. & D.] Laws, 275 [1 Stat. 736]. The law of 1810 omitted the whipping and the word "much." The part of the law of 1825 which bears on the case of the prisoner, is a literal copy of the first part of the nineteenth section of that act. 4 [Bior. & D.] Laws, 297 [2 Stat. 598]. Thus it appears that this phrase, "or put his life in jeopardy," has been used in three different laws, the last passed twenty-six years after the first. It must have been well considered; its legal meaning must have been well understood; if it had been deemed at all ambiguous at first, it would have been superseded by some other expression in the subsequent acts of congress, but it seems to have been retained as a phrase better expressive of the intention of the law makers than any other which could have been substituted for it. The meaning of this expression in the law of 1810 was settled in the circuit court of the United States for the district of Maryland and Pennsylvania in 1818, on the trial of the Hares and Alexander at Baltimore for robbing the mail, and of Wood in this place as an accessory. In the three first cases the court declared, "that robbing the carrier of the mail of the United States or other person entrusted therewith, of such mail, by stopping him on the highway, demanding the surrender of the mail, and at the same time showing weapons calculated to take his life, such as pistols or dirks, putting him in fear of his life, and obtaining possession of the mail by such means, against the will of the carrier, is such a robbery of the mail and such a putting of the life of the carrier or other person entrusted therewith in jeopardy, as comes within the terms of the law making the offence capital." The jury adopted this as the law; found the prisoners guilty; they were sentenced to death, and executed, except one, who received a pardon on the capital charge. Wood was tried before this court as an accessory to this robbery; and on his trial Judge Washington thus laid down the law to the jury. "As to the nature of the offence of which Joseph I. Hare was convicted (alluding to the Baltimore trials), the court does not entertain a doubt; we think, that putting the mail carrier in fear, and his life in peril or danger, is putting his life in jeopardy within the meaning and intent of the act of congress; and if the jury should be of opinion, under the circumstances which attended this transaction, that Boyer (the driver) was put in fear or danger of his life, the offence of the prisoner was capital." So strong was the conviction on the mind of this humane and eminent judge that this was the law, that he so gave it in charge to the jury: though the district attorney was willing to abandon the capital charge, the jury agreed with the court, and convicted the prisoner capitally.

These cases are important, not only as affording a judicial construction of the law from which the present one is copied word for word, which is entitled to very great respect, especially in a court in which one of the judges who gave this construction presided so long and with such eminent public satisfaction and usefulness, but because congress have adopted and re-enacted the same expression of "put his life in jeopardy," after it has received a judicial exposition in two courts. There is no rule of law better settled than this; that where a word or a set of words has received a fixed and determined meaning, and is afterwards used in a law, it is with a reference to such meaning, as much so as if that meaning had been superadded as a definition. It is on this principle that the word "rob" and "robbery" is considered as defined by its mere use and adoption in a law. So if the word "deed," "will," "bond," "note," &c. as used in this same law, requires any explanation of what congress meant by their use, we must look to the common law for it. The word "jeopardy" was not for the first time seen in the act of 1825; it has been in use from the beginning of the government; it is in the fifth amendment of the constitution "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Its meaning was well understood to be the same as peril and danger, and it has been since used and expounded in the same sense. Vide 6 Serg. & R. 597. But if this were a new question we should entertain as little doubt about it as our predecessors have done. We think the intention of the law is manifestly apparent in the terms which are used, and the punishment affixed to the commission of the different offences therein enumerated, the first of which is robbery of the mail with no other circumstance attending it but such as constitutes the crime of robbery at common law, which is punishable with not less than five or more than ten years' imprisonment for the first offence, and death for the second. You will observe that the robbery effected by putting the life of the carrier in jeopardy, is not a distinct offence, but a more aggravated species of mail robbery; if it does not consist in putting the driver in fear, peril and danger

of his life by the use of dangerous weapons, or the threat or offer to use them, then it must be necessary that some act should be done with dangerous weapons which does actually put his life in jeopardy, by a blow, a stab or shot, for there can be no middle kind of jeopardy, greater than the offer or threat to strike, stab or shoot, and less than the direct perpetration of either. But this construction cannot avail the prisoner, for the wounding of the carrier is made an act, of itself, sufficient to bring the offence within the capital punishment. "Shall wound the person having the custody thereof"—this makes the offence complete; "or shall put his life in jeopardy;" this is a distinct act; it need not be the mere wounding, for that case is fully provided for in the preceding sentence. Whether the wound is light or dangerous is immaterial, if done with a dangerous weapon; for the term "much wound," as used in the law of 1799, was altered in 1810 and 1825, by omitting the word "much." So that a wounding which puts the life in jeopardy, forms no part of the description of the offence with which the prisoner is charged. This will, we think, be as clear to your minds as to ours, by examining that part of the law immediately following, which punishes the attempt to rob the mail, by assaulting the person having the custody thereof, by shooting at him, or his horse, or mule, or threatening him with dangerous weapons, by imprisonment not less than two, or more than ten years. Stealing the mail is made a distinct offence, with the same punishment as the last. Cutting a mail bag, or doing the other acts enumerated in the twenty-third section of the same law, with intent to rob or steal the mail, are punishable by fine not exceeding 500 dollars, or three years' imprisonment. Here are four distinct offences. 1. Actually robbing the mail, of two species. (1) Robbery as defined at common law. (2) By putting the life of a driver in jeopardy. 2. Attempt to commit robbery by the assaulting the carrier, &c. 3. Stealing the mail. 4. Cutting the bags, &c. with intent to rob or steal.

From this view of the act of congress, it is clear that it intended not only to make a difference between the different species of robbery, but the different modes of attempting or intending to commit it. If by assaulting the driver, &c. the court may inflict as high a punishment as for actual robbery; if by cutting open the mail bags, the punishment is limited to a fine of 500 dollars, or three years imprisonment—the circumstance which so highly aggravates the offence is the offer or threat of violence to the carrier or shooting at him, his horse or mule; it is not in the mere attempt or intent to commit the felony. No one could doubt that if the prisoner was indicted for attempting to rob the mail by assaulting the carrier, or threatening him with dangerous weapons, the evidence in this case, if believed by the jury, would bring him within the express words of the law. Why shall we not apply the same rule to the commission as to the attempt to commit the offence? Can it be credible that congress did not mean to discriminate between the mere robbery of the mail, and doing it attended with the use of deadly weapons by an assault on the person of the carrier, and threats of death in case of resistance? The law itself furnishes a most decisive answer; in the one case, it is imprisonment for the first offence, and death in the other, if life is put in jeopardy. In affixing this meaning to the word "jeopardy," we differ from the defendant's counsel, principally as to the degree of danger, peril and hazard which it implies. They contend it must be extreme, imminent, and one of them, that there must be a struggle and personal conflict between the driver and the robber, in order to put life in danger. This principle can be easily settled by analogy to the case of homicide in self defence. A man may defend his life or person, when it is in danger, by taking the life of the assailant; and it is not necessary that he should wait to receive a blow or shot, but may take the life before any injury is actually inflicted; if the danger is impending, his life may be truly said to be put in jeopardy. If a man with a drawn pistol in his hand threaten to blow out his brains if he does not surrender his property, the one assailed may take the life of the other. The driver might in this case have taken the life of any of the robbers, and would have been perfectly justified in law in so doing, because his life was in danger. And if the driver was placed in such circumstances as justified taking life, his life was in jeopardy according to the true meaning of the act of congress. It is a question of danger, and not of fear; whether the driver had the iron nerves of the little Perry county witness, or was timid, is not material. Clark's life was as much in danger as any other passenger; and though he is a stranger to the feelings of fear, he would have been as much justified in killing the robber as any one who would do it under the influence of fear.

The court have no hesitation in saying to you, as matter of law, that such acts are putting life in peril, danger and jeopardy, within the express letter of the law, if you credit the testimony of the witnesses. If any one of you, driving a stage at the dead hour of night, should see three men suddenly rush upon you with drawn pistols; one seize your horses, and two others approach you with such expressions as have been testified to you, would you not feel your life in jeopardy, when it was held at the mercy of a highway robber with his pistol at your breast; and if you were thus compelled to part with property entrusted to your care, could you with truth say you had not been robbed by putting your life in imminent danger? There is no magic in words, nor is law that mystical science whose words of art are enveloped in hidden meanings; if jeopardy does not mean danger, peril, reasonable fear and well

grounded apprehension, we are at a loss to give the word any definite meaning; as used in the constitution, "jeopardy of life or limb," it can admit of no other interpretation than such as is mentioned; so, we think, it is received and used in common acceptation; so it has been judicially expounded, and, we think, adopted and used in the law. If, therefore, you shall believe that a robbery of the mail has been committed by the prisoner; and that in effecting it he has done such acts as created in the mind of the driver a well grounded apprehension of danger to his life, in case of resistance or refusing to give up the mail; if his life was actually in danger, or he really believed it to be so, then the robbery was committed by putting his life in jeopardy. It is not necessary that the danger should exist at the moment of giving up the mail, if it ceased in consequence of the driver's submission from a reasonable fear of his life if he resisted or refused. The law implies that the fear continued during the whole transaction; it was but one act; one offence; deriving its character from the circumstances attending its inception; which was an attempt to commit a robbery by putting the life of the carrier in jeopardy, ending in the consummation by the same means. In applying the evidence to this part of the case, you will bear in mind that the prisoner is on trial for the robbery of the mail, not of the passengers; the latter is not an offence within the jurisdiction of this court; and that the subject of your inquiry is whether his life was put in peril.

The next question is, whether the robbery and putting in jeopardy the life of the driver was done with dangerous weapons; pistols are such weapons; it is a use of them to point them at another, accompanied with words which denote an intention of injury, or without words, if they are shown and so held as to plainly indicate a design to do so in case of resistance or refusal to consent to the objects intended to be effected by their production and display. It need not be pointed at the driver, if intended to be used in case of resistance or refusal to surrender the mail; or if it was seen by the driver, and he had reasonable cause for believing it was to be so used; and it is not necessary that it be proved to have been charged, the presumption is that it was so until the contrary is proved. These are the words in which the law has been heretofore given in charge to a jury by our lamented predecessors, and we fully concur therein. "The law does not say that to constitute the crime the pistols shall be loaded, or a dirk be drawn from its sheath, we see no reason for giving to it such a construction. This presumption assumes the form of positive proof, the demand of the mail having been accompanied with a threat to blow out the brains of the carrier if he refused to deliver it, which could not have been effected unless the pistols were charged, and in all respects prepared to endanger life." U. S. v. Wood [Case No. 16,756]. Our opinion then is, that in point of law the facts given in evidence in this case, if believed by the jury, do amount to the offence for which the prisoner is indicted; if such should be likewise your opinion, you may find him guilty generally; if, on the other hand, you shall believe that the prisoner has robbed the mail, but has not effected it by putting the life of the driver in jeopardy, or has not done so by the use of dangerous weapons, you will find him guilty of the robbery charged in the indictment, and not guilty of effecting it by the putting the life of the driver in jeopardy by dangerous weapons; if you think there has been no robbery of the mail by the prisoner, you will find him not guilty generally.

We have thus stated to you the law of this case under the solemn duties and obligations imposed on us, under the clear conviction that in doing so we have presented to you the true test by which you will apply the evidence to the case; but you will distinctly understand that you are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the court; you may judge for yourselves, and if you should feel it your duty to differ from us, you must find your verdict accordingly. At the same time, it is our duty to say, that it is in perfect accordance with the spirit of our legal institutions that courts should decide questions of law, and the juries of facts; the nature of the tribunals naturally leads to this division of duties, and it is better, for the sake of public justice, that it should be so: when the law is settled by a court, there is more certainty than when done by a jury, it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us, you are in the exercise of a constitutional right to do so. We have only one other remark to make on this subject—by taking the law as given by the court you incur no moral responsibility; in making a rule of your own there may be some danger of a mistake.

These remarks apply to the expositions of the act of congress as made to you by the court; but if you are of opinion that the evidence in this case brings it within that act, or in others words, that in effecting the robbery of the mail the life of the driver was put in jeopardy, you have no discretion and no dispensing power, your oath makes the law your only guide to your verdict. You are not to look to its consequences or the punishment which may result; you only find that an offence has been committed, such as is defined in the law, and must be governed by the same rules of evidence, whether the punishment is death, fine or imprisonment. In all capital cases appeals are made to the feelings of jurors to induce them to be influenced by other considerations than such as grow out of the law and the evidence, but such appeals must be listened to with caution. It is for the national legislature to prescribe the

punishment of offence; it is not for you or us to arraign their justice or wisdom, and in performing our respective duties in the administration of criminal justice, we must go in the safe road prescribed by the laws as their expounders, but without assuming the power to repeal, alter, dispense or annul their provisions. It is the most painful duty imposed on us to become the agents through whose judgment punishment must reach an offender, but we must in all cases meet it with an honest and firm purpose, to do justice between the public and the accused, by an even, steady course. We cannot vary in the rules of evidence, accordingly as they apply to offences of greater or lesser degree of atrocity—no man can be convicted unless on clear and satisfactory proof of guilt. If a jury have a reasonable, well founded doubt of guilt, they must acquit of even the lowest offences—we know of no other rule for the highest. As to evidence, it must be the best the nature of the case and the ability of the party admits of, in cases of assault and battery; there can be no other rule in murder, unless it shall be required to prove the fact by some means of information more certain than human testimony. As to the law, it must meet the evidence and the case—whether it does so or not is for the court first and the jury afterwards to decide; but if it does, in their opinion, meet the case of the prisoner—obedience to the law is as much the duty of a citizen in the jury box as out of it. He violates every duty, if when his reason and judgment are entirely convinced of the guilt of the accused, he acts against such convictions from feelings of humanity, merely arising from the nature of the punishment; he does not, in the words of his oath, "a true verdict give according to the evidence." The degree of punishment cannot alter the weight of the evidence or the meaning and words of the law; and a jury are bound to render their verdict according to these alone, be the crime or its punishment what it may. We have made these remarks not from any belief that they are necessary for this jury, but from the hope that hereafter our attention may be more confined to the true subjects of our inquiry, and less directed to matters which are exclusively for the cognizance of a tribunal to whom is entrusted the enactment of laws defining and punishing offences.

Our attention has been called to other questions of law which may affect the prisoner's case. It is contended by his counsel that the act of congress under which he is on trial, being highly penal, ought to be construed strictly. This is a rule of construction of statutes as old and well established as law itself, and must be always borne in mind by courts and juries. It is founded on the tenderness of the law for the rights of individuals, and on the plain and universal principle that the power of punishment is vested in the legislature, and not in the judicial department—it is the legislature and not the court which is to define a crime and ordain the punishment. [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 95, 96. But though the penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute, so as to exclude cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. Their intention is to be collected from the words they employ. If there is no ambiguity in the words, there is no room for construction. The court cannot depart from the plain meaning of a penal act of congress, in search of an intention the words do not suggest; but it is not enough to authorize a conviction under it that the case comes within the mischief or reason of a law, it must come within its provisions, and be one of the enumerated cases for which it inflicts a punishment; these are the rules settled by the supreme court, which we recommend for your adoption, as safe and unerring guides. It has been contended that inasmuch as Samuel M'Crea, from whom the mail is alleged to have been robbed, has not taken the oath directed by the second section of the postoffice law, the prisoners have committed no offence in robbing him of the mail; but we cannot agree with the prisoner's counsel in this position; the words of the law are, "if any person shall rob any driver of the mail of the United States, or other person entrusted therewith, of such mail;" it does not say, who shall have taken the oath prescribed. We cannot think that because the oath has been omitted, it was the intention of the legislature that any person should be permitted to rob, steal and plunder the mail, letters and packets it contains, and put the life of the driver in jeopardy with impunity. If you are of opinion that M'Crea was a carrier of the mail, or entrusted with it, you ought to have no hesitation in saying that robbing him of the mail is the offence described in the law; to say otherwise would be to repeal and nullify it.

Another position has been taken by the prisoner's counsel, and very strongly impressed upon the court; it is this, that Wilson cannot be convicted on this indictment as a principal offender, unless he with his own hands committed the robbery, and put the driver's life in jeopardy by the use of dangerous weapons; that the proof of all these acts must be brought home personally to him; and that it is not sufficient if they were committed by Porter or Poteet in his presence, with his consent, direct aid and assistance. To support this position it is alleged, that by the postoffice law the offence of principal and accessory is distinct, punishable by different sections of the law, and that Wilson can be reached only by an indictment against him as accessory under the twenty-fourth section. It is certainly a correct legal principle, that an accessory cannot be convicted on an indict-

ment against him as principal; the offences are distinct, though the punishment may be the same, and so they are considered in this law—but it does not define what shall be the legal line of discrimination between the procuring of, advising or assisting in the doing or perpetrating any of the enumerated acts or crimes forbidden by the law, and the actually doing or perpetrating them. The rules laid down as to the meaning and legal import of words used in laws must be applied to this; if they have acquired it by long usage, judicial exposition and common acceptation by legislative adoption, they must be presumed to be so intended, unless a different sense is affixed to them by the laws in which they are found. There are no words in the law which have so acquired a more definite and specific meaning, than procure, advise and assist, as contradistinguished from the actual commission of a crime—the latter is the principal offence, the former only accessary. If a person does no more than procure, advise or assist, he is only an accessory; but if he is present, consenting, aiding, procuring, advising or assisting, he is a principal, and must be indicted as such. A crime may consist of many acts, which must all be committed in order to complete the offence; but each person present consenting to the commission of the offence, and doing any one act which is either an ingredient in the crime, or immediately connected with or leading to its commission, is as much a principal as if he had with his own hand committed the whole offence. You could not respect the laws of your country if they punished with less severity, or made any discrimination between the man who bound and held the victim and the one who gave a fatal blow—the robber who held the pistol to your breast, or the one who rifled your pockets—both are murderers, both are robbers, in the eye of the law, of reason and of justice. No principle can be better settled or ought to be maintained with more care than this. It would be in vain to pass laws for the prevention or punishment of crimes, if courts and juries were bound so to administer them as to require definite proof that a party accused committed every act necessary to bring them within the law, though it was manifest that it was the joint act of himself, and associates who took an active part in the actual perpetration: there is no such rule in our jurisprudence. The one contended for by the prisoner's counsel is only applicable to cases unknown to the United States. In England there are felonies which are punishable with death, unless the parties accused are entitled to the benefit of clergy, which exempts them from that punishment—there are cases in which by the statutes of that country the party is deprived of this benefit—and these statutes are construed with extreme strictness out of tenderness towards human life. But this principle is not applied to new created statutory felonies. They possess, in England, all the incidents which appertain to felony by the rules and principles of the common law, one of which is, that all those who are present, aiding and abetting when a felony is committed, are principals. This has never been questioned there; the principle has been adopted here, and has become one of universal application. 4 Burrows, 2073, 2083; [U. S. v. Gooding] 12 Wheat. [25 U. S.] 460, 467. That it fully meets the case now on trial, we have not a doubt, provided you believe the witnesses who have been examined. If Wilson was one of those who formed a plan of robbing the carrier of the mail, of the mail; if all were present; if each consented to the commission of the robbery, took any part in effecting it, or did any act tending to its commission, all are principals, and in an equal degree. It is wholly immaterial which held or stopped the horses, threatened the driver, held the pistol at him or took the mail from the boot, all the various acts in relation to the driver and the mail constituted the crime, of which each was as completely guilty as if he had effected it unassisted. Each one put the driver's life in jeopardy with dangerous weapons, whether they were used by himself or accomplice. It is hard to decide which took the most efficient part in the scene; the night was dark, and it was impossible for the driver or the passengers to identify which of the three committed the various specific acts which have been detailed. They were all unknown, and they took especial pains to conceal their persons from observation. The confessions of Wilson and the evidence of Poteet, if believed by you, fill every chasm in the testimony, which, in point of law, in our opinion, brings each of them within the express provisions of the law. But whether they are so in fact is your exclusive province to decide. Our duty ends on this part of the case by instructing you as to this law.

There are four questions for your consideration: 1. Was the carrier of the mail robbed of the mail at the time and place referred to? 2. Was it effected by putting the life of the driver in jeopardy? 3. Was it done with dangerous weapons? 4. Was it done by the prisoner, or by any of the others in his presence with his aid or assistance? If you can with a safe conscience answer these questions in the affirmative, your duty is plain—to say so by your verdict of guilty. If you have reasonable doubt you must acquit, but the doubt must be a real, honest one, whether the acts charged have been committed by the prisoner or in his presence and with his aid or consent. They must not be doubts about the policy, justice, or binding power of the law, or in any way growing out of the degree of punishment which may follow conviction.

In the case of Porter.

THE COURT (BALDWIN, Circuit Justice) charged the jury. He explained the law and recapitulated the evidence, as far as it ap-

plied, in much the same terms as those used in Wilson's case, and then proceeded:

These are the remarks made by the court in their charge to the jury in the case of Wilson. The course taken in this case makes it necessary to say something more. The robbery of the passengers is no offence against the laws of the United States of which this court has any jurisdiction—we cannot try, still less punish, this offence; it is within the exclusive jurisdiction of the courts of Pennsylvania, with which we claim no right to interfere. But thus far it is a proper subject for your consideration in this case. Taking the whole transaction, from its commencement to the end, you must view it as one connected series of acts properly given in evidence, to enable you to decide on the matters directly under your consideration. As a part of the transaction, the robbery of the passengers is material, as tending to furnish evidence of the nature, character and design of the threats to the driver, the use of pistols, and the robbery of the mail. Thus far, and no further, will you consider it.

It is contended, that inasmuch as the indictment charges a robbery of the mail, the evidence must show that the whole mail must be robbed; that though robbing part of the mail is the same offence, yet the indictment not so laying the robbery, the defendant cannot be convicted. It is said that by mail, the law means all the bags then in the stage, containing letters, papers, or packets. We cannot assent to this proposition. By a mail is meant, a bag, valise, or portmanteau, used in the conveyance of letters, papers, packets, &c., by any person acting under the authority of the postmaster-general, from one postoffice to another; each bag so used, is a mail, of which there may be several in the same vehicle—as the way mail, the general, the letter, or the newspaper mail. We can conceive no reason why the law should be construed otherwise. If a man should rob the carrier of the great southern, western or eastern mail bag, would it comport with common sense to say that because a small way mail bag had escaped the notice of the robber, he had not robbed the mail, and must go unpunished? Can you seriously believe that such was the intention of congress, or that the words they have used can justify the imputation to them of such consummate folly? If you do, then the crime of mail robbery may be expunged from the statute book; for the insignificant mail will always be left untouched. The court have no doubt that robbing the person entrusted with any one bag, valise or portmanteau, used for the purposes aforesaid, is a robbery within the express words of the law. Taking it from the driver's box, and throwing it into the road, cutting it open in the manner described, is robbery, if you believe the testimony. The twenty-third section of the law punishes the cutting of a bag, &c., with intent to steal or rob even a newspaper; it would be truly a strange conception of the preceding section to say that a wholesale robbery of the bag and all its contents was no offence at all.

It is said there can be no jeopardy by the use of dangerous weapons till the pistol is discharged; but there is no danger to the driver if it is not directed at him; or with a ball in it, discharged at him without hitting him, or not in a dangerous or vital part; the loss of an arm or leg may not put life in imminent danger; if the discharge did not take effect, it would seem to us, that the danger is less, for then there is no jeopardy of life,—but before the discharge, he could not foretell the extent of danger—it might take effect. Why then the actual discharge of the pistols should be made the criterion of jeopardy, we are utterly at a loss to conceive. In laying down a rule for the jury in Wilson's case, we stated that all who were present at the commission of an act, and assenting to it, were principles; we said that this was a rule of universal application; we repeat it now, and go further—it applies not only to crimes but to trespass and contracts. When two or more persons act together, in pursuance of a common object, one is answerable for the acts of the other tending to effectuate their common object. If this rule is broken in upon, it will derange the law in many of its most important provisions. As it affects criminal jurisprudence, it would go far to operate as a general jail delivery. No case can illustrate it more thoroughly than the one before you. Who robbed the carrier of the mail?—who robbed him, by putting his life in jeopardy, by the use of dangerous weapons? The night was dark; the robbers were unknown. Some one did one act, and some another; but each identical act was not done by one alone; there were three concerned and no more, and the deed was done by them in conjunction. If the prisoner's counsel are correct then, from the nature of the case there can be no conviction of any one, for no one with his own hands committed the whole offence. The law becomes a dead letter; future prosecutions will become useless, if, where one holds the horses, a second puts the pistol to the driver's head, and the third takes the mail from the box, all and each are not guilty. So, if we apply it to burglary, where one breaks open a dwelling-house in the night, another stands guard, and their comrades plunder it;—breaking and stealing make the crime. A did not break open the house; B did not plunder it; and C did neither—all must be acquitted. So, if one forges the plate of a bank note, and his associate the signature of the officers of the bank, and a third makes the paper, and a fourth strikes it off. Are you prepared to establish this as a feature which is in future to distinguish our Criminal Code? If you are, we have only to say it is a new one, and must be introduced without our concurrence. You cannot apply one rule to the capital and another to the lesser offence; it must have a general application or it can have none. It is neither in your power nor ours to go further, as to the law of any case, than to decide

upon what it was at the time the offence was committed. Courts are mistaken often. It is the frailty of humanity to err, and we can claim no exemption; but you must remember that in all governments of laws there is some rule by which its citizens must be guided. The constitution entrusts the making of laws to the representatives of the people: they are often unwise, sometimes unjust, and public opinion calls for their repeal by the same body which enacts them; but, until they are so repealed, courts dare not, and juries ought not, to disregard them. In us it would be an impeachable offence; and though a jury could be punished by no law, their moral offence would be no less than ours.

The constitution and laws of the nation have entrusted this court with the power of expounding the statute, and declaring the common law applicable to all offences within its jurisdiction; and it has not been thought proper to give to the supreme court any authority to revise our decisions on any of the matters now in issue before you. If we agree, our judgment is final; if we differ, we can certify the point of difference to the supreme court for their final determination. This is the only mode in which our errors can be corrected. We wish it were otherwise ordained, as it would relieve our minds from an awful responsibility; but we cannot shrink from it, when the duty is imposed on us under the highest obligations. In repeating to you what was said on a former occasion to another jury, that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law, we feel ourselves constrained to make some explanations not then deemed necessary, but now called for from the course of the defence.

You may find a general verdict of guilty or not guilty, as you think proper, or may find the facts specially, and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquits the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case; and in this respect a jury are the judges of law, if they choose to become so. Their judgment is final, not because they settle the law, but because they either think it not applicable, or do not choose to apply to the case. But if a jury find a prisoner guilty against the opinion of the court on the law of the case, a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment; the court do not act, and cannot judge, there remaining nothing to act upon. This, then, you will understand to be what is meant by your power to decide on the law; but you will still bear in mind, that it is a very old, sound and valuable maxim in law that the court answers to questions of law and the jury to facts. Every day's experience evinces the wisdom of this rule. In the case of Wilson, court and jury have passed on the questions of law, having no doubt of its embracing the case; we still adhere to our opinion, and cannot think otherwise. If this jury should differ from the former, can any man say what is the law of mail robbery as practically applied in this district? Where is the line which separates the guilty from the innocent in the transaction at Turner's lane? Is it the one drawn by the court from judicial decision, legislative adoption, and, to their minds, contained in the very words of the law, the one drawn by the prisoner's counsel in the zeal of their noble struggle to save a client's life, or the one recommended to you as deducible from the verdicts of juries in cases of murder, where the law and justice of the country may have been violated in obedience to supposed or prevalent public opinion. This case has assumed an aspect which places you and us in a most interesting and responsible attitude before the public. We have stated our deliberate and decided opinion on the whole law of this case. There is no tribunal authorized by law to revise or correct our judgment; not even the supreme court, on appeal or writ of error. Will you undertake to do what is forbidden to that high tribunal, which may decide questions arising between governments, but cannot decide this in any other event than our division of opinion? If you will, it may subserve the purposes of the defence; it may illustrate powerfully the humanity of the law in protecting prisoners from justice; but are you convinced in your minds and judgments, that you will declare the settled pre-existing laws of the land; that you will act on a rule which is a safe guide for the future, and better subserve the great purposes of public justice than what we have recommended? If you indulge feelings of humanity, in construing acts of congress, decide whether it shall be humanity to robbers and felons, or to the innocent victims of their avarice or revenge—the carriers of the mail; and whether you conscientiously believe that it was the intention of congress to protect, and save from the punishment prescribed by their own laws, the lives of atrocious offenders; or to protect the lives of those whose public duty exposed them to danger from their attacks. In a word, gentlemen, decide on the law and the facts as best comports with your sense of duty to the public and yourselves; act on the same rule under which you would be guided as a magistrate or judge on the oath and responsibility of office. Then you will not err. The court cannot but admire the efforts of intellect and eloquence made by the counsel for the prisoners. In going to the verge of their rights, in appealing from the court to the jury, they have acted in the strict line of their duty, from which they are under no obligation to depart; but you will judge whether you will be equally within the line of your duties in sustaining this appeal, and sanctioning the doctrines urged upon you with all the exertions of strong minds, brought in-

to action by warm hearts. In them to make the attempt is properly growing out of their professional situations; but your position is wholly different. All we can say to you is, reflect, deliberate, forget all appeals to your feelings, or any modes of operating on your judgment but such as are pointed out by the law or evidence.

On Thursday, May 6th, 1830, a motion was made by Mr. V. L. Bradford, junior counsel for Wilson, based on the alleged admission of irrelevant and irregular evidence at the trial, for a new trial; which THE COURT, after the hearing of argument from the counsel, overruled. A motion was subsequently made for arrest of judgment in both cases, and reasons filed in support of such motion. THE COURT was occupied several days in the arguments of counsel hereon. In overruling this motion THE COURT entered at length into the reasons filed, and the arguments relied on by the prisoners' counsel.

Both prisoners were found guilty, whereupon motions for new trials were made and overruled; motions in arrest of judgment were then made.

J. K. Kane.

1. The indictment is fatally defective, in not laying the offence to have been committed in a particular county in the district.

Every issuable fact must be set forth as committed in some village, hamlet or parish, as well as the county, so that a venire may issue to a jury of the vicinage. If the offence is laid in London, it is not sufficient without naming the parish, ward, &c. If laid in Guildhall, in London, it is not good. 1 Chit. Cr. Law, 132, 196, 200. It is enough to prove the commission of the act in the county, but the indictment must refer to a special venire, from which the jury are to come. 4 Durn. & E. [4 Term R.] 490; 5 Durn. & E. [5 Term R.] 162; 1 Rolle, Abr. 781; 2 Leach, Crown Cas. 800, 925; Archb. Cr. Pl. 12. If the facts stated are repugnant as to place or time, or are not stated, the defendant may demur or move in arrest. Yel. 94; Cro. Eliz. 97, 98; Cro. Car. 525; 2 Hawk. P. C. c. 25, § 77; 2 Hale, P. C. 180; 4 Com. Dig. "Indictment," 670. There can be no intendment after verdict. Archb. Cr. Pl. 14; 5 Durn. & E. [5 Term R.] 162, 628. The indictment must show a certain place. 4 Maule & S. 215. The omission of the words "then and there" is fatal. 3 Johns. Cas. 265, 266; 1 Madd. 26; 2 Keb. 583; 1 Vent. 60; 12 Mod. 88, 502; 2 Strange, 902. In capital cases the township, as well as county, must be laid. 7 Mass. 9, 13. So in misdemeanours, each constituent of the offence must be laid with a special venire. 1 Johns. 66, 75. The twenty-ninth section of the judiciary act directs that twelve jurors shall come from the county. 1 Story's Laws, 63 [1 Stat. 88]. The sixth amendment to the constitution directs that the trial shall be in a district designated by law, wherein the offence shall have been committed. This does not mean the general judicial district within which the court has jurisdiction, but the particular place or county from which the jury are to come. Hence the indictment must lay the county, so that the jury may be summoned thence, in analogy to the old rule in England, that four jurors, at least, must come from the parish, village or ward. Though this rule has become obsolete in England, it is adopted by the twenty-ninth section, and the record must show that the trial was had in the county; or if that was inconvenient, that twelve of the jurors come from the county named. The venire is a special one, and forms part of the record. 1 Bl. Comm. Append. 1. When no county is named, the clerk cannot make out the venire according to the act of congress, nor could we frame a plea to the jurisdiction, unless the county was named, for such plea must show what court could try the offence, and where it would be tried. 1 Chit. Cr. Law, 298, 439. The forms of indictments show the law to be so. 4 Chit. 476, 505. The practice is to summon twelve jurors from the county where the crime is committed, and issue separate venires in each case. U. S. v. Insurgents [Case No. 15,443]; U. S. v. Stewart [Id. 16,401]. A trial in the county is in the discretion of the court. U. S. v. Insurgents [Id. 15,442]; U. S. v. Fries [Id. 15,170]. But the indictment must lay the particular place, county and district, and the venire goes accordingly. 1 Burr, Tr. 352, 430. So it was done in the cases of Wood and Alexander, in which Judge Washington said, there would be a propriety in laying the county. Mail Robbers' Trial, 5, 6, 9, 196. It must appear by the indictment that the weapons were dangerous. Here it is not stated that they were loaded. Though the presumption may be that they were so in fact, that does not supersede the necessity of the averment. Vide U. S. v. Wood [Case No. 16,756]. The felonious intent of the prisoners, in putting the driver's life in jeopardy, does not appear; this is necessary, as in cases of treason, to show the intent in robbing the mail. U. S. v. Mitchell [Id. 15,789].

Dallas, Dist. Atty.

The time and place of the commission of an offence are immaterial, if they are so laid as to show the jurisdiction of the court. Though both time and place are specially laid, proof is sufficient of the act done at any time before the bill is found, and at any place within the district. 4 Com. Dig. 607. This indictment states the offence to have been committed in the Eastern district of Pennsylvania, within the jurisdiction of the court, and while the mail was proceeding from Philadelphia to Reading. It is not necessary to state the subdivisions which the state or local authorities have made of the district designated by the act of congress. There is a necessity for laying the district in this

court, to show that they have jurisdiction. So in England the county must be laid for the same reason. 1 Chit. 131, 94. But the township need not be laid, if it is not material to jurisdiction. 4 Bl. Comm. 306. Chief Justice Parsons gives the reasons why the county and parish must be laid in England, "because their limits are not prescribed by act of parliament, but depend on usage, of which the judges cannot judicially take notice;" and the rule does not apply where they are designated by law; hence it was held not necessary to lay the county, when the court judicially knew the township laid to be in the county. 7 Mass. 12. In reference to the criminal jurisdiction of the United States, the constitution looks only to the district which is designated by law as the place of trial; it knows neither counties, townships, parishes, vills, &c. The twenty-ninth section is only directory to the marshal in summoning the jury. A prisoner can suggest the county where the offence was alleged to be committed, and apply for a trial there, as in the case cited,—U. S. v. Insurgents [Case No. 15,442],—or may, at his option, waive the application. It is not a matter of right, but discretionary with the court, to direct the trial at any other than the ordinary place of its session,—U. S. v. Fries [supra]. If, as a matter of fact, the defendant has been deprived of any right at the trial, it would have been a mistrial; but he has in fact been tried by a jury of the county. The summoning of twelve men from the county, as directed by the twenty-ninth section, cannot refer to the indictment, which is found after the venire issues. The venire does not name the jurors, the marshal must summon twelve out of the forty-eight or sixty, as the case may be, and return jurors from such parts of the district, from time to time, as the court shall direct, so as to secure an impartial trial; the residence of the jurors appears on the panel annexed to the venire, and if any defect of jurors appears, the court can award a tales. In England the laying the vill, &c., has become obsolete, as the four jurors are no longer summoned from the place named. 1 Chit. 132, 196. When it ceased to be the law that the jury should be summoned de vicineto, and the statute directed they should come de corpore comitatus, from that time it becomes enough to allege a county for a venire. 3 Maule & S. 149. The construction of the constitution of this state directing an impartial trial by a jury of the vicinage, has been that it means the county, and the supreme court thus held that it is sufficient if the indictment shows that the court have jurisdiction, and can give judgment for the offence; the court presumes that the sheriff knows, and will perform his duty, if not, they will set aside the jury process. 6 Bin. 185. It is not necessary to lay the township, though the penalty goes in part to the supervisors. 4 Serg. & R. 450. Though there is no venue laid, yet if the jurisdiction appears on the face of the indictment it is good. Cam. & N. 38; 3 Am. Dig. 170. The cases referred to in this court, and the case of Colonel Burr, were cases of treason, which are exceptions to the general rule, depending on the necessity of laying an overt act specially, and proving it as laid,—1 Burr, Tr. 563,—whereas, as a general rule, it is sufficient to charge the offence in the words of the law prescribing the punishment,—[U. S. v. Gooding] 12 Wheat. [25 U. S.] 460.

Joseph R. Ingersoll, in reply.

The prisoners have had a fair and impartial trial, but if there had been a mistrial, it would be a good ground to arrest the judgment. Cro. Jac. 284. There is greater reason for laying the locality of an offence in indictments in the federal courts, than in England, or the state courts, because many of the districts are as large as an European sovereignty. Laying the county is sufficient, as they are small; but from this indictment the court cannot know in what county the offence was committed: there are four counties between Philadelphia and Reading, and there are no jurors from the county of Berks; the defence is negative; if it turned on an alibi, the county might be very important, and therefore it should be referred to in the record. The court cannot look to the evidence, if the indictment does not show jurisdiction, and give notice of every matter necessary for them to act upon at the trial, or in giving the proper directions preceding it. 2 Hawk. P. C. c. 25. It must contain every requisite prescribed by the law, on the same principle which applies to the civil jurisdiction of the courts of the United States. The first proceeding is the indictment, the venire follows, or a distringas and a tales; but as twelve jurors must come from the county, it can only be ascertained from the indictment; as the prisoner is presumed innocent, he is not to name the county where the offence was committed. The panel shows where the jurors come from; the indictment shows where he is charged with committing the offence; the prisoner then knows whom to challenge; but if there is no venire, his right of challenge is impaired. At common law, the going to trial, in an action of trover, was no waiver of the want of a venire in the declaration. Cro. Eliz. 78. And in criminal cases there must be an express waiver of the right to a local jury, or it remains. 2 Hale, P. C. 193; 3 Mass. 133. Though the present is not a question of jurisdiction, it is an important one. In England the indictment lays the county to show jurisdiction, and as the general vicinage from which all the jurors must come; the vill, parish, &c., are laid to ascertain the particular place from which four are to be summoned,—1 Chit. 196; 3 Thom. Co. Litt. 505, Hargrave's note; the want of which is not mere form, but is good cause of challenge at the trial, and a mistrial, for which judgment will be arrested. Co.

Litt. 125a. Defects in venires are cured in civil cases, by 4 Anne, c. 16, § 6, but felonies are excepted by the seventh section. 4 Ruff. 206. Before this statute the consent of parties to an ejectment did not cure a defect in the venire. Hob. 5, 89; Cro. Eliz. 260. In New York, where the offence is laid in the city, the ward must be named. 7 Cow. 430. So must a parish be (by the note of the reporter), or the judgment will be arrested; and in England, though the statute 7 Geo. IV. has provided that the judgment shall not be staid on an indictment for such defect, where the court has jurisdiction, it may be still taken advantage of on demurrer, according to Car. Cr. Law, 44, 57. In civil suits it is enough to lay the venue in the county, where it is in a superior court of general jurisdiction; where the court has only a special jurisdiction, the place where the cause of action arose, must be specially laid so that jurisdiction will appear. 1 Chit. Pl. 280. When a jury are to be summoned from a particular vicinage, it must be laid. 3 Maule & S. 148. Where an indictment laid the offence at the parish of St. Mary, in the county of M., and there was no such parish, Lawrence, J., saved the point. 3 Camp. 77. The common law is in force in the circuit courts, as to the forms of indictments and pleadings, challenges to jurors, &c. U. S. v. Coolidge [Case No. 14,857]. Any defect in an indictment, or in the mode of setting out the offence, is fatal. 4 Chit. 44, 46; 2 Hawk. P. C. 185. Judgment will be arrested if there is no venire. 18 Johns. 212; 1 Wend. 117. So if the time of the offence is not stated,—9 Cow. 660,—though time is not essential unless in special cases, as in the assignment of perjury,—U. S. v. McNeal [Case No. 15,700]. The cases in this court on indictments for treason and mail robbery, and the case of Colonel Burr, are conclusive on the point.

BALDWIN, Circuit Justice. The counsel for the defendant has filed the following reasons in arrest of judgment. "1. That it does not appear in the indictment in what county the offence charged therein was committed. 2. That it does not appear with certainty in the indictment that the weapons therein charged to have been used by the prisoner, were dangerous weapons, inasmuch as it does not appear that the weapons therein set forth, viz., pistols, were loaded. 3. That the offence charged against the prisoner is not so described in the indictment as to make it certain, by reference to the statute of the United States, that judgment of death should pass against him. 4. That it does not appear by the indictment that the intent of the prisoner was felonious in the putting of the driver's life in jeopardy. 5. That the indictment is in many other respects defective and erroneous."

Having laid down the law to the jury, that it was not necessary to prove that the pistols were loaded, and that their use in the manner testified brought the case of both prisoners within the act of congress, the court has already decided on the second and fourth assigned reasons in arrest of judgment; we have no doubts as to the entire correctness of the opinion, and deem it unnecessary to repeat the reasons there given or to assign any new ones, as the shape in which they are now presented does not vary their legal bearing. The third and fifth are fully answered, in our opinion on the first.

The remaining exception to the indictment is one on which the court have bestowed their most serious and deliberate attention. In a capital case we would not pass sentence on a prisoner, where we entertained any doubts of his case coming within the law which inflicted the punishment, or of the sufficiency of the indictment on which he had been tried; we must be satisfied that he is guilty not only in substance and form as he is indicted, but that he is indicted according to the mode and in the manner prescribed by law. U. S. v. Gooding, 12 Wheat. [25 U. S.] 474. At the common law great nicety is necessary in the description of offences, and especially of capital ones. The rules which regulate this subject have, in former cases, been founded on considerations which no longer exist in our own, or English jurisprudence; but being once established, they still prevail, although if the case was new, they might not be incorporated into the law. But before we could be justified in declaring a rule of the common law of England, which was founded in no reason, or in such as was no longer operative there and was never applicable here, to be a part of the common law of the United States binding on this court, we ought to be well convinced that it has been adopted in the states before the organization of the federal government, or by the courts which have been brought into action under it. We should be the more cautious in giving way to an objection to an indictment which is founded in mere form, in a case where the words of an act of congress, defining and punishing an offence had been pursued, when it appeared to have been committed within the jurisdiction of the court, and when any further particularity would be of no possible benefit to the prisoner, or the result of it in any possible manner deprive him of the means of information necessary for a full defence. There are certain principles by which we must be governed in judging of the sufficiency of all indictments. They must contain a legal description of an offence, laid with such locality as to enable the court to judge, on the face of it, that they have power to punish for its commission. It is our duty to see that these requisites are complied with, as constitutional and legal provisions which we must obey. When, however, we are called upon to prescribe additional ones, we must find them in some law which controls us, before we can refuse to render judgment on a verdict

which has been rendered on a fair trial, on clear undoubted testimony and when the record contains all the form and substance required by any statutory provisions or decisions of any court acting under our laws. The only clauses on this subject to be found in the constitution are in the second section of the third article, declaring that all trials for crimes shall be in the state where the offence shall have been committted, and in the 6th amendment which says, "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The only act of congress which can be relied on is the 29th section of the judiciary act, which provides: "That in cases punishable with death, the trial shall be had in the county where the offence was committed; or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence." All these requisites have been complied with. The trial has been in the state, in a district previously ascertained by law, in the county where the offence was committed, from which twelve at least of the petit jurors have been summoned. The indictment alleges the offence in the words of the act of congress—charges on the prisoners the robbery of the carrier of the mail, proceeding from Philadelphia to Reading—to have been committed within the Eastern district of Pennsylvania, and within the jurisdiction of this court. These facts being found true by the jury, give judicial knowledge that an offence has been committed, which is punishable by law, as well as at the place over which we have jurisdiction and power to try consistently with the constitution and amendment. We are bound to try all crimes committed within the district which are duly presented before us, but not to try them in the county where committed; that is a matter of which the court must judge in the exercise of their discretion,—U. S. v. Cornell [Case No. 14,868],—which does not require to be guided by the averments in the indictment. If the law was imperative that the trial must be in the county, the reasons might be very strong, and even conclusive, for requiring the county to be named; but being discretionary in the court, there would seem to be no necessity for the averment, as they had other means of knowing the place of the offence, which need be noticed only to direct their discretion, but not to give them power to try. When that is apparent from the record, and every legal requisition is met, we must inquire if there have been any superadded by judicial authority. In the reports of cases in federal courts we find no decision that an indictment for capital crimes against the laws of the United States must lay the county in which it is committed. In the Case of Wood, for mail robbery, the objection was mentioned, but Judge Washington did not arrest the judgment on that ground, or give any opinion whether it was a fatal one or not. He contented himself with observing that there was a propriety in naming the county, in which we fully concur with him. But although there is always a propriety in avoiding any questions which the ingenuity of counsel may raise, it by no means follows that the averment was necessary in his opinion. This appears to be the only case in which the question raised before us has been distinctly proposed before any court of the United States, but there are others in which principles very strongly analogous have arisen and been settled. The third section of the act of the 30th of April, 1790, affixes the punishment of death to any crime of murder committed in any fort or place under the exclusive jurisdiction of the United States. One Connell was indicted for the murder of William Kane in Fort Adams, in Newport harbour, which was alleged to be a place within the sole and exclusive jurisdiction of the United States. He was convicted, and sentenced to be executed. The principal question was as to the jurisdiction of the court. In order to give it, the murder must have been committed within the exclusive jurisdiction of the United States. It was so considered by Judge Story both in his charge to the jury and in overruling the motion for a new trial. It does not appear that the act was charged to have been done in the county of Newport; indeed it could not have been so, for this learned judge declares, that "strictly speaking, it was not within the body of any county of Rhode Island, for the state had no jurisdiction there." It could not then have been necessary to have so laid it; yet the trial seems to have proceeded according to the provisions of the twenty-ninth section of the judiciary act. Sixteen jurors were summoned from the county of Newport, and the various points growing out of that act were fully considered by the court. Though they gave no direct opinion on the question now under consideration, they gave a judgment in a case, where the record must have directly presented it. It seemed sufficient that the case came within their jurisdiction by the commission of the crime within a fort, and so laid. This case is also an authority in answer to the arguments in favour of this objection drawn from the twenty-ninth section, that as twelve jurors must be summoned from the county, it must be alleged in the indictment, as a guide for the venire. In that case the prisoner's counsel urged that the venire could not issue till the prisoner had pleaded. The court instantly overruled the objection as forming no part of the issue before the jury: as also the one taken on the ground that the trial ought to have been had in the county of Newport, and for the same reasons. If then the commission of the offence in the county formed no part of the issue, it clearly follows that it would not be a material averment in

the indictment, the court having jurisdiction without it.

In general, it is sufficient if the indictment sets forth an offence in the words of the statute creating it, or as defined at common law, without the particulars of the manner or means, place or circumstance. "The case of treason stands upon a peculiar ground; there the overt acts must by statute be specially laid, and must be proved as laid." U. S. v. Gooding, 12 Wheat. [25 U. S.] 473, 475. It is evident that the law was so considered by the chief justice on the trial of Colonel Burr. He observes: "In considering this point the court is first led to inquire whether an indictment for levying war must specify one overt act, or would be sufficient if it merely charged the prisoner in general terms with having levied war, omitting the expression of place or circumstance. The place in which the crime was committed is essential to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defence." It was held in that case to be necessary to lay the particular manner in which the war was levied; "that an overt act must be averred and proved at the place alleged in the indictment, no other overt act can be inquired into except for the purpose of proving the particular fact charged, it is as evidence of the crime consisting of this particular fact, not as establishing the great crime by a distinct fact. The overt act charged is the sole act of that treason which can produce conviction. It is the sole point in issue between the parties." These are rules of the law of treason in levying war both in England by their statute, and in the United States by the act of the 30th of April, 1790, which has this expression in the section punishing treason: "and shall be thereof convicted by confession in open court, or on the testimony of two witnesses to the same overt act, of the treason whereof he or they shall stand indicted," following mostly the words of the third section of the third article of the constitution. The requiring the overt act of levying war to be specially laid, is an exception to the general laws of treason in England, growing out of the statute of Edw. III., which directs it as to this species of treason; but as to that which consists in counterfeiting the coin, does not require it, and it need not be laid. The same rule must apply to the constitution and act of congress, as treason consists only in levying war, and is the only crime in our Code which must be proved by the commission of the specific act, in the manner, place and circumstances as charged in the indictment.

The act of congress on the subject of trial in the county, and the summoning of jurors, can have no bearing on the forms of this indictment, for the place of trial is discretionary with the court, and by the uniform practice in Pennsylvania, before the passage of the judiciary act, and of this court ever since, the venire issues before the indictment is found. The jury cannot take these matters into their consideration, as they form no part of the issue of guilty or not guilty; they cannot inquire into the sufficiency of the reasons which induced the court to refuse a trial in the county, or whence the jurors come; these are matters which the court will so regulate as to do justice to the prisoner on any objections made by him to the panel, but they cannot in any manner affect the indictment, which is presented after the jury are summoned, and cannot of course serve as a guide to the marshal in executing the venire. If he shall not have summoned the requisite number from the county, and the prisoner insists on his right, the court may continue the cause, or direct a return of the proper number from such county or part of the district as shall be most favourable to an impartial trial. This part of the twenty-ninth section of the judiciary act fully meets every exigency which may arise at the trial, and in our opinion furnishes a very satisfactory answer to all the arguments which are founded on the preceding provisions contained in that section. The case of People v. Barrett, 1 Johns. 66, does not sustain the position assumed. It was decided in that case that the offence must be laid in the county, not that it must be laid in the township. The true reason for the judgment of the court was assigned by Justice Spencer, "it did not appear that the essence of the offence was committed in the county," and leaves the present question untouched; for the county, in a state court, means no more than state or district in this; which is, that it must appear to be within their respective jurisdictions. The one from Massachusetts seems to us to be more in direct opposition to the principle asserted. It was decided in that case that an indictment for not repairing a road was good, although it did not lay the offence to be in the county; it was held to be sufficient to say the township, because, as judges, they knew from the several public statutes of the state that the township of Springfield lay wholly in the county of Hampshire. The eminent judge (Parsons) who delivered the opinion of the court, declared that "the objection by the common law of England might prevail, because the judges cannot presume that the whole of the township or parish lies in the same county. In England the limits of the several townships and parishes are not ascertained by public acts of parliament, the records of which are remaining, but are determined by ancient usage, of which the judges cannot judicially take notice. The case is different in Massachusetts: our county limits are prescribed by public statutes, of which we are bound judicially to take notice." 7 Mass. 9, 12. In referring to the law of Pennsylvania, as it was at the time of the passage of the judiciary act, we find

that robbery was a capital offence: the punishment was altered in 1790, but the laws as to the form of the indictment did not change with the change of punishment. The act of assembly of 1777 adopted so much of the common law of England as had heretofore been in force in the province. 1 Dall. St. Laws, 723. But that part of it which relates to this question does not appear to have been in force before the Revolution, but a different rule must have prevailed. From the early periods of our judicial history, the uniform practice in the criminal courts has been to lay the county, and not the township. Such are the forms yet in use in cases of murder. The only reported case to be found in which an objection was made that the township was not alleged, was in Duncan v. Com., on an indictment for adultery. It was said to be necessary, because the fine was to be divided between the commonwealth and the supervisors of the township in which the defendant resided, according to the provisions of the law punishing the crime. The court held it "not necessary, because they could ascertain the place of the defendant's residence otherwise than by the verdict of a jury." 4 Serg. & R. 450. If there was any case in which there could be reason for laying the township, it was this; but it has never been decided in Pennsylvania that it was necessary in any. The practical construction of that part of the constitution requiring a trial of all offences by a jury of the vicinage, has been, that it is fully complied with by a trial by a jury of the county.

We have then, in this case, the authority of the supreme court of Pennsylvania added to all that has been referred to, and, on a deliberate consideration of the subject, are clearly of opinion that the objection taken to the indictment in these cases cannot be sustained. If we entertained a doubt, we would certify the case to the supreme court; but feeling none, it is our duty not to delay public justice. We have carefully reviewed all the proceedings on the trials, and can find nothing, in our opinion, in the least erroneous. Had we doubted in the least the correctness of our decision on any point which arose, we would have given the prisoners an opportunity of another trial; but we have had none. The evidence was clear, uncontradicted and conclusive. The guilt of the prisoners was apparent, and ascertained after a long, laborious and impartial trial, in which they were defended with all possible ability and exertion. The jury was satisfied on all questions of fact; we are equally so on those of law, arising on the trial or apparent on the record, and therefore overrule the motion in arrest of judgment.

[NOTE. Subsequently the cause went to the supreme court upon a certificate of division of opinion upon a question as to the admissibility of a pardon by the president of the United States, which question arose upon the motion for sentence. See 7 Pet. (32 U. S.) 150.]

[NOTE, from 1 Baldw. 607.] In the case of Leland v. Wilkinson, reported in 6 Pet. [31 U. S.] 317, 322, the supreme court seem to have disaffirmed the principle on which the pardon was admitted in the case of United States v. Wilson and Porter. A paper purporting to contain copies of the proceedings of the legislature of Rhode Island in various cases from 1784 to 1827, authorizing the sale of the real estate of decedents for the payment of debts, was offered to the court to be read as evidence of the usage and law of the state. To the copy of each proceeding was annexed the following certificate: "True copy of the petition and vote (or order) thereon, and all the papers and documents on file. Witness, Henry Bowen, Secretary." The copies were connected together with the certificates, to which was annexed the following certificate, with the seal of the state affixed. "By his excellency, Lemuel H. Arnold, governor, captain-general and commander-in-chief of the state of Rhode Island and Providence Plantations. Be it known that the name 'Henry Bowen,' to the aforewritten attestations subscribed, is the proper handwriting of Henry Bowen, Esq., who, at the time of subscribing the same, was secretary of the state aforesaid, duly elected and qualified according to law; wherefore unto his said attestation full faith and credit are to be rendered. In testimony whereof I have hereunto set my hand, and caused the seal of said state to be affixed, at Providence, this seventh day of January, in the year of our Lord one thousand eight hundred and thirty-two, and independence the fifty-sixth. Lemuel H. Arnold. By his excellency's command, Henry Bowen, Secretary. (Seal.)" The paper was rejected by the court for the reasons stated by the judges. The following dissenting opinion was delivered, which will fully explain the grounds of the decision in the circuit court, as to the effect of an authentication of a paper by the great seal of a state. [See dissenting opinion of Mr. Justice Baldwin in Leland v. Wilkinson, 6 Pet. (31 U. S.) 321.]

Case No. 16,731.

UNITED STATES v. WILSON.

[3 Blatchf. 435.] [1]

Circuit Court, S. D. New York. March 5, 1856.

FEDERAL COURTS—ADMIRALTY JURISDICTION, CIVIL AND CRIMINAL—DESTROYING VESSEL—"HIGH SEAS" DEFINED.

1. The civil jurisdiction of the courts of the United States, in maritime causes of contract or tort, embraces tide-waters within the bays, inlets of the sea and harbors along the sea-coast of the country, and in navigable rivers.

2. But the federal courts of inferior jurisdiction cannot take cognizance of criminal offences of any grade, without the express appointment or direction of positive law.

[Cited in U. S. v. Myers, Case No. 15,847; U. S. v. Plumer, Id. 16,056; U. S. v. Lewis, 36 Fed. 450.]

3. Under section 1 of the act of March 26, 1804 (2 Stat. 290), prescribing punishment for the offence of wilfully destroying a vessel, it is necessary, in order to give to this court jurisdiction of the offence, that it should have been committed upon the high seas, and not merely upon waters within the jurisdiction of the United States.

4. Congress, in its criminal legislation, uses the term high seas in its popular and natural

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

sense, and in contradistinction to mere tide-waters flowing in ports, havens and basins, that are land-locked in their position and subject to territorial jurisdiction.

[Cited in Miller's Case, Case No. 9,558; Ex parte Byers, 32 Fed. 406. Cited in dissenting opinion in U. S. v. Rodgers, 14 Sup. Ct. 116, 150 U. S. 268.]

This was an indictment for a capital offence, charging that the prisoner [George Wilson], who was a colored man, being a mariner, belonging to the schooner Eudora Imogene, which vessel was not owned in whole or in part by him, and was the property of Asa R. Shaifer and others, citizens of the United States, did, on the 23d of November, 1855, on the high seas, and within the jurisdiction of this court, feloniously, wilfully, and corruptly destroy the said vessel, (specifying the means and manner by which the act was committed). The indictment varied the statement of the crime, in different counts, but the charge was substantially the same in all. The prisoner demurred to the indictment.

Philip J. Joachimsen, for the United States.
William T. B. Milliken, for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The indictment in this case is founded upon the act of congress, approved March 26, 1804 (2 Stat. 290), entitled "An act in addition to the act entitled 'An act for the punishment of certain crimes against the United States,'" by the 1st section of which it is enacted, that any person, not being an owner, who shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship or other vessel unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, and being thereof lawfully convicted, shall suffer death.

The fact charged against the prisoner is admitted by his demurrer to the indictment; and, it being conceded, on the part of the United States, that the vessel was destroyed in the East river or western extremity of Long Island Sound, at a point between City Island and Hart Island, within the territorial limits of the town of Pelham, in the county of Westchester and state of New York, and accordingly within the jurisdiction of that state, the question raised by the demurrer is, whether the place where the act was done is within the criminal jurisdiction of the federal courts. We assume it as a notorious geographical fact, that the breadth of water at that place, from Long Island on the south to the main land on the north shore, is not beyond the reach of ordinary eyesight, and does not exceed two miles. That point was not in controversy on the argument, and therefore we have not called for specific evidence to fix the distance.

The constitution of the United States declares (article 3, § 2), that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction;" and it is now indisputable that, by force of the constitutional provision, the civil jurisdiction of the courts of the United States, in maritime causes of contract or tort, embraces tide-waters within the bays, inlets of the sea and harbors along the seacoast of the country, and in navigable rivers. The Thomas Jefferson, 10 Wheat. [23 U. S.] 428; The Orleans v. Phœbus, 11 Pet. [36 U. S.] 175; U. S. v. Coombs, 12 Pet. [37 U. S.] 72; Waring v. Clarke, 5 How. [46 U. S.] 441; N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344. But it is a fundamental doctrine, in respect to the federal courts of inferior jurisdiction, that they cannot take cognizance of criminal offences of any grade, without the express appointment or direction of positive law. To enable them to exercise the functions bestowed by the constitution over crimes and misdemeanors, there must be a designation, by positive law, both of the offence and of the tribunal which shall take cognizance of it. U. S. v. Hudson, 7 Cranch [11 U. S.] 32; Ex parte Bollman, 4 Cranch [8 U. S.] 75; U. S. v. Coolidge, 1 Wheat. [14 U. S.] 415; Wharton, Cr. Law, 76-80. Congress has, by the statute referred to, defined the crime of destroying a vessel. The act must be done wilfully and feloniously, by a person not an owner, and on the high seas. The place where the offence is committed becomes, thus, an essential element in the description of the crime. The mere fact that the accused wilfully destroyed the vessel, being upon waters within the jurisdiction of the United States, does not subject him to prosecution and punishment under this act, unless the vessel was at the time on the high seas.

It is no doubt within the competency of congress to bring all waters subject to federal jurisdiction within the scope of its criminal jurisprudence. This is manifestly the doctrine declared by the supreme court in the cases of U. S. v. Bevans, 3 Wheat. [16 U. S.] 336, and U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76. But the power is regarded as dormant unless exercised by direct enactments of law. It is not enough that a felony of the highest enormity is charged in the indictment, or that the laws of the United States denounce it as a capital crime, and subject it to trial and judgment in the national courts; but it must further be manifest that the place where the transaction occurred is designated by legislative enactment as one over which this authority may be exercised by the court. Thus, any person committing murder on board an American vessel in bays, harbors, basins, or rivers, not within the jurisdiction of any state of the Union, is triable in the courts of the United States, and punishable therefor, the same as

if the crime were committed upon the high seas. Act April 30, 1790, § 8 (1 Stat. 113). But he cannot be punished for manslaughter committed elsewhere than upon the high seas, because the 12th section of the act of April 30, 1790, extends only to that offence when committed in that locality. U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76. Place is made, by the statute, an essential ingredient in the offence; and, if the locus in quo specified in the indictment, is not, in a legal sense, the high seas, this court has no jurisdiction over the charge. U. S. v. Furlong, 5 Wheat. [18 U. S.] 184.

There is less precision in the use of the term high seas in reference to the jurisdiction of maritime courts in civil actions, than in cases of a criminal character, because, in the former, it is immaterial to the authority of the court whether the transaction be on the open ocean, or on inland waters subject to the ebb and flow of the tide. In those cases, it might be immaterial whether tide-waters were or were not universally denominated high seas, neither the rights of the parties nor the power of the court being affected by the appellation. In the construction of criminal law, greater exactness and certainty are demanded, and words must be interpreted so as to carry out clearly the intention of the law-maker.

It appears to us very manifest, that congress, prior and subsequently to the enactment under consideration, has, in its criminal legislation, sedulously evinced the intention to use the term high seas in its popular and natural sense, and in contradistinction to mere tide-waters flowing in ports, havens and basins. Thus, in the 8th section of the act of April 30, 1790, and in the 4th, 5th, 6th, 7th, 8th, and 11th sections of the act of March 3, 1825 (4 Stat. 115, 116, 117), high seas are discriminated from rivers, havens, basins and bays, which are not within any state in the Union, all the enactments importing unequivocally the meaning of congress, that the term high seas alone embraces no waters that are land-locked in their position, and are subject to territorial jurisdiction.

The adjudications already cited from the supreme court affirm that to be the legal import and effect of the language; and the more labored and erudite elucidations made by inferior courts show that construction to be in consonance with the principles of general jurisprudence. U. S. v. Grush [Case No. 15,268]; The Harriet [Id. 6,099]; Thomas v. Lane [Id. 13,902]. In U. S. v. Robinson [Id. 16,176], Judge Story applied the doctrine to the act now under consideration, and held that a bay in the island of Bermuda, where an American vessel had been feloniously burned and destroyed, was not on the high seas, within the purview of the statute in question.

We are of opinion, upon a careful consideration of the subject, that the offence charged in this indictment is not, within the purview of the act of March 26th, 1804, cognizable by this court, and that, accordingly, judgment must be rendered for the prisoner. The prisoner will be remitted by the marshal to the custody of the proper state authority by which he was detained when he was arrested on this indictment.

Case No. 16,732.

UNITED STATES v. WILSON.

[6 Chi. Leg. News, 304.]

District Court, D. Minnesota. June Term, 1874.

FORGERY WITH INTENT TO DEFRAUD THE UNITED STATES—"OTHER WRITING" CONSTRUED.

[1. The act of March 3, 1823 (3 Stat. 771), making it a crime to forge, etc., "any deed, power of attorney, order, certificate, receipt or other writing," for the purpose of defrauding the United States, cannot, by force of the words "other writing," be made to cover the case of a forged indorsement on a genuine check drawn by a pension agent upon a depository of the United States.]

[2. The common law confers no criminal jurisdiction upon the district courts, and no crime can be punished therein which is not defined to be such by an act of congress, or the constitution of the United States.]

The defendant [L. M. Wilson] was indicted for forging an indorsement on a check drawn by the pension agent of this district upon a depository of the United States. The indictment is founded upon the 1st section of the act of March 3d, 1823, which is in the following words: "If any person or persons shall falsely make, alter, forge or conterfeit, or cause or procure to be falsely made, altered, forged or counterfeited * * * any deed, power of attorney, order, certificate, receipt or other writing, for the purpose of obtaining, or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum or sums of money, or cause to be uttered and published as true any such false forged, altered or counterfeited deed, power of attorney, order, certificate, receipt, or other writing, as aforesaid, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited, * * * every such person shall be deemed and adjudged to be guilty of felony," etc. A motion was made to quash the indictment, on the ground that this court has no jurisdiction of the offense charged.

W. D. Cornish, for motion.

W. W. Billson, U. S. Dist. Atty., opposed.

NELSON, District Judge. If this indictment can be sustained it must be for the reason that the forgery charged falls within the clause "or other writing," as included in the 1st section of the act of congress approved March 3d, 1823. The great difficulty in the case is, that the instrument is genu-

ine—being a bank check—and the indorsement of the name of the payee only charged to be forged. The words "or other writing" are found in connection with a class of instruments, as a deed, power of attorney, order, receipts, etc., and in my opinion refer to other instruments not specifically enumerated in the section.

It would be a forced construction, and not in harmony with the object contemplated, to say that the words "other writing," when in such connection, embraced a forced indorsement of a genuine instrument. To give this court jurisdiction of the crime specified in the first subdivision of this section, an instrument in a technical sense must be forged.

The second count in the indictment must fall, also, for the instrument uttered and published as true, with intent to defraud the United States, must be such as is described in the first subdivision of the section. The common law confers no criminal jurisdiction on this court, and no crime can be punished which is not defined to be such by an act of congress, or by the federal constitution. Motion to quash the indictment is granted.

Case No. 16,733.

UNITED STATES v. WILSON.

[1 Cranch, C. C. 104.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

LARCENY OF BANK CHECK—EVIDENCE—VARIANCE.

1. Upon an indictment for stealing a check upon a bank it is not necessary to produce the check itself, in order to admit parol evidence that it was presented at the bank.

2. Quære, whether a check drawn upon "the office of discount and deposit, Washington," be good evidence to support an averment of a check drawn on "the Bank of the United States," the corporate name being the "President, Directors, and Company of the Bank of the United States."

Indictment for stealing a check on the office of discount and deposit, Washington, from a seaman.

P. B. Key, for prisoner, objected that the United States ought not to be suffered to give the testimony of the officer of the bank respecting the prisoner's going to the bank with the check, unless they produced the check itself, and proved the handwriting of the drawer.

THE COURT overruled the objection, unless the prisoner can show that the check is in the possession or power of the United States.

The indictment stated the check to be "a check drawn on the Bank of the United States, and payable at the office of discount and deposit, Washington." The check proved was in this form—"Office of Discount and Deposit, Washington, pay to —— or bearer —— dollars."

Mr. Key, for the prisoner, contended that the evidence did not support the averment in the indictment respecting the check. That the variance between the check proved and that alleged in the indictment was material; that the indictment ought to have set forth the check in hæc verba, and that there was no such body corporate as the Bank of the United States. The corporate name being the "President, Directors and Company of the Bank of the United States." 1 Stat. 192.

Mr. Mason, for the United States. By the act of Maryland, 1797, c. 96, § 1, it is enacted "that if any person within this state shall steal or take by robbery, any check or checks, order or orders, drawn on any bank established, or that may be established under a charter from the government of the United States, or of any particular state, it shall be deemed and construed to be felony of the same nature, and in the same degree, as if the offender, or offenders had stolen or taken by robbery any other goods of like value with the money due on such check," &c. And the act of congress establishing the bank (1 Stat. 191) enacts "that a Bank of the United States be established." Every check drawn on the office of discount and deposit is a check on the Bank of the United States. The branch is only an office of that bank. It was necessary to set forth the check according to its legal operation, and not according to its precise form. If a note of the Bank of the United States be refused payment at a branch, the suit must be against the Bank of the United States.

Mr. Key, in reply. If the check is not set forth in hæc verba, it ought, at least, to be stated according to its legal operation, which is not a check on the Bank of the United States, for there is no such corporate body, but on the president, directors and company of the Bank of the United States.

KILTY, Chief Judge, was of opinion that the variance was not material, and that the check was well set forth in the indictment.

CRANCH, Circuit Judge, contrà. The check is not set forth in hæc verba, nor according to its legal effect, and therefore it does not appear that the check proved is the same which is averred in the indictment.

MARSHALL, Circuit Judge, absent.

Verdict for the prisoner.

Case No. 16,734.

UNITED STATES v. WILSON.

[Hoff. Dec. 63.]

District Court, N. D. California. April 11, 1864.

MEXICAN LAND GRANT—DETERMINATION OF BOUNDARIES.

[In determining the limits of the tract from the map, regard is to be had to the natural objects there laid down as bounding the tract,

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

rather than to the distance of such objects from other natural objects as shown by the scale.]

[This was a claim by Juan Wilson, the real party in interest being William Hood, for Guilicos, four square leagues, in Sonoma county, granted November 20, 1847, by Juan B. Alvarado, to Juan Wilson. Claim filed February 10, 1852, confirmed by the commission December 27, 1853, and by the district court March 3, 1856. Case No. 16,735.]

HOFFMAN, District Judge: In the petition addressed by the claimant to the governor, the land solicited is described as "the place named Guilicos, to the extent indicated on the map which duly accompanies the petition." The grant concedes to the petitioner the piece of land known by the name of Guilicos, within the boundaries shown by the map which duly accompanies the petition. The fourth condition is as follows: "The land granted is purely that which is expressed in the petition of the party interested, and is expressed in the diseño annexed to these proceedings. The judge who shall give the possession shall inform the government of the number of square leagues it may contain."

In the opinion of the board it is observed: "The principal question in this case relates to the description and boundaries of the premises. The grant contains no words of description of the land other than its name, and a reference to the grantee's petition and the map which accompanied it. The land granted is that therein described. In the petition the land is described as that named Guilicos, situated in the frontiers to the north of San Francisco, to the extent that is designated on the map. The map shows the exterior limits of the land by lines drawn thereon to indicate the four sides of the premises granted, and by a scale which is made a part of the map, the premises appear to be about one league in width, and about three leagues and one-third in length. The land is represented on the map as a valley, extending from east to west, and the premises are bounded on the north and south by the hills enclosing the valley, and on the east and west by lines cutting across the valley and running due north and south. The testimony of the witness Peabody shows that this description of the land known as Guilicos is, in its general terms, correct, and there would seem to be no difficulty in recognizing as defined with sufficient certainty the north and south lines. There is more difficulty in determining the precise location of the lines running across the valley, and forming the east and west lines of the premises. Without the aid of the scale on the map, there would seem to be nothing to fix their position. They are natural objects laid down on the map. The junction of two streams and a lake of considerable magnitude, which would seem to be points easily found, and the relative position of Guilicos in reference to these objects are exhibited on the map. Their distance from them, however, can be ascertained only from the general features of the map and an application of the scale of distances to it. By doing this, however, there would seem to be no difficulty in approximating at least a correct description of the exterior boundaries. We must either adopt this course or reject altogether the claim. The map is made a part of the grant. In fact it contains the only description of the premises which are granted by name, and by reference to the map for metes and bounds. We should be unwilling, unless imperative necessity required it, to reject a claim, otherwise meritorious, for this reason; and we think it better to rely on such proof as the map, aided by other testimony as to locality and description, gives, although not so definite as we could wish them, to reject altogether the grant, on the ground of indefiniteness of description incorporated in the grant by reference to the map."

It will be observed from the foregoing extract that the only description of the land granted is that contained in or to be derived from the diseño. Some testimony has been taken to show what were the boundaries popularly assigned to the tract called Guilicos. But none of the witnesses pretend to have known it before the grant was made, or to assert that at that time it had any determinate limits. The governor himself gives precision to the grant by describing the land named Guilicos as purely that delineated on the diseño. It is to the diseño alone, therefore, that, under the decree of confirmation, as well as by the terms of the grant, we must look both to ascertain the limits and quantity of the land granted. Recurring, then, to the diseño, we find it in some particulars inconsistent. If, in ascertaining the tract of land delineated, we are guarded by the natural objects represented on the diseño, its limits can, without much difficulty, be ascertained. But if, on the other hand, the eastern and western boundaries are to be established at the distances indicated by the scale on the map, we shall include a considerable tract not represented on the diseño.

It is observed in the opinion of the board above quoted that, without the aid of the scale on the map, there seems to be nothing to fix the position of the eastern and western lines. But this observation is inaccurate. A little to the east of the centre of the tract a small oval object is represented on the diseño from which issues a stream, flowing in nearly an easterly direction. This object is evidently identical with the laguna of the official survey, from which also issues a brook running in an easterly direction. The easterly boundary of the diseño is drawn at right angles to this stream, and evidently was intended to cut it at a

point where its course still continues easterly. But it appears from the official survey, that the stream further down makes a marked deflection, and, running in a course not far from southerly, flows into the Sonoma creek. The official survey has established the eastern boundary by its distance as indicated on the scale of the diseño, from the laguna. But it has thereby included in the tract the whole of the land in the stream just referred to, and has fixed the eastern portion of the southern boundary the Sonoma creek, while the Calaberas creek is taken for the eastern boundary, neither of which streams are represented on the diseño. A glance at the diseño shows that the dotted line, which indicates the eastern boundary, was intended to cross the stream flowing from the laguna. For that stream is represented as running in an easterly direction, and passing through the dotted line at some distance from its southern extremity. In the official survey the stream does not even approach the eastern boundary, and the latter is fixed at the Calaberas creek, which it follows to its junction with the Sonoma creek, which latter is thus made to form the eastern portion of the southern boundary.

The question, then, arises, are we in fixing the location of the eastern line, to be governed exclusively by the correct distance, as shown on the scale? Or is the line to be drawn at the place indicated by its position on the diseño relative to the natural objects thereon represented. In determining the comparative dignity of these two inconsistent calls, we naturally assign the greater importance to that which we may suppose to have been most in the mind of the governor, and concerning which he was the least likely to have been mistaken. The distances, as indicated on the scales of the diseños which accompanied the petitions for land, were almost invariably loose conjectural estimates, and in a great majority of cases extremely inaccurate. Where the applicant indicated a brook, a sierra, or a grove, as constituting his limit in a particular direction, and delineated it on his diseño, it cannot be doubted that the governor, when granting the "tract marked out on the map," must have meant to adopt the natural object so laid down, notwithstanding that its distance from some other natural object also represented, might be greater or less than that shown by the scale.

The petitioner, by whom the diseño was presented, and who was acquainted with the land, could not have been mistaken as to the object which he designated as a boundary; but he might well have made an inaccurate guess as to its distance from some other object unrepresented on his map. Where land was freely bestowed for the asking, in tracts many leagues in extent, it cannot be supposed that quantity or extent could have been the paramount consideration in the mind of the applicant; but rather that he desired to obtain a specific piece of land with established boundaries, the precise extent of which he could only guess at, and as to which he was to a certain degree indifferent. The common-law rule, therefore, which prefers natural or artificial monuments to course and distance, when the calls are repugnant, applies with additional force to a system of granting like that pursued by the former government of this country. If then, a specific stream, grove or sierra, if designated on the diseño, would be adopted, as the boundary, notwithstanding that its distance from another object might be greater or less than that indicated by the scale, I see no reason why the same rule should not be observed in a case like the present, where the boundary, though not itself a natural object, can be determined by reference to natural objects. We determine its position with reference to those objects in this case, not by drawing it at the distance from the laguna, or the junction of the streams, indicated by the scale, but in such manner as to cross the stream it is represented as crossing at the point in its course represented on the diseño, whatever be the distance of that point from the laguna or the junction. But more especially must we do so when we find that if drawn at the distance indicated, the line will not cross the stream at all, and a portion of the southern and the whole eastern boundary will be fixed at two great natural objects (the Calaberas and the Sonoma creeks), which are not represented on the diseño, the situation of which must have been well known to the petitioner, and which he surely would not have omitted if he had intended to adopt them as boundaries.

It will be observed that, from the language of the fourth condition the governor seems to have been ignorant of the extent of the land he was granting. In that condition it is stated, that "the land granted is purely that expressed in the petition, and exhibited on the plan which goes with the expediente. The judge who shall give the possession will inform the government of the number of square leagues it may contain." But the scale of the diseño showed to the governor that the tract solicited was of precisely the extent of 3½ leagues in length, and one league in breadth. Had he intended, therefore, to grant the quantity of land indicated by the scale, there could have been no reason why that quantity should not have been expressed. But on the contrary, he grants the land "marked out on the diseño," and carefully avoiding all mention of quantity, directs the officer to inform him how many leagues the tract contains. A direction clearly unnecessary, if the eastern and western lines were to be drawn as indicated by the scale, at exactly the distance of three leagues and one-third from each other; while the northern and southern lines were in like manner to be fixed exactly one league apart.

But the official survey does not even seem to have pursued the theory on which the eastern line has been located. If distance as in-

dicated by the scale is to control, there would appear to be no reason why the width of the tract should be allowed to exceed one league; nor why the northern and southern lines should be located at greater distances to the north and south respectively from the junction of the streams, the laguna, and other natural objects than those indicated by the scale on the diseño. But the survey following the call of the diseño for the sierras, and disregarding the call for width as shown by the scale, has made the distance of the northern from the southern boundary, throughout nearly the whole extent of the tract, to exceed a league by more than one-third. The distance of those lines from the natural objects above referred to, as indicated by the scale, has in like manner been entirely disregarded. But it is plain that in this respect the survey was right, and that the tract granted was intended to be bounded on the north and south by the parallel ranges of hills which inclose the valley. By parity of reasoning the length of the tract should be determined by drawing the eastern line across the valley at the point but not at the distance indicated by the diseño. The western line seems to be drawn not only at the point but at the distance from the junction of the creeks indicated on the diseño. It is therefore correctly located on either theory of location. It appears also to have been fixed by the authority of the alcalde of the district on the occasion of a dispute between the present claimant and one of the colindantes. The location of neither the northern or southern lines is objected to on the part of the United States. It seems to be admitted that the sierras adopted as boundaries are those represented on the diseño, although the width of the tract is, as before stated, considerably greater than that indicated by the scale on the diseño. The eastern boundary alone is in dispute.

For the reasons above given I am of opinion, that the boundary should be drawn at right angles to the general course of the valley, and so as to cross the stream issuing from the laguna as near as may be at the point indicated on the diseño as the point of intersection. That point to be taken as far to the east as it is possible to go before reaching the bend or deflection to south herein before referred to.

Case No. 16,735.

UNITED STATES v. WILSON.

[1 Hoff. Land Cas. 84.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANTS.

The description of the land granted is sufficient, aided by the diseño.

Claim [by Juan Wilson] for a tract of land, supposed to contain four leagues, in Sonoma county, confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

B. S. Brooks, for appellee.

HOFFMAN, District Judge. The claim in this case was confirmed by the board. No doubt is suggested as to the authenticity of the documentary evidence submitted, and the only point upon which a question was made was whether the grant and map accompanying it sufficiently indicate the granted land—there being no designation of the quantity or number of leagues in the original grant. The grant bears date on the thirteenth of November, 1839, but was not issued until the twentieth. The signature of the governor to the original grant is fully proved, and the expediente produced from the archives containing the proceedings upon the petition, the various orders of the governor, and the decree of approval by the departmental assembly. The requirements of the regulations of 1828 seem to have been substantially complied with, and the land cultivated and inhabited within a reasonable time. With regard to locating the tract, there seems to be no difficulty. The grant describes it as the parcel of land known by the name of "Guilicos," within the boundaries shown in the map which accompanies the petition. On inspecting the map, those boundaries appear to be indicated with tolerable certainty, and it is presumed that by means of it no practical difficulty will be found by the surveyor in laying off to the claimant his land. A decree of confirmation must therefore be entered.

[See Case No. 16,734.]

Case No. 16,736.

UNITED STATES v. WILSON et al.

[1 Hunt, Mer. Mag. 167.]

District Court, S. D. New York. 1838.

CUSTOMS DUTIES—MANUFACTURED MARBLE.

[The tariff act of 1832 (4 Stat. 583), imposing a duty of 25 per cent. on all manufactured marble, does not apply to marble which has been cut into blocks simply for convenience in transportation.]

This was an action on two customhouse bonds, dated September 2, 1837, given by the defendants, T. Wilson and George F. Darby, for duties to the amount of $554.68, on 45 blocks of marble imported here by them, which duties had been imposed by the customhouse, on the ground that the marble was manufactured marble, whereas it was contended by the defendants that it was unmanufactured, and ought to be admitted free of duty. The bonds were given under protest, and were now put in suit, with the view of obtaining a judicial decision. By the tariff of 1832, unmanufactured marble is admitted free of duty, but there is a duty imposed on all manufactured marble of 25 per cent.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

The case was briefly stated by B. F. Butler, Esq., the district attorney, and the defendants called two witnesses, one a measurer of, and the other a dealer in, marble, from whose concurrent testimony it appeared that the marble had been cut into blocks simply for the convenience of transportation, and that so badly and crookedly as to occasion a waste of the article. The protest was produced and admitted, and here the case closed, neither of the counsel summing up.

THE COURT (BETTS, District Judge) charged the jury that the only question for their consideration was as to whether this marble was or was not manufactured. A thing may be considered manufactured if any labor has been put upon it, changing it from the raw material, as with bar iron. When the term "manufactured" is applied to a commodity, the question then arises, has it been removed from its character of raw material? Another question is, in what sense or acceptation is the term "manufactured" used among dealers in marble? From the evidence of the defendants' witnesses, it does not appear that this is a manufactured article. If this was a manufactured article, it is your duty to render a verdict for the United States. If unmanufactured, then for the defendants.

The jury, without leaving their seats, found for the defendants.

Case No. 16,737.

UNITED STATES v. WILSON.

[6 McLean, 604.] [1]

Circuit Court, N. D. Ohio. Nov. 23, 1855.

GRAND JURY—SELECTION FOR FEDERAL COURT—ABSENCE OF JUROR—CONCLUSIVENESS OF RECORD.

[1. By Act Cong. July 20, 1840 (5 Stat. 394), providing for the adoption in the federal courts of the methods of the highest courts of the respective states in selecting jurors "in so far as such mode may be practicable," the federal court sitting in Ohio had authority in its discretion to adopt the mode of impaneling grand juries practiced in the inferior courts of the state.]

[2. If 12 jurors agree in finding an indictment, it cannot be invalidated by showing that 1 of the 15 jurors was absent at the time of such finding.]

[3. Where the record shows that the grand jury found the bill of indictment on their oaths, the intendment and legal effect and presumption is that it was found on proper evidence, with due deliberation, and by the concurrence of 12 of their number.]

[This was an indictment against Joseph L. Wilson. Motion to quash.]

Upham, Carter, Adams & Brooks, for the defence.

McLEAN, Circuit Justice. This is a motion to quash the indictment, and three causes are assigned. The 1st is, that the grand jury who found and returned the bill, was not drawn, selected and designated, according to law. The 2d is, that the bill was found by fourteen grand jurors only; or, in other words, that one of the fifteen grand jurors was absent when said bill of indictment was found. The 3d is, that said bill of indictment was returned into court by fourteen grand jurors only.

From the view I have taken of the causes urged for granting this motion, it is perhaps unnecessary to consider the point in controversy between counsel as to the right or propriety of allowing the defendant to change his plea. I supposed, when that application was made and leave granted, that it was fully understood, and agreed to, by opposite counsel. This motion will therefore, be disposed of without any intention on the part of the court to furnish the precedent, of allowing a plea in bar to be withdrawn, in order to file a plea in abatement, or of a motion of the character of a dilatory plea. To the first question, then, raised by this motion—"Was the grand jury of the last July term of this court a legally constituted grand jury?" By the act of congress of the 20th of July, 1840 [5 Stat. 394], it is provided "that jurors to serve in the courts of the United States, in each state respectively, shall have the like qualifications and be entitled to the like exemptions, as jurors of the highest courts of law of such state now have and are entitled to, and shall hereafter, from time to time have, and be entitled to, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practiced, and hereafter to be practiced therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof; and for this purpose, the said courts shall have power to make all necessary rules and regulations for conforming the designations and empannelling of juries, in substance, to the laws and usages now in force in such states; and further, shall have power, by rule or order, from time to time, to conform the same, to any change in these respects which may be hereafter adopted by the legislature of the respective states for the state courts." By the first clause of this statute the enactment is positive in its requirements, that so far as the qualifications and exemptions of jurors in the federal courts are concerned, they should be the same as those of the highest courts of law of the state, and that the mode of forming such juries, should, so far as practicable, conform to the mode of the state for the highest courts of law in such state. So far as relates to the qualifications and exemptions of federal juries, the courts have no discretion. The law is positive that they shall have the like qualifications, and be entitled to the like exemptions as jurors of the highest courts of law of such state had at the time of pass-

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

ing the law, or should thereafter have in such state. By the latter clause of the statute the language used is—"The said courts shall have power to make all necessary rules and regulations for conforming the designation and empannelling of juries, in substance, to the laws and usages now in force in such state; and further, shall have power by rule or order, from time to time, to conform the same to any change in these respects which may hereafter be adopted by the legislature of the respective states for the state courts." It was clearly the intention of the framers of this law, to confer upon the federal courts a discretionary power, to be exercised as they should deem proper, in forming rules and regulations for the designation and empannelling of jurors

The courts, from necessity, were to exercise a discretion as to the practicability of designating and empannelling juries according to the mode prescribed for selecting juries of the the highest courts of law in the state. They have the power and the discretion to change the mode from time to time. The court may exercise the power or refrain to exercise it, as it may now deem practicable. But what was the mode of selecting grand juries, at the time this act of the 20th July, 1840, was passed, in the highest court of law in the state of Ohio? The highest court of law in the state, at that time, was the supreme court of Ohio, and the jury law then in force was the act of the 9th of February, 1831. The only provision for selecting juries for the supreme court is found in the fifth section of the act. This section provides, "that the clerk, at least thirty days previous to the sitting of the supreme court, in the presence of the sheriff, shall draw out of the box in which is contained the names selected as aforesaid, twelve persons, and shall forthwith deposit in the office of the clerk of the supreme court of said county, a list of the names so drawn, and the clerk of the supreme court shall immediately issue a venire." It would hardly be claimed by a lawyer of discrimination and candor, that a court should receive commendation for selecting and empannelling a grand jury according to any mode which existed in the highest court of law in Ohio on the 20th of July, 1840. Neither will it be found that any material change has taken place, by legislative enactment, in the selection of juries in Ohio, since the adoption of the new constitution. This court, therefore, from the necessity of the case, was obliged to exercise that discretionary power, conferred on it by the act of congress, determining the mode of designation and empannelling grand juries. By the 4th rule the mode is assimilated to that practiced in the inferior courts of the state, and the court has seen to it, that in practice, that mode has been substantially carried out. As a matter of fact, the first fifteen names drawn from the box, constitute the grand jury, and for those the venire issues. The rule contemplates, that in case any of the fifteen should fail to attend, the marshal should fill the panel from the remaining nine names drawn. It was hoped by this careful mode of selection, the grand inquest of the district would be composed of men whose character and standing would command the respect and confidence of all; and however sincere counsel may be in imputing to the court a disregard of law, and an indifference in the formation and adoption of the rule, we are nevertheless satisfied, that it secures for this court, what all must desire, viz: jurymen of integrity, intelligence and impartiality.

In relation to the second cause urged in support of this motion, I must confess that its consideration has been attended by no small degree of embarrassment. At the last term, in the absence of the presiding judge of this circuit, some days elapsed, in which the grand jury, fourteen in number, were desirous to come into court and report several bills, and this, probably among the number. I then had doubts as to the power of fourteen grand jurors to report a bill, and my doubts were increased by reading the sententious language of the learned judge who delivered the opinion of the court in the case of Doyle v. State, 17 Ohio, 222. On the arrival of the presiding judge, the grand jury reversed their application. The experienced judge presiding took the ground at once, that the court should not look beyond the endorsement upon the indictment of a true bill, signed by the foreman; especially when a greater number than twelve appeared in court to make the presentment. This was upon the hypothesis, that fifteen qualified grand jurors had been empannelled, sworn and sent out, as the grand inquest of the district. To this ruling of my learned brother I assented, though reluctantly at the time, and the fourteen grand jurors came into court and reported several bills. There is doubtless a broad and substantial distinction to be observed between the action of an illegally constituted grand jury, and that of a jury all of whom are legally qualified members.

In the limited time which I have had to examine the question, I find no case where the indictment has been declared vitiated by the irergularity of one member of a properly constituted grand jury, while on the contrary, numerous adjudged cases are to be found, where the action of the whole panel has been pronounced void, in consequence of containing one or more unqualified members. In England, it would seem that formerly, twelve grand jurors could return a bill. Lord Mansfield, in 1760, when application was made to have the panel exceed twenty-three names, refused the application, and held that for the purpose of finding or reporting a bill, twelve men of the panel agreeing would be regarded as the grand jury. 2 Burrows, 1088. The act of 11 Hen. IV. provided, that the grand jurors should be of the king's liege people, returned by sheriffs or bailiffs of franchise, and of whom none should be outlawed, or fled to

sanctuary for treason or felony, otherwise the indictment should be void. And by the same act it was provided that if any one of the grand jurors should be an outlaw, the indictment should be void. The case of Dovey v. Hobson [6 Taunt. 460] is a leading authority for construing the act, and declares that the mischief was, that persons were put on the jury who were not qualified to serve, that they had no right on the jury, and that their presence vitiated the whole panel, and rendered their action void; and for the plain reason, that the bill must be found by at least twelve, and that the disqualified juror might be one of the twelve. The American cases have nearly all proceeded on this same principle. It is recognized in the case Com. v. Parker, 2 Pick. 550, referred to by counsel, and very earnestly contended for by the court in the Case of Doyle, 17 Ohio, 222. The principle established is, that if a person is on the panel not having the qualification of a juror as required by law, the action of the whole jury is vitiated and an indictment found by them would be void. The statute of Ohio has always required that regular juries should be composed of persons having the qualifications of electors, and the supreme court of the state, in its interpretation and construction of the statute has gone to the full extent of strictness adopted by the English courts in their decisions upon the statute of 11 Hen. IV.

But a very different question is presented by this motion. It is not claimed that any of the jury were disqualified to serve by reason of not being qualified electors in the district. Taking for granted that the whole panel was composed of good and lawful men, the counsel claim that the absence of one of the fifteen vitiates the action of the whole, and that this irregularity of the jury can be inquired into by motion to quash the indictment. On this question the Case of Turk, 7 Ohio, 241, is to the point, and decisive of this motion. The court there held, that if twelve jurors agree in finding an indictment, it cannot be invalidated by showing misconduct of one of the fifteen jurors, nor can inquiry be made upon what grounds any one of the twelve jurors concurred in the finding. In that case the exception was taken by plea; in which plea it was averred, "that Geo. Parsons, one of the grand jurors, was not present at the finding of the indictment, did not hear any witness, nor examine, nor inquire touching any allegation of the indictment, and that as to him there was no inquest whatever." The court there overruled the plea, and its decision enunciated the principles of law, familiar to all, that the record cannot be contradicted; that a record is proved by itself, and is of such validity that no fact can be averred against it.

In the motion now before the court, how stands the case? The record shows the grand jury found the bill of indictment on their oaths. The intendment and legal effect and presumption is, that it was found on proper evidence, with due deliberation, and by the concurrence of twelve of their number. The Case of Doyle, 17 Ohio, 222, does not invalidate the authority of the case in 7 Ohio. In Doyle's Case one of the grand jurors was not an elector, and had not the statute qualification of a juror, and the simple and legitimate question for the court to decide there was, whether an illegally constituted grand jury, (by the disqualification of one of its members), rendered the indictment void, and the court very properly held it did. The question now before this court was not embraced in that case.

The 3d point urged in support of this motion, is substantially embraced in the 2d, and would stand or fall with it.

Upon consideration, therefore, of all the points, the court overrules this motion.

UNITED STATES (WILSON, The, v.). See Case No. 17,846.

Case No. 16,738.

UNITED STATES v. WILTBERGER.

[3 Wash. C. C. 515.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1819.

MANSLAUGHTER—SELF-DEFENCE—EVIDENCE—JURISDICTION OF CIRCUIT COURT—OFFENCES COMMITTED ON FOREIGN RIVER.

1. Indictment for manslaughter, committed by the master of an American merchant ship, on a seaman, in the river off Wampoa in China.

2. A man may oppose force to force in defence of himself, his family, or property, against one who manifestly endeavours, by surprise or violence, to commit a felony. The intent of the person resisted, must be to commit a felony, or the killing will not be justified.

[Approved in U. S. v. Outerbridge, Case No. 15,978.]

[Cited in People v. Campbell, 59 Cal. 251; State v. Field, 14 Me. 245. Cited in brief in Perkins v. State, 78 Wis. 551, 47 N. W. 828.]

3. No words or gestures, however irritating, will justify the killing; although they may reduce the offence from murder to manslaughter.

[Approved in U. S. v. Outerbridge, Case No. 15,978.]

[Cited in State v. Wieners, 66 Mo. 25.]

4. The intent to commit the felony must be apparent—the damage must be imminent, and the resistance used necessary to avert the damage.

[Approved in U. S. v. Outerbridge, Case No. 15,978.]

[Cited in People v. Campbell, 59 Cal. 251; State v. Thompson, 9 Iowa, 193; Shorter v. People, 2 N. Y. 200.]

5. The prosecutor must prove, that the blows caused the death; but if he proves that the blows were given by a dangerous weapon—were followed by insensibility or other alarming symptoms, and soon afterwards by death; this is sufficient to impose it on the accused, to show that the death was occasioned by some other cause.

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

6. Quere, whether this offence, which was committed on a river, was within the jurisdiction of the circuit court of the United States, according to the provisions of the act of congress.

This was an indictment against the defendant [Peter Wiltberger], for the manslaughter of one Peters, a mariner on board the ship Benjamin Rush, committed by the defendant, the master of the said ship. The offence was charged to have been committed on board of this vessel, an American bottom, on the high seas. The evidence was, that at the time the offence is charged to have been committed, the ship lay at anchor in the river Tigris, off Wampoa, some yards from the shore, in four and a half fathom water, fourteen miles below the city of Canton, and thirty-five miles above the mouth of the river;—that at this place, and higher up the river, the tide ebbs and flows; and in very dry seasons, the water is salt; but at other times it is fresh, and that vessels take in water there, for their return voyages—that there are Chinese forts at the mouth of the river, on each side, which entirely command it; the river not exceeding half a mile in width at the mouth, and retaining the same width at Wampoa;—that a Chinese custom-house officer is taken on board at one of these forts, by foreign vessels, to prevent smuggling.

An objection was made by the defendant's counsel, to the jurisdiction of the court; and this constituted the only point of law which was much controverted. The material parts of the evidence relating to the offence, as charged, are stated in the charge. In support of the objection to the jurisdiction, it was contended, that the question is not as to the extent of the criminal and civil jurisdiction of the admiralty; but whether, under the laws of the United States, manslaughter is cognizable in the courts of the United States, unless it is committed within some place under the exclusive jurisdiction of the United States, or on the high seas; and whether a foreign river or harbour can be considered as the high sea? The 8th section of the first article of the constitution, authorizes congress to define and punish piracies and felonies committed on the high seas; and the 2d section of the third article declares, that the judicial power shall extend to all cases of admiralty and maritime jurisdiction. It is admitted, that under this latter grant, congress might have vested, in any of the courts of the United States, the cognizance of offences committed in any place to which the admiralty and maritime jurisdiction rightfully extends, even although that should be proved to include rivers, ports, and havens. Accordingly, murder and robbery committed in any river, &c., out of the jurisdiction of any particular state of the United States, is made punishable by the 8th section of the act upon which this indictment is founded. [1 Stat. 113.] But the offence of manslaughter is confined, by the 12th section, to the high seas; from which it is plainly to be inferred, that congress was attentive to the distinction, and intended to make it, between the high or main sea, and waters within the bodies of counties, or within the mouths of rivers.

It was contended, that the term high sea, means the ocean or main sea; and the coast thereof below the low water mark, the space between that and the high water mark, or the sea-coast, being the "divisum imperium" spoken of in the books, and not the same space in arms of the sea, rivers, &c. Cases cited, Co. Litt. 260; 5 Coke, 107; [U. S. v. Hamilton, Case No. 15,290]; De Lovio v. Boit [Id. 3,776]; U. S. v. Ross [Id. 16,196]; 3 Term R. 315; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 371; 2 Browne, Civ. & Adm. Law, 460, 466, 474; 1 Browne, Civ. & Adm. Law, 422; Sir Leon. Jenkins, 76, 77; Heb. De Jure Maris, c. 4; 2 East, P. C. 803, 804; 4 Bl. Comm. 268; Sea Laws, 422.

It was contended, that the grant of jurisdiction to the courts of the United States, to punish offences of this kind, committed in foreign rivers and havens, was unnecessary, as they were clearly cognizable by the tribunals of the country where they were committed, though perpetrated by foreigners, in foreign vessels; those places being parts of the public domain of that nation. Vatt. Law Nat. bk. 1, c. 20, § 245; Id. c. 22, § 278; Id. c. 23, § 295; Id. bk. 2, c. 7, § 84.

It was contended, by the district attorney, that the place where this offence was committed, is within the admiralty and maritime jurisdiction, as asserted and exercised, invariably, on the continent of Europe, and always in England, until after the statutes of Richard II.; seconded by the prohibitions and usurpations of the common law courts. The constitution vests in the judicial department of the government, cognizance of all cases of admiralty and maritime jurisdiction; and thereby clearly refers to that jurisdiction, as generally understood and exercised amongst the nations of Europe; and not to the exercise of it at the period when the constitution was framed. Of this general nature was the jurisdiction of the colonial courts of admiralty, at the period of the Revolution. This power, then, having been conferred on the legislature, it is not to be believed, that congress could have intended, by the expression of high seas, to have this, and many other offences enumerated in this act, committed on runs and arms of the sea, either dispunishable altogether, or subject to the will or caprice of a foreign government, to punish them or not, as such government might think proper. There is no civilized nation, with which we are acquainted, where jurisdiction over offences committed on board of its own vessels, in foreign ports, would not be exercised; and it is incredible, that congress intended to place the tribunals of the United States, in this respect, in a different predicament. That congress did not so intend, is obvious from the whole tenor of this law; where we find the "high seas," the "high sea," and "sea,"

used promiscuously, and as synonymous throughout the different sections. This is remarkable in the 12th section, in reference to offences, between which scarcely a shade of difference can be discovered. He contended, that the high seas include not only the coasts of the sea, but the arms of the sea, runs, creeks, and harbours below the low water mark. Cases cited, U. S. v. Ross [supra]; U. S. v. M'Gill [Case No. 15,676]; 1 Burrows, 266; 2 Browne, Civ. & Adm. Law, 403, 404, 457, 464, 468, 484, 486, 487; 2 Sir Leon. Jenkins, 708, 745; 1 Hale, P. C. 424; Com. Dig. tit. "Admiralty," 9; 4 Inst. 136, 137; Constable's Case, 5 Coke, 105b; De Lovio v. Boit [supra].

Upon the merits, it was insisted, by the counsel for the defendant, 1st, that the blows, inflicted upon the deceased by the defendant, were not the cause of his death; and that the evidence clearly established, that it was produced by a mortification of the stomach, caused by the improper use of an ardent spirit, distilled in China, and known by the name of samchoo. 2d. That, if the death was caused by the blows, still the homicide was justifiable, on account of the menacing attitude of the deceased, and the combination which had been formed amongst the crew, to resist the master, in case he should strike any one of them.

Charles J. Ingersoll, U. S. Dist. Atty.

J. Sergeant and Joseph R. Ingersoll, for defendant.

WASHINGTON, Circuit Justice (charging jury). The evidence may be arranged under two heads,—1st, that which relates to the death of Peters; and 2d, to the cause of it.

1. Coles, the witness most relied upon by the defendant's counsel, to justify his conduct upon this unfortunate occasion, has testified, that the deceased, being aloft, was called down by the defendant, in consequence of some expressions of discontent at being sent up, which were not distinctly heard by the defendant. As he went aft to the quarter deck, where the defendant was standing, he pulled off his jacket, rolled up the sleeves of his shirt, and approached the defendant with folded arms. Being asked by the defendant what he was grumbling at, he complained of being unwell, and was ordered by the defendant to go below, accompanied with an observation, that he knew that no person on board, in that situation, was required to do duty. The defendant then turned his back upon Peters, and walked to and fro on the quarter deck. Peters still continued on the deck; altered the position of his arms; and, with his fists clenched, and in a menacing attitude, impertinently addressed the defendant, observing, "You called me down, with intention, I suppose, to flog me; —I wish to know if you mean to do it or not?"—To which the defendant answered, "If you want flogging, I will flog you;" and immediately struck the deceased with his fist. About this time, Clark, another seaman, came abaft the windlass, and then Peters sprang toward the defendant; but whether he struck the defendant or not, the witness could not testify. The defendant then picked up a stave, (which all the witnesses say was of white oak and large,) and struck Peters with it on the head. Immediately after this, a conflict took place between the defendant and Clark, the latter having grasped the right arm of the defendant with one of his hands, and his collar with the other. Clark was ordered to go forward, which he did; but immediately afterwards returned; and the order being repeated, he refused, with insolent language, to do so, which was followed by a blow, inflicted on him by the defendant, with the stave, which Clark returned with another stave, and prostrated the defendant; Clark then went forward, and here the affray ended. As to the throwing off his jacket, and rolling up his sleeves, by Peters, Coles is supported by two other witnesses. Some evidence was given by another witness, as to the menacing attitude of Peters, after the defendant told him to go below; and two other witnesses have testified, that the defendant struck Peters with his fist, not in the first instance, but after he had been stricken with the stave, and as he fell. The advance of Clark at the time mentioned by Coles;—the springing of Peters towards the defendant, and the seizing of the defendant by Clark, are facts unsupported by any other witness, and are in effect contradicted by them. Coles saw but one blow with the stave. The other witnesses speak of two, and three; and all agree, that, from the time that Peters was knocked down, he continued speechless, and senseless, till his death; which happened about eighteen hours afterwards.

Upon this evidence, the first question is, whether this homicide, (if attributable to the defendant,) amounted to the crime of manslaughter? Manslaughter is the unlawful killing of another, without malice, either express or implied. It differs from murder in the important particular of the absence of malice; as where it happens in a sudden heat, when passion has obtained the dominion over reason and the gentler feelings of the heart. From a respect to human infirmities, our law, in such a case, mitigates the offence of murder into manslaughter, as well as the punishment. Still, however, this offence is unlawful; the law not permitting any man to avenge his own wrongs, unless in a case of great emergency, by the death of the supposed offender. The present case is one which the defendant's counsel have contended is justified by law;—justified, they say, upon the ground of self-defence. As to this, the law is, that a man may oppose force to force, in defence of his person, his family, or property, against one who manifestly endeavours, by surprise, or violence, to commit a felony, as murder, robbery, or the like. In

this definition of justifiable homicide, the following particulars are to be attended to. The intent must be to commit a felony. If it be only to commit a trespass, as to beat the party, it will not justify the killing of the aggressor. No words—no gestures, however insulting and irritating—not even an assault, will afford such justification; although it may be sufficient to reduce the offence from murder to manslaughter. In the next place, the intent to commit a felony must be apparent, which will be sufficient; although it should afterwards turn out that the real intention was less criminal, or was even innocent. This apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like; and, lastly, to produce this justification, it must appear that the danger was imminent, and the species of resistance used, necessary to avert it.

Nailor's Case is a strong exemplification of the law, as here stated. The homicide was decided to be manslaughter, and not murder; because it took place in a sudden affray, and in the heat of passion. But it was not considered to be justifiable; because the apparent intent of the deed, was merely to rescue the father, and by no means to affect the life of the deceased; and there was no such danger as could render the use of the weapon, which caused the death, necessary. The case of the adulterer, killed by the offended husband, at the moment when he discovers his dishonour, is another, and a very strong example of the rule; although no provocation can be more difficult to bear with, yet the law does not reduce the offence below that of manslaughter.

It is for you, gentlemen of the jury, to say, upon the whole of the evidence given in this case, whether there was any intention in the deed, apparent, or otherwise, to take the life of the defendant, or to commit any known felony; and whether there existed any danger which rendered it necessary for the defendant to use the weapon which he did?

It is contended by the defendant's counsel, that the combination amongst the seamen to resist any attempt of the defendant to strike, or to correct them, affords a ground of justification, which distinguishes this from ordinary cases of a simple assault, happening on land.

This distinction is inadmissible, in the present case, for the following reasons: (1) There is no evidence that this combination, if it was ever formed, was at any time communicated to the defendant. (2) The circumstances of the moment, afforded no indication that mutiny or resistance of any kind was intended, much less "that it was imminent;" as there was but one seaman on the deck, besides Peters, who appeared to take any part or interest in the affray; and the appearance of that seaman, was subsequent to the termination of the conflict between the defendant and Peters. Some indulgence, we admit, may be claimed by the master of a vessel, beyond what the law extends to a person on shore. He may not be required to retreat, when assaulted by a seaman; so as thereby to indicate fear, and to diminish his authority, so essential to the due subordination of his crew. In like manner, slighter evidence of danger may be admitted in his justification, than in that of a person on land. Still, it must be shown, that there was a necessity for what he did, to prevent an apparent intention to commit a felony. Even an officer of justice, who has a warrant commanding him to arrest a person, must prove resistance; and that the act which occationed the death of the party to be arrested, was necessary.

2. The next, and by far the most important question in this case, is, whether the blows inflicted on the deceased by the defendant, were the cause of his death? It has been truly stated by the defendant's counsel, that the proof of this fact lies upon the prosecutor. He has accordingly laid before you evidence, that Peters was, by repeated blows, inflicted by a dangerous weapon on the head, knocked down; and that from that time, until his death, which took place in about eighteen hours afterwards, he continued speechless, insensible, and motionless, with no other sign of life than a difficult respiration.

It is unnecessary for the prosecutor to prove more, to establish the fact in controversy. The law presumes, that the death was occasioned by the alleged cause; unless the contrary can be clearly established to your satisfaction, by proving, either that this was not the cause of the death, or by showing some other cause which was sufficient to produce that effect. It will not do to assign some other possible or probable cause, unsupported by evidence of at least equal weight with that assigned in support of the prosecution. To prove that the blows inflicted on the deceased, by the defendant, did not occasion his death, the defendant relies upon the testimony of many respectable witnesses, who examined the body soon after the death took place; who have declared, that there were no appearances of violence having been committed on any part of it except the head, and that the skull was free from any appearance of fracture. To prove that the death is to be attributed to another cause, evidence is given you by the same witnesses, that the body was opened by a surgeon, and that the stomach evinced a high state of inflammation, if not of gangrene. It has also been proved, that Peters had, on different occasions, and even recently before the wounds inflicted by the defendant, drank of a species of ardent spirits, distilled in China, called by the natives "samchoo"; and that a liquid which resembled samchoo in smell, was discharged from the mouth and nostrils of the body when it was examined, which became more copious by pressure on the stomach. Many instances of the deleterious effects of this

liquor, have been stated by the witnesses; and the physicians who have been examined, have given it as their opinion, that this liquor, taken into a stomach diseased, or predisposed to inflammation, might in a short time so increase the state of inflammation, as to produce mortification and sudden death.

Upon this evidence, you must decide to which of these causes the death of Peters is to be attributed; and if you should doubt, let that doubt be cast into the scale of innocence.

As to the question of jurisdiction, there will be no necessity for the court to give an opinion upon it, if you should think that the defendant is not guilty of the offence of manslaughter. Should your opinion be unfavourable to the defendant, you will find him guilty, subject to the opinion of the court upon the facts of the case.

The jury found the defendant guilty, subject to the opinion of the court upon a case stated, upon which the question of jurisdiction was carried to the supreme court. See 5 Wheat. [18 U. S.] 76.

Case No. 16,739.

UNITED STATES v. WINCHESTER.

[2 McLean, 135.] [1]

Circuit Court, D. Illinois. June Term, 1840.

PERJURY—OATHS AND FEDERAL LAWS—ADMINISTRATION BY STATE OFFICERS—PAROL EVIDENCE—NOTICE TO PRODUCE DOCUMENT.

1. Where an act of congress requires an oath to be administered, such oath under the usage of the proper department of the government, may be administered by a state officer having power to administer oaths.

2. Parol proof of the contents of a written agreement, cannot be given in evidence, where the contract is in the hands of the opposite party, unless notice be served on the party or his attorney to produce it.

3. The rule of evidence is the same in criminal as in civil cases.

[This was an indictment against L. N. Winchester for perjury.]

Mr. Forman, Pros. Atty., for plaintiffs.

Mr. Spring, for defendant.

McLEAN, Circuit Justice. This is an indictment for swearing falsely in regard to the defendant's right of pre-emption. The indictment sets forth that the defendant swore, before a justice of the peace, who, it is alleged, had full power to administer the oath—"that sometime before the 2nd February, 1838, he entered upon the north-west quarter of section No. 15, town. 38, north, of range 14, east of the third principal meridian, in his own right and exclusively for his own use and benefit. And that previous to the 22d February, 1838, he, the said Winchester, had built a dwelling house on said land; and that he had not directly or indirectly made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure to the use of," &c. The act of June 22d, 1838 [5 Stat. 251], entitled "An act to grant pre-emption rights to settlers on the public lands," provides "that before any person, claiming the benefit of this law, shall have a patent for the land which he may claim by having complied with its provisions, he shall make oath, which, with the certificate of the person administering it, shall be filed with the register of the land office, &c., that he entered upon the land which he claims in his own right and exclusively for his own use and benefit, and that he has not directly nor indirectly made any agreement or contract in any way or manner, with any person or persons whatever, by which the title he might acquire from the government of the United States should inure to the use or benefit of any one except himself, or to convey or transfer the said land or the title which he may acquire to the same, to any other person or persons whatsoever at any subsequent time; and if such person, claiming the benefit of this law, as aforesaid, shall swear falsely in the premises, he shall be subject to all the pains and penalties for perjury," &c. It is objected that the requirement of the law of congress, of the applicant for a pre-emptive right to make oath, does not authorize a justice of the peace, as a state officer, to administer the oath. That to subject the defendant to the penalty of the statute, the oath must be made before some one authorized to administer oaths by the federal government. Before the decision of the case of U. S. v. Bailey, 9 Pet. [34 U. S.] 238, I should have thought this argument forcible, if not conclusive. But under that decision, it seems to me, there can be little or no doubt on the subject. In that case an oath was not specially required by law, but under the usage of the treasury department it was required, and the right to administer it by a justice of the peace was recognized by the department. And this the court held was sufficient to convict the defendant for false-swearing under the statute. In the present case the statute requires an oath to be made, and it is not denied, but admitted, that under the instruction of the treasury department this oath was usually administered by a justice of the peace. I cannot, therefore, overrule the evidence of the oath, but it must be received.

In the further progress of the cause it appeared that a contract, in writing, had been entered into by the defendant in regard to this land; the contents of which contract the prosecution offered to prove, with the view of showing the falsity of his oath. To this evidence the defendant's

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

counsel objected, because the agreement was in writing. The prosecution then showed that the paper had been delivered up to the defendant, and was then in his possession. This was admitted by the defendant's counsel, who alleged they had received no notice to produce the paper, and that it was in fact at Chicago, more than a hundred miles distance from the court. THE COURT held that parol evidence of the contents of the contract could not be given in evidence, unless a reasonable notice to produce it had been served on the defendant or his counsel. The rules of evidence are the same in criminal cases as in civil. The writing in question is the most important evidence in the case. It shows, it is suggested, that the defendant had disposed of the pre-emptive right in question, which contradicts his oath. Now if this agreement be so important, it should be produced; or at least before parol proof of its contents be given, the prosecution should, by a notice, have required the defendant to produce it. And if after a reasonable notice he should fail to bring it into court, he cannot complain that evidence of a secondary nature is received. No case could well be imagined which more forcibly shows the wisdom and safety of the rule, as to the admission of secondary evidence, than the one under consideration. We are clearly of the opinion that the evidence offered is inadmissible. 1 Phil. Ev. 389; 2 Term R. 201, note; 1 Term R. 203, note; 2 Starkie, Ev. 357; 3 Term R. 306; Leach, 214.

The jury, on this evidence being rejected, found a verdict for the defendant.

Case No. 16,739a.

UNITED STATES v. WINN.

[Brunner, Col. Cas. 519; [1] 1 Law Rep. 63.]

Circuit Court, D. Massachusetts. May Term, 1838.

SEAMEN—AUTHORITY OF MASTER.

A seaman has a right to refuse to inflict punishment on one of the crew, unless some justifiable cause is pointed out to him.

The defendant was charged with having imprisoned, on board the ship Eliza, of Salem, "with force and arms, and from malice, hatred, and revenge, and without justifiable cause," John B. Bassett, the first mate of the said ship, for the term of three months from the 10th day of February, 1836, and also for the term of three months from the 17th of October, 1836. The indictment was founded upon the act of March 3, 1835, § 3 [4 Stat. 776], which provides that "if any master or other officer of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison, any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them any cruel and unusual punisment, every such person so offending shall," etc. From the testimony of Bassett, which was confirmed in many respects by other witnesses, it appeared that when the ship was near the Feejee Islands, in February, 1836, Captain [John D.] Winn took offense at something he did and ordered him below. Soon afterwards he ordered him to set the evening watch, but witness refused to go upon deck, alleging that he had been sent from his duty with dishonor, and could not return unless he was honorably reinstated. Next morning Captain Winn imprisoned him in his room, which was very small, and ordered him to be kept on short allowance—a pound of beef and a pound and a half of yams per day. He also ordered the skylight to be darkened, and witness remained in this situation about three months. His food was brought to him but once in twenty-four hours, and at different parts of the day, sometimes in the morning, sometimes in the evening, and sometimes not at all. The weather was so warm that he was obliged to keep naked all the time, and then his distress for want of pure air was very great, and the vermin were extremely annoying. The witness detailed several other circumstances attending his imprisonment which were disgusting, and need not be stated here. He finally returned to duty, but afterwards had more trouble with the captain, and was again confined in the same place for three months.

Choate & Lord, for defendant, declined arguing the case to the jury, but contended as matter of law that the defendant was not liable on the act of 1835. That act provided for the punishment of the master or other officer who should beat, wound, or imprison, etc., any one or more of the crew, thereby making a distinction between the "master," "other officers," and "the crew," and not contemplating a case like the present, where the "master" was charged with imprisoning one of the officers. The act was intended merely for the protection of the crew from an abuse of power by those placed over them.

Mr. Mills, for the United States.

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

STORY, Circuit Justice. I am clearly of opinion that the defendant is liable on the act of 1835. I think the act was intended to protect every individual composing the ship's crew, in the ordinary acceptation of the term, from an abuse of power by those placed in higher authority; and that, while

[1] [Reported by Alfred Brunner, Esq., and here reprinted by permission.]

the ordinary seamen are protected from injury by the "master or other officer," the inferior officers have a like protection from injury by the master of the ship.

DAVIS, District Judge, assented to this opinion, and the jury returned a verdict of guilty.

In the course of this trial it appeared that the captain, in a state of intoxication, once ordered the mate to punish one of the crew with great severity, which the latter refused to do, alleging that he saw no sufficient reason for such a course. Mr. Justice STORY took occasion to remark that the refusal of the mate was perfectly justifiable under the circumstances. There was a limit to the authority of the master, and the crew were not bound to inflict punishment upon his mere caprice. Any seaman had a right to refuse to inflict punishment, unless some justifiable cause was pointed out to him. He had a right to do this for his own protection.

[A motion for a new trial was subsequently denied. Case No. 16,740.]

Case No. 16,740.

UNITED STATES v. WINN.

[3 Sumn. 209.] [1]

Circuit Court, D. Massachusetts. May Term, 1838.

SEAMEN—BEATING BY MASTER—CONSTRUCTION OF STATUTE—"CREW" DEFINED.

1. Under the act of congress, of 1835, c. 40 [4 Stat. 776], providing, "that if any master or other officer, &c., shall from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison any one or more of the crew, &c.," he shall be punished by fine, &c., *held*, that the word crew was intended to include the officers, as well as the common seamen, and that a master was liable, under the statute, for an imprisonment of the first mate of his ship.

[Cited in U. S. v. Pratt, Case No. 16,082. Quoted in U. S. v. Huff, 13 Fed. 633.]

2. Wherever in a statute, the words master and crew occur in connection with each other, the word crew embraces all the officers, as well as the common seamen.

[Cited in The Marie, 49 Fed. 287.]

3. In the construction of penal statutes, the proper course is to search out and follow the true intent of the legislature, and to adopt that sense, which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.

[Cited in The Bolina, Case No. 1,608; U. S. v. Rhodes, Id. 16,151; U. S. v. Hartwell, 6 Wall. (73 U. S.) 396; U. S. v. Hutchinson, Case No. 15,431; U. S. v. Mattock, Id. 15,744. Quoted in U. S. v. Pratt, Id. 16,082. Cited in U. S. v. One Raft of Timber, 13 Fed. 798; Gardner v. 1,467 Bales of Cotton, 20 Fed. 529; U. S. v. Trice, 30 Fed. 495; U. S. v. Ellis, 51 Fed. 810; U. S. v. Lacher, 134 U. S. 628, 10 Sup. Ct. 625.]

[Cited in Schultz v. Pacific R. Co., 36 Mo. 27; Kane v. Union Pac. R. Co., 5 Neb. 109; Pike v. Jenkins, 12 N. H. 261; Leicht v. Board of Excise, 19 N. Y. Supp. 3.]

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

Indictment against the defendant [John D. Winn], master of the ship Eliza, for having from malice, hatred and revenge, and without justifiable cause, on the high seas, beaten and imprisoned one John B. Bassett, one of the crew of the same ship, against the statute of March 3, 1835 (chapter 40, § 5). Plea, not guilty.

At the trial, the facts established a very aggravated imprisonment of John B. Bassett, who was chief officer of the Ship Eliza (of which the defendant was master), at two different times, one by confinement to his state-room for five or six weeks, and another for three months, at the Feegee Islands and other places in the Pacific Ocean.

At the trial, Choate and Lord, for the defendant, contended, that an imprisonment by the master of an officer of the ship was not within the purview of the act; and that by crew, in the act of 1835, common mariners or seamen only were intended, in contradistinction to officers. The court ruled, that the case, if proved to the satisfaction of the jury in point of fact, was within the purview of the act of 1835. But, at the same time, suggested to the defendant's counsel, that they might move for a new trial, if, upon further consideration, the objection appeared to them worthy of the more deliberate consideration of the court. The jury found the defendant guilty. [Case No. 16,739a.]

And now Choate and Lord moved for a new trial upon the point saved at the trial. They contended, that the act of 1835 provided for the punishment of the master or other officer, who should beat, wound, or imprison, &c., any one or more of the crew, thereby making a distinction between the "master," "other officers," and "the crew," and not contemplating a case like the present, where the "master" was charged with imprisoning one of the officers. The act was intended merely for the protection of the crew from an abuse of power by those placed over them.

Mr. Mills, U. S. Dist. Atty.

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

STORY, Circuit Justice. The words of the third section of the statute of 1835 (chapter 40) are as follows:—"That if any master or other officer of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them, any cruel or unusual punishment, every such person so offending, shall, on conviction thereof, be punished by fine not exceeding, &c., or by imprisonment not exceeding, &c., or by both, according to the nature and aggravation of the offence." And the question now presents

ed for the consideration of the court is, whether the offence, when committed by the master upon the chief or other officer of the ship, is an offence within the purview and intent of the statute. In other words, is the word "crew" in the section used in contradistinction to officers of the ship, and so including the common seamen or mariners only; or does the word "crew," in the sense of the statute, embrace all the officers, except the master, as well as the common mariners.

Now, I do not think any thing material in the construction of this statute can turn upon the rule so ably and strenuously expounded at the bar, that penal statutes are to be construed strictly. I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule, that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words, which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature. I adopt, on this subject, the doctrine laid down in the case of The Industry [Case No. 7,028], and which, I am persuaded, is in perfect consonance with the general authorities most considered and most relied on in cases of this sort. The court there said: "We are undoubtedly bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words, and the mischiefs, to be within the remedial influence of the statute." The most restricted sense, then, is not, as a matter of course, to be adopted as the true sense of the statute, unless it best harmonizes with the context, and stands best with the words and with the mischiefs to be remedied by the enactment.

Now, the word "crew" has several well-known significations. In its general and popular sense, it is equivalent to "company." Thus, for example, we find the most general definition of it laid down in Johnson's Dictionary to be "a company of people associated for any purpose." And the same learned lexicographer adds, that, when spoken with reference to a ship, the crew of a ship, or ship's crew, means "the company of a ship," illustrating it by a verse from Dryden's translation of the Aeneid:

"The anchor dropped, his crew the vessel moor."

Falconer, in his Marine Dictionary, says: "The crew of a ship ("Equipage," French) comprehends the officers, sailors, seamen, marines, ordinary men, servants, and boys"; adding, "but exclusive of the captains and lieutenants in the French service." Whether this definition, so far as it is applicable to the French service, is correct or not, it is not necessary to decide, though M. Boulay Paty, in his vocabulary annexed to his edition of Emerigon, has defined "equipage" somewhat differently. "Equipage se forme de tous les Hommes d'un Batiment, portés sur un Registre, que l'on nomme Role d'equipage. Les officiers sont designés sous celui d'Etat Major. 2 Emerigon des Assur. Par. Boulay Paty (Ed. 1827) p. 682. Valin, after giving the text of the Ordinance of the Marine (Liv. 2, tit. 1, du capitaine, art. 5), "Appartiendra au Maitre de faire l'Equipage du Vaisseau, de choisir et louer les pilote, contre-maitre, matelots et compagnons," in his commentary, adds: "Ces termes, Matelots et compagnons, employés dans cet article, sont synonymes. De tous temps, suivant les us et coutumes de la mer, les matelots ont été designés sous le nom de compagnons du Maitre." 1 Valin, Comm. 386. In this sense it is nearly equivalent to our phrase crew. or ship's company. See. also, Poth. Mar. Cont., by Cushing, pp. 98, 99, note 163. Roccus (De Nav. et Naut. note 9) has used the word "Nauta," in the same general sense. "Habet (Navis) etiam nautas, quod est nomen generale, et comprehendit, omnes personas, quæ in navi deserviunt, et faciunt illam navigare." But upon a question of the construction of our own laws, little light can be derived from the usages of language in foreign nations.

The general sense of the word "crew," being then, as I think, equivalent to ship's company, which, it can scarcely be doubted, embraces all the officers, as well as the common seamen, that sense ought not to be displaced, unless it is manifest, that the legislature have used the word "crew" in a more restrictive sense; and this must be ascertained, either from the context, or from the object to be accomplished by the enactment. Now, in examining our laws upon maritime subjects, it will be found, that the word "crew" is used sometimes in the general sense above stated, and sometimes in other senses, more limited and restrained. It is sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only, excluding the master and officers. But in these two last classes, I think, upon close examination, it will be found that the context always con-

tains language which explains and limits the general to the particular sense.

There are various acts of congress in which the words "crew" and "ship's company" are used as equivalent to each other. In the ninth section of the act of 1790, c. 56 [1 Story's Laws, 106; 1 Stat. 134, c. 29], requiring a certain quantity of provisions to be put on board for every person in a foreign voyage, the word "crew" seems used as equivalent to ship's company, and to include officers, as well as common seamen. See, also, Passenger Act 1819, c. 170, § 3 [3 Story's Laws, 1722; 3 Stat. 488, c. 46]. In the act of 1803, c. 62, § 1 [2 Story's Laws, 883; 2 Stat. 203, c. 9], which requires the master to deliver to the collector a list and "description of the persons composing his ship's company, to which list the oath or affirmation of the master shall be annexed, that the list contains the names of his crew," &c., &c., it is plain, that crew and ship's company are used as equivalent; and the form of the list prescribed by the treasury department shows that all the officers are included as a part of the ship's company or crew. See, also, Act 1813, c. 184, § 3 [2 Story's Laws, 1302; 2 Stat. 809, c. 42.] In the salvage act of 1800, c. 14, § 4 [2 Stat. 18], the distribution of the salvage in cases of recapture is to be among the commanders, officers, and crew of public armed vessels; and in case of private armed vessels, "among the owners and company," which manifestly includes the master, officers, and common seamen, or the whole ship's company. In the piracy act of 1819, c. 200 [3 Story's Laws, 1738; 3 Stat. 510, c. 77], the first section, in providing for the employment of the public ships of the United States "in protecting merchant-vessels of the United States and their crews from piratical aggressions and depredations," manifestly includes the master and officers, as well as common seamen, in the descriptive word, "crew." The second section of the same act uses the word, "crew," in the same comprehensive sense, as applicable to the persons belonging to the piratical vessel. On the other hand, the third section speaks of the "commander and crew of every merchant vessel," and authorizes them to oppose and defend themselves against any piratical aggression, in which the word, "crew," as clearly comprehends all the officers and common seamen. In the piracy act of 1820, c. 113, §§ 3–5 [3 Story's Laws, 1798; 3 Stat. 600, c. 113], the words "crew," and "ship's company" are used as exact equivalents: "If any person, being of the crew or ship's company of any piratical ship or vessel, shall land," &c. &c.; and "if any citizen, &c., being of the crew or ship's company of any ship or vessel, &c., shall land," &c.; where the word manifestly comprehends the master, officers and common seamen. In the act of 1792, c. 24, § 8 [1 Story's Laws, 235; 1 Stat. 256], respecting the discharge of the crew of the vessel in a foreign country, it is provided that "the master, unless the crew are liable by their contract to be discharged there, or do consent, shall send them back." Here the word "crew" embraces officers, as contradistinguished from the master. And, generally, it may be stated, that wherever in a statute the words master and crew occur, in connection with each other, the word crew embraces all the officers, as well as the common seamen. See Abb. Shipp. pt. 2, pp. 87, 88, c. 1, § 5. On the other hand, in the act of 1817, c. 204, § 3 [3 Story's Laws, 1622; 3 Stat. 351, c. 31], providing, that bounties in the fisheries shall be to such vessels only where "the officers and three-fourths of the crew" shall be citizens, the word crew is used as applicable to the common seamen or fishermen only. So, in the act of 1790, c. 56, § 3, where it is provided "that if the mate or first officer under the master, and the majority of the crew of any ship or vessel," &c. shall discover the vessel to be leaky, &c. they may require the vessel to proceed to some convenient port to examine her state, the same construction must prevail; or rather, the word "crew" there comprehends all the officers, except the mate or chief officer, as well as the common seamen.

The result of this examination of some of the leading provisions of our own statutes upon similar subjects shows that the word crew is ordinarily used as equivalent to ship's company, and that, whenever it is not intended to embrace the officers, the context manifestly excludes them, by enumerating them, as contradistinguished from the rest of the crew.

But, passing from the consideration of other statutes, let us now proceed to the examination of that of 1835 (chapter 40), upon which our judgment must finally turn. The first section provides, "that, if one or more of the crew of an American ship or vessel, on the high seas, &c., shall unlawfully, &c., usurp the command of such ship or vessel, from the master or other lawful commanding officer thereof, &c., &c., every such person, &c., shall, on conviction," &c., be punished as provided for in the act. Now, it seems to me, that every other officer of the ship, except the master or commanding officer, is, and ought to be, deemed within the purview of the act, as one of the crew. He may commit the offence of usurping the command of the vessel, as well as a common seaman; and the mischief is the same as in the case of a common seaman; and he is one of the crew or ship's company, in the sense of the general maritime law. Why, then, should not the section be construed to embrace all cases within the words, and within the mischiefs? Why should we resort to the narrowest possible sense of the words, instead of the general sense, if there is the same mischief in each case to be suppressed, and the same public policy in the protection of the commercial interests of the country? The second section admits of similar considerations. It provides, that, "if any one or more of the crew of an American ship or vessel, on the high seas, &c., shall endeavor to make a revolt," &c., he shall be punished, as stated in the act. Why is not

an officer, not being the commanding officer, to be deemed within the purview of the section? The offence would be even more reprehensible, when committed by a subordinate officer than by a common mariner. So far from there being any public or presumed policy in exempting such an officer from the reach of the penalties of the section, there would seem to be a very strong ground for holding him within it. Why then should the general import of the word "crew" be restricted in his favor? When we come to the third section, the language is somewhat varied. It provides, "that if any master, or other officer, of an American ship, or vessel, on the high seas, &c., shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or shall inflict upon them any cruel and unusual punishment." Now, the plain object of this section is not to punish every offence of the like nature committed by any person, belonging to or on board of the vessel, when committed upon any other person, belonging to or on board of the same vessel. The offence can be committed only by the master, or an officer of the ship; and it must be committed upon some person, belonging to the ship, and of the crew of the ship. Hence, the like offence, when committed by any one of the crew, not being an officer, or by a passenger or a stranger on board, is not punishable by the act. And so, on the other hand, the offence, when committed by the master or other officer of the ship, upon any person on board, not of the crew, as, upon a passenger, or a stranger, is also not within the reach of the act. It was, manifestly, then, the intention of the act to punish only such offences, as were committed by persons standing in a particular relation to each other on board. There is also some reason to infer, that the object of the section was confined to the offence, when committed by a superior upon some person who stood in relation to him in the character of a subordinate, or in a subordinate station. The consideration, that the acts enumerated are required to be done by officers from malice, hatred, or revenge, and without justifiable cause; that some of them, at least, are of a nature properly within the functions of a superior officer on board, and might be exercised officially for a justifiable cause, such as imprisonment, withholding suitable food and nourishment, and inflicting cruel and unusual punishments; and that ordinarily these acts could not be done on board, except by the instrumentality, consent, or authority of the superior officer on board; these circumstances, I say, do greatly enhance the presumption that the offence could be committed only by a superior officer upon some one inferior to him. In this view, the words "other officer" might well be interpreted to mean commanding officer, standing in connection with the word master, so as to import an officer ejusdem generis, pro hac vice. If this were to be admitted as the true interpretation of the section, then the word "crew" would naturally embrace all the ship's company, except the master or commanding officer at the time of the offence.

But suppose this construction not to be entirely free from doubt, and I cannot but think that there is considerable force in it, as a true interpretation of the legislative intention, from the very words used; let us proceed to consider the words of the section in other aspects. The words must be read distributively, "If any master shall from malice, &c., beat, wound, or imprison," &c.; or "if any other officer shall, from malice, &c., beat, wound, or imprison," &c. Now, if the first clause only had been in the section, "If any master shall, from malice, beat, wound, or imprison any one or more of the crew of such ship or vessel," I confess that I should have entertained no doubt that the word "crew" was here used in its most comprehensive sense, as embracing all the officers under the master, as well as the common seamen. The words, master, and crew, in such a connection, naturally embrace all persons on board constituting the ship's company; and our statutes (as we have seen) so interpret them. Can it make any difference whatsoever in the case, that the words "other officer" are added? They only extend the persons, who may become offenders; but they do not change or limit the persons, against whom the offence may be committed. The word "crew" ought reasonably (one should suppose) to receive the same interpretation, whether the words "other officer" are in or out of the statute. Now, because the offence must be committed by the master, or other officer, it does not follow in reason, that it may not be committed upon another officer as well as upon a common seaman. If the word "crew," in its general sense, includes officers, as well as common seamen, there does not seem any ground, why the interpretation should be restricted to the latter. It is not so common for a master or other officer to beat, wound, or imprison another officer, as to beat, wound, or imprison a common seaman. But the act is not the less reprehensible in the former case, than in the latter. Indeed, it is justly considered more reprehensible; for it goes to the overthrow of all authority and discipline, and degrades the officers in the eyes of the whole body of seamen. The mischief to be remedied, then, is, to say the least, equal; and the public policy the same. The word "crew," in its general, appropriate, and even popular sense, covers both cases. It admits, I agree, of being construed in a more restrained sense, which will not, however, reach the whole mischief. But my difficulty is, how the court is to presume, that the legislature intended the more restrained sense, when the word in its actual connection

equally admits of the general sense. The argument for the narrower interpretation, comes to this, that the words "master and other officers" are used in contradistinction to "crew" in the clause. But I think, that they are used merely as descriptive of the offenders, and that the word "crew" is used, not in contradistinction to "officers," but in contradistinction to other persons who might be on board, as passengers, or as mere strangers. The argument reads the clause as if it were, "If any master or other officer shall beat, wound, or imprison any of the rest of the crew, or any others of the crew, not an officer." Now, I am not prepared to say that this is the true reading. The more natural construction is, "If any master or other officer shall beat, wound, or imprison any other of the crew," if we must interpolate a word, to express the full sense.

Upon the whole, after much deliberation upon the subject, I adhere to the construction which was stated to the jury at the trial. I think the word "crew" was intended to include the officers, as well as the common seamen; and that the section uses the word as equivalent to ship's company. In this view, it is used in the same sense as it is in the first and second sections of the act; and for purposes equally important to the due protection of all engaged in the maritime service, and equally necessary for the safety and security of the voyage.

Case No. 16,741.

UNITED STATES v. WINSLOW (two cases).

[2 Cranch, C. C. 47.] [1]

Circuit Court, District of Columbia. June Term, 1812.

FORGERY OF BANK NOTES.

Forgery of the note of a private, unchartered bank, may be punished under the Maryland act of 1799, c. 75, § 1. So also the forgery of the notes of chartered banks.

The indictment against Thomas Winslow was for counterfeiting and passing a note of the Bank of Potomac, a private, unchartered bank. The prisoner pleaded guilty, and being recommended to mercy by the bank, in consequence of disclosures as to other offenders, THE COURT sentenced him to six months' imprisonment, to pay a fine of 100 dollars, and to stand committed until the fine and costs should be paid. This sentence was under the Maryland act of 1779, c. 75, § 1.

The indictment against Mark Winslow was for forging the bank-notes of chartered banks, namely, the Farmers' Bank of Alexandria and the Bank of Virginia, with intent to defraud those banks. THE COURT passed a like sentence.

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

Case No. 16,742.

UNITED STATES v. WINSLOW.

[3 Sawy. 337;[1] 7 Chi. Leg. News, 298.]

District Court, D. Oregon. May 7, 1875.

INDICTMENT FOR SELLING LIQUOR TO INDIANS—OREGON—INDIAN COUNTRY—INDICTMENT—UNCERTAINTY.

1. In an indictment under section 2139 of the Revised Statutes for disposing of spirituous liquors to an Indian, it is necessary to allege that the defendant is not an "Indian in the Indian country."

2. The exception in said section, "an Indian in the Indian country," does not apply to the offense, but only to the person who may commit it.

3. Section 5 of the act of June 5, 1850 (9 Stat. 437), making Oregon Indian country, so far as the disposition of spirituous liquors to Indians is concerned, is not repealed by section 5596 of the Revised Statutes.

4. An allegation in an indictment that the defendant did the act charged "on or about" a certain day is void for uncertainty; it does not show but that the action is barred by lapse of time.

[Cited in Conroy v. Oregon Const. Co., 23 Fed. 73.]

Rufus Mallory, for plaintiff.

John M. Gearin, for defendant.

DEADY, District Judge. The indictment in this case charges that the defendant [Mark Winslow], on or about February 1, 1875, in the county of Yamhill and state of Oregon, did dispose of spirituous liquors to one Bill, an Indian who resides upon the Grande Ronde Indian agency, who was then and there, and is now under the charge of P. B. Sinnott, an Indian agent appointed by the United States, contra formam statuti, etc. The defendant demurs to the indictment because (1) it does not state facts sufficient to constitute a cause of action, and (2) the allegation as to time is uncertain and void.

The material part of the statute under which the indictment was found reads as follows: "Every person except an Indian, in the Indian country, who sells, exchanges, gives, barters or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent * * * shall be punishable," etc. Rev. St. § 2139.

Under the first cause of demurrer it is maintained that the indictment should have contained an allegation to the effect that the defendant was not "an Indian in the Indian country," and that without such allegation, negativing this exception in the statute, no violation of it is alleged.

In answer to this, the district attorney assumes that the state of Oregon is not Indian country, and therefore it is impossible that the defendant could come within the exception; which obviates the necessity of negativing it in the indictment.

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

Section 5 of the act of June 5, 1850, provided: "That the law regulating trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the territory of Oregon."

It has always been held that the effect of this provision was to make Oregon, so far as the disposition of spirituous liquors to Indians is concerned, Indian country. U. S. v. Tom, 1 Or. 27; U. S. v. Seveloff [Case No. 16,252]. Nor is this provision repealed by the Revised Statutes; for although a "portion" of the act of June 5, supra—parts of sections 2 and 4—are embraced in sections 2046 and 2052 of said statutes, yet it is not "affected" by them, for being merely a local provision, it is expressly reserved from the operation of the repealing clause of section 5596 of said statutes.

Assuming, then, that Oregon is Indian country, so far as the charge in this indictment is concerned, it becomes material to inquire whether this clause, "except an Indian in the Indian country"—should have been negatived in the indictment. The general rule is, that when there is an exception in the enacting clause, the indictment must show that the defendant is not within it. 1 Bish. Cr. Proc. § 375 et seq.; 1 Whart. Cr. Law, § 379; 1 Chit. Cr. Law, 284; U. S. v. Pond [Case No. 16,067]; Dawson v. People, 25 N. Y. 399; Rex v. Stone, 1 East, 639; Rex v. Earnshaw, 15 East, 456.

Is this exception within the enacting clause of section 2139 supra? It is hardly contended that it is not, and I think there can be no doubt but that it is. It is a part of the clause which defines the offense, or the person who may commit it. By reason of it, the description of the offense is so limited, that as to "an Indian in the Indian country," the act of disposing of spirituous liquor to an Indian is not a crime. In other words, such act is not a crime unless done by a person other than "an Indian in an Indian country;" and so it must appear from the indictment that the defendant is a person other than such an Indian. The familiar case under the statutes making it a crime to sell spirituous liquor without license or special tax therefor is in point. The qualifying clause in regard to the license or tax is considered an essential part of the description of the offense, and an indictment under the statute which should fail to show that the selling was done by a person without a license or who had not paid the special tax, would be insufficient.

It has also been suggested that the exception in section 2139, supra, extends to the offense as well as to the offender—to the act of disposing of the liquor as well as to the person disposing of it. This construction would divide the exception into two separate and independent clauses, the first one, "an Indian," qualifying the word "person" in the phrase "every person;" and the second one, "in the Indian country," qualifying the following part of the sentence or the verbs "sells, exchanges," etc., or the word "Indian" following them. Upon this theory of the purpose of the act the sentence is very awkwardly and ungrammatically constructed. If the second clause was inserted in the sentence for the purpose of limiting its operation to cases where the liquor is sold to an Indian "in the Indian country," it should have been placed after the word "Indian" in the third line of the sentence, so that it would read: "Every person, except an Indian, who sells, exchanges, gives, barters or disposes of any spirituous liquors or wine to any Indian in the Indian country * * * shall be punishable," etc.

But according to what I consider the proper construction of the sentence, these qualifying clauses are now naturally and properly placed therein. The first one, "except an Indian," as has been said, qualifies the word "person" in the preceding phrase "every person." The universality of this phrase is thus limited, so that it shall not include "an Indian," and so far an Indian cannot commit a crime by disposing of liquor to another Indian. The same result, so far as Indians are concerned, might have been accomplished by enacting—"Every white person who sells," etc.

As this provision stood in section 20 of the act of June 30, 1834, as amended by act of March 15, 1864 (13 Stat. 29), this exception concerning Indians was not in it. The phrase "every person" was used without qualification. Accordingly, this court in U. S. v. Shaw Mux [Case No. 16,268], held that the word "person," as therein used, included an Indian, and therefore he could be punished for disposing of liquor to another Indian in charge of an Indian agent. It may be that this clause was inserted in the sentence by the revisers on account of that decision.

The second clause of the exception, "in the Indian country," was evidently added for the purpose of qualifying and restraining the first one, so that "an Indian" simply is not excepted from the phrase "every person," but only "an Indian in the Indian country." Neither of these clauses has any relation to the offense but only to the persons who may commit it. The general policy of the law being as shown by section 2146, Rev. St., to leave the conduct of Indians in the Indian country as between themselves, to the tribal law, the second exception which limits the first one so that only Indians in the Indian country are excluded from the operation of section 2139, supra, is in harmony with such policy. But as to Indians not "in the Indian country," the effect is to leave them within the purview of the section and punishable for any violation of it.

Besides, the qualifying clause as to the offense—that the Indian to whom the liquor is

disposed must be "under the charge of an Indian superintendent or agent," shows plainly that the intent of the law-maker was to make the act of disposing of liquor to an Indian a crime, without reference to the fact of the place of disposal, provided the Indian was at the time under the charge of an Indian agent. This qualifying clause was first introduced into section 20 of the act of 1834, supra, by the act of 1862 (12 Stat. 339). The effect of it was to limit the operation of the section, so far as the disposition of liquor to Indians is concerned, to the Indians under the charge of a superintendent or agent, whether within or without the Indian country. U. S. v. Shaw Mux, supra. In this condition of the section it was held by the supreme court in U. S. v. Holliday, 3 Wall. [70 U. S.] 416, that it was a crime to sell liquor "to Indians under charge of a superintendent or agent, wherever they might be."

The compilers of the Revised Statutes have preserved this radical change, which made the criminality of the act of giving liquor to an Indian depend upon his being under charge of an agent, and not the character of the country where it took place, but added the qualification, "except an Indian in the Indian country," which excludes such Indians, and only such, from the category of persons who may commit the crime. In effect, this exception restores the qualification made to section 20, supra, by section 3 of the act of March 27, 1854 (10 Stat. 270), which provided that nothing contained in said section should "extend to any Indians committing said offenses in the Indian country." U. S. v. Shaw Mux, supra.

The demurrer in this respect is well taken. It is also well taken upon the second ground. Every indictment must allege a day and a year certain on which the offense was committed. 1 Bish. Cr. Law, § 239. This is the common law rule. The Code of Criminal Procedure of this state, which has been adopted by this court as a rule of practice, does not change the law. On the contrary, the form of an indictment given in section 70, indicates an absolute averment as to the time of committing the offense. An allegation that a crime was committed "on or about" a certain day, does not show but that the action is barred by lapse of time.

The demurrer must be sustained.

Case No. 16,743.

UNITED STATES v. WINTER.

[13 Blatchf. 276.] [1]

Circuit Court, S. D. New York. March 17, 1876.

INDICTMENT—CHRISTIAN NAME OF DEFENDANT.

1. A person was indicted by the name of D. K. Olney Winter. He moved to quash the indictment, on the ground that he was not described therein by any Christian name. *Held*, that the motion must be denied.

2. When a person has selected a particular given name as the only given name by which he will be known, such given name becomes part of his legal name, and he is properly described by that name in an indictment, whether it stands first, or second, or third, in the order of his given names.

Benjamin B. Foster, U. S. Dist. Atty.

Ambrose H. Purdy, for defendant.

BENEDICT, District Judge. The defendant has been indicted by the name of D. K. Olney Winter. He now moves that the indictment be quashed, upon the ground that he is not described therein by any Christian name. The argument is, that a middle name forms no part of the legal name, and that, as the initial letter D., given in the indictment, shows that the defendant has a Christian name of which D. is the initial letter, the indictment, on its face, is insufficient, because it fails to give that Christian name in full, and omits to say that it is unknown.

It has frequently been held, that, when a person has a first name by which he is known, and a middle name in addition, he is sufficiently described if the first name and the surname be accurately stated. But, I do not know that it has been settled, in this country, that, when a person has caused himself to be known by a certain given name, and by no other except his surname, he is not properly described in an indictment, when such given name and the surname are set forth. In State v. Hughes, 1 Swan, 261, it is said: "The middle name may properly be a part of a person's name."

In this country, no religious or legal ceremony is necessary to entitle a person to use a particular name. A name chosen by the person, by which he has caused himself to be commonly known, becomes his name; and I know of no law to prevent a person from adopting letters alone, not being initial letters, or intended to stand for any word, to be his name. It has been said, that a person can have but one Christian name; but, as pointed out by Archbold (Cr. Prac. p. 38): "This must be understood to mean, merely, that he cannot be named 'John, alias James,' or the like." See, also, Jones v. Macquillin, 5 Term R. 195.

There appears to be no law against a person's having several given names, nor anything to prevent a person from adopting any one of several given names given him at baptism, as the one by which he will be called and known; and, when a person has selected a particular given name as the only given name by which he will be known, I conceive that such given name becomes part of his legal name, and that he is properly described by that name in an indictment, whether it stands first, or second, or third, in the order of his given names. If this defendant had chosen to be known by the giv-

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

en name of Olney, with the letters D. K. between it and his surname, he would have been properly described as Olney D. K. Winter. Surely, it can make no difference if the fact be, that, having the right to do so, he has placed the letters D. K. before instead of behind the name by which, as his given name, he has chosen to be known.

This, then, is not a case where no Christian name is mentioned, nor where the Christian name by which a person is known has been designated simply by its initial letter. Here, a given name is set out and, upon a motion to quash, it is to be presumed that such name is the only given name by which the defendant has chosen to be and has come to be known. Having, by such adoption, become the distinctive given name of the defendant, it is properly used to describe him in an indictment, and is sufficient for that purpose. "A person is well described by the name by which he is generally known." 2 Russ. Crimes, 796. The motion to quash is denied.

[Defendant was subsequently convicted, but a motion in arrest of judgment was granted. See Case No. 16,744.]

Case No. 16,744.

UNITED STATES v. WINTER.

[13 Blatchf. 333.] [1]

Circuit Court, S. D. New York. April 29, 1876.

INDICTMENT—STEALING MONEY FROM LETTER.

An indictment, under section 5467 of the Revised Statutes, against an employee in a post office, for stealing money from a letter, did not aver that the letter was one intended to be conveyed by mail, or that it had been deposited in any post office, or in the charge of the defendant, or that it came into his possession in the regular course of his official duty. *Held*, that the indictment was bad.

[This was an indictment against D. K. Olney Winter for stealing money from a letter. A motion to quash was denied (Case No. 16,743), and defendant was convicted. He now moves in arrest of judgment.]

Benjamin B. Foster, Asst. U. S. Dist. Atty.

Ambrose H. Purdy, for defendant.

BENEDICT, District Judge. The accused was indicted under section 5467 of the Revised Statutes. The indictment contains several counts, but all except the first were nol. prossed, on motion of the district attorney. Upon the first count a conviction was had and now the accused moves in arrest of judgment, upon the ground that the count upon which he was convicted charges no offence. The count avers, that the accused was clerk and assistant postmaster, and did steal and carry away from and out of a certain letter (describing it by its direction), which letter then and there came into his possession, and had not then and there been delivered to the party to whom it was directed, an article of value (describing money). There is no averment that the letter from which the money was taken was a letter intended to be conveyed by mail, or that it had been deposited in any post office, or in the charge of the accused, or that it came into his possession in the regular course of his official duty. In order to sustain the indictment, it has, therefore, been argued, and necessarily, that the act of stealing money from out of a letter, whenever committed by a person employed in the postal service, is an offence against the United States, whether the letter be at the time in the charge of the United States or not. It is not to be denied, that the language of the clause in section 5467, upon which this indictment is framed, affords room for such an argument; for, while, in the first part of the section, where the offence of stealing a letter is created, the provision requires that the letter should be one intended to be conveyed by mail, or to be carried or delivered by some person employed in the postal service, or forwarded through or delivered from some post office, in the clause under consideration, the letter is described simply as a letter "which shall have come into his possession, either in the regular course of his official duties, or in any other manner whatever." But, it cannot be supposed that it was intended, by this clause, to protect the contents of any letters other than such as come within the jurisdiction of the United States, and for the safety of which the United States is responsible, by reason of a deposit thereof in some post office, or in charge of some person employed in the postal service; and this is indicated by the provision in this same clause, which excludes from the provision any letter after its delivery to the person to whom it is directed. No reason is suggested for this exception, if it was intended to protect all letters, whether in charge of the United States, or not. The clause must, therefore, be understood as if express reference had been made to the description given in the first part of the section, and as having application, therefore, only where the letter from which the money is abstracted was intended to be conveyed by mail, or to be carried or delivered by a mail carrier, or other person employed in some department of the postal service, or forwarded through, or delivered from, some post office. If this be the true construction to be placed upon the clause of the statute under which this indictment is framed, it is necessary to insert in the indictment an averment showing that the letter from which the money was taken was intended to be conveyed by mail, or carried or delivered by some employee of the postal service, or to be forwarded through, or delivered from, some post office. The first count of this indictment, upon which

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

alone a verdict was asked and taken, contains no such averment. For all that appears, the letter in question might have been a letter never sent, or intended to be conveyed, by mail, or in any other way placed in the charge of the post office department—picked up, it may be, in the street by the accused. This omission of a necessary ingredient of the offence is a fatal defect, and compels an arrest of the judgment.

UNITED STATES (WINTER v.). See Case No. 17,895.

Case No. 16,745.

UNITED STATES v. WIRT.

[3 Sawy. 161;[1] 20 Int. Rev. Rec. 122; 7 Chi. Leg. News, 26.]

District Court, D. Oregon. Sept. 29, 1874.

INDIANS PRESUMED TO BELONG TO TRIBE—INDIAN SUPERINTENDENTS—ACT ABOLISHING OFFICE—PAYMENT OF SALARY.

1. All Indians born and resident in Oregon are prima facie members of some Oregon tribe, and are therefore under the charge of the superintendent of Indian affairs in Oregon, appointed in pursuance of the act of June 5, 1850 (9 Stat. 437), within the meaning of section 20 of the act of June 30, 1834 (4 Stat. 732), as amended by section 1 of the act of March 16, 1864 (15 Stat. 29).

2. An Indian born in Minnesota is prima facie not a member of an Oregon tribe, though he might become such by adoption.

3. The clause in section 6 of the act of February 17, 1873 (17 Stat. 463), providing for the abolishing of Indian superintendencies after June 30, did not of itself abolish any such superintendency, but only took effect when and as the president designated and appointed.

4. The payment of a superintendent's salary until September 1, 1873, is prima facie evidence that his office was continued until that time, although he was notified that his office was one of those selected under the act to be abolished.

The defendant [A. C. Wirt] was indicted for disposing of spirituous liquor to Indians under the charge of T. B. Odeneal, superintendent of Indian affairs, to wit: Michelle Martineau and William, contrary to section 20 of the trade and intercourse act of June 30, 1834 (4 Stat. 732), as amended by section 1 of the act of March 16, 1864 (15 Stat. 29). The jury found the defendant guilty of disposing of liquor to William as charged in the indictment, and the defendant moved for a new trial.

Rufus Mallory, U. S. Atty.
John F. Caples, for defendant.

DEADY, District Judge. The ground of the motion for new trial is: 1. That the court erred in charging the jury that the Indian William was under the charge of a superintendent of Indian affairs appointed by the United States, on August 2, 1873; and 2. That the evidence is not sufficient to justify the verdict, because there was no testimony that Indian William was, on the date aforesaid, under the charge of a superintendent of Indian affairs appointed by the United States.

From the evidence it appeared that Martineau was born in Minnesota, of a half-breed Chippewa woman, by a Canadian Frenchman; that on August 2, 1873, and prior thereto, he was living in Clatsop county, and married to a Clatsop Indian woman, and that William was a Clatsop Indian, about 25 years of age, and the step-son of Martineau.

The court charged the jury that any Indian, being a member of any Indian tribe in Oregon, was under the charge of the superintendent of Indian affairs in Oregon, appointed pursuant to section 2 of the act of June 5, 1850 (9 Stat. 437), which authorized the president to appoint such superintendent, "whose duty it shall be to exercise a general superintendence over all Indian tribes in Oregon;" that all Indians born in Oregon are prima facie members of one of such tribes, but that an Indian born in Minnesota was not prima facie a member of any such tribe, although he might possibly become one by adoption, and therefore they ought to acquit the defendant of the charge, so far as the same related to Martineau, irrespective of the question whether he was an Indian within the meaning of that term as used in the intercourse act.

By section 6 of the act of February 18, 1873 (17 Stat. 463), it is provided: "That after June 30, 1873, the offices of four of the superintendents of Indian affairs, and of the clerks of such superintendents, are hereby abolished; * * * and the president may assign the remaining four superintendents to jurisdiction over such agencies as he may deem proper, or, in his discretion, dispense with any, or all, of the said superintendents and their clerks."

At the passage of this act, T. B. Odeneal was superintendent of Indian affairs for Oregon. On June 28, 1873, he received a communication from the department informing him that his superintendency was one of the four selected by the president to be abolished under this act, but he was paid his salary until September 1; and in the meantime received a communication from the commissioner of Indian affairs concerning the selling of liquor to these Clatsop Indians, and was otherwise, during this time, addressed by the inspector of Indian affairs and the department as superintendent.

Upon these facts, the court instructed the jury, as a matter of law, that Indian William was under the charge of Odeneal as superintendent of Indian affairs, on August 2, 1873.

Judicial knowledge extends to the public and private acts of the executive of the United States. The evidence upon this point

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

was therefore addressed to the court and it instructed the jury as to the fact.

Counsel for defendant insists that the office of superintendent for Oregon was abolished after June 30, by operation of the act aforesaid, and that, in any view of the matter, it was then abolished by the action of the president, as shown by the communication received from the department on June 28; therefore the ruling was erroneous and a new trial ought to be granted.

The act of congress, although it declares in so many words that "the offices of four of the superintendents * * * are hereby abolished," of itself could not produce that effect, because it does not mention or indicate any particular four superintendents. In the nature of things the act could not take effect as to any particular superintendency until the president so declared. If he had taken no action in the premises, the act would have remained inoperative and without effect, for uncertainty. Until the president gave effect to it by assigning "the remaining four superintendents" to particular "agencies," and thereby impliedly indicating the four whose offices were to be abolished, or until he dispensed "with any or all of said superintendencies," none of them were abolished.

The execution of the act was by its terms committed to the president. If he did not abolish the office in Oregon, Odeneal remained superintendent of Indian affairs. The only question is, was he continued in office until September 1? The payment of his salary until that date is itself prima facie evidence of the fact. It is not to be presumed that his salary was paid for two months after he was out of office. Then, there are the other circumstances pointing to the same conclusion. The motion for new trial is overruled.

[Upon the question of what sentence ought to be imposed upon the defendant he was examined as a witness in his own behalf. The court sentenced him to pay a fine of $100 and the costs, taxed at $146, and one day's imprisonment in the county jail.] [2]

Case No. 16,746.

UNITED STATES v. WISE.

[1 Cranch, C. C. 546.] [1]

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

PRISON BOUNDS—RIGHTS OF PRISONERS.

Every prisoner not committed for treason or felony, is entitled to the benefit of the prison bounds, upon giving security.

Debt on prison-bounds bond; oyer of bond and condition; and general demurrer to the declaration. The question is whether a prisoner, committed at the suit of the United States, not for treason or felony, is entitled to the prison's bounds, upon giving security under the act of congress of 3d of March, 1803 (2 Stat. 237).

THE COURT (DUCKETT, Circuit Judge, absent) were of opinion that the bond was good and well taken.

Judgment for the plaintiffs on the demurrer.

[2] [From 20 Int. Rev. Rec. 122.]

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

Case No. 16,746a.

UNITED STATES v. WISE et al.

[1 Hayw. & H. 82.] [1]

Criminal Court, District of Columbia. May 14, 1842.

MEMBERS OF CONGRESS—PRIVILEGE FROM ARREST—BREACH OF PEACE.

The plea of privilege will not avail a member of congress to prevent him from being arrested on a warrant that charges "that there was probable cause to believe a breach of the peace was about to be committed."

On the 12th of May, 1842, Judge Thruston issued a warrant charging that "there is probable cause to believe that the Honorable H. A. Wise and the Honorable Edward Stanly, members of the house of representatives, are about to commit a breach of the peace by fighting a duel, and that preparations are now making by said parties to commit said breach of the peace." Mr. Wise was arrested and the return made by the marshal before Judge Morsell, of the circuit court.

Mr. Wise appeared in person.

P. R. Fendall, U. S. Dist. Atty.

Mr. Wise denied the right of any judge or justice in this district to require of him to give or sign any bond obliging him to keep the peace outside of the district, and pleaded his privilege from arrest as a member of congress, the warrant not charging actual breach of the peace.

On the 14th of May, 1842, the honorable Messrs. Goode and Hunter of Virginia appeared as counsel for Mr. Wise before Judge Dunlop, of the criminal court.

Mr. Goode maintained the following propositions: 1st: That the warrant does not state on whose information the charge was made. 2d. That the warrant charges no specific offense. 3d. That the defendant, being a member of the house of representatives, he is privileged from arrest, except for an actual breach of the peace which is not charged in the warrant.

Mr. Hunter cited the proceedings in the court of common pleas in England and the decision of Chief-Justice Pratt, settling the question as raised in the third objection[2] in

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

[2] 19 State Tr. 987: The third matter insisted upon for Mr. Wilkes is that he is a member of parliament (which has been admitted by the king's sergeants) and entitled to privilege to be free from arrests in all cases except treason, felony and actual breach of the peace, and,

the celebrated Case of Wilkes[3] that members of parliament are privileged from arrest except in certain cases named. That the constitution (article 1, § 6, cl. 1) provides that "they shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses." Jefferson's Manual[4] was cited as establishing the point, and denied that he, the defendant, could be arrested and held to bail, except for an actual breach of the peace, by any judge or justice of the peace in this District or elsewhere.

The district attorney said that the privileges claimed by senators and members ought to be rigidly scrutinized and kept within narrow limits; if, indeed, in a form of government like ours, they could be tolerated at all. He disliked the name of "privilege." It had, indeed, to use the language of Patrick Henry, "a squinting toward monarchy." It was a privilege and English history would show to what arbitrary lengths it had been carried even in a limited monarchy until the independence of the English judiciary had checked it. In the Case of Hansard,[5] printer to the house of commons, the decision of Lord Chief-Justice Denman clearly showed that whatever might have been the decision in the Wilkes Case, the doctrine of parliamentary privilege, as formerly maintained and acted upon, was emphatically repudiated by an honest and upright judge uttering from the English bench sentiments that were in unison with law and the increasing liberality of the age. That laid down in Jefferson's Manual was ill suited to the present age, and Jefferson himself would not have recommended a compliance with some of the forms and usages which were laid down in his own manual. The court had jurisdiction and it had power to interfere to prevent a breach of the peace, and it was enough to charge in the warrant that "there was probable cause to believe a breach of the peace was about to be committed."

THE COURT decided that the defendant's plea of privilege could not avail him in the present case.

After the testimony was closed, Judge DUNLOP requested the counsel to reargue the points.

After argument by the respective counsel, the court required the defendant to give security to keep the peace towards all the citizens of the United States within the District of Columbia, and not at any time within the period of one year to leave the District with the intention or purpose of fighting a duel with Edward Stanly, under the penalty of $3,000.

Case No. 16,747.

UNITED STATES v. WITHENBURY.

[Nowhere reported; opinion not now accessible.]

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therefore, ought to be discharged from imprisonment without bail; and we are all of opinion that he is entitled to that privilege and must be discharged without bail. In the Case of the Seven Bishops, 12 State Tr. 430, the court took notice of the privilege of parliament, and thought the bishops would have been entitled to it if they had not judged them to have been guilty of a breach of the peace; for three of them, Wright, Holloway and Allybone, deemed a seditious libel to be an actual breach of the peace, and, therefore, they were ousted of the privilege most unjustly. If Mr. Wilkes had been described as a member of parliament in the return, we must have taken notice of the law of privilege of parliament, otherwise the members would be without remedy, where they are wrongfully arrested against the law of parliament. We are bound to take notice of their privileges as being part of the law of the land. 4 Inst. 25, says, the privilege of parliament holds unless it be in three cases, viz., treason, felony and the peace; these are the words of Coke. In the trial of the Seven Bishops, the word "peace" in this case of privilege is explained to mean where surety of the peace is required. Privilege of parliament holds in informations for the king, unless in the cases before excepted. The case of an information against Lord Tankerville for bribery (in 1758) was within the privilege of parliament. We are all of opinion that a libel is not a breach of the peace. It tends to the breach of the peace, and that is the utmost. 1 Lev. 139. But that which only tends to the breach of the peace cannot be a breach of it. Suppose a libel be a breach of the peace, yet I think it cannot exclude privilege, because I cannot find that a libeller is bound to find surety of the peace in any book whatever, nor ever was, in any case except one, viz., the Case of the Seven Bishops, where three judges said that surety of the peace was required in the case of a libel. Judge Powell, the only honest man of the four judges, dissented; and I am held to be of his opinion and to say that case is not law. But it shows the miserable condition of the state at that time. Upon the whole, it is absurd to require surety of the peace or bail in the case of a libeller, and, therefore, Mr. Wilkes must be discharged from his imprisonment.

[3] John Wilkes was elected to parliament in 1757, arrested on a general warrant, was committed to the Tower in 1763 for printing a violent attack on the king. He was released, Chief-Justice Pratt deciding "that general warrants were unconstitutional, illegal and also absolutely void." 4 Johns. Enc. 1412.

[4] Even in cases of treason, felony and breach of the peace, to which privilege does not extend as to substance, yet a member is privileged as to the mode of proceeding. When it is found necessary for the public service to put a member under arrest, or when, on any public inquiry, matter comes out which may lead to affect the person of a member, it is the practice immediately to acquaint the house * * * but the communication is subsequent to the arrest, citing 2 Hats. Prec. 259, and 1 Bl. Comm. 167.

[5] Stockdale v. Hansard, 9 Adol. & E. 1, Lord Chief Justice Denman, in this case, referring to Wilkes' Case, said that Mr. Wilkes was entitled to his release from custody by reason of his privilege of parliament.

Case No. 16,748.

UNITED STATES v. WITTIG.

[2 Lowell, 466; 22 Int. Rev. Rec. 98; 3 Cent. Law J. 270; 13 Alb. Law J. 240; 23 Pittsb. Leg. J. 151.] [1]

District Court, D. Massachusetts. March, 1876.

INTERNAL REVENUE—RETAIL LIQUOR DEALERS—SALES BY CLUB—SPECIAL TAX.

A club or association of persons, not incorporated, combining together to promote social or literary objects, which delivers beer to its members, receiving checks in exchange for glasses of beer, having sold the checks originally to members of the club, is a dealer, under the statute, and liable to be taxed, under section 18 of chapter 36 of the statutes of 1875 [18 Stat. 311].

[Cited in State v. Boston Club (La.) 12 South. 896; Barden v. Montana Club, 10 Mont. 330, 25 Pac. 1044.]

[The defendant [Julius Wittig] as one of the officers of a club existing in Clinton, Mass., as part of the National German Turnverein, was indicted for carrying on the business of a retail dealer in malt liquors without payment of the special tax required of such dealers by the internal revenue laws of the United States. It appeared in evidence that the club was sustained by initiation fees and equal monthly assessments; that beer was regularly kept by the club, being bought out of the general fund, and was served out by glass to members of the club on presentation of a ticket—a card of twenty tickets being sold by the club through its treasurer to any member thereof for $1; and only in that way were such malt liquors disposed of by the club. It further appeared in evidence that some members bought more tickets and consumed more beer than others; and that the proceeds were paid into the general funds of the club. The defendant refused to pay said revenue tax, claiming that neither the club nor any member thereof was liable therefor; but under the instructions of the court the jury found the defendant guilty, sentence being delayed by leave of the court to give the defendant opportunity to move for a new trial. Other facts, so far as material, are stated in the opinion.

[It was contended in behalf of the defendant that the club being a partnership could not, as matter of law, sell to its members; and that what was done amounted in fact to a mere division among the members of their common property.

[The government contended, on the other hand, that as matter of law, a partnership may sell to its members; that the method of disposing of malt liquors adopted by the club amounted to more than a mere division among themselves of their common property, inasmuch as they bought of the wholesale dealers, and owned equally, but divided unequally; that the parties receiving more than their share paid the club therefor; that the whole transaction was in form and substance a sale, and, therefore, that the club was liable to pay the tax in question, and any member thereof criminally responsible for failing so to do.] [2]

P. Cummings, for the United States.

M. F. Dickinson, Jr., and J. Fox, for defendants.

LOWELL, District Judge. The question raised by the motion for a new trial is, whether a club or association of persons, not incorporated, combining together to promote social and literary objects, are to be considered a retail dealer or dealers in malt liquor under the circumstances proved at the trial, so as to be liable to an annual tax of twenty dollars, under chapter 36, § 18, of the act of 1875 (18 Stat. 311). The club bought lager beer at wholesale, and the members of the club, and no others, were permitted to take beer at the rooms of the club, upon giving as many checks as they received glasses of beer. The checks cost the members five cents each, and the price was intended to cover the cost of the beer, though there was sometimes a small profit.

There seems to me to be no doubt that the club sells the beer to its members. Every element of a sale is present: the delivery of beer on the one part, and the payment on the other. It was argued that, at common law, a man cannot buy of himself and others. This is a mistake. The common law recognizes such a sale, though, if the contract is executory, the common law has no mode of enforcing it.

The true question is, whether such sales make the association a dealer under the statute. The question is one of much importance, from the number of such clubs throughout the country, many of whom, it is said, have conceded the point rather than undertake a contest with the United States. But I am not aware that it has been passed upon by any court.

If I am right in saying that the beer is sold by the club to its members, the club is within section 18, above referred to, and the question is, whether the generality of these words is to be restricted by a consideration of the subject-matter, or by the words of section 16, which speaks of the same persons as dealers and as those "who shall carry on the business." &c. If the question were merely whether the club carries on the business of beer-selling, there would seem to be great doubt; but section 18 appears to be intended to define such dealers with as much exactness as may be, and, if so, the ordinary definition of dealers, or persons carrying on a business, is of no importance. Take the case of distillers and brewers. They were originally defined as persons who distilled or brewed for sale (12 Stat. 456); but these two words have been left out of

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 13 Alb. Law J. 240, and 23 Pittsb. Leg. J. 151, contain only partial reports.]

[2] [From 3 Cent. Law J. 270.]

all the later statutes, and it is conceded on all hands that a person who distils spirits or brews beer, though not for sale, carries on the business of a brewer or distiller; though, in ordinary speech, one who distils for his own use merely, would not be said to carry on the business of a distiller.

This is a revenue law, and the decisions of the supreme court require us to construe it liberally in favor of the revenue, to prevent evasions. So construed, I think it must be held that any course of selling, though to a restricted class of persons and without a view to profit, is within its meaning.

The only case cited at the argument (Com. v. Smith, 102 Mass. 144) was a decision under a highly penal statute, which creates an artificial nuisance when premises are used for the illegal sale of intoxicating liquors. The supreme judicial court in that case held that the judge at the trial had erred in ruling, as matter of law, that certain facts proved the defendant to be a seller, and that it should have been left to the jury to say whether he was so. The defendant was member and agent of a club; but the evidence was consistent with the possibility that the agent merely divided the liquors among the members in the precise proportions in which they had paid for those very liquors on their purchase from the importer. No such point is raised by the evidence in this case. The sales here were for checks which cost a certain sum of money, and it was not the intention of the club to divide its beer among those persons who bought it from the dealers. Besides, while I agree that every statute must be construed according to its intent, there is a certain amount of truth left in the old maxim, that penal statutes should be construed strictly; and it may be that a court ought to give the same word a more limited meaning in a statute intended to punish public immorality, than in one intended for raising revenue.

Upon the whole, therefore, I am of opinion that the verdict of guilty was well warranted by the facts, and that the motion for a new trial must be denied. Motion denied.

Case No. 16,749.

UNITED STATES v. The W. K. MUIR AND The DAVIDSON.

[Cited in The Daniel Ball, Case No. 3,564. Nowhere reported; opinion not now accessible.]

Case No. 16,750.

UNITED STATES v. WONSON.

[1 Gall. 5.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

CIRCUIT COURTS—REVIEW OF DISTRICT COURT—APPEAL AND ERROR.

No appeal lies from the district to the circuit court in any causes, except civil causes of admiralty and maritime jurisdiction. Therefore in debt for a penalty, tried in the district court, no appeal lies. Where a cause has once been tried by a jury in the district court, there cannot, even supposing an appeal lay, be a new trial by a jury at the circuit court. A writ of error is the proper process to correct the errors of the district court in common law actions. See Curtis, Adm. Dig. tit. "Appeal," pp. 53–60.

[Cited in Stearns v. Barret, Case No. 13,337; Mayer v. Foulkrod, Id. 9,341. Approved in Westcott v. Bradford, Id. 17,429. Cited in U. S. v. Jarvis, Id. 15,469; Kennedy v. Bank of State of Georgia, 8 How. (49 U. S.) 611; Knickerbocker Ins. Co. v. Comstock, 16 Wall. (82 U. S.) 269; Ruddick v. Billings, Case No. 12,110; U. S. v. 37 Barrels of Rum, Id. 16,467.]

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

This action was debt for a penalty incurred under the 3d section of the embargo supplementary act, Jan. 9, 1808, c. 8 [2 Stat. 453]. The defendant [Samuel Wonson, Jr.] pleaded in the district court, the general issue, nil debet; upon which issue was joined, and a verdict was found for the defendant; upon which the district court gave judgment for the defendant [case unreported], and the United States filed an appeal to this court. And now at this term two questions were made.

George Blake, U. S. Dist. Atty.
William Prescott, for defendant.

STORY, Circuit Justice (the District Judge not sitting in the cause), after stating the facts, said:

Two questions have been argued: (1) Whether this action, being a common law suit, can be brought before this court by appeal, or ought not to be by writ of error. (2) Supposing the action rightfully before the court, whether the facts are again to be submitted to a jury in this court, or the appeal submits questions of law only for the consideration of the court.

By the judiciary act of 1789, c. 20, § 21 [1 Story's Laws, 61; 1 Stat. 83, c. 20], an appeal is given from the district court to the circuit court from final decrees in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of $300, exclusive of costs. And by the 22d section of the same act, final decrees and judgments in civil actions in the district court, where the matter in dispute exceeds the sum or value of $50, exclusive of costs, may be re-examined in the circuit court by a writ of error. In the language of this act, there is a marked distinction between appeals and writs of error; the former being applied to admiralty, the latter to common law proceedings. And so it was considered by the supreme court of the United States, in Wiscart v. D'Auchy, 3 Dall. [3 U. S.] 321, and in U. S. v. Goodwin, 7 Cranch [11 U. S.] 108. Under this statute of 1789, it is very clear that the appellate jurisdiction of the circuit court, in civil actions at common law, could be exer-

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

cised by way of writ of error only, and not by appeal.

But it has been supposed, that the act of 3d March, 1803, c. 93, § 2 (6 Laws [by authority], 315 [2 Stat. 244, c. 40]), has given the remedy by appeal, as well in common law as in admiralty actions, where the sum exceeded $50. That act provides, "that from all final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute exclusive of costs shall exceed the sum or value of $50, shall be allowed to the circuit court next to be holden in the district where such final judgment or judgments, decree or decrees, may be rendered; and the circuit court or courts are hereby authorized and required to receive, hear, and determine such appeal;" and from all final judgments, or decrees, rendered, or to be rendered, in any circuit court, &c. in any cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, an appeal, where the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000, shall be allowed to the supreme court of the United States. This act does not in terms repeal the appellate jurisdiction of the circuit court by writ of error in civil actions, provided by the act of 1789. And unless such were the intention of the legislature, we ought not to construe the repeal as within the purview of the act. That the process by writ of error yet remains, as provided by the act of 1789, seems admitted by the invariable practice in every other circuit, and was conceded by the court in the case of U. S. v. Goodwin, 7 Cranch [11 U. S.] 108.

But it is argued, that even if the remedy by error remain, yet the act of 1803 has given the party an election to proceed by appeal, and that the expression, "all final judgments," is peculiarly pointed to common law proceedings, and "all final decrees" to admiralty proceedings. It seems admitted, that if the expression had been confined to the words, "all final decrees," the act would have been restrained to the latter proceedings. But it is very clear, that the word "judgment" is not used in the act in contradistinction to "decree," but rather as explanatory or equivalent. For in the same clause, the word "judgment" is exclusively applied to admiralty, and equity and prize causes. If then the word be not used in a sense manifesting a restriction to common law actions, the argument built upon it is without foundation.

Upon the construction urged by the United States, the parties below would have a right to an appeal to the next circuit court, or to a writ of error within five years to the same court. And yet in either case, as I shall presently show, the same points, and none others, would come before the court. Can it be imagined, that the legislature could intend a difference of remedy in cases where no benefit could arise? or to provide for the re-examination of the same cause at the next court only, and yet at the same time provide for its re-examination within five years? In order to understand the act of 1803, let us consider the mischiefs, which were supposed to exist previous to its passage. In the first place, common law causes might be re-examined in the circuit court, where the sum in dispute exceeded $50; but admiralty causes could not be re-examined, unless the sum in dispute exceeded $300. This was an inequality difficult to sustain upon any acknowledged principles. For, generally speaking, admiralty causes might involve as important and intricate questions, as the questions on the other side of the district court. In the next place, causes of admiralty and maritime, as well as of equity jurisdiction, were in all the superior civil law courts reviewed by the process of appeal, and not of error. The nature and effect of an appeal, and the manner of conducting it, were well understood in causes of this character. But the act of 1789 had provided, that equity and admiralty causes should be re-examinable in the supreme court by writ of error. See Mayer v. Foulkrod [Case No. 9,341]; 1 Kent, Comm. (5th Ed.) 342, note a; 4 Kent, Comm. (5th Ed.) 278, note. Much embarrassment arose from this restriction; and it was very early decided, that in such cases the court could not examine any facts, but what appeared in the decree of the court below; and that if there was no statement of facts in the decree, the parties were forever precluded from correcting an erroneous decision. Wiscart v. D'Auchy, 3 Dall. [3 U. S.] 321; Jennings v. The Perseverance, Id. 337; Blaine v. The Carter, 4 Dall. [4 U. S.] 22; U. S. v. Hooe, 1 Cranch [5 U. S.] 318. In admiralty and prize causes, foreign sovereigns, as well as foreign subjects, might be deeply interested in the investigation of the facts, as well as the law of the case. In equity causes, the decree was necessarily shaped in many instances by a minute inquiry into facts, and the result of the evidence, as well as the propriety of relief, were questions almost inseparably connected. An appeal in both classes of causes, would enable the highest tribunal of the nation to dispense justice with greater certainty, and greater satisfaction, than the mode already prescribed, entangled as it was with the technical niceties of the common law. Considerations of this nature, combined with the acknowledged benefits of an adherence to established usages, could not fail to attract the attention of the legislature. And accordingly first by the act of 1801 [2 Stat. 89], which I shall hereafter consider, and subsequently by the act of 1803, now before us, the legislature placed admiralty and common law causes, as to appellate jurisdiction, in the same grade; and gave a remedy by an appeal to the supreme court (instead of a writ of error) in causes of admiralty, prize and equity jurisdiction.

If then the apparent mischiefs are completely done away; if the obvious intention

of the act is satisfied; if the remedy, as to a review of the law, is in full force; why, let me ask, should we extend the construction of doubtful expressions beyond these legitimate purposes?

The construction of the act, which I have assumed, is, as I apprehend, illustrated and aided by reference to the judiciary act of 13 Feb. 1801, c. 75 [2 Stat. 89, c. 4], which was soon afterwards repealed. The second section of the act of 1803, is a substantial, and so far as this inquiry extends, is a literal re-enactment of the 33d section of that act. 5 Smith's Laws, 253 [2 Stat. 98]. The 34th section of the same act provides, that all final judgments in civil actions at common law in any circuit courts, whether brought there by original process, or removed there from the state courts, and "all final judgments in any of the district courts of the United States may, where the matter in dispute, exclusive of costs, shall exceed the sum or value of $2,000," be re-examined by a writ of error returnable to the supreme court of the United States.

Now it has been held, that as the law stood after the passing of this act, and before its repeal, the parties had an election, where the cause exceeded the value of $2,000, to carry it, under the act of 1789, by a writ of error from the district to the circuit court, but without the privilege of proceeding further; or under the 34th section of the act of 1801, to proceed with the cause by the same process directly to the supreme court, passing by the circuit court. Yet if it were true, that under the 33d section of the act of 1801, (a substantive original of the 2d section of the act of 1803) a civil action at common law might have been carried by appeal to the circuit court, where it exceeded $2,000 in value, it might afterwards, under the act of 1789, have been removed by writ of error to the supreme court; although, if the same cause had been carried to the circuit court by writ of error, (which might well be), and not by appeal, the supreme court would have had no jurisdiction. It would, therefore, on such construction, be in the power of the appellant or dissatisfied party, to give or oust the jurisdiction of the supreme court in the same cause; not from any difference of the nature of the questions to be reviewed, but merely from the nature of the process to be employed. Against the obvious intention also of the act, he might obtain the opinion of three successive courts, when the law studiously pointed the election to one of two, the circuit or the supreme court. If such a construction were not admissible under the act of 1801, neither can it be under the act of 1803. The language is the same in both; and the words are completely satisfied by restraining the "judgments and decrees," from which an appeal lies, to those rendered in admiralty and maritime proceedings, leaving civil actions at common law, as they stood under the act of 1789. If, indeed, a contrary legislative intention were apparent, we should bow to it. But as such intention may well be doubted; as the inconveniences, which I have suggested, would arise from the construction now contended for by the United States; and as an uniform practice to the contrary has prevailed in every other circuit, and seems to have been recognised by the supreme court itself; there seems little reason at this time to presume, that the legislature could intend to subject the appellate jurisdiction of its courts to such unmeaning niceties.

My opinion accordingly is, though it is formed with much diffidence, that the act of 1803, so far as it respects the district court, uses the word appeal in a technical sense, and applies it to "decrees and judgments" in causes of admiralty and maritime jurisdiction only. So that now such causes may be removed to the appellate court, where they exceed $50 in value; whereas, before that time, they must have exceeded $300 in value. As to the appellate jurisdiction in civil causes at common law, it remains to be exercised by way of writ of error, regulated by the provisions of the act of 1789. But it is not my intention, whatever might be my opinion, to rest the present cause on this point. The second point which has been argued, involves a question of a magnitude vastly more important; and as (in my opinion) the decision of it definitely disposes of the present cause, I shall confine my judgment to it.

Supposing the present cause is rightly before the court, it is admitted, that there are no errors apparent upon the record, which require the correcting power of the court. The counsel for the United States propose to try, by a new jury, at the bar of this court, the whole facts which have been settled by the verdict of a jury in the court below, and on which, it is admitted, that court delivered a right judgment. This right is claimed, not from any error, for which a new trial ought to be granted, at the discretion of the court, but as an inherent right of the party, to be exercised at his own discretion, and grounded upon the nature of the process, by which this cause has been removed to this court; viz. an appeal. If by law the United States have this right, it is the duty of the court to grant the new trial, whatever might be their own opinion, as to the wisdom or danger of such a practice. But, called upon to examine the ground of this right, I can neither shrink from the inquiry, nor hesitate in pronouncing my own decision. I have examined the question with deliberation and care; and if I am wrong in the result, I have the consolation to know, that there exists a higher tribunal, competent and willing to review my errors, and to apply an adequate remedy. No clause has been shown, and none probably exists in the laws of the United States, which in the most distant manner hints at such a second trial. It rests altogether upon the local practice in our state courts, and is engrafted on a word first used by, and now

generally confined to, courts which never acknowledged the trial by jury. The word "appeal" comes from the civil law, and the nature and operation of an appeal, in its technical sense, cannot be a subject of doubt in the proceedings of courts governed by that law. It is sometimes, indeed, used with us in legal language to denote the nature of appellate jurisdiction, as distinguished from original jurisdiction, without any regard to the particular mode, by which a cause is transmitted to a superior jurisdiction. In this sense it is used by Blackstone (3 Bl. Comm. 56), where he speaks of the court of exchequer chamber, as a court "that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions." Now it is well known, that this court determines causes brought from the courts of common law, not by way of appeal, but by writs of error. So also the house of peers is considered by the same elegant writer as the supreme court of appeal of the empire. There are some other senses, in which the word occurs in the common law, which I may pass over in silence as they have no application to the present inquiry. Appeal, ("appellatio" in the civil law), is defined "ab inferioris judicis sententiâ ad superiorem provocare:" the removal of a cause from the sentence of an inferior to a superior judge (Calvin. Lex. "Appellatio"; Shep. Abr. "Appeal"); or as Blackstone has expressed it (4 Bl. Comm. 312), a complaint to a superior court of an injustice done by an inferior one. Calvinus, in his Lexicon, has collected the definitions given by many learned civilians; but they all resolve themselves into the above. Each of these definitions accurately states the meaning, but not the mode of prosecution or effect of an appeal.

The remedy by appeal, as known and practised in England, is in a great measure confined (for I speak not of summary proceedings before magistrates, or appeals of death or robbery) to causes of equity, ecclesiastical and admiralty jurisdiction; in all of which no jury intervenes. In the courts possessing these respective jurisdictions, the judge is in general the sole arbiter of fact and of law, and the mode of proceeding is borrowed, almost exclusively, from the civil law. It is undoubtedly true, that in courts proceeding according to the course of the civil law, an appeal from an inferior to a superior tribunal removes the whole proceedings, and usually, though not invariably, opens the facts, as well as the law to re-examination. Wiscart v. D'Auchy, 3 Dall. [3 U. S.] 321: "Nam in appellatione a sententiâ definitivâ, licet, non allegata allegare et non probata probare;" Clerke, Praxis Adm. tit. 54; Yeaton v. U. S., 5 Cranch [9 U. S.] 281; Cod. lib. 3, tit. 63, § 4; Carth. 474; 3 Bin. 88.

In courts of equity in England it is otherwise, for Blackstone (3 Bl. Comm. 455), speaking on this subject, says, "it is a practice unknown to our law, though constantly followed in the spiritual courts, when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below." And in the appellate courts in England, in proceedings according to the course of the common law, writs of error are the modes, by which these courts exercise their jurisdiction,—and the facts once settled by a jury are, while the judgment remains in force, forever conclusive upon the parties. A verdict of a jury can only be set aside by such courts, where the judgment is reversed, and a venire facias de novo is awarded. We should search in vain, then, in the common law, for an instance of an appellate court re-trying the cause by a jury, while the former verdict and judgment remained in full force. The practice, indeed, seems to be a peculiarity of New England, and, if I am not misinformed, does not exist in more than one (if any) other state in the Union. So early as the year 1642 (Colony Laws, tit. "Appeal," p. 3) a colonial statute of Massachusetts provided for appeals in all cases, civil as well as criminal, from magistrates to the county courts, and from these to the court of assistants, and declared, "that if the point of appeal be in matter of law, then to be determined by the bench; if in matter of fact, by the bench and the jury;" and further, "that in all cases of appeal, the court appealed to should judge the case according to the former evidence, and no other, rectifying what was amiss therein." The practice of appeals thus established, was recognised and confirmed by several provincial statutes, and even extended by the admission of new evidence, and new pleas on the appeal. St. 7 Wm. III. c. 8; 9 Wm. III. c. 2; 11 Wm. III. cc. 1, 3; 13 Wm. III. c. 15. The same practice has continued to the present time, and has been sanctioned by our courts, and by the legislature (St. July 3, 1782, §§ 2, 3, 1 Mass. Law Rep. 71; St. July 3, 1782, § 3, 1 Mass. Law Rep. 74; St. March 11, 1784, § 6, 1 Mass. Law Rep. 147; St. March 16, 1784, § 3, 1 Mass. Law Rep. 160; St. October 30, 1784, § 8, 1 Mass. Law Rep. 160), and is the undoubted privilege of every citizen of Massachusetts in our state courts. But it is a privilege existing by statute, and not by common law, and is considered by our courts as a mere legislative, and not a constitutional privilege. Mountfort v. Hall, 1 Mass. 443. I have reason also to believe that the same practice in the state courts of New-Hampshire (1 Laws N. H. 89) and Rhode-Island depends altogether on statutory law (1 Laws R. I. p. 150, § 3). From the prevalence of this practice in the courts of this and the neighboring states, concurring with the infrequency of appeals from the decisions of the court below, in civil actions at common law, it has happened that this question, if it has not slumbered sub silentio, has at least never received a final decision.

Before the act of 1803, it is very certain that there could not be a second trial by jury in the appellate courts, for the proceeding was by writ of error, which, according to the law of the courts of the states, as

well as of the United States, could in general remove only errors of law, and if affirmed, left the facts decided by the former verdict conclusive on the parties. If, indeed, the act of 1803 gives on all appeals this new trial, however consonant it may be with our own habits, we should recollect that it overthrows the established jurisprudence of at least three fourths of the states, and abolishes a fundamental principle of the common law. Many learned men among ourselves have lamented the existence of reviews and appellate trials, from their pernicious tendency in tempting to the horrible crime of perjury, and in provoking vexatious litigation. These considerations ought not to outweigh the positive regulations of law; but they afford ground to believe, that the counsel for the United States may be contending for what the legislature, at one period, must have considered a mischievous novelty.

Let us now consider the language of the act. It declares "that the circuit court or courts are hereby authorized and required to receive, hear, and determine such appeals;" and in precisely the same words delegates the same authority to the supreme court in the exercise of their appellate jurisdiction. In these words I can discern nothing that alludes to a new trial by a jury. The court (not the jury) are to receive, hear, and determine the appeal; that is, the whole cause brought up by appeal. In many, nay, in a majority of cases, there is nothing to try but facts, and these, when decided, leave nothing for the court to determine. It is certain that these words delegate no authority to the supreme court, to try the facts by a jury in causes coming by appeal before that court. And it will be difficult to contend that the same words, in the same section, applied to the same subject matter, are to receive a different construction. Nor can the word "appeal" be with propriety allowed, as importing a re-examination of the facts by a jury. Its received sense in other legislative acts is obviously different (Act Feb. 27, 1801, § 8; 5 Smith's Laws, 270 [2 Stat. 106]), and in the language of the civil, and even the common law, it is directly the reverse. Further: the same section provides, that "such appeals shall be subject to the same rules, regulations and restrictions, as are prescribed in law in case of writs of error." Now by law (Act 1789, § 22) there can be no reversal of a judgment for any error of fact, nor for error in ruling a plea in abatement; and writs of error may be brought within five years, and security must be taken to prosecute such writs and to answer damages and costs, before the writs of error are allowed. It is contended that this clause is confined to appeals to the supreme court, and does not extend to appeals to the circuit court, because such appeals must be to the next court. If this be true, ought it not to induce a doubt, whether the legislature could have intended to apply the remedy by appeal to cases, which were before remediable by writ of error in the circuit court; since errors in ruling pleas in abatement and errors of fact would be subjected to revision? Security to pay damages and costs was requirable in all cases where a writ of error lay, but not where an appeal lay, by the act of 1789. If the clause now alluded to, refers to the supreme court only, as the propriety of security in the one court, as well as the other, would seem to result from the same probable mischiefs, the argument would rather incline to show, that the appeals to the circuit court were considered as restrained to admiralty causes, in which no security had been required by the former law. But I do not so construe the clause. The whole is coherent in language and in grammar; and construing it distributively, it may well be maintained, that an appeal to the circuit court should be governed by the same rules and regulations, as a writ of error, viz.—that nothing but errors of law could be examined;—and by the same restrictions, viz. the taking of security to prosecute the appeal with effect and to pay all costs and damages. Where the language of the law pointed to so reasonable a course, I should feel no desire, by any ingenuity of construction, to escape from so beneficial a result.

It has been further argued, that the 34th section of the act of 1789 (1 Stat. 92), which provides "that the laws of the several States, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States where they apply," authorizes the court to retry this cause by a jury, in consonance with the laws of this commonwealth. If this argument were correct, the courts of the United States would be completely governed by the state practice in all cases; and reviews with all their accompaniments would be the familiar guests of the circuit court. Nay, even a new trial had in the present case would not be final, but it might again be reviewed. But it is very clear, that such has not been the construction of that section. Its true exposition is, that the rights of persons and rules of property, as settled in the states, shall be guides to the courts of the United States in controversies depending before such courts. See Swift v. Tyson, 16 Pet. [41 U. S.] 1, 18. As, for instance, the mode of conveying real estate by deed or by will, the right in cases of intestacy of the heirs, in the descent and distribution of estates. In the case of Massie v. West, 6 Cranch [10 U. S.] 148, which was a suit in equity before the circuit court of the United States, the facts had been found by a jury in conformity to the state

practice in the chancery courts in Kentucky; but the court set aside the verdict as founded in irregularity.

I have examined the subject thus far upon the supposition, that it depended altogether upon the acts of the legislature. But it takes a higher range, and involves the exposition of a great constitutional right. Whenever it becomes our duty to decide on the constitutionality of laws, sound discretion requires, that the court should not lightly presume an excess of power by the legislative body; nor so construe the generality of words, as to extend them beyond its lawful authority, unless the conclusion be unavoidable. The constitution of the United States provides "that the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as congress shall make." At the time when the constitution was submitted to the people for adoption, one of the most powerful objections urged against it was, that in civil causes it did not secure the trial of facts by a jury. And that the appellate jurisdiction of the supreme court, both as to law and fact, would enable that court, with or without a new jury, to re-examine the whole facts, which had been settled by a previous jury. The advocates of the constitution endeavored to remove the weight of this objection by showing, that it was within the authority of congress to provide in all cases for the trial by jury; and that the appellate jurisdiction of the supreme court as to facts, did not necessarily include a re-examination of the facts so settled by a jury; and further, that it might be with the strictest propriety held, that when a writ of error is brought from an inferior to a superior tribunal, the latter had jurisdiction of the fact as well as of the law, and this was all the constitution intended. Whoever will read the commentary on the constitution, entitled "The Federalist," will learn how deeply the subject at that time interested the several states of the Union, and with what singular zeal and acuteness it was discussed. I advert to this work with the more readiness, because it is the acknowledged production of three eminent statesmen, of whom one was afterwards elevated to the highest judicial office in the country, and to him the comments on the judicial department have been generally attributed. 2 Federalist, No. 81, No. 83.

With this view of the defects of the constitution as to the trial by jury, and of the apprehensions entertained of new trials by the appellate courts, we shall be able to comprehend the scope and object of the amendment, which was proposed, and almost immediately and unanimously adopted, as part of the constitution. It is in these words: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. And no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law. Now, according to the rules of the common law the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire facias de novo is awarded. This is the invariable usage settled by the decisions of ages. Upon a writ of error, the appellate court can examine in general errors of law only, and never can re-try the issues already settled by a jury, where the judgment of the inferior court is affirmed.

According to the obvious intention of the amendment, the legislature then could have no authority to give an appellate jurisdiction, the power to re-examine by a jury the former decision of another jury, while the judgment below stood unreversed. As little reason could there be to imagine the legislature would voluntarily transcend its constitutional authority. The language must be very clear and precise, which would impose on the court the duty of declaring the solemn act of the legislature to be void. The court could never incline so to construe doubtful expressions, much less to seek astutely for hidden interpretations, which might darkly lead to such a result. The word "appeal" has no acknowledged general sense necessarily involving such a conclusion even in this commonwealth; and certainly in the common and civil law it can find no foundation, on which it may rest. It is not a little remarkable, that the most strenuous objection against the constitution originally contemplated a reverse sense of the word, viz. that the court, and not the jury, might review the facts. If this be true, then the present attempt, to claim of right a new trial in the appellate court, is a novelty, to which we are bound to answer "Nolumus leges communes mutari."

On the whole, on this last point I am clearly of opinion, that an appeal in a common law suit from the district court removes errors of law only for the consideration of this court; and that we are bound to deny a new trial of the facts by a new jury. As it is admitted there are no such errors of law on record, the judgment of the court below ought to be affirmed. The view, which I have taken of this point, seems in my judgment to add strength to the opinion expressed on the former point. I will only remark in confirmation of my opinion on both points, that on a careful inquiry, I find that the invariable practice in every other circuit is, in like cases, to bring the suit by writ of error, and not by appeal before this court; and that no instance has ever occurred, in which a new trial by the jury has been al-

lowed in the appellate court. See, also, Ross v. Rittenhouse, 2 Dall. [2 U. S.] 160.

There were a great number of causes on the docket standing on the same ground, and as the district attorney ultimately expressed himself satisfied with the opinion of the court, and declined to have a re-examination at the supreme court, the circuit court ordered this cause, as well as all the others, to be dismissed for want of jurisdiction.

Case No. 16,751.

UNITED STATES v. WOOD.

[Nowhere reported; opinion not now accessible.]

Case No. 16,752.

UNITED STATES v. WOOD et al.

[13 Blatchf. 252.] [1]

Circuit Court, N. D. New York. Jan. 20, 1876.

ARMY PAYMASTER—ACTION ON OFFICIAL BOND—EVIDENCE.

On the trial of a civil action by the United States against the sureties on the official bond of an assistant paymaster in the army, it is erroneous to allow evidence to be given by the defendants of the general conduct of the officer in the discharge of his official duties, and of his mode of life and pecuniary circumstances, even though he is dead.

[Cited in Hawloetz v. Kass, 25 Fed. 767.]

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

This was an action against the sureties on the official bond of one Scholefield, an assistant paymaster in the army, brought in the district court. At the trial, there was a verdict for the defendants [David S. Wood and others] and the United States brought the case into this court by a writ of error.

Richard Crowley, U. S. Dist. Atty.

Conkling, Lord & Coxe, for defendants in error.

WALLACE, District Judge (after disposing of sundry exceptions). The remaining exceptions in the case involve the question, whether it was error to permit the defendants to give evidence of Scholefield's general conduct in the discharge of his official duties, and of his mode of life and pecuniary circumstances. It is not surprising that the peculiar hardship of the position of the defendants upon the trial induced the learned judge who presided to give them the benefit of any doubts that might arise upon questions of evidence. Scholefield died in 1869, and it appeared inferentially that he was never aware that he had been charged with the $10,000 in dispute. After his death, many of the papers were lost or destroyed, and the person who had been his clerk while assistant paymaster died while prosecuting an examination into the matters in controversy. Hodge had been convicted as a defaulter for a large amount, and was in prison under his sentence, and no assistance from him could be reasonably expected. The defendants were, therefore, deprived to a great extent of means of defence, and, as they were strangers to the transaction involved, their situation appealed strongly to the court, and justified the utmost liberality in the application of the rules of evidence to their defence. These considerations, while they might and justly should influence the determination of doubtful questions upon the trial, cannot be permitted to prevail over convictions which are arrived at upon a deliberate review of the case.

I am constrained to hold that the evidence excepted to was erroneously received. In criminal cases it is always competent to permit the accused to give evidence of general good character. But, in such cases, where the offence is clearly proved, it is incumbent on the court to instruct the jury that such evidence is not entitled to great consideration. In civil actions, the authorities are adverse to permitting such evidence, irrespective of the nature of the action. In the case of Ruan v. Perry, 3 Caines, 120, it was held to be admissible in actions where the party offering it is charged with fraud or a tort involving moral turpitude, and this doctrine has been quoted approvingly by other authorities, when limited to cases where the wrongful act complained of is established by circumstantial evidence or by the testimony of witnesses of doubtful character (Townsend v. Graves, 3 Paige, 455, 456); but the later decisions in the same state repudiate it and adopt the rule in England, that the evidence is only admissible in a direct prosecution for a crime (Flower v. Aetna Fire Ins. Co., 6 Cow. 675; Gough v. St. John, 16 Wend. 646). Upon the trial of an information for keeping false weights it was excluded (Attorney General v. Bowman, 2 Bos. & P. 532, note); also, in an action for divorce (Humphrey v. Humphrey, 7 Conn. 116). Nor does the fact that the person is dead whose fraudulent or wrongful act is the subject of the action permit any relaxation of the rule (Anderson's Ex'rs v. Long, 10 Serg. & R. 55; Nash v. Gilkeson, 5 Serg. & R. 352); and the reason for the rule is, that the evidence must apply to the particular fact in dispute (Givens v. Bradley, 3 Bibb, 195), or, as stated by Chief Justice Savage, "the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties." The evidence received in this case is more objectionable than that which I have referred to. Its effect was not to prove the general character of Major Scholefield, but his special characteristics as a paymaster. The effort was to prove the general manner in which he discharged his official duties. It was none the less incompetent because this evidence was given by those who spoke from

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

personal observation of his conduct. However exemplary his conduct may have been, and however faithful and accurate the discharge of his general official duties, evidence of this could not throw any light upon the particular transaction involved. Numerous cases can be cited, where the issue was one involving negligence, which hold that proof of negligence or of care upon other occasions than the one which is the direct subject of investigation, cannot be permitted. Barker v. Savage, 1 Sweeny, 288; Warner v. New York Cent. R. Co., 44 N. Y. 465. As well might it be contended that it would be competent to show, in an action involving the question of usury or fraud or breach of contract, the general conduct of the person charged to be inconsistent with the particular transaction involved, as to assert it of the evidence admitted here. Even in criminal cases, where the vital inquiry was as to the conduct of the deceased at the time when he was killed, evidence to show what his usual conduct was under similar circumstances has been held incompetent. State v. Thawley, 4 Har. [Del.] 562; State v. Barfield, 8 Ired. 344; Jolly v. State, 13 Smedes & M. 223. The tendency of this evidence was inevitably to mislead the jury. Very many of the cases which I have cited were those where the admission of such testimony was held fatal to the verdict.

I do not deem it necessary to discuss the exceptions taken to other evidence received upon the trial. The judgment of the court below must be reversed, and the cause remanded for a venire de novo.

Case No. 16,753.

UNITED STATES v. WOOD.

[2 Cranch, C. C. 164.] [1]

Circuit Court, District of Columbia. April Term, 1819.

COUNTERFEITING BANK-NOTE—PEREMPTORY CHALLENGES.

1. A defendant indicted for counterfeiting a bank-note in Alexandria, D. C., is entitled to a peremptory challenge, it being felony without benefit of clergy, by the Virginia acts of December 19, 1792, and December 8, 1794.

2. Falsely altering a promissory note in a material part, with intent to defraud any person, is a forging within the meaning of the statutes.

Indictment [against George Wood] for counterfeiting a note of the Mechanics' Bank of Alexandria.

Mr. Mason, for defendant, contended that the statutes of December 19, 1792, and December 8, 1794, do not punish the altering of a note; that altering is not forging, or counterfeiting, or making. The note had been originally a note of the Merchants' Bank, which had failed, and was altered so as to purport to be a note of the Mechanics' Bank, which was in good credit.

THE COURT (THRUSTON, Circuit Judge, absent), on the prayer of Mr. Jones, for the United States, instructed the jury that the falsely altering of the note in a material part, with intent to defraud any person, was a forging, within the meaning of the statutes.

Verdict not guilty.

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

Case No. 16,754.

UNITED STATES v. WOOD.

[2 Gall. 361.] [1]

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

RESISTING OFFICER — INSPECTOR OF CUSTOMS — RESIGNATION OF COLLECTOR.

The office of an inspector of the customs ceases with that of the collector who appointed him, and an indictment for resisting such inspector after the resignation of the collector, and before his being reappointed to office by the succeeding collector, cannot be sustained.

Indictment for resisting one Lewis, an inspector of the customs, in the execution of the duties of his office, founded on the 71st section of the act of March 2, 1799, c. 128 [3 Bior. & D. 200; 1 Stat. 678, c. 22]. At the trial, it appeared that Lewis was duly appointed an inspector of the customs by the late collector of Boston, since whose resignation he had been reappointed to the same office by the present collector, but the alleged resistance took place after the resignation of the former collector, and before the reappointment of Lewis, he having continued to act as inspector under his old commission. The question reserved at the trial was, whether Lewis was, under the circumstances, an inspector, against whom the offence could be committed.

G. Blake, for the United States.

J. T. Austin, for defendant.

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

STORY, Circuit Justice. The twenty-first section of the act of March 2, 1799, c. 128, provides, that the collectors of the customs shall, with the approbation of the principal officer of the treasury department, employ proper persons as weighers, gaugers, measurers and inspectors, at the several ports within their districts. The officers appointed by the collectors under this section hold their offices during his pleasure; and cease to be such upon his death, removal, or resignation, unless the law has enabled him to give more permanency to their offices. In respect to certain officers, the law has provided for the execution of their duties after their principal is out of office. Vide Rex v. Corporation of Bedford Dock, 6 East, 356.

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

Such, in case of the death of the collector, is the authority vested, by the 22d section of the act, in his deputy. No such provision exists in respect to inspectors. They depend for their employment upon the good will of each successive collector, and in practice it has always been understood, that unless appointed, or, in the language of the statute, employed by the collector actually in office, they are no longer officers of the customs. The indictment, therefore, cannot be sustained, and the defendant is entitled to judgment.

Case No. 16,755.

UNITED STATES v. WOOD et al.

[5 Hunt, Mer. Mag. 170.]

Circuit Court, S. D. New York. April Term, 1841.

INSOLVENCY—PRIORITY OF THE UNITED STATES—JUDGMENT FOR FRAUDULENT IMPORTATION OF GOODS.

[A judgment in favor of the United States arising out of a fraudulent entry of goods by the judgment debtor is, in case of his insolvency, entitled to the same preference given by section 65 of the act of 1799 [1 Stat. 676] to bonds for the payment of duties; but such priority is only conferred by the statute in case of insolvency proved by the assignment of all the debtor's property. An assignment of only part thereof gives no right to the preference.]

On the 23d October, 1839, the United States recovered judgment against the defendant Wood for $12,469.14. The foundation of the judgment was that Wood had fraudulently entered goods at the custom-house at this port at prices below their actual cost abroad, and had thus evaded the payment of the duties due on their importation. John Wood, from whom the goods were purchased in England by the defendant, became bankrupt, and his assignees employed the other defendant, Ives, to collect or secure the debt owing by Samuel R. Wood to John Wood, and arising chiefly out of sales of the goods so imported. On the 30th of May, 1838, Ives obtained of Samuel R. Wood an assignment of a large amount of property to cover that debt. On the next day Ives executed to S. R. Wood a certificate or stipulation to the effect that "the following securities are to be applied to the amount due by said S. R. Wood to John Wood in the first place, and to his other creditors and the expenses attending the collection and securing the same, and the balance I agree to reconvey and redeliver to him," and then followed a description of the property and securities assigned.

On the 28th of April, 1840, the United States filed a bill in equity against the defendants upon these facts, and claimed priority of payment out of the property so assigned. The answer denied that the assignment was of the entire estate of Wood, or that it was made because of his insolvency, and averred, that it was a partial assignment intended to secure a specific debt only. By arrangement between the parties, Ives was examined as a witness on the part of the United States, and detailed the circumstances leading to and attending the assignment; but stated that the assignment at the time was not understood to embrace all of Samuel R. Wood's property; his household furniture, represented to be worth several thousand dollars, was not included, etc.

Mr. Hoffman, Dist. Atty., and Mr. Butler, for the United States.

Mr. Foote, for defendants.

Before THOMPSON, Circuit Justice, and BETTS, District Judge.

THE COURT observed that if the debt due the United States is entitled to the preference secured by the impost act of 1799 (section 65) to bonds given for the payment of duties, yet such priority was conferred only in case of insolvency proved by the assignment of all the debtor's property. The language of the act plainly looks to this condition, and no adjudication of the United States courts or state courts has given it a greater extent. [U. S. v. Hooe] 3 Cranch [7 U. S.] 73; [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 386, 1 Paige, 139; U. S. v. Clark [Case No. 14,807]. The United States must establish by clear proofs their right to come in as creditors of the first degree. When the assignment purports to convey all the debtor's estate, that may be sufficient evidence per se, but, this assignment not being of that character, the plaintiff must supply the proof aliunde. If the receipt or stipulation of Ives to Wood may import that the whole of Wood's estate was conveyed, still it is susceptible of explanation by parol proof, and the testimony of Ives shows that it was designed as an acknowledgment only of the amount of property transferred, and the conditions upon which it was received. This testimony, corroborative of the answer, is full to the fact that the assignment was of parcels of Wood's estate only, and for the specific object of securing the debt which Ives represented. The United States accordingly lay no foundation for their claim of priority, if such right may be considered to exist even where no bond has been taken or credit given.

But the evidence, as it now stands, exhibits Ives as a general trustee of Wood's creditors for the surplus in his hands. The plaintiff, as such creditor, would be entitled to enforce the trust in this form of action. [U. S. v. Howland] 4 Wheat. [17 U. S.] 108, and note 118. The bill can, therefore, be retained for that object, and the suit be prosecuted to the appropriate decree. Order accordingly.

[See Case No. 16,755a.]

Case No. 16,755a.

UNITED STATES v. WOOD.

[N. Y. Herald, Jan. 13, 1840.]

District Court, S. D. New York. Jan. 11, 1840.

IMPRISONMENT FOR DEBT — ACT ABOLISHING — DEBTS FRAUDULENTLY CONTRACTED— DUTIES ON IMPORTS.

[1. The act of congress abolishing imprisonment for debt applies to any continuing imprisonment or detention under arrests made prior to its enactment.]

[2. Money due the United States as duties on imports is a debt fully contracted immediately on the importation of the goods. Therefore fraud of the importer in inducing the government to accept less than the whole sum due does not make the balance a debt fraudulently contracted, so as to subject importer to arrest in a civil suit to recover such balance].

[Cited in brief in U. S. v. Hewes, Case No. 15,359.]

[This is an action of debt by the United States against Samuel Wood to recover the duty on certain importations.]

The defendant's counsel moved the court to discharge his client from the sureties he had entered into, in the civil suits which had been instituted by the district attorney, for the recovery of certain duties alleged to be due to the government. Wood was tried on an indictment for perjury. In that case the court had released his bail. [Case No. 16,751.]

The district attorney having been heard in opposition, BETTS, District Judge, delivered the judgment of the court.

In this case the defendant was arrested in the civil action before the act of congress was passed abolishing imprisonment for debt, &c. But the decisions of this court, and the first court of this district, have uniformly been, that the act applies to any continuing imprisonment or detention equally as to the first arrest. The action is debt to recover duties owing from the defendant to the United States, and is therefore in its nature within these provisions. The debt or obligation was contracted or complete on the importation made by the defendant. The United States recovered in this court, in this cause, upon the ground that the defendant came under an indebtedness to them when his importations were made, which he had not fully discharged; but that he had, by false representations, induced the United States to accept as evidence of that indebtedness—subsequently payment of it—an amount less than the true sum. The indebtedness or obligation was not fraudulently contracted, nor did it result from fraud. The fraud was directed only to a concealment of the real sum that should have been paid. I am of opinion, therefore, that the defendant is entitled to his discharge. Let an order be entered accordingly.

[See Cases Nos. 16,751 and 16,755.]

Case No. 16,756.

UNITED STATES v. WOOD.

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

Circuit Court, E. D. Pennsylvania. Oct. Term, 1818.

ROBBING MAIL—EVIDENCE AT FORMER TRIAL—LIST OF WITNESSES—"PUTTING IN JEOPARDY."

1. Indictment for aiding and assisting in the robbery of the mail; putting the life of the carrier in jeopardy, by means of dangerous weapons; and for robbing the mail.

2. What a witness (since dead) swore at the former trial of this indictment, may be proved by a person who was present, and heard his testimony; provided he can repeat the testimony as the witness gave it, and not merely what he conceives to be the substance of it. He may refresh his memory from notes, taken at the time; or from a newspaper, printed by him, containing the evidence as taken down by himself.

[Cited in U. S. v. Macomb, Case No. 15,702; U. S. v. Angell, 11 Fed. 42.]

[Questioned in Iglehart v. Jernegan, 16 Ill. 521. Cited in Barnett v. People, 54 Ill. 330; State v. Wilson, 24 Kan. 195. Disapproved in Young v. Dearborn, 22 N. H. 376. Cited in Com. v. Richards, 18 Pick. 438, 440; Summons v. State, 5 Ohio St. 345. Cited in brief in Marsh v. Jones, 21 Vt. 380; Earl v. Tupper, 45 Vt. 281.]

3. The 28th section of the act of congress, for punishing certain crimes, passed April 30, 1790 [1 Stat. 118], which requires a list of the witnesses to be delivered to the prisoner, three days before the trial, is confined to treason; nothing more being required, in any other capital offences, than the delivery of a copy of the indictment and a list of the jurors.

[Cited in U. S. v. Van Duzee, 140 U. S. 173, 11 Sup. Ct. 760.]

4. Upon an indictment for robbing the mail, and putting the life of the mail-carrier in jeopardy; a sword or pistol, in the hand of the robber, by terror of which the robbery is effected, is a dangerous weapon, within the law, although the sword be not drawn, and the pistol be not pointed. It is not necessary to prove, that the pistol was charged; it is presumed to be so, until the contrary is proved.

[Approved in U. S. v. Wilson, Case No. 16,730.]

The prisoner [William Wood] was indicted again, for aiding and assisting in the robbery of the mail, putting the life of the carrier in jeopardy, by the means of dangerous weapons. 2d. For simply robbing the mail. The evidence was nearly the same as that given upon the former indictment [see Case No. 16,757,] except that Joseph Hare, who was examined as a witness, in behalf of the prosecution, had since died.

Mr. Bache was offered as a witness, to prove what Hare swore at the former trial. This was objected to.

BY THE COURT. The evidence is admis-

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

sible, provided the witness can repeat the testimony which Hare gave, and not merely what he conceives to be the substance and effect of it, of which the jury ought alone to judge. He may refresh his memory from notes, which he took of the evidence at the trial, or from a newspaper, printed by himself, containing the evidence of Hare, as taken down by the witness; but he must be sure of the accuracy of the statement, from his own recollection, and not merely from a confidence in the accuracy of the statement to which he refers.

The witness acknowledged, that he could not say that he recollected the words of Hare, although he felt the most entire confidence that he had taken them down as the witness uttered them, and that they are truly copied into the paper published under his own inspection.

The court refused to suffer him to be examined.

Another objection was made to the examination of this witness—that the prisoner had not received a list of the witnesses, in which the name of this one was mentioned, as required by the 29th section of the act for punishing certain crimes, &c. 2 [Bior. & D.] Laws, 98 [1 Stat. 118].

BY THE COURT. The part of that section which requires a list of the witnesses to be delivered to the prisoner, three days at least before the trial, is expressly confined to cases of treason; the same section, immediately afterwards, requiring nothing more than a copy of the indictment, and list of the jurors, to be delivered in other capital offences.

The charge delivered by WASHINGTON, Circuit Justice, was in substance the same as on the former trial; except, that he stated, as the opinion of the court, the following principles, in relation to the construction of the 19th section of the post office law (4 [Bior. & D.] Laws, 297 [2 Stat. 598]): (1) That a sword or a dirk, in the hands of the robber, by means and under terror of which the carrier is robbed of the mail, is a dangerous weapon within the meaning of the act, although not drawn or pointed at the breast of the driver at the time. (2) A pistol in the hands of the robber, by means and terror of which the carrier is robbed of the mail, is a dangerous weapon; and it is not necessary to prove that it was charged;—the presumption is, that it was so, until the contrary is proved. But in this case, this presumption assumes the form of positive proof, the demand of the mail having been accompanied by a threat to blow out the brains of the carrier, if he refused to deliver it; which could not have been effected, unless the pistols were charged, and in all respects prepared to endanger life.

The jury found the prisoner guilty upon the third count, as accessary to a simple robbery of the mail.

Case No. 16,757.

UNITED STATES v. WOOD.

[Brun. Col. Cas. 456; [1] 2 Wheeler, Cr. Cas. 325.]

Circuit Court, D. Pennsylvania. June, 1818.

ROBBERY OF THE MAIL—CAPITAL CRIME—INDICTMENT—JURISDICTION—WRIT OF ERROR—CERTIFICATE OF RECORD.

1. Robbing the mail is a capital crime if the robbery be effected by the use of dangerous weapons, thus putting in jeopardy the life of the person having the custody of such mails, and putting him in fear and his life in peril is putting his life in jeopardy.

2. The jurisdiction of circuit courts in criminal cases is confined to offenses committed in the district where the courts sit, if committed on land, and the indictment should distinctly show on its face that the offense was committed within the jurisdiction of the court.

[3. Cited in Latterett v. Cook, 1 Iowa, 5, and Bank of Newbury v. Eastman, 44 N. H. 438, to the point that the attestation of the presiding judge is not necessary to the certificate of a record made by the clerk of a district court of the United States, that it is his certificate, or that the seal is that of the court, or that the record is in legal form; it is sufficient if the seal of the court is affixed to the record.]

Indictment [against William Wood] for having aided and abetted in the robbery of the mail.

C. J. Ingersoll, Dist. Atty., for the United States.

Z. Phillips, for the prisoner.

[2] [Mr. Ingersoll opened the cause to the jury, by detailing the facts that would be given in evidence, and concluded by reading the law on which the indictment was founded. It is contained in the 19th and 21st sections of the act "regulating the post office establishment," passed April 30, 1810 [2 Stat. 598]: "That if any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death; or if, in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death." Section 19. "That every person who shall procure, aid, advise, or assist in the doing or perpetrating any of the acts or crimes by this act forbidden to be done or performed, shall be subject to the same penalties and punishments as the persons are subject to who shall actually do or perpetrate any of the said acts or crimes, according to the provision of this act." Section 21. Mr. Ingersoll then offered the record of the conviction of John T. Hare

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

[2] [From 2 Wheeler, Cr. Cas. 325.]

and others, who were the principals in the mail robbery, and who were convicted at Baltimore.

[Mr. Phillips objected to this conviction being received by the court, because there is no attestation of the presiding judge that the certificate attached to the record is that of the clerk; or that the seal is that of the court; or that the record is in a legal form. Also, that the record is on three distinct sheets of paper, not attached or connected together.

[Mr. Ingersoll: If this were a state court, and this record certified from one county to another, as it is, would it be in form? That is the question, for the districts of the United States are part of the same country, and not foreign to each other. To require the certificate of the presiding judge would end in nothing; for then you must go farther, and get a certificate, if such a thing could be had, that he is a judge of the circuit court, which would be a difficult thing, as the judges of the supreme court are not commissioned circuit judges. Besides, the circuit judge does not appoint the clerk, and probably never sees his commission. All he knows is the acting of the clerk ex officio, and possessing and using the seal of the court.

[As to the second objection, Mr. Ingersoll observed, that the record is written in the same hand, and is connected in the matter from sheet to sheet, and there is nothing in it that can for a moment make the court doubt that it is not the entire record. It is for the court to say, from an examination of it, whether they believe it to be one record.

[Mr. Phillips: This record is signed by P. Moore, and it is impossible for this court to know, judicially, that P. Moore is clerk of the court whence the record issued; he gives the only evidence that he is a clerk, which the court will not allow. The danger of accepting a record of this kind would be very great, and might lead to very serious frauds, for it would be an easy matter for a man to sign himself clerk, and step into the clerk's office when he was absent, and attach the seal to a certificate that he was clerk. In executing commissions in civil cases, the greatest strictness is observed and required; and where the record consists of more than one piece of paper, every sheet is marked and numbered, and attached together. The same strictness should be observed in criminal cases, particularly where the life of the man is the forfeit in case of conviction.

[Mr. Phillips also objected, that it was not certified to be a full exemplification of the record.

[THE COURT overruled the objections. As to the first objection, there is no law which requires such a certificate. The act of congress of the 26th May, 1790 (1 Stat. 122), does not apply to the records of the federal courts; and even as to the records of the state courts, that act does not require a certificate of the judge that the person attesting the record is clerk. It is sufficient in this case that the seal of the court is affixed. Were it the record of a state court, the certificate of the presiding judge that it was done in due form would be necessary. As to the other objection, it is by no means fatal to the evidence, although it is certainly improper to certify records in the way that this is, in sheets unconnected by some fastening. But if the court, upon inspection, is satisfied (as we are in this case) with the verity of this record, that is sufficient.

[Mr. Ingersoll then read the conviction of John Alexander and others, indicted for robbing the mail, from the record of the circuit court of Baltimore. He then called the following witnesses:

[Evidence.

[Owen Churchman, affirmed: In consequence of information left at my counting house by Mr. Baily, I was going to see him; on my way I met Wood, the prisoner, and another (by the name of Davis), conversing together. I followed them down to Water-street. Davis went into a slop-shop. I spoke to an acquaintance to watch Wood, and went into the shop to watch Davis; he showed no money; I went out and waited. I had not been out many minutes, when a boy came out of the slop-shop with a note, and went into Mr. Pritchett's store. (The note was payable to the order of Churchman and Thomas.) Wood also went into Pritchett's store. I followed him and the boy in; Wood asked the price of flour; I caught him and sent word to have Davis secured. We took them to Mr. Baily's office, and thence to Alderman Bartram's. When I first saw Davis and Wood, supposing them to be the men described by Mr. Baily, I followed them and saw a paper pass from Wood to Davis. When at the alderman's Wood refused to give any account of the manner by which he became possessed of the money; he said he was an honest man. The alderman told him if he was honest, he would not refuse to give an account of the money. Wood replied, "If this answer will do, I found it (the note) near the market-house in Callowhill-street." I assisted in stripping him, and found a pistol in a belt under his waistcoat. He acknowledged giving the note to Davis. A statement had been made by Mr. Ducker (a broker) of the manner in which the note had been presented to him; he said that Wood had been two or three times at his office, and had sold him parcels of North Carolina money; that the last time he was there, he presented this note (the one he had endeavoured to pass charged in the indictment); that he, Ducker, discovered that it was payable to Churchman and Thomas, and wanted their names to make it negotiable, and asked him whether he was one of the firm; he replied that his name was Churchman, and that he was from Baltimore; that Ducker then said, if he was one of the firm, and would endorse the note, he would purchase it; that Wood seemed confused, and

walked out. Wood said in the alderman's office, that all which Mr. Ducker had stated was correct, and acknowledged being in prison before in Philadelphia and Baltimore.

[Cross-examined: There were a number of persons in the office, about twelve or fifteen. I do not recollect any particular conversation about the robbery of the mail; if Wood was charged with robbing the mail I do not recollect it; it must have been when I was not near enough to hear. I stated, that this note must have come from the mail, but I do not recollect any particular charge, that Wood had robbed the mail. He said he was in the city when the mail was robbed, and he brought a witness who swore that he had lodged with him on the night of the mail robbery. He then called himself Alexander.

[Chester Baily, sworn: I first saw the fellow to the pistol at Havre-de-Grace. I went there on the 13th March, after hearing the mail was robbed. After the information I received from Mr. Ducker, I got a written description of Wood from him, and sent it throughout the city. Churchman came in a short time after, with Wood and Davis; I immediately saw that Wood was the man I had given a description of. We went with the prisoner to Alderman Bartram's office; the first thing done was to search Wood, and the pistol was found on him; I observed to the alderman that this was the match to the pistol found at Havre-de-Grace. I sent for the pistol; it was forwarded by mail. Wood was asked some questions about the note; he said the note belonged to him, and not to Davis. I asked him where he got it, and if he got it honestly he would tell; he said he got his money as honestly as I got mine, and afterwards he said he found it in the street.

[David Bell, sworn: I saw this note enclosed in a letter at Charleston, S. C., and put in the post office; it was directed to Churchman and Thomas. The endorsement is my father's. There were forty $100 notes enclosed in the letter.

[John Ducker, sworn: About 9 o'clock of the morning that Wood was apprehended, he sold me a $100 note on the State Bank of N. Carolina. At the middle of the day he offered me some other notes about $57, for which I did not offer enough; I wanted 40 per cent. discount. He said he must consult his brother; he stept out and then came in and agreed to sell me the notes; they were Somerset notes, of Maryland; I bought them; he then offered me this note; I asked him if he was one of the firm; he said his name was Churchman of Baltimore. I gave this statement before the alderman; Wood said it was correct, and the alderman entered his acknowledgment on the docket.

[Furman Black, affirmed: I am one of the keepers of the prison. Some day last week a gentleman called at the prison and wanted to see Wood; I went to the cells with the gentleman to see him; the gentleman addressed him by the name of Wood or Alexander, and asked him if he would do him the justice to give him an order for some money that was in the hands of Bartram. Wood observed that he had nothing to do with the robbery of the mail, that the money he got exchanged he received from John Alexander, and returned the proceeds to him; he then stated the money was found with Alexander behind the looking glass, and it was the identical money which was the proceeds of the notes he exchanged for Alexander.

[Mr. Ingersoll here read the following order for this money, which was signed by the prisoner: "I hereby authorize Mr. J. A. Isaacs to receive of George Bartram, Esq., the sum of three hundred and thirty nine dollars, fifty cents, which was found in my possession, and taken by the officer who executed the process under which I was arrested, and which were the proceeds of Mr. John M. Patton's check on the Philadelphia Bank, or if the said money should not now be under the control of the said George Bartram, Esq., I authorize any person who may have the control of it, to pay the same to the said Isaacs. (Signed) William Wood. May 27th, 1818. Witness present, Seth Price."

[Thomas Hare, sworn: About the 27th of February last Wood and myself started from Baltimore; we arrived here the 3d or 4th of March; when we came here I understood that Joseph and Lewis Hare were in the city; I found them—Joseph at John Alexander's, and Lewis, at a house near there. Lewis came down to John Alexander's, and they told me about this plot of robbing the mail, which was to be executed as soon as Joseph's feet got well, which were sore by traveling. I do not recollect whether Wood was there at that time or not. They asked me if I knew who had pistols; I told them Wood had; I asked Wood to let them have his pistols; he refused at first, and then consented to lend them. These look like the pistols; they were brass barrels; I never had them in my hands but once or twice; I think they received the pistols the day before they started. Sunday morning previous to the robbery John Alexander, Lewis Hare, Joseph T. Hare, W. Wood, and myself started from Alexander's house; we went into Arch street, and went up Arch street, as far as 10th or 11th street, when Wood and myself returned; the others went on to rob the mail, as they said; I returned to Alexander's house, and Wood went down town. On the Friday following, John Alexander returned, and said he had completed the business, and had received about 4,000 dollars. The next day Wood came to Alexander's; the conversation again took place about the mail robbery; Alexander told Wood that he had got about 4,000 dollars from the mail, as his share; and gave Wood a post note of 100 dollars; he said he did not know much about the note, but he would give it to him, that he expected it was good. I do not know wheth-

er this is the note; I gave him a 100 dollar note also. Alexander gave him the note as a present, or as a compensation for the loan of the pistols. Wood was present when the pistols were cleaned; I took one to pieces to clean it.

[Cross-examined: I believe the plan to rob the mail was made before Wood and I came from Baltimore. I knew nothing of it until I came from there. John Alexander or Joseph Hare first told me of it. I think it was Joseph; they all talked to me about it. I think I mentioned to Wood first, that they were going to rob the mail, but am not certain. Wood did not advise against it. I was not to go with them; Lewis wanted me to go, but Joseph did not want me. The three that went were to divide the spoil. I was to receive none. I did not state in my examination that I was taken sick, and returned on that account. I stated that I was unwell when it took place. Mrs. Alexander was opposed to the plan. I received two notes from Alexander, one of 100 dollars, and one of 10 dollars. I gave one of 100 dollars to Johnson, and one of 100 dollars to Wood. Joseph and Lewis Hare are my brothers. Joseph is the oldest—Lewis is younger than I am. I saw Wood whilst the three were absent; he lodged in the same house with me for two or three nights. I do not know what part Wood took but lending his pistols. He was not invited to go; they thought three were enough. Lewis said he would rather have me than Alexander, as he was afraid Alexander would tell of them, and he did not know Alexander. I made the disclosure to Mr. Bache; my motives were, Mr. Bache said he would favor me all he could. What induced me was for the sake of liberating my brothers. I supposed if I was not admitted as a witness, John Alexander would be, and we all three should be convicted, as John Alexander was present. I had not been acquainted a long time before with Wood. I formed an acquaintance with him at Baltimore. I heard of the mail robbery before Alexander came up. It was understood that the mail was to be robbed when Wood lent the pistols. I informed him when I asked him for them.

[T. W. Ludlow, sworn: Gave the same evidence as on the trial of the three principals convicted at Baltimore.

[D. Boyer, the mail carrier, was also sworn, and testified as in the former trial.

[John M. Patton, affirmed: On the morning of the day he was taken prisoner, Wood offered me 350 dollars on the State Bank of N. C. I exchanged the notes for him, and paid him in a check on Philadelphia Bank; after I paid him he left the office. I sold the notes to H. M. Prevost. When I found the notes were taken from the mail I went to Mr. P. to take a minute of the marks and numbers of the notes, which he did also.

[Richard Bache, sworn: I accompanied Wood to prison to have him searched; he protested that he had nothing to do with the robbery of the mail and refused to tell me at that time where he got the 100 dollar note that he had given Davis to pass. He told me that he lived at Deal's Tavern, up Sixth street, and afterwards that he resided at Mr. Black's. I went to him the morning after he was committed to prison, and told him the object was not so much to punish the offenders, as to obtain the money robbed from the mail, and I urged him to tell me where it could be found; he denied knowing anything about it, and told me I might as well rob the mail as to take the money which he said he became possessed of lawfully. At the magistrate's he said that he worked on the turnpike, and received the note in payment for work done on the road. After Hare and Alexander had made a confession, I was of opinion that a fourth person had been engaged on the spot in the robbery, as the four horses had been taken from the mail wagon, and as the sum which Alexander acknowledged to have been his portion was so much smaller than that found on the persons detected at Baltimore. I went to the prison, therefore, and had Alexander, Wood and Thomas Hare brought out of their cells into the entry. Alexander there stated, that Wood knew of the robbery, and that when he came from Baltimore, he gave him the money which he had taken from the mail to exchange; that he went along with him to the broker's office in Fourth street (Mr. Ducker's); that he stood at a distance and gave Wood the money, which when exchanged, Wood returned the proceeds to him. Alexander said, that he had given the 100 dollar note to Wood for himself; Wood did not deny anything that Alexander said, but when Alexander assured me that there were but three persons actually engaged on the spot in the robbery, Wood observed that we had Alexander's confession that there were but three concerned, and he hoped we did not want to hang more than the three. I told him to be on his guard; and that persons concerned in aiding and abetting would share the same punishment as the principals. At a previous time, when I pressed him to tell me where the money was, and that it would be a serious matter to him if he did not disclose the facts, he said that he was not afraid; that no person concerned in the robbery could be admitted as a witness against him, because they had all been convicted; that Davis, who informed against him, was a convict; and that Alexander and Thomas Hare were both convicts; to which I replied, that Hare had been pardoned. Wood remarked to me, that Alexander had told me he had given up all the money, and he asked me why I suspected him. Alexander told me that he had placed the money (the proceeds of that which Wood exchanged) behind the looking glass. He did not state that Wood was to have a share in the plunder, but he said that the reason why Wood and T. Hare did not accompany them was, that they concluded three were enough; and if there were more, there

would be greater difficulty in escaping detection.

[The prisoner offered no evidence.

[Mr. Ingersoll, the district attorney, contended, that the evidence in relation to all the counts which are not capital, was conclusive; whether the other counts were proved would depend upon the meaning which the court and jury might give to the word "jeopardy," in the 19th section of the law. With respect to the term "jeopardy," he observed that the legislature used a word for which we can recur to no code of laws for a definition. We are obliged to inquire of dictionaries for its meaning. This is the first step of departure from that precision which the law exacts in a criminal case. Dr. Johnson derives it from the French "J'ai perdu,"—I have lost,—and defines it "peril," "danger"; I should rather derive it from "Je perde,"—I lose,—and define it "extreme peril or danger," equivalent to, "It's all over," "I am lost," or the like. When a loaded pistol is presented with a threat to discharge it, the man aimed at may be in fear, as the driver of the mail says he was; and he may be in danger too, but not that extremity of danger which this word calls for. If the pistol had been fired, and missed or snapped, I should consider the life in jeopardy by the use of the dangerous weapon; but I doubt whether a mere menace to use a loaded pistol or naked dirk, can be considered as within the law; and it would be especially severe to apply the strongest meaning of a doubtful word, in an accessorial case like this, where the accused was not at the place of perpetration.

[In short, my difficulty is this: The word is doubtful and the case is capital. Like the word "revolt" therefore, on which this court has refused to settle a judgment of conviction in a capital case, it appears to me that the prosecution is liable to be defeated by the mere doubtfulness of the word used by the legislature. The best idea I have met with, of what strikes me as the true use of "jeopardy," is to be found in the Bible, in the 18th verse of the 5th chapter of Judges: "Zebulun and Naphtali were a people that jeoparded their lives unto death, in the high places of the field." Here the word means a danger of an extreme degree, approaching close to death, and such I suppose the word "jeopardy." Perhaps the idea is a refinement. But such as it is, I think proper, after some reflection, to state it, and under the impression of at least the questionableness of the term. I shall not press that part of the case which calls for the offender's life, when it is perfectly clear upon the testimony and the law, that he is guilty of that crime which is not capital.

[Mr. Phillips, for the prisoner, stated, that as the prosecution upon the counts which charge the prisoner with the capital offence was given up, he should submit the prisoner's case upon the other counts to the jury.

[Judge WASHINGTON informed Mr. Phillips that the court did not entertain the doubt which the district attorney had expressed as to the meaning of the word "jeopardy," and that it was proper to apprize him of this in order that he might defend his client in like manner, as if no concession had been made, or doubt expressed, by the district attorney.

[The counsel still submitted the case to the jury under the charge of the court.] [3]

WASHINGTON, Circuit Justice (charging jury): The first inquiry for the jury is, whether the mail carrier was robbed of the mail, and if he was, whether it was effected by putting the life of the carrier in jeopardy by the use of dangerous weapons, or otherwise. The conviction of Joseph T. Hare, John Alexander, and Lewis Hare before the circuit court of Maryland, and the sentence of the court thereon, are evidence the most conclusive against the prisoner, that the crime for which those persons were severally convicted was committed by them. [See Case No. 15,304.] This is confirmed by the testimony of Boyer, the mail carrier, and Mr. Ludlow, the passenger. As to the nature of the offense of which Joseph T. Hare, etc., were convicted, the court does not entertain a doubt. We think that putting the mail carrier in fear, and his life in peril or danger, is putting his life in jeopardy, within the meaning and intent of the act of congress, and if the jury should be of opinion, under the circumstances which attended this transaction, that Boyer was in fear, and in danger of his life, the offense of those principals was capital. We think it our duty to give you this opinion, notwithstanding the concessions which the candor of the district attorney induced him to make. We do not, however, think it necessary or proper in this case to press this point against the prisoner; and with these few observations which have been made, I leave this point to the jury.

The next question is, whether the prisoner did aid, advise, or assist in the perpetration of a crime committed by the principals. If Thomas Hare, who has given testimony on the part of the prosecution, is believed by the jury, he has clearly proved that the prisoner not only participated in the plan formed for robbing the mail, and aided its execution by his countenance and advice, but that he lent his pistols to the principals, with a distinct knowledge of the criminal purpose for which they were borrowed; and that he accompanied the perpetrators of the crime a short distance on their journey to the place of its intended execution. In addition to the testimony of this witness, Mr. Bailey has proved the exact similitude of the pistol found upon the prisoner at the magistrate's, and that found at Havre-de-Grace, near to the spot where the robbery was committed. Should the jury be of opinion that the prisoner is guilty of the offense charged against him as capital, according to the explanation of the law given by the court, they may find him

[3] [From 2 Wheeler, Cr. Cas. 325.]

generally guilty. If they should think him guilty of assisting only in a simple robbery of the mail, or that the life of the mail carrier was not in jeopardy, according to the meaning of that word as given by the court, then they will find him guilty on the third or fourth count, and not guilty on the others. If they think him not guilty of any offense, they will find him not guilty.

The jury retired at half past three o'clock, and at five returned with a verdict of guilty. On being called over and asked separately, one of them dissented from the verdict given in; after some observations from the court they again retired, and at half past six o'clock brought in a verdict of guilty.

Motion in arrest of judgment and for a new trial. The prisoner being brought before the court to receive sentence of death, Zalegman Phillips, Esq., his counsel, moved for a new trial, and in arrest of judgment.

WASHINGTON, Circuit Justice. This is a motion in arrest of judgment, and various causes have been assigned, but as the decision of the court will be given on the first two, it will be unnecessary to state the others. These were: 1st. That the verdict is against law and against evidence. 2d. That the jury have convicted the defendant capitally, to wit, on the first, second, fourth, and fifth counts, of the indictment, when the attorney of the United States expressly stated to them, that he did not ask a conviction on these counts, as he considered the law very doubtful, and would be satisfied with a conviction on the third and sixth counts of the indictment, and that in consequence thereof the prisoner's counsel did not enter into any examination of the law and facts in his behalf, as applying to the said mentioned counts, believing them to have been abandoned by the attorney of the United States.

The first objection then is to the style of the court, which, it is contended, should be the circuit court for the Eastern district of Pennsylvania; this change being produced by the act of congress "to divide the state of Pennsylvania into two judicial districts," passed on the 20th April, 1818 [3 Stat. 462]. It is not contended that the style of the court is altered in express terms, but it is supposed to arise necessarily from the division of the state and the jurisdiction assigned to the Western court. There might be some color for this argument, if the law had created a new circuit court for the Western district, in which case there would seem to be a propriety, at least, in distinguishing that court from this, by calling that the Western, and this the Eastern circuit court. But it will appear from a correct analysis of the law, that the style of the Western court is the district court for that district, in contradistinction to the district court for the Eastern district, and that the division of the state into two districts is in reference to those courts. The title of the act is, "An act to divide the state of Pennsylvania into two judicial districts." Section 1 divides the state of Pennsylvania into two districts, and designates their respective boundaries. Certain counties shall compose one district, to be called the Western district, and the residue of the state shall compose another district, to be called the Eastern district; and the terms of the circuit court for said Eastern district shall be held at Philadelphia, and the terms of the circuit court for the Western district shall be held at Pittsburg. Sec. 2. Richard Peters, Esq., now judge of the district of Pennsylvania, is assigned as the judge to hold the courts in the Eastern district, and to do all things appertaining to the office of a district judge under the constitution and laws of the United States. Sec. 3. The president is to appoint a district judge for the Western district, and he shall do and perform all such duties as are enjoined on or in any wise appertain to a district judge of the United States. Sec. 4. The circuit court shall be held for the Eastern district at Philadelphia, at the time and in the manner now directed by law to be held for the district of Pennsylvania, and the district court for the Western district, in addition to the ordinary jurisdiction and powers of a district court, shall, within the limits thereof, have jurisdiction of all causes, except of appeals and writs of error, cognizable by law in a circuit court, and shall proceed therein in the same manner as a circuit court, and writs of error shall lie to the circuit court in the said Western district in the same manner as from other district courts, to their respective circuit courts. Sec. 5. The president shall appoint the district attorney and marshal for the Western district; the district attorney and marshal for the Western district of Pennsylvania to be district attorney and marshal respectively for the Eastern district. Section 6 directs how civil causes shall be removed, and in all its terms has reference to civil causes, and to the district court for the Western district. It is true that the word "circuit" is used in the first section in connection with the Western court; but the other parts of the law show, most obviously, that this was an inaccuracy of expression, since in every other section it is styled a district court. It has not only the style and jurisdiction of a district court, but it is subordinate to the circuit court in the Eastern district in the same manner as other district courts are to their respective circuit courts. It is true that the Western district court has the same jurisdiction assigned to it as is exercised by the circuit court. But this circumstance does not constitute it a circuit court.

The second objection to the caption is that it states the presentment to be by the grand jury of the United States, inquiring for the district of Pennsylvania, when in truth there

is no such district, and the jury had no power to inquire except for the Eastern district. The answer to this objection is that the caption is consistent with the truth of the case, and would therefore have been faulty had it been qualified as the prisoner's counsel has contended it ought to have been. The venire issued before the passage of the law in question to summon the grand jury for the district of Pennsylvania, and on the 11th of April, some days before the passage of this act into a law, they were sworn and affirmed to inquire for the body of the district of Pennsylvania. The indictment, therefore, is with strict propriety found by the grand inquest of the United States inquiring for Pennsylvania district upon oath and affirmation, inasmuch as they were legally sworn and affirmed to inquire for the whole district. Nevertheless, there remains to be considered under this head a very interesting question, which is, does this indictment show that this court has jurisdiction of the offense charged to have been committed by the prisoner? This question resolves itself into two others. Although the grand jury were sworn and very properly to inquire for the district of Pennsylvania, yet could they, after the passage of this law, inquire of offenses committed on land out of the Eastern district of Pennsylvania? And if they could not, then secondly, does the indictment sufficiently show that the offense of which the prisoner stands convicted was committed within the jurisdiction of the court? The court has not been able to find any act of congress which in express terms fixes the jurisdiction of the circuit courts in criminal cases by the place in which the offense was committed. But the court is clearly of opinion, upon the fair and reasonable construction of the different laws upon this subject, that the jurisdiction of the circuit court in criminal cases is confined to offenses committed within the district for which those courts respectively sit, where they are committed on land. See the eleventh, twenty-third, and twenty-ninth sections of the first judiciary act [1 Stat. 78, 85], and the third section of the act of the 2d March, 1793,—2 Laws, 225 [1 Stat. 333].

It was contended by the district attorney that the jurisdiction of the Western district court does not extend to criminal cases; but the court cannot give its assent to this construction of the law. The fourth section declares that that court, in addition to the ordinary jurisdiction of a district court, shall, within the limits of the Western district, have jurisdiction of all causes, except appeals and writs of error, cognizable by law in a circuit court. Now, as it is clear that a circuit court has jurisdiction of all offenses prohibited by the laws of the United States committed at sea or on land within the district where the court sits, it follows, from the general expressions above quoted, that the Western district court has the cognizance of the offenses limited as to jurisdiction as the circuit courts are. If, then, this court has not jurisdiction of offenses committed within the Western district, and the Western court has, the next question is, does this indictment sufficiently show that the offense of which the prisoner is convicted was committed within the jurisdiction of this court? The allegation in all the counts is that the offense was committed at the district of Pennsylvania. It might then have been committed as well in the Western as in the Eastern district, and the court cannot help the indictment in this respect by any presumptions, or because we know from the evidence that the offense was committed in this city. It is indispensable that the indictment should distinctly show that the court has jurisdiction of the offense, and it ought, therefore, to have laid it to have been committed in the Eastern district. And since it might be proper in some cases of a capital nature to try the cause in the county where the offense was committed, there would seem to be a propriety in stating the county, also in the indictment, though on this point we give no positive opinion at this time, the case not requiring it. Upon the whole, we are of opinion that the judgment must be arrested for the reason which has been stated.

[For a second indictment, upon which the jury found the prisoner guilty, see Case No. 16,756.]

Case No. 16,758.

UNITED STATES v. WOODRUFF.

[4 McLean, 105.] [1]

Circuit Court, D. Illinois. June Term, 1846.

SELECTION OF JURORS—STATE PRACTICE—RULES OF COURT.

1. A jury being called, the counsel for the defendant objected, on the ground that the jury had not been selected as the act of congress requires.

2. That act requires, in the selection of jurors, that the state practice, as near as may be, shall be followed.

3. It was *held*, that the defendant had a right to claim the selection of jurors according to law, and on that ground his cause was continued.

4. And the court adopted a rule, that at a proper time before each term, names of suitable persons for jurors should be selected throughout the state, put into a box, and a sufficient number drawn out, and inserted in the venire as jurors.

[Followed in U. S. v. Collins, Case No. 14,837. Cited in Brewer v. Jacobs, 22 Fed. 234; U. S. v. Richardson, 28 Fed. 69.]

At law.

Mr. Gregg, U. S. Dist. Atty.

Mr. Butterfield, for defendant.

McLEAN, Circuit Justice. Mr. Butterfield appeared for the defendant, and the cause being called, objected to a trial, on the ground that the jurors had not been sum-

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

moned conformably to the act of congress of the 20th of July, 1840 [5 Stat. 394]. That act required the jurors to be selected as jurors were selected under the state laws. By an early rule of this court, the "clerk is required to issue a venire facias, commanding the marshal to summon twenty-four persons to serve as traverse jurors." By the act of September 24, 1789, § 29 [1 Stat. 88], it was provided, "that jurors in all cases to serve in the courts of the United States, shall be designated by lot or otherwise in each state respectively, according to the mode of forming juries therein now practiced, so far as the laws of the same shall render such design practicable by the courts or marshals of the United States," etc. As that law applied only to states then organized, other laws have been passed as applicable to the states subsequently admitted. That was the object of the act of 1840. By the act of Illinois, of the 3d of March, 1845, for the selection of jurors, it is made the duty of the county commissioners to select the jurors. Now, this court can not call upon any officers of the state to perform this duty, but we are bound to conform as nearly as may be to the state practice. The venire under the above rules, leaves the selections of jurors to the marshal, as his convenience shall permit. This does not, therefore, conform to the state practice. The jurisdiction of this court extends throughout the state, consequently the jurors should be selected from the state at large, and their names should be inserted in the venire. The court will, therefore, adopt a rule requiring the clerk and marshal to select the jurors from the state at large, previous to each term, and to conform in doing so, as near to the state practice as may be practicable. As the defendant is entitled to a jury selected under the laws of congress, which, as far as may be, adopts the laws of the state, we think, for the reasons stated, he is entitled to a continuance of the cause.

Case No. 16,759.

UNITED STATES v. WOODS.

[24 Int. Rev. Rec. 150; 3 Cin. Law Bul. 59.]

Circuit Court, N. D. Ohio. 1878.

INTERNAL REVENUE—ILLEGAL SALES OF LIQUOR—RETAILER—JANITOR OF CLUB.

[Sales of liquors belonging to a social club by the janitor thereof to the individual members, the money being deposited in the treasury of the club, makes the janitor a retail liquor dealer, and subject to indictment, where no special tax was paid.]

The defendant [Edwin Woods] was indicted, first, for carrying on the business of a retail dealer in liquor, without having paid the special tax therefor, and, second, for negligently failing to place and keep conspicuously in his establishment the stamp denoting the payment of special tax. Plea of not guilty. Tried to a jury and verdict of guilty, and motion for new trial.

The evidence showed that the defendant was the janitor of the Garretsville Mutual Benefit Club, formed for the purpose of social amusement; that the club owned certain spirituous liquors, and kept them for the use of the members of the club, who were entitled to use them on paying to the janitor for the use of the club, the value thereof; that the defendant, as janitor, at the time stated in the indictment, had furnished such liquors to the members, and received therefor, pay for the same, which went into the treasury of the club. Held that the club, as a body, was the owner of the liquors, and the janitor who sold the same to individual members of the club, made himself a retail dealer, and in so doing violated the statute.

Motion for new trial overruled.

Case No. 16,760.

UNITED STATES v. WOODS.

[4 Cranch, C. C. 484.] [1]

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

MURDER—SELECTION OF JURORS—EVIDENCE—DECLARATIONS OF DECEASED—SEPARATION OF WITNESSES—COMPETENCY—CONVICTION OF CRIME—PARDON.

1. At the request of the prisoner's counsel, the court will ask each juror as he comes to be sworn, whether he has formed and delivered any opinion as to the guilt of the prisoner upon the indictment.

2. In a criminal case the United States must prove, first, that an offence has been committed, and secondly, that it was committed by the prisoner.

3. On a trial for murder, the declarations of the deceased, not made in extremis, or with a settled conviction that he is about to die, cannot be given in evidence.

4. If one of the witnesses who have been ordered to be taken out of court during the examination of other witnesses, remains in court in violation of the order, the court will not permit him to be examined.

5. The court will not order the United States' witnesses to be sent out of court, after they have been examined, and while the prisoner's witnesses are under examination.

6. The court will not receive parol evidence of a conviction of larceny in Maryland, to disqualify a witness. If upon cross-examination he admit the fact, but states that he was pardoned upon condition of leaving the state, these facts only go to his credit. A witness, who after his examination remains in court and hears the testimony of the other witnesses, may be examined again to rebut the defence set up by the prisoner.

7. If the deceased died of a fever caused by the beating while she was in a weak state of health, and the beating was with malice aforethought, it was murder; if without malice aforethought, it was manslaughter.

8. On a trial for murder the jury must be kept together at night as well as in the day.

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

Indictment [against Joseph Woods] for the murder of his wife.

At the request of the prisoner's counsel, the court asked each juror, "whether he had formed and delivered an opinion as to the guilt of the prisoner upon this indictment." After witnesses had been examined to prove that the prisoner had several times beat and kicked his wife—

Mr. Marbury, for the prisoner, objected to further testimony on that point until proof should have been produced that a felony had been committed.

THE COURT (nem. con.) said, that the proper order of proof was, first, to prove that a crime had been committed; and secondly, that it was committed by the prisoner.

Mr. Key, attorney of the United States, assented to this course, and offered to give in evidence the declaration of the deceased, made on the 5th of November, after she had, on that day, expressed her conviction that she would die. She did not die till the 2d of December; and after the 5th of November, appeared to her physician to be convalescent for several days; and he told her he thought she would get well; and she said she hoped she would. The declarations offered were made between the 5th and 20th of November, when the appearances of convalescence first ceased.

THE COURT (nem. con.) refused to permit them to be given in evidence; not being satisfied that there was a settled conviction in the mind of the deceased that she was about to die; and that the declarations could not be considered as having been made in extremis.

THE COURT had, at the request of the prisoner's counsel, ordered the witnesses on the part of the United States to be taken out of court, except the one under examination, so that each witness should be examined separately and out of the hearing of the others.

Mr. Key offered to examine Mr. Connelly.

Mr. Coxe and Mr. Brent, for the prisoner, objected, that in violation of the order of the court, he had been present in court and heard the testimony of the other witnesses. 2 Russ. 624; 4 Starkie, 1733; Attorney-General v. Bulpit, 9 Price, 4; 1 Cr. Recorder [1 Wheel. Cr. Cas.] 123; 1 Phil. Ev. 258.

THE COURT (MORSELL, Circuit Judge, contra), upon those authorities, rejected the witness.

After this decision of the court, Mr. Key cited Parker v. M'William, 6 Bing. 683, in the common pleas, decided nine years after the exchequer case of Attorney General v. Bulpit, in which the judges say there is no such rule in the other courts; but that it is in the discretion of the judge at nisi prius whether he will, or will not suffer a witness to be examined, who has been in court and heard the testimony of the other witnesses, in violation of the order of court.

But THE COURT (MORSELL, Circuit Judge, contra), adhered to their opinion rejecting the witness.

CRANCH, Chief Judge, said that the court did not mean to establish a rule by which every witness who shall violate the order to remain out of court, while other witnesses are under examination, should be rejected as incompetent; but they considered the court as having a discretion to exclude or admit the witness according to circumstances; and that, according to the circumstances of this case, especially as it is a capital case, if it were only doubtful whether the witness were competent, the court would exclude him.

Mr. Coxe, for the prisoner, after the attorney of the United States had closed the evidence on his part, prayed the court to order the witnesses on the part of the United States, to be removed from the court, while the witnesses for the prisoner were under examination. The rule, he contended, included the witnesses on both sides. That the reason of the rule is not merely to prevent the witnesses from combining to agree in their testimony, but to prevent them from forming a combination to contradict the testimony given on the other side. He cited Free's Case, [unreported] in this court in 1822; Attorney-General v. Bulpit, 9 Price, 4; and 2 Russ. 624.

THE COURT (nem. con.) refused to order the witnesses for the United States to be sent out of court (after they had been examined), while the prisoner's witnesses were under examination.

CRANCH, Chief Judge, observed that the prisoner's witnesses had heard the whole evidence on the part of the United States, and it did not seem fair that the United States' witnesses should be excluded, while the prisoner's witnesses were under examination. That if it had been originally asked to exclude all the witnesses on both sides, except the one under examination, it is probable the court would have granted it.

MORSELL, Circuit Judge, said that it would be proper that the United States' witnesses should be present to hear the witnesses on the other side, for they may deny the truth of their testimony, or assail their credit, and they ought to have an opportunity to support their credit and testimony, if attacked.

Mr. Key, for the United States, offered to examine one Henry Holt.

The counsel for the prisoner, offered to prove, by parol, that Holt had been convicted of larceny in Maryland, and had been sentenced to the penitentiary, and had been banished by the governor; and cited 1 Starkie, 144, note; Clarke v. Hall, 2 Har. & McH. 378; State v. Ridgely, Id. 120; and Cole's Lessee v. Cole, 1 Har. & J. 572.

THE COURT, however (nem. con.), rejected the parol evidence of the conviction.

Holt was then sworn, and upon cross-examination, admitted the conviction of lar-

ceny in Maryland, the sentence and the pardon by the governor, upon condition of his quitting the state.

The prisoner's counsel then prayed the court to instruct the jury, that the testimony of Holt was incompetent.

But THE COURT (nem. con.) refused so to instruct them, and said that the facts proved went to his credit only.

Mr. Key, for the United States, then offered to examine Mrs. Lucas again, who had been before examined in behalf of the United States, and who, after her examination, had remained in court, and heard the examination of other witnesses who were examined after her examination. She was now offered to rebut the defence set up by the prisoner, that the deceased was a drunkard, and had got her bruises by falling.

Mr. Coxe and Mr. Brent, for the prisoner, objected that she was within the rule which rejected Connelly.

THE COURT (MORSELL, Circuit Judge, absent), decided, that the attorney of the United States had a right to examine witnesses to rebut the defence set up, and, for that purpose, to examine again those who had been before examined, although they had remained in court after their first examination.

THE COURT, at the motion of the attorney of the United States, instructed the jury, that if they believe, from the evidence, that the deceased was in a weak state of health, from a previous miscarriage, and while in such state, was cruelly, deliberately, and wilfully so beaten by the prisoner, as apparently to endanger her life, or to produce some great bodily harm, and that such beating, and such state of bodily health, arising as aforesaid, were the combined causes of the fever of which she died, then the prisoner is guilty of murder, if the said beating was inflicted with malice aforethought; and of manslaughter, if inflicted without such malice; unless they should be satisfied, by the evidence, that the fever became mortal by reason of some positive misconduct of the deceased during her last sickness, or the mismanagement of her attendants.

And on the prayer of the prisoner's counsel—

THE COURT (nem. con.) instructed the jury that if they should not be satisfied by the said evidence that the death of the deceased was occasioned by the said wounds upon her body, or that the wounds which occasioned her death were caused by the violent acts of the accused, then the prisoner is entitled to a verdict of not guilty; and that if the jury should be of opinion, from the said evidence, that the wounds so received by the deceased, were not mortal in their character, but that the fever which caused her death, was rendered mortal by some positive, supervening cause or stimulant, independent of and not produced by the wounds or beating, or other act of the prisoner, then the prisoner is, in like manner, entitled to a verdict of acquittal.

On the first day of the trial, the court and jury having been in session from 10 a. m. to half past 5 p. m., without having taken any food or refreshment, it became a question what should be done with the jury. There were thirty or forty more witnesses to be examined, and it was impossible to finish the cause that night. The prisoner and the attorney of the United States were willing that the jurors should separate and meet again in the morning.

CRANCH, Chief Judge, thought it might be so done by consent. It was so done in Berry's Case [Case No. 1,352], in this court, in December, 1830. But MORSELL, Circuit Judge, being clear that the court had not the power to make such an order, and CRANCH, Chief Judge, and THRUSTON, Circuit Judge, doubting, it was decided to be the safest course to keep the jury, and it was so ordered, and they were so kept by the marshal on Monday and Tuesday nights.

The following is the order entered on the minutes of the court: "By consent of the prisoner, the trial of this cause is adjourned until tomorrow morning at 10 o'clock; and the marshal is commanded to keep the jury together until the next meeting of the court, and then to bring them into court; and in the mean time not to speak to them himself, nor to suffer any other person to speak to them relative to any matter touching the trial of this issue; and it is ordered that the bailiffs who may be employed by him for that purpose, be sworn accordingly."

The jury retired at half past 8 p. m. to consider of their verdict, and at 10 p. m. returned with a verdict of acquittal.

Case No. 16,760a.

UNITED STATES v. WOODWARD.

[2 Hayw. & H. 119.] [1]

Circuit Court, District of Columbia. June 16, 1853.

MURDER—INSANITY AS DEFENSE—INSANITY CAUSED BY DRUNKENNESS—NEW TRIAL.

1. Insanity caused by drunkenness, where the party is not intoxicated at the time of the commission of the offense charged, excuses as much as any other form of insanity contracted involuntarily.

2. Where a prisoner has been for a long time so far of unsound mind, frequently if not uniformly, as to be wholly unconscious and irresponsible for his acts, *held*, that a knowledge of the above, after conviction, will not be a reason for granting a new trial.

[This was an indictment against Daniel T. Woodward upon the charge of murder.]

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

W. T. Woodward, for the United States.

E. C. Carrington and M. Thompson, for the prisoner.

The counsel for the defence having prayed certain instructions to the jury, they were granted in a modified form, and are as follows: "1st. If the jury believe from the evidence given in the case that the deceased destroyed herself, or are uncertain whether she did or not, or that some one else other than the prisoner might have killed her, they ought to acquit him. If she killed herself, of course he is innocent of the charge; or if you think it a matter of doubt whether she did it or not, or whether some other than the prisoner may have killed her, he is entitled to your verdict; for if a reasonable doubt, or any feature of the crime material to its institution exists in the minds of the jury, the law requires his acquittal. To authorize you to convict on circumstantial evidence, it is necessary that the inference of the guilt of the prisoner should exclude every other inference. 2nd. If the jury believe from the evidence they have heard that the prisoner killed the deceased, and that he did so in a fit of madness, insanity, lunacy or frenzy, he ought to be acquitted. In order to constitute a crime a person must have intelligence and capacity enough to have criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. The question of capacity must refer to the particular act with which he is charged. In order to be responsible he must have sufficient power of memory to recollect the relation in which he stands to others, and to which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. Insanity caused by drunkenness, if the party is not intoxicated at the time of the commission of the act, excuses as much as any other species of insanity contracted involuntarily. In cases of delirium tremens or mania a pota, therefore, the law excused the act, provided the party is not drunk when it is committed. If the defendant was laboring under the deficiency of mind first stated, or had not the capacity stated in the second proposition, or was affected by mania a pota when the act was done, he ought to be acquitted, notwithstanding any threats he may have used previously. Drunkenness is of itself no excuse for any crime. It is however a fact for the jury in connection with all the rest of the evidence in the cause. 3rd. The above instruction applies to this prayer, and answers it as to insanity. It is only necessary to add that if the defendant was so far deprived of his reason as to be incapable of forming an intention to murder, and being so deprived, inflicts the fatal injury in sudden heat and passion, he ought to be acquitted, no matter what his threats or previous expressions may have been; for the deliberate, wicked, malicious design must exist at the very instant of the commission of the act, and be the motive for committing it. 4th. If you believe from the evidence that the prisoner took the life of the deceased, and was at the time of doing so of sound mind, but that he was in a transport of passion, which for the time controlled his conduct, it would reduce the crime to manslaughter, provided there was adequate provocation, notwithstanding any previous threats or expressions he may have used."

The verdict of the jury was, that they found the prisoner guilty of murder in the first degree. A motion was thereupon made and entered for a new trial. The following are the grounds on which the motion was predicated: 1st. Because the verdict is contrary to law and the evidence in the case; in that the inference of his guilt does not exclude every other inference; the evidence showing, as it does, that the deceased might or could have killed herself, or that some other than the defendant might or could have killed her, or that she might have been accidentally killed, or she might have been killed by defendant "in transport of passion, which for the time controlled his conduct," and "with adequate provocation," and thereby reduced the crime to "manslaughter" instead of murder. 2nd. Because it is believed and proposed to show that, according to the declaration and admissions of one or more of the jurors upon the trial, they, the said jurors, agreed and determined upon their said verdict of guilty, immediately after the close of the evidence in the case, and before the court instructed them as to the law of the case, and before the accused, thereafter, had the "assistance of counsel for his defence." 3rd. Evidence discovered since the trial, and which the utmost diligence of the prisoner and his counsel failed to discover previous to the trial, and which the prisoner and his counsel verily believe would have led to a different verdict, had it been adduced upon the trial, and which they expect to deduce, and thereby secure a different verdict, upon a new trial, if granted; said evidence being to the full effect that the prisoner has within the last twenty or more years been so far of unsound mind, frequently, if not uniformly, as to be wholly unconscious and irresponsible for his acts; said unsoundness of mind, according to said evidence, being attributable, in part at least, to disappointment in love and religious enthusiasm.

Motion overruled.

Case No. 16,761.

UNITED STATES v. WOOLHEIM.

[11 Int. Rev. Rec. 78.]

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

INTERNAL REVENUE ACT—SALE OF CIGARS—FAILURE TO STAMP.

[Evidence that the owner of the cigars would have sold them if he had found an opportunity, though he would have properly stamped them before consummating the sale, shows a violation of the law in keeping cigars for sale not properly stamped.]

L. W. Emerson and T. Simons, Asst. U. S. Dist. Attys.

In the suit against Hugo Woolheim for the forfeiture of 37,600 cigars, seized at No. 177 Pearl street, New York City, July 20, 1869, the government claimed that these cigars were kept for sale on the premises without being stamped according to the law of 1868 [15 Stat. 125]. The decision turned on the question whether the cigars were designed to be sold or not, and the claimant admitted that he should have sold them if he had found an opportunity, but should have properly stamped them before consummating the sale.

BLATCHFORD, District Judge, charged that this was a violation of the law, and the jury, without leaving their seats, found for the prosecution, but recommended the case as a suitable one for remission of forfeiture by the secretary of the treasury.

Case No. 16,762.

UNITED STATES v. WOOLSEY.

[6 Betts, D. C. MS. 50.]

District Court, S. D. New York. Nov. 19, 1845.

PLEADING IN FEDERAL COURTS — DEMURRER FOR WANT OF JURISDICTION — VIOLATION OF EMBARGO LAWS — LOCUS OF SUIT — RETROSPECTIVE LAWS.

[1. The federal courts being courts of limited jurisdiction, the declaration must aver facts bringing the case within the cognizance of the court sued in; and if, in the case of a local action, such as an action of debt to recover a penalty for a violation of the embargo laws, no venue is laid, or a wrong one is averred, and this appears on the face of the pleading, the defect may be taken advantage of by demurrer.]

[2. Act Feb. 28, 1839 (5 Stat. 321), which provides that all pecuniary penalties and forfeitures accruing under the laws of the United States may be sued for in the district where such penalties or forfeitures have accrued, or in which the offender may be found, repeals by implication the previous laws requiring such suits to be brought only in the district where the penalty accrued. As this act relates only to the remedy, it is retrospective in its operation, and therefore an action of debt to recover a penalty for violation of the embargo laws of 1807–1808 (2 Stat. 473) may now be brought in the district where the offender may be found.]

[3. Where, in order to give jurisdiction, it is necessary that the defendant shall be found within the district, a mere statement in the declaration that the defendant "being in custody, etc.," is insufficient.]

O. Hoffman, for the United States.

G. Brinkerhoff and G. Wood, for defendant.

PER CURIAM (BETTS, District Judge). The declaration is demurred to as insufficient in the particulars that it does not make a case of which the court can take cognizance and that it does not show that any offence was committed by the defendant. The action is in debt to recover a penalty of $320,000 for a violation of the embargo act of December 22, 1807 [2 Stat. 451], and the act supplementary thereto of January 9, 1808 [Id. 453]. The declaration avers that the defendant on the 10th day of January, 1808, at the port of the city of Jersey in the state of New Jersey, to wit, at the city and port of New York, in the Southern district of New York, and within the jurisdiction of this court, was the owner of the ship Ambition, a registered vessel of the United States, not furnished with a clearance to any foreign port or place, nor under the immediate direction of the president of the United States, being laden with a cargo of goods, wares and merchandise of the growth and produce of the United States, and the defendant then and there on the day aforesaid, and at the place aforesaid, knowingly and willingly did suffer and allow the said vessel to proceed from the said port of the city of Jersey in the state of New Jersey aforesaid to a foreign port or place, to wit, to the port of Liverpool in Great Britain. The declaration asserts and negatives other particulars so as to bring the matter charged within the interdiction and penalty of the acts of congress; but all four counts put forth the allegation of which the above is a summary as the foundation of this action.

For the defendant it is contended that the declaration shows upon its face that the offence complained of was committed within the district of New Jersey, and is not, therefore, within the jurisdiction of this court. The plaintiffs insist that the cause being laid under a scilicit renders this distinction as to the place where the offence is thought to have been committed immaterial, and that the defendant cannot take advantage of the misstatement, if any, by demurrer, but must traverse the pleas laid, if the action is local and the pleas accordingly material.

The 89th section of the act of March 2, 1799, authorizes penalties accruing under any breach of that act to be sued or recovered in any court competent to try the same; and directs the trial of any fact which may be put in issue to be witnin the judicial district in which the penalty shall have accrued. 3 Bior. & D. Laws, 221 [1 Stat. 695]. The 6th section of Act Jan. 8, 1808, directs that all penalties, &c., incurred by force of that act, shall be sued for, recovered and distributed in the manner provided by the act of March 2, 1799. 4 Bior. & D. Laws, 132 [2 Stat. 454].

Upon the plain language of these statutes there can be no doubt that they require suits like this to be limited to the district in which the penalty has accrued. Barber v. Tilson, 3 Maule & S. 429. If the declaration fails to aver facts giving the particular court cognizance of the case, it would be defective in substance and pronounced bad on general demurrer. The United States courts, being all of limited jurisdiction, the record must always show either that the subject-matter of the action, or the party, is within the jurisdiction of the particular court. [Jackson v. Twentyman] 2 Pet. [27 U. S.] 136; [Gassies v. Ballon] 6 Pet. [31 U. S.] 761; [Breithaupt v. Bank of Georgia] 1 Pet. [26 U. S.] 238; [Sullivan v. Fulton Steamboat Co.] 6 Wheat. [19 U. S.] 450; 1 Mass. 360. If, then, no venue be laid, or a wrong venue in a local action, the defendant may demur or plead in abatement. 6 C. Abr. "Abatement," H, 17; Archb. Civ. Pl. 90; Com. Dig. "Action," N, 10. Whether the jurisdiction is sufficiently stated on the face of the record the defendant is put to his special plea in order to avoid it. [D'Wolf v. Rabaud] 1 Pet. [26 U. S.] 476; [Mollan v. Torrance] 9 Wheat. [22 U. S.] 537. In the case of Livingston v. Jefferson [Case No. 8,411] in the circuit court of Virginia, the action was for trespass on lands in New Orleans, and the declaration in all the counts averred that the trespass was committed at New Orleans, to wit, at Richmond, and in the district of Virginia. The pleadings were complicated, consisting of two general issues and also demurrers and special pleas covering all the eight counts, but the decision rested on a plea to the jurisdiction, averring that the lands on which the trespass was alleged are not situate and within the Virginia district, or within the jurisdiction of the court, but are situated and in New Orleans, &c., and the court held the action local and out of its jurisdiction. [Livingston v. Jefferson, supra.] Chief Justice Marshall clearly considered the declaration sufficient, although the venue was laid by a fiction, unless the fiction was traversed for the purpose of contesting the jurisdiction. Id. The same principle applies to actions local by usage of the courts, as actions for trespass quare clausum fregit, &c., and those made so by positive enactment of law, as actions on penal statutes, &c., usually are in England and in this country (Com. Dig. art. N, 10; 2 Rev. St. p. 482, § 8; 12 Wend. 149), and the action will be defeated upon exceptions that the suit is not prosecuted within the proper territory or because the testimony on trial fails to show the penalty accrued at the place charged in the pleading. But I think the doctrines in respect to the venue or locality of the offence to be set forth in the declaration or information well support the mode of pleading adopted in this case. It is enough if a right venue is given, although it be under a videlicet, and the defendant must avoid the effect of it, either by a traverse of the place laid, or by objecting to evidence proving the offence at a different place as a material variance from the pleadings. U. S. v. Burnham [Case No. 14,690]. Congress by a recent act, has modified in an essential point, the provisions of the 89th section of the act of March 2, 1799.

It is now enacted: That all pecuniary penalties and forfeitures accruing under the laws of the United States may be sued for and recovered in any court of competent jurisdiction in the state or district where such penalties or forfeitures have accrued, or in which the offender or offenders may be found (Act Feb. 28, 1839; 9 Bior. & D. Laws, p. 963, § 3; 5 Stat. 322), thus rendering this class of actions transitory. This meets a mischief indicated by Chief Justice Marshall in Livingston v. Jefferson [Case No. 8,411], that a failure of justice may ensue from the offender taking care never to be found in the district where alone he would be amenable when the remedy is local. The defendant insists that this enactment must be construed as prescriptive in its object and operation and cannot govern the present suit, because the cause of action accrued long before the passing of the article and the court would give it a retrospective operation to bring the present case within its authority. I think the objection is not maintainable. The statute does not look to the offence itself. It neither declares any constituent or quality of the offence, nor augments in any way the punishment inflicted by antecedent law. It acts solely upon the remedy, and that merely in designating tribunals in which this description of suits may be brought, differing from those which might have taken cognizance of it under the act of 1808. A new arrangement of the functions of the courts or of the location of the courts themselves, changes no vested right of the citizen in his relation to the government either as a suitor in cases of a civil character, or as amenable to its punitive justice. If he forms a contract or is subjected to a public prosecution of a civil or criminal nature he does not thereby bind the government to maintain, for hearing and disposing of the one or the other subject, the same tribunals and the same modes of procedure that were in existence when the contract or the offence came into being. If, when any right or interest accrues, personal or to property, it would fall under the exclusive cognizance of a particular forum (the supreme court or the court of chancery) and it should happen when the party concerned attempts to vindicate the right by action. The legislature has abolished the functions of those courts or has transferred them to different judicatories. This change of courts or practice could not be regarded retrospective in its character. Raising the jurisdiction of inferior tribunals imparts to them cognizance of rights of action pre-existing equally with those subsequently arising. Suitors being always com-

pelled to take their remedies in the tribunals as they exist when the action is instituted and are not entitled to reclaim the re-establishment and use of those which would have been appropriated when the cause of action or the right itself accrued. This is not only most manifestly so with respect to the court, which shall adjudicate upon the subject, but it is furthermore always held that the legislature may regulate ad libitum the whole subject of remedies.

Limitation laws passed after contracts are executed will govern the remedy upon such contracts. Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122. The power of the legislature to modify or control the remedy in respect to existing rights, not being one which touches the validity of the right itself cannot be questioned by the courts. 4 Wend. 206, 210, 211; 2 Paige, 284; Parsons v. Bowne, 7 Paige, 354; 6 Wend. 531; [McClurg v. Kingsland] 1 How. [42 U. S.] 202. This point was in effect determined in the circuit court of this circuit in 1841, it being decided that the first section of the act of February 28, 1839, went into immediate operation in fixing this mode of practice and furnished the rule to be applied whenever the case arose therein indicated. [McClurg v. Kingsland] 1 How. [42 U. S.] 202. The method of prosecution on penal statutes, directed by law, is clearly regarded as only affecting the remedy, and in which the citizen has no vested right. People v. Phelps, 5 Wend. 10. Thus in Rex v. Gaul, in information under a penal statute, exhibited out of the county where the offence was committed, objection was taken, that by St. 21 Jac. I. c. 4, the prosecution must be local. Holt and Hale held that the statute applied to actions of debt and penal statutes as well as informations and on adjourning the points in the case, ten judges held that all informations and popular actions on penal statutes enacted before 21 Jac. I. c. 4, must by form of the latter act be prosecuted in the county where the act was done. 1 Salk. 372; 1 Ld. Raym. 370; 3 Salk. 199. But it was held that the statute was not prospective and did not extend to offences created by subsequent penal statutes. Hicks' Case, 3 Salk. 350, 1 Salk. 373. The question was again agitated in the king's bench, where an action of debt for a penalty, under the act of 52 Geo. III., was brought in London for acts done in Middlesex and Surrey and not in London, and exception was taken at the trial to the proofs because the action was made local by 31 Eliz. c. 5, which forbids "the offence against any penal statute being laid in any other county than where it was committed." It was not questioned by the bar or court that the act of Elizabeth applied to anterior statutes, and the question debated was whether it also extended to penalties created by subsequent statutes, and Lord Ellenborough, and the whole court held that "the language related to statutes both in time past and in future." Barber v. Tilson, 3 Maule & S. 429, 436. There was no special force of expression used by the legislature to denote an intention to embrace penal statutes previously enacted; if any distinction can be drawn upon the language, it would rather point to a future than antecedent enactments. But the king's bench accept the language as regulating a prosecution under a penal statute whenever the statute might have been made or the suit brought. So, of the act of congress of 1839, it designates the courts where particular suits may be prosecuted and renders to a certain degree actions before local, transitory, and extends the competency of district courts to entertain this class of actions, without regard to the place of the offence, where the offender is found within their respective districts.

No question, I suppose, can be made of the power of congress to transfer the jurisdiction exercised by district courts in suits in favor of the United States, to the circuit courts, nor that from the day of such transfer the district courts must cease to act in these matters, and the circuit courts could lawfully hear and determine them, whether the cause of action existed then or arose thereafter. Had the act of 1839 instead of the phrase "any court of competent jurisdiction" inserted "any circuit court of the United States," the jurisdiction of the district courts would necessarily cease eo instanti, and I take it to be clear of doubt that actions for penalty for past and future offences must then have been prosecuted in this circuit court; and if this same act or any other had reorganized the circuit court so that no one sat within the state of New Jersey that such new allotment of the location of courts would necessarily repeal the provisions of the 89th section of the act of 1799, limiting the trial of facts in issue to the judicial district of New Jersey as then established. What shall be the distribution of powers to the courts of the United States, and how those powers shall be exercised is a matter under the discretion of congress except as directed by the constitution, and when the court is designated and its jurisdiction defined, and its mode of procedure established by congress, it must perform its functions under such new law in regard to all matters triable before it, irrespective of the laws before governing the like proceedings.

It is furthermore contended for the defendant that the court cannot take jurisdiction under the act of 1839 without it is advised in the record that the defendant was found within this district, the penalty having accrued in a different district. The 3d section of the act of 1839, having re-enacted the 89th section of the act of 1799 in relation to this class of prosecutions, with an important addition and modification, must be regarded as a repeal by implication of those provisions in the antecedent act. U. S. v. One Case of Hair Pencils [Case No. 15,924]. The power of the court is accordingly contained in the act of 1839, and one of the particulars there indicated must

exist in order to found its jurisdiction over penalties or forfeitures; the penalty must have accrued within the particular district, or the offender must be found within it. In respect to the courts of the United States all having a limited jurisdiction, I take the proposition to be undeniable that the record must set forth facts showing the subject matter to be within the jurisdiction of the court, taking cognizance of it. Conk. Prac. 221.

If the jurisdiction in this case rests solely upon the ground of finding the defendant within the district, the declaration should show that fact, for the same reason, that it must in the circuit court, aver that one of the parties is a citizen of the state where the suit is brought. A formal averment is not always necessary, but a statement which may afford opportunity to the defendant to plead in denial must be made. The precision and directness of averments with respect to the residence of a party, which was exacted in some of the cases ([Abercrombie v. Dupuis] 1 Cranch [5 U. S.] 343; [Wood v. Wagnon] 2 Cranch [6 U. S.] 9), is modified by later decisions and a description or rehearsal equivalent to an averment is received as sufficient (Gassies v. Ballon, 6 Pet. [31 U. S.] 761); nor is a positive averment necessary, when this jurisdiction is necessarily implied from the nature of the case or suit by the United States on contracts, &c., or by private parties under the patent act, &c. In this case, the only statement in the record to this point is that the United States by their attorney bring into court their bill against the defendant being in custody, &c. This form of allegation does not necessarily import that the defendant was found and arrested in the district. It is a formula which could be equally used if he had entered his appearance to the writ, without having been ever personally within the district; and the court cannot upon a suggestion of that character, assume a personal arrest, and the fact that the defendant was in the district when the suit was instituted. There is then, nothing alleged here which the defendant is bound to traverse, and he has a right to put himself upon the insufficiency of the arrest to give the court jurisdiction. In so far as this particular in the declaration is concerned, I think accordingly, that the demurrer is well taken, although the jurisdiction of the court is otherwise technically supported by the allegation that the offence was committed within this district.

I have noticed these various particulars with more fullness as both parties will unquestionably seek to vary their pleadings, and that, if the cause is continued in this court, they may be put in possession of the views of the court as a guide to amendments that may be offered. I hold, then, that the plaintiffs have sufficiently charged the offence to have been committed within this district, to authorize them to prove that fact on trial; that the court has jurisdiction of the subject matter, if the defendant be found and arrested within the district, although the offence was committed out of it; and that it is not sufficiently stated on the record to give the court jurisdiction of the cause, that the defendant was found within the district.

The remaining question is whether the declaration charges the commission of the offence interdicted by the embargo act. The declaration charges that the said vessel "proceeded" and was allowed by the defendant to proceed from the port of the city of Jersey to a foreign port or place, to wit, to the port of Liverpool, &c. The 3d section of the act of January 9, 1808, enacts: "That if any vessel shall, contrary to the provisions, &c. proceed to a foreign port or place," the owner shall forfeit and pay, &c. No exception is taken to the sufficiency of the allegations in all other respects, to bring the case within the statute, and the point here raised is that the offence was not complete until the arrival of the vessel in a foreign port, and that the declaration accordingly should have charged such arrival. In U. S. v. The Etruscan, 7 Cranch [11 U. S.] 113, 115, the supreme court find the interpretation upon the act claimed by the defendant, but there it was a question of the sufficiency of the proof and not one arising upon the pleadings. The term "proceed to a foreign port," as used in the statute, imports the performance of the voyage charged and the judgment of the supreme court establishes the rule, that no proof short of that will subject a party to the penalty or forfeiture. But in pleading it is not necessary to set forth the construction of the statute. In this case the plaintiffs assert that the vessel was laden and dispatched in violation of the embargo law, and proceeded to Liverpool employing the language of the act itself in describing the offence. The same form of pleading was adopted in the First circuit upon this section, without exception, although the form of the declaration was critically scanned in that case. Smith v. U. S. [Case No. 13,122]. In that case the court assert the rule, that in general it is sufficient to maintain a suit upon a statute that the case is brought within the terms of it. Smith v. U. S. [supra]; U. S. v. Elliot [Case No. 15,044]. I hold the declaration sufficient in this particular.

My decision accordingly is against the demurrer upon all the points, except the sufficiency of the averment that the defendant was found within this district. The plaintiff may have leave to amend the declaration by introducing an averment to that effect, and the defendant has leave to plead to the declaration within 20 days after the amendment, if made, or if not, within 30 days from the day of this decision.

Case No. 16,763.

UNITED STATES v. WOOLSEY.

[8 Betts' D. C. MS. 56.]

District Court, S. D. New York. Oct. 16, 1846.

LIMITATION OF ACTION—EMBARGO ACT.

[1. The limitation of actions prescribed by Act March 2, 1799, § 89, continues to apply to suits brought for penalties under the embargo act of 1808.]

[2. When a statute is made in addition to another on the same subject-matter, without express words of repeal as to any part of the former, the provisions of both must be construed together.]

B. F. Butler, for the United States.

D. B. Ogden, Geo. Wood, and G. Brinkerhoff, for defendant.

PER CURIAM (BETTS, District Judge). An action of debt is brought by the United States to recover a penalty given by the embargo act of 22 December, 1807, and the supplementary act of January, 1808. Bior. & D. Laws, pp. 129, 132, §§ 3, 6 [2 Stat. 451, 453]. The defendant pleads in bar, that the causes of action stated in the declaration did not any of them accrue within three years next before the commencement of this suit. To this plea the plaintiff demurs. The point raised by the demurrer is whether the limitation of actions prescribed by the 89th section of the act of March 2, 1799 [1 Stat. 695], continues to apply to suits brought for penalties under the embargo act of 1808. It is admitted by the counsel for the defendant, that the precise question was raised and decided in the second circuit. U. S. v. Mayo [Case No. 15,755]. But it is contended that the decision is not conclusive upon this court. If the question be an open one, it is urged that the true construction of section 6 of the act of January 9, 1808, is to continue in force the three-years limitation fixed by the act of 1799. I believe the decisions of the circuit judges are not regarded as of binding authority out of their particular circuits, although they are received in all other courts as eminent evidence of the true rule of law. In a case resting at all in doubt, I should accordingly yield to the weight of such opinion, however the inclination of my own mind might be; and as that judgment is not objected to as in palpable opposition to the law, it would be a case proper for this court to follow, whether the general reasoning on which it is founded be satisfactory or not.

Without giving the subject a labored examination, I am disposed to think, the decision rests upon sound general principles. The act of March 26, 1804, § 3 (3 Bior. & D. Laws, 611 [2 Stat. 290]), beyond all question, operates a repeal of the limitation contained in the act of 1799; and it seems to me that reference to that provision of the act of 1799 made in that of 1808, connects with the latter only such portions of the former as were then in force. A general reference in one statute to another antecedent one, naturally embraces also its amendments and additions, because all the provisions must be construed together as composing the act (reddenda singula singulis). The general doctrine to be deduced from the authorities being, that when a statute is made in addition to another, on the same subject-matter, without express words of repeal as to any part of the former, the provisions of both must be construed together. Pearce v. Atwood, 13 Mass. 344. So an act reviving an antecedent one, revives also all acts explanatory or supplemental to it. Dwar. St. 676; Williams v. Rougheedge, 2 Burrows, 747; Rex v. Justices of Surrey, 2 Term R. 504. The general rule undoubtedly is, that relative words in a statute make the thing pass the same as if particularly expressed in the act itself. Wheatly v. Thomas, T. Raym. 54; Dwar. St. 705. Yet the judgment of the court in Rex v. Justices of Surrey introduces the qualification, that a clause of reference to statutes of complicated provisions some of which are at variance with others, does not extend to and comprehend every particular clause of the acts referred to, but only their general forms and provisions. 2 Term R. 504; Dwar. St. 705.

Under either view of the rule, it is conceived that the 6th section of the act of January 9, 1808, incorporates in it, or recognizes as law, nothing further than the then subsisting and operative provisions of the act referred to. The language, carefully considered, would perhaps be limited to those particulars of the act of 1799 which regulated or had regard to the proceedings of the prosecutor—determining who might sue—the method of suit and disposition of the proceeds of the action. This latter clause of the section strongly countenances this interpretation, because it introduces one particular regulation in favor of the party condemned in the suit, without adverting to any matter of defence or protection in respect to the action. The manner of suing for, recovering, distributing or accounting for penalties may be the same as prescribed by the act of March, 1799, without its being made to appear affirmatively by the prosecution, or declared by the judgment of the court, and that the offence was committed within any period of limitation. The declaration in this case avers the offence was committed on the 10th day of January, 1809, and the record shows that the action was instituted of July term, 1841. It was not necessary for the plaintiff to allege more, and it devolved upon the defendant to bring forward the statute of limitation by plea (Lawes, Pl. Am. Ed., 536–539), or perhaps in a penal action, make it his evidence under the general issue (Esp. Pen. Act. 78). The default of the defendant to produce such defence by plea or proof according to his right would leave a peremptory judgment to be entered without regard to the act of limitation. The presumption would be forcible, that congress, in view of these rules of law, intended no more by

the sixth section of the act of 1808 than to direct the method of the plaintiff's proceeding, leaving the party sued to make his defence in such manner as the existing law might sanction. It is believed to be well settled that the remedies in relation to suitors must be administered by the court conformably to the law prevailing at the time of trial, unless some special enactment establishes, in respect to a particular prosecution or class of cases, a different rule. U. S. v. Woolsey [Case No. 16,762], in this court, and cases cited. This embraces statutes of limitation, or matter of defence [Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 122,—as well as the practice on the part of the plaintiff,—4 Wend. 206, 210; 7 Paige 354. Judgment must be rendered for the claimant, with leave to the defendant to plead on the usual terms.

Case No. 16,764.

UNITED STATES v. WORKMAN et al.

District Court, D. Louisiana. March 6, 1807.

CONTINUANCE FOR ABSENT WITNESS—ANIMUS OF PROSECUTION — EVIDENCE — DECLARATIONS OF CO-CONSPIRATOR — DISCHARGE OF JURY — EFFECT.

[1. It is proper to allow a continuance to obtain the testimony of a material witness, who is a resident of the territory, and who, though in a foreign jurisdiction, has declared that he will return in 15 days.]

[2. On a prosecution for setting on foot an invasion of Spanish territory, in violation of the act of 1794, it appearing that defendant had acknowledged that a certain person was associated with him in a plan for such invasion, statements by such person were admissible to show the extent of the plan, and whether it was legal.]

[3. On such a prosecution it was proper to introduce evidence that, a short time before defendant's arrest, he had been instrumental in instituting habeas corpus proceedings to release one imprisoned by the United States military authorities, with the object of showing that the prosecution arose from the animosity of such authorities, engendered by this conduct on his part.]

[4. The court is at liberty, in all cases not capital, to discharge the jury when it is apparent that they cannot agree, and it may then order another jury to be summoned.]

Trials of Hon. James Workman and Col. Lewis Kerr on a charge of joint misdemeanor in planning and setting on foot within the United States an expedition for the conquest and emancipation of Mexico, a colony and possession of the kingdom of Spain, in violation of Act Cong. June 5, 1794, § 5 [1 Stat. 384], prohibiting the setting on foot of a military expedition or enterprise within the territory or jurisdiction of the United States to be carried on against the territory or dominions of any foreign prince or state with whom the United States are at peace. The defendants having pleaded not guilty to the indictment, the attorney for the district moved on February 9th, 1807, for a postponement on account of the absence of a material witness, M. Brognier De Clouet, who had been summoned, but who had declared that he was a Spanish officer, and could not attend, owing to his absence at Baton Rouge on public service. The prosecution made affidavit as to the materiality of the testimony of the absent witness, and that it hoped before the next term to procure his attendance. It appeared that he was a militia officer under the Spanish government, but was a resident of the district, and that he had declared that he would return from Baton Rouge in fifteen days. After considerable discussion by the opposing counsel as to the propriety of a postponement in such a case, the defense citing the Case of D'Eon, 3 Burrows, 1513, the court stated that the affidavit being in the usual form, and the residence of the witness and his declaration that he would return in fifteen days being circumstances that did not occur in the Case of D'Eon, the trial should be postponed for fifteen days.

The prosecution having admitted that the evidence of M. De Clouet did not affect Mr. Kerr, his counsel moved that the trial of the latter should be brought on. This was opposed by the attorney general, who urged that the offenses charged were joint, and that hence the defendants could not sever in their defense, but the court ordered the trial of Mr. Kerr to proceed. A jury having been sworn, and the district attorney having opened for the prosecution, Lieut. Francis W. Small was introduced as a witness for the United States. He testified to conversations with Mr. Kerr in which the latter suggested the seizure of certain Spanish possessions, beginning with Baton Rouge. He testified further that he was led by the statements of Mr. Kerr to think that such a plan would be sanctioned by the United States government, and that there was no suggestion of undertaking it without such sanction. A further question asked of him, as to whether Mr. Workman told him anything respecting an attempt to invade the Spanish dominions, was objected to by the defense, unless the statements by Mr. Workman were in the hearing of the defendant Mr. Kerr. After extended argument by counsel, the court ruled that the question was proper to show the extent of the plan, but no further; it having been proved that Mr. Kerr acknowledged that Mr. Workman was associated with him in a plan for the invasion of the Spanish territories, and the evidence being proper to show whether this plan was legal or not. The witness then testified to some conversation with Judge Workman in regard to the enterprise, and stated that the latter had suggested that the banks might be seized to procure money for the expedition, but that this suggestion was made in a humorous manner, and that he did not think that it was meant to be taken seriously. Lieut. W. M. Murray also testified to conversations with Messrs. Workman and Kerr in

regard to an expedition into the Spanish dominions, stating that there was little secrecy about it, and that there was no suggestion that the plan was unlawful until the designs of Col. Burr began to be made the subject of conversation. Mr. Brown was then introduced as a witness, and asked to relate what he knew as to the plans of the Mexican Society, and he testified to conversations with Judge Workman as to the proposed expedition to Mexico and the proper methods of getting the sanction of the United States government. The defense then proposed to introduce a witness to prove that a short time before Mr. Kerr's arrest he had, as a magistrate, taken proof of the imprisonment of Mr. Ogden under the orders of General Wilkinson, and that as an attorney he had sued out a writ of habeas corpus on which Mr. Ogden was liberated by the other defendant Judge Workman, connecting this proof with other testimony by which it would appear that defendants were confined by the military authorities at the quarters of the general in command, and that they were freed only by the interposition of the judge presiding at this trial, and that the affidavits on which the prosecution was founded were taken at headquarters, and that the prisoners were sent from such quarters under the conduct of an officer, the object being to show that the prosecution arose from the animosity of the military authorities at the interference of defendants in their summary proceedings. After extended discussion by counsel, the court decided that the witness should be examined, and Mr. Lawrence Clark then testified to the institution of a habeas corpus proceeding by him for the release of Mr. Ogden and the part taken by Mr. Kerr and Judge Workman in such release. The presiding judge then said that it was perhaps proper that he should inform the jury that Mr. Kerr and Judge Workman had both been arrested by the military force, and that they had been liberated in consequence of a habeas corpus which he himself had issued, that after they had been surrendered to the civil authorities by the general Mr. Small and Mr. Murray made in his presence the affidavits on which the prosecution was based, and that he delivered those affidavits to the attorney for the district, who had then commenced the prosecution. The judge added that he had also furnished to the district attorney the exculpatory affidavits made before him by the defendants. The defense then introduced a number of witnesses to testify to the objects of the Mexican association, so called, from which it appeared that it was merely an agreement between a number of men as to measures to be taken for the defense of the district, and to aid the United States in case war should arise with Spain, and to endeavor by all lawful means to accomplish the emancipation of Mexico.

[The evidence for the defendant having been closed, the counsel for the parties addressed the jury at great length. The arguments took a wide range, embracing much matter concerning the condition of public affairs in the territory, the conduct of Gen. Wilkinson, and the relations of the United States to Spain at the time of the commission of the alleged unlawful acts. Mr. Livingston and Mr. Jones, being both unable, on account of illness, to attend, Mr. Kerr addressed the jury in his own behalf; and his co-defendant, Mr. Workman, also, by permission of the court, made an extended argument for the defense.]

HALL, District Judge, then charged the jury. He said he would state the law to the jury, and it would be their province to apply the evidence. The act on which the indictment was founded was one which had been provided by the wisdom of a Washington and a Jefferson at the time when M. Genet was issuing commissions to privateers, raising armies and appointing officers to commence an attack against a friendly nation. By this act it was declared highly criminal for any person or any body of individuals to prepare or set on foot a military expedition against any power at peace with the United States. The means for an expedition might be prepared by enlisting men, or by inducing others to enlist them. In support of the prosecution, it was urged that men had been enlisted by the defendant. Mr. Small stated that he took an oath of secrecy, and an oath to forward the plan; and at the defendant's desire it appeared he had engaged other persons. This seemed very like beginning or setting on foot an expedition. As to the testimony relative to providing means from the banks, he thought, and it was admitted on all hands, that no stress whatever ought to be laid on it. The witnesses did not appear to believe that what was said on this subject was serious. With respect to the Mexican association which the jury had heard so much applauded, he did not think its members ought to boast of it. He disapproved of all such societies. The government of our country was sufficiently strong, vigilant, and careful of the national security and honor. It was the duty of a good citizen to keep pace with, and not attempt to outstrip the government in its operations.

The jury then retired; after having been together three days, they were sent for, called over and asked if they had agreed on a verdict to which they answered in the negative. They added that there did not appear any probability or in the opinion of some of them, any possibility of their ever agreeing.

THE COURT desired the traverser to say whether he would consent to discharge the jury. The traverser observed that he knew of no claim which the prosecution had on him for favors, and did not feel himself under any obligation to the prosecutors to give them any facilities in their proceedings. Those who commenced the prosecution had done so

without his consent, and must proceed without it. He declined giving any consent for the discharge of the jury. The court discharged the jury.

At a subsequent session of the court the traverser moved that his recognizance be discharged, as he could not be again put on his trial for the same offence. The attorney for the United States opposed the motion. He cited several cases to show that however the law might be in this respect in capital cases or where life or limb is jeopardized, all other cases, according to the latest doctrines on the subject, are to be governed by their own circumstances; and where it is necessary to justice, either to the state or to the accused that a new jury should be empannelled, the court could not refuse one. The traverser replied that the only distinction between capital cases and those of other high offences, is that in the latter a new jury might be empannelled when a former one had been discharged by the consent of the traverser or with a view to favor him; but that in capital cases even the prisoner's consent could not authorize the discharge of the jury. He cited several cases in which a second jury had been empannelled, but in all of which the reason was given that the former one had been discharged at the request or as an indulgence to the defendant; to let him in to plead to the jurisdiction or the like.

THE COURT was of opinion that the general doctrine prohibiting the discharge of a jury in all cases was erroneous and obsolete. The doctrine is now confined to capital cases, and not without exceptions even there. In all other cases it is clear that the court may, when it is necessary to justice, discharge a jury. It was necessary to justice in this case; it is plain the first jury never could have agreed; they have been discharged; and it is now necessary that another be summoned. A venire de novo was ordered returnable on the second of March.

The second trial of Mr. Kerr began Monday, Mar. 2. The jury being sworn, Lieut. Small and Lieut. Murray testified substantially the same as on the first trial. Mons. Brognier De Clouet was next called. He said that Judge Workman had often spoken to him concerning the propriety of rendering Mexico an independent state. Mr. Workman seemed to consider a war with Spain as inevitable. In that case he said the government of the United States would authorize an expedition to Mexico, and the army would aid in it. Some time subsequent to the late disturbances here, Mr. Workman told the witness that General Wilkinson had sworn his (Workman's) ruin; but that he had many friends, and he knew how to support himself and his friends too. Mr. Workman told the witness that if an expedition to Mexico should take place, the witness might probably have a command in it.

For the defendant the evidence was, in general, similar to that given on the previous trial.

Several gentlemen of the jury having expressed to the court their wish to be permitted to retire immediately, in order to consult on their verdict, and declaring that as they had heard the former discussion their opinions could not be altered by the debates from the bar, the counsel on both sides agreed to submit the cause to the jury without argument. The jury then retired and immediately brought in their verdict. "Not guilty."

Friday, Mar. 6.

Trial of Mr. Workman. The jury being called and sworn, Mr. Brown, opened the cause, and explained the nature of the charge against the traverser. In support of the prosecution, Lieuts. Small and Murray and Mr. Brognier De Clouet were examined, and gave the same testimony as in the preceding trial. Mons. Garricke, commandant of the Terre aux Bœufs settlement, was the next witness produced by the prosecutor. He deposed that some time in April last, he dined in company with Mr. Workman and Dr. Watkins at Mr. Gurley's, and that in the evening when they had returned, Mr. Workman asked the witness how he would like to have a military command, and spoke of an approaching Spanish war and an expedition to Mexico, and also asked if the witness could not get a number of the young men at Terre aux Bœufs to volunteer in such an expedition. The witness also stated that Mr. Workman desired him not to mention this conversation, which he promised not to do.

The case on the part of the prosecution being closed, the traverser left it to the jury, without offering any testimony or argument in his defence. The jury then retired, and immediately brought in their verdict, "Not guilty."

Case No. 16,765.

UNITED STATES v. WORMS et al.

[4 Blatchf. 332.] [1]

Circuit Court, S. D. New York. May 27, 1859.

CRIMINAL LAW—COMMITMENT—PRELIMINARY EXAMINATION.

1. A commitment of a prisoner by a commissioner, on a preliminary warrant, for examination, should be for a short fixed period of time, and not for an indefinite time.

[Explained in Re Mason, 43 Fed. 514.]

2. The time should not exceed 24 hours, except for special cause shown, unless requested by the prisoner.

3. The government should be held to diligence in producing their testimony, or the prisoner should be discharged.

[Explained in Re Mason, 43 Fed. 514.]

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

This was an application to discharge the defendants [Charles Worms and John Reiga] from custody.

NELSON, Circuit Justice. The defendants were arrested in March last on a charge of smuggling, and were committed, on a preliminary warrant, for examination, for an indefinite time. They remained in prison, without any steps being taken for their examination, till the case was brought before me, they having then been in prison from one to two months. I directed that the examination should take place immediately, or I would discharge them from custody.

The commitment in the first instance was erroneous, as it should have been for a short, fixed period of time. In these cases of arrest, the commitment, with a view to the hearing by the commissioner of the testimony on behalf of the government, should be for a time certain, and, unless, on special cause shown, should not, except at the request of the prisoner, exceed the period of twenty-four hours; and, in case cause is shown, on the part of the government, for farther delay, to procure testimony, great diligence should be required in its procurement, and, in case of neglect, the commissioner should discharge the prisoner. It is the special duty of the officers who have charge of the prosecution, to attend to the examination with all reasonable dispatch, as the prisoner is usually kept in close custody during the preliminary examination, and it is wrong, if he is ready for the hearing, that he should be kept in confinement an hour beyond the time reasonably necessary for a full investigation of the crime charged.

I think the imprisonment in the present case exceedingly exceptionable, and the indefinite imprisonment under the warrant altogether irregular. I refrain, however, from discharging the parties, as the government have agreed to a speedy hearing of the case.

Case No. 16,766.

UNITED STATES v. WORRALL.

[Whart. St. Tr. 189; 2 Dall. 384.]

Circuit Court, D. Pennsylvania. April, 1798.

FEDERAL COURTS — JURISDICTION — ATTEMPT TO BRIBE FEDERAL OFFICER—COMMON LAW OFFENCES.

[1. The offence of attempting to bribe an officer of the United States is completed within the district of Pennsylvania, so as to be cognizable in the circuit court thereof, when the letter containing the corrupt offer is both written and delivered at the post office in that state, although it is forwarded to and received by the officer in the state of New Jersey.]

[Cited in Re Palliser, 136 U. S. 266, 10 Sup. Ct. 1036.]

[Quoted in Gatton v. Chicago, R. I. & P. Ry. Co. (Iowa) 63 N. W. 595.]

[2. Upon the question whether a person is subject to indictment in the federal courts for attempting to bribe the commissioner of revenue of the United States, in the absence of any act of congress defining such an offence, the court was divided; Chase, Circuit Justice, being of opinion that there is no common law of the United States, and that no offences against the United States are punishable except as provided by statute; while Peters, Circuit Judge, thought that the United States possessed the common-law power to punish misdemeanours, which, by corruption of its officers, threatened its existence and well being.]

[Quoted in Wheaton v. Peters, 8 Pet. (33 U. S.) 318. Cited in brief in McElrath v. McIntosh, Case No. 8,781. Cited in Goddard v. Coffin, Id. 5,490; U. S. v. Rogers, 46 Fed. 3.]

[Cited in People v. Markham, 64 Cal. 161, 30 Pac. 620.]

The defendant [Robert Worrall] was charged with an attempt to bribe Tench Coxe, the commissioner of the revenue; and the indictment, containing two counts, set forth the case as follows:

"The grand inquest of the United States of America, for the Pennsylvania district, upon their respective oaths and affirmations do present—that, whereas, on the 13th day of May, 1794, it was enacted by the senate and house of representatives of the United States of America, in congress assembled; 'that as soon as the jurisdiction of so much of the headland of Cape Hatteras, in the state of North Carolina, as the president of the United States shall deem sufficient and most proper for the convenience and accommodation of a light house, shall have been ceded to the United States, it shall be the duty of the secretary of the treasury to provide by contract, which shall be approved by the president of the United States, for building a light house thereon of the first rate:' And also, 'that the secretary of the treasury be authorized to provide by contract, which shall be approved by the president of the United States, for building on an island in the harbour of Ocracock, called Shell Castle, a lighted beacon of a wooden frame, fifty-five feet high, to be twenty-two feet at the base, and to be reduced gradually to twelve feet at the top, exclusively of the lantern, which shall be made to contain one large lamp with four wicks, and for furnishing the same with all necessary supplies. Provided, that no such lighted beacon shall be erected, until a cession of a sufficient quantity of land on the said island shall be made to the United States by the consent of the legislature of the state of North Carolina:' And whereas the legislature of the state of North Carolina did, on the 17th day of July, 1794, cede to the United States the jurisdiction of so much of the headland of Cape Hatteras in the same state, as the president of the said United States deemed sufficient and most proper for the convenience and accommodation of a light house, and also a sufficient quantity of land for building on the said island, in the harbour of Ocracock, called Shell Castle, a beacon of the kind, description, and dimensions aforesaid: And, whereas, afterwards, to wit, on the 28th day of September, 1797, at the district

aforesaid, Tench Coxe, Esq. (he the said Tench Coxe, then and there being commissioner of the revenue, in the department of the secretary of the treasury) then and there was appointed and instructed by the secretary of the treasury, by and with the authority of the president of the said United States, to receive proposals for building the light house aforesaid, and beacon aforesaid: Robert Worrall, late of the same district, yeoman, being an ill-disposed person, and wickedly contriving and contending to bribe and seduce the said Tench Coxe, so being commissioner of the revenue, from the performance of the trust and duty so in him reposed, on the said 28th day of September, 1797, at the district aforesaid, and within the jurisdiction of this court, wickedly, advisedly and corruptly, did compose, write, utter and publish, and cause to be delivered to the said Tench Coxe, a letter, addressed to him the said Tench Coxe, in the words and figures following, that is to say: 'Dear Sir: Having had the honour of waiting on you, at different times, on the light house business, and having delivered a fair, honest estimate, and I will be candid to declare, that with my diligent and industrious attendance, and sometimes taking an active part in the work, and receiving a reasonable wages for attending the same, I will be bold to say, that when the work is completed in the most masterly manner, the job will clear at the finishing the sum of £1,000. Now if your goodness will consider, that the same set of men that will be wanted for a small part of one job, will be necessary for the other, and particularly the carpenters, and smith for the iron work, and as they will want a blacksmith's shop and a set of tools at Cape Hatteras, the other iron work might be made there, and sent across the sound at a small expense, which would make a considerable saving. I have had this morning a set of good carpenters, four in number, as ever emigrated from the old country, as also several stone masons, offering themselves to go to Carolina. As I told you about the smith that I had engaged, he informed me that he had a set of good second-hand tools offered him that might be purchased at a reasonable price—therefore, good sir, as having always been brought up in a life of industry, should be happy in serving you in the executing of this job, and always content with a reasonable profit; therefore, every reasonable person would say that £1,400 was not unreasonable, in the two jobs. If I should be so happy in your recommendation of this work, I should think myself very ungrateful, if I did not offer you one-half of the profits as above stated, and would deposit in your hand at receiving the first payment £350, and the other £350 at the last payment, when the work is finished and completed. I hope you will not think me troublesome in asking for a line on the business by your next return, and will call for it at the post office, or in Third street. In the mean time I shall subscribe myself to be, your obedient and very humble servant to command. Robert Worrall. Philadelphia, Sept. 28, 1797, No. 26, North Third Street.' Which letter was directed in manner following, that is to say: 'For Tench Coxe, Esq. At Burlington near Bristol, Pennsylvania.' To the evil example of others in the like case offending, and against the peace and dignity of the said United States.

"And the grand inquest aforesaid, upon their respective oaths and affirmations, do further present, that Robert Worrall, late of the same district, yeoman, being an ill-disposed person, on the 28th day of September, in the year aforesaid, in the district aforesaid, and within the jurisdiction of this court, wickedly, advisedly, and corruptly did solicit, urge, and endeavour to procure Tench Coxe, Esq., he the said Tench Coxe, then and there being commissioner of the revenue of the said United States, and then and there interested and employed in the execution of the duties of the said office, to receive proposals for contracting to build a light house on Cape Hatteras, and a beacon on Shell Castle Island, to contract with, and give a preference to him the said Robert Worrall, for the building of the said light house and beacon, and in order to prevail upon him, the said Tench Coxe, to agree to give him, the said Robert Worrall, the preference in and the benefit of such contract, he the said Robert Worrall, then and there did wickedly, advisedly and corruptly, offer to give the said Tench Coxe, then and there being commissioner of the revenue of the United States, as aforesaid, a large sum of money, to wit—the sum of seven hundred pounds, money of Pennsylvania, equal in value to eighteen hundred and sixty-six dollars and sixty-seven cents, in contempt of the laws and constitution of the said United States, to the evil example of others in the like case offending, and against the peace and dignity of the said United States."

On the evidence, it appeared that in consequence of instructions from the secretary of the treasury, Mr. Coxe had officially invited proposals for erecting the light houses, &c., mentioned in the indictment, that the defendant presented proposals; and, while they were under consideration, he sent the offensive letter, which was dated at Philadelphia; but Mr. Coxe having removed his office (in consequence of the yellow fever) to Burlington, in the state of New Jersey, received the letter at the latter place on the 28th of September, 1797, with other despatches from the post-office of Bristol, in Pennsylvania. On the receipt of the letter Mr. Coxe immediately consulted Mr. Ingersoll (the attorney general of the state), communicated the circumstance that had occurred to the president, and invited the defendant to a conference at Burlington. In this conference, the defendant acknowledged having written and sent

the letter; declared that no one else knew its contents, for "in business done in his chamber, he did not let his left hand know what his right hand did;" and repeated the offer of allowing Mr. Coxe a share in the profits of the contract. He then pressed for an answer, but was referred by Mr. Coxe to the period when the public offices should be again opened in Philadelphia. Accordingly, soon after the revival of business in the city, the defendant called at Mr. Coxe's office—the whole subject was gone over, and perfectly recognized—the offer to give the money mentioned in the letter was repeated—and, in the fullest manner, the defendant gave Mr. Coxe to understand that he would allow £700 as a consideration for Mr. Coxe's procuring him the contract. It was not positively stated that the letter was produced to the defendant at this interview, but he adverted to and unequivocally confirmed its contents.

On these facts, Mr. M. Levy, for defendant, observed, that it was not sufficient for the purpose of conviction to prove that the defendant was guilty of an offence, but the offence must also appear to be legally defined, and it must have been committed within the jurisdiction of the court which undertakes to try and punish it. The eighth article of the amendments to the federal constitution (3 Swift's Laws, p. 456) provides, indeed, expressly that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state or district wherein the crime shall have been committed," &c. Now, in the present instance, there is no proof that the criminal letter was written in Pennsylvania, and the proof of publication and delivery is at Burlington, in New Jersey. The first count of the indictment, therefore, must necessarily fail, and unless he is convicted upon that, he cannot be convicted on the second count, which is attempted to be supported merely by evidence of recognizing in Philadelphia, a corrupt offer previously made in another place, out of the jurisdiction of the court.

The attorney of the district (Mr. Rawle) replied, that according to the decision in Dr. Hensey's Case, 1 Burrows, 642, the letter being dated at Philadelphia, is in itself sufficient proof that it was written there. But the letter was put into the Bristol post-office by the defendant; and, consequently, by his act, done in Pennsylvania, it was caused to be delivered to Mr. Coxe, at Burlington. The opposite doctrine, indeed, would furnish absolute impunity to every offender of this kind, whose crime was not commenced and consummated in the same district: for, the defendant, it is said, cannot be punished in Pennsylvania, because the letter was delivered to Mr. Coxe in New Jersey; and, by a parity of reasoning, he could not be punished in New Jersey, because it was neither written nor delivered by him within the jurisdiction of that state. To show that the offer of a bribe is indictable, though the bribe is not accepted, he referred to 4 Burrows, 2494; 1 Ld. Raym. 1377.

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

BY THE COURT. The letter appears by its date to have been written in Pennsylvania, and it is actually delivered by the defendant at a post-office in Pennsylvania. The writing and the delivery at the post-office (thus putting it in the way to be delivered to Mr. Coxe) must be considered, in effect, as one act; and, as far as respects the defendant, it is consummated within the jurisdiction of the court. We, therefore, think that the first count in the indictment is sufficiently supported. But, on the second count, there can be no possible doubt—if the testimony is credited. The defendant, in the city of Philadelphia, unequivocally repeats in words, the corrupt offer which he had previously made to Mr. Coxe in writing. Verdict —guilty on both counts of the indictment.

Mr. Dallas, (who had declined speaking on the facts before the jury) now moved in arrest of judgment, alleging that the circuit court could not take cognizance of the crime charged in the indictment. He premised, that, independent of the general question of jurisdiction, the indictment was exceptionable, inasmuch as it recited the act of congress, making it the duty of the secretary of the treasury to form the contracts contemplated, but did not state the authority for devolving that duty on the commissioner of the revenue; and, consequently, it could not be inferred, that the corrupt offer was made to seduce the commissioner from the faithful execution of an official public trust, which was the gist of the prosecution. But, he contended, that the force of the objection to the jurisdiction, superseded the necessity of attending to matters of technical form and precision, in presenting the accusation. It will be admitted, that all the judicial authority of the federal courts, must be derived, either from the constitution of the United States, or from the acts of congress made in pursuance of that constitution. It is, therefore, incumbent upon the prosecutor to show, that an offer to bribe the commissioner of the revenue, is a violation of some constitution, or legislative prohibition. The constitution contains express provisions in certain cases, which are designated by a definition of the crimes; by a reference to the characters of the parties offending; or by the exclusive jurisdiction of the place where the offences were perpetrated: but the crime of attempting to bribe, the character of a federal officer, and the place where the present offence was committed, do not form any part of the constitutional express provisions, for the exercise of judicial authority in the courts of the Union. The judicial power, however, extends, not only to all cases, in law and equity, arising under the constitu-

tion; but, likewise, to all such as shall arise under the laws of the United States (article 3, § 2), and besides the authority, specially vested in congress, to pass laws for enumerated purposes, there is a general authority given "to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or office thereof." Article 1, § 8. Whenever, then, congress think any provision necessary to effectuate the constitutional power of the government, they may establish it by law; and whenever it is so established, a violation of its sanctions will come within the jurisdiction of this court, under the 11th section of the judicial act, which declares, that the circuit court "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States," &c. 1 Swift's Laws U. S. 55 [1 Stat. 78]. Thus, congress have provided by law, for the punishment of treason, misprision of treason, piracy, counterfeiting any public certificate, stealing or falsifying records, &c.; for the punishment of various crimes, when committed within the limits of the exclusive jurisdiction of the United States; and for the punishment of bribery itself in the case of a judge, an officer of the customs, or an officer of the excise. 1 Swift's Laws U. S. p. 100; Id. p. 236, § 66; Id. p. 327, § 47. But in the case of the commissioner of the revenue, the act constituting the office does not create or declare the offence (2 Laws U. S. p. 112, § 6), it is not recognized in the act, under which proposals for building the light house were invited (3 Laws U. S. p. 63), and there is no other act that has the slightest relation to the subject.

Can the offence, then, be said to arise under the constitution, or the laws of the United States? And, if not, what is there to render it cognizable under the authority of the United States? A case arising under a law, must mean a case depending on the exposition of a law, in respect to something which the law prohibits, or enjoins. There is no characteristic of that kind in the present instance. But, it may be suggested, that the office being established by a law of the United States, it is an incident naturally attached to the authority of the United States, to guard the officer against the approaches of corruption, in the execution of his public trust. It is true, that the person who accepts an office may be supposed to enter into a compact to be answerable to the government, which he serves, for any violation of his duty; and, having taken the oath of office, he would unquestionably be liable, in such case, to a prosecution for perjury in the federal courts. But because one man, by his own act, renders himself amenable to a particular jurisdiction, shall another man, who has not incurred a similar obligation, be implicated? If, in other words, it is sufficient to vest a jurisdiction in this court, that a federal officer is concerned; if it is a sufficient proof of a case arising under a law of the United States to affect other persons, that such officer is bound, by law, to discharge his duty with fidelity;—a source of jurisdiction is opened, which must inevitably overflow and destroy all the barriers between the judicial authorities of the state and the general government. Any thing which can prevent a federal officer from the punctual, as well as from an impartial performance of his duty; an assault and battery; or the recovery of a debt, as well as the offer of a bribe, may be made a foundation of the jurisdiction of this court; and, considering the constant disposition of power to extend the sphere of its influence, fictions will be resorted to, when real cases cease to occur. A mere fiction, that the defendant is in the custody of the marshal, has rendered the jurisdiction of the king's bench universal in all personal actions. Another fiction, which states the plaintiff to be a debtor of the crown, gives cognizance of all kinds of personal suits to the exchequer: And the mere profession of an attorney attaches the privilege of suing and being sued in his own court. If, therefore, the disposition to amplify the jurisdiction of the circuit court exists, precedents of the means to do so are not wanting; and it may hereafter be sufficient to suggest, that the party is a federal officer, in order to enable this court to try every species of crime, and to sustain every description of action.

But another ground may, perhaps, be taken to vindicate the present claim of jurisdiction: it may be urged, that though the offence is not specified in the constitution, nor defined in any act of congress; yet, that it is an offence at common law; and that the common law is the law of the United States, in cases that arise under their authority. The nature of our federal compact will not, however, tolerate this doctrine. The twelfth article of the amendment stipulates, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In relation to crimes and punishments, the objects of the delegated power of the United States are enumerated and fixed. Congress may provide for the punishment of counterfeiting the securities and current coin of the United States; and may define and punish piracies and felonies committed on the high seas, and offences against the law of nations. Article 1, § 8. And, so likewise congress may make all laws which shall be necessary and proper for carrying into execution the powers of the general government. But here is no reference to a common law authority: Every power is matter of definite and positive grant; and the very powers that are granted cannot take effect until they are exercised through the medium of a law. Congress had undoubtedly a power to make a law, which should render

it criminal to offer a bribe to the commissioner of the revenue; but not having made the law the crime is not recognized by the federal code, constitutional or legislative; and, consequently, it is not a subject on which the judicial authority of the Union can operate.

The cases that have occurred, since the establishment of the federal constitution, confirm these general principles. The indictment against Henfield, an American citizen, for enlisting and serving on board a French privateer, while she captured a Dutch merchant ship, &c., expressly charged the defendant with a violation of the treaties existing between the United States and the United Netherlands, Great Britain, &c., which is a matter cognizable under the federal authority by the very words of the constitution. The jurisdiction in the indictment against Ravara, was sustained by reason of the defendant's official character as consul. And in a recent prosecution by the state of Pennsylvania against Sheaffer, in the mayor's court of Philadelphia, a motion in arrest of judgment was overruled by the recorder (Mr. Wilcocks) though the offence consisted in forging claims to land-warrants, issuable under the resolutions of congress; and although the cognizance of all crimes and offences, cognizable under the authority of the United States, is exclusively vested in the district and circuit courts.

Mr. Rawle (the attorney of the district) observed, that the exception, taken in support of the motion in arrest of judgment, struck at the root of the whole system of the national government; for, if opposition to the pure, regular and efficient administration of its affairs could thus be made by fraud, the experiment of force might next be applied; and doubtless with equal impunity and success. He concluded, however, that it was unnecessary to reason from the inconveniency and mischief of the exception; for, the offence was strictly within the very terms of the constitution, arising under the laws of the United States. If no such office had been created by the laws of the United States, no attempt to corrupt such an officer could have been made; and it is unreasonable to insist, that merely because a law has not prescribed an express and appropriate punishment for the offence, therefore, the offence, when committed, shall not be punished by the circuit court, upon the principles of common law punishment. The effect, indeed, of the position is still more injurious; for, unless this offence is punishable in the federal courts, it certainly is not cognizable before any state tribunal. The true point of view for considering the case, may be ascertained, by an inquiry whether, if Mr. Coxe had accepted the bribe, and betrayed his trust, he would not have been indictable in the courts of the United States? If he would be so indictable, upon the strongest principles of analogy, the offence of the person who tempted him, must be equally the subject of animadversion before the same judicial authority. The precedents cited by the defendant's counsel, are distinguishable from the present indictment. The prosecution against Henfield was not expressly on the treaty, but on the law of nations, which is a part of the common law of the United States; and the power of indicting for a breach of treaty, not expressly providing the means of enforcing performance in the particular instance, is itself a common law power. Unless the judicial system of the United States justified a recourse to common law against an individual guilty of a breach of treaty, the offence, where no specific penalty was to be found in the treaty, would therefore remain unpunished. So, likewise, with respect to Ravara, although he held the office of a consul, he was indicted and punished at the common law. The offence charged in Respublica v. Shaffer, did not arise under the laws of the United States; but was simply the forgery of the names of private citizens, in order to defraud them of their rights; and even as far as the forgery might be supposed to deceive the public officers, it was a deception in regard to a mere official arrangement, for ascertaining transfers of donation claims, and not in regard to any act directed by law to be performed. But a further distinction presents itself. The donations to the soldiers were founded upon resolutions of the United States in congress, passed long before the adoption of the present constitution. The courts of the several states therefore held a jurisdiction of the offence, which, without positive words or necessary implication, was not to be divested. The case did not come within the expressions in the constitution, "cases arising under the constitution and laws of the United States," &c., nor has it been expressly provided for by any act under the present constitution. The criminal jurisdiction of the circuit court, which, wherever it exists, must be exclusive of state jurisdiction, cannot, perhaps, fairly be held to operate retrospectively, by withdrawing from the state judicatures powers they held, and duties they performed, previously to the constitution, from which the circuit court derived its birth.

CHASE, Circuit Justice. Do you mean, Mr. Attorney, to support this indictment solely at common law? If you do, I have no difficulty upon the subject. The indictment cannot be maintained in this court.

Mr. Rawle, answering in the affirmative, CHASE, Circuit Justice, stopped Mr. Levy, who was about to reply, in support of the motion in arrest of judgment; and delivered an opinion to the following effect:

CHASE, Circuit Justice. This is an indictment for an offence highly injurious to morals, and deserving the severest punishment; but, as it is an indictment at common law, I dismiss, at once, everything that has been said about the constitution and laws of the United States.

In this country, every man sustains a two-fold political capacity; one in relation to the state, and another in relation to the United States. In relation to the state, he is subject to various municipal regulations, founded upon the state constitution and policy, which do not affect him in his relation to the United States: For, the constitution of the Union is the source of all the jurisdiction of the national government; so that the departments of the government can never assume any power, that is not expressly granted by that instrument, nor exercise a power in any other manner than is there prescribed. Besides the particular cases, which the 8th section of the 1st article designates, there is a power granted to congress to create, define, and punish crimes and offences, whenever they shall deem it necessary and proper by law to do so, for effectuating the objects of the government; and although bribery is not among the crimes and offences specifically mentioned, it is certainly included in this general provision. The question, however, does not arise about the power; but about the exercise of the power:—Whether the courts of the United States can punish a man for any act, before it is declared by a law of the United States to be criminal? Now, it appears to my mind, to be as essential, that congress should define the offences to be tried, and apportion the punishments to be inflicted, as that they should erect courts to try the criminal, or to pronounce a sentence on conviction.

It is attempted, however, to supply the silence of the constitution and statutes of the Union by resorting to the common law for a definition and punishment of the offence which has been committed: but, in my opinion, the United States, as a federal government, have no common law; and, consequently, no indictment can be maintained in their courts, for offences merely at the common law. If, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England; and, yet, it is impossible to trace when, or how, the system was adopted, or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither, as a birth-right and inheritance, so much of the common law as was applicable to their local situation and change of circumstances. But each colony judged for itself what parts of the common law were applicable to its new condition; and in various modes by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different states, will soon discover, that the whole of the common law of England has been nowhere introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another; but the common law of England, is the law of each state, so far as each state has adopted it; and it results from that position, connected with the judicial act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a federal or state court.

But the question recurs, when and how have the courts of the United States acquired a common law jurisdiction in criminal cases? The United States must possess the common law themselves, before they can communicate it to their judicial agents: Now, the United States did not bring it with them from England; the constitution does not create it; and no act of congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified, as it exists in some of the states; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?

Upon the whole it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common law authority, relating to crimes and punishments, has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction; but judges cannot remedy political imperfections, nor supply any legislative omission. I will not say whether the offence is at this time cognizable in a state court. But, certainly, congress might have provided by law for the present case, as they have provided for other cases, of a similar nature; and yet if congress had ever declared and defined the offence, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject.

PETERS, District Judge. Whenever a government has been established, I have always supposed, that a power to preserve itself, was a necessary and an inseparable concomitant. But the existence of the federal government would be precarious, and it could no longer be called an independent government, if, for the punishment of offences of this nature, tending to obstruct and pervert the administration of its affairs, an appeal must be made to the state tribunals, or the offenders must escape with absolute impunity.

The power to punish misdemeanours is originally and strictly a common law power; of which I think the United States are constitutionally possessed. It might have been exercised by congress in the form of a legislative act; but it may also, in my opinion, be enforced in a course of judicial proceeding. Whenever an offence aims at the sub-

version of any federal institution, or at the corruption of its public officers, it is an offence against the well-being of the United States; from its very nature, it is cognizable under their authority; and, consequently, it is within the jurisdiction of this court, by virtue of the 11th section of the judicial act.

THE COURT being divided in opinion, it became a doubt, whether sentence could be pronounced upon the defendant; and a wish was expressed by the judges and the attorney of the district, that the case might be put into such a form, as would admit of obtaining the ultimate decision of the supreme court, upon the important principle of the discussion: But the counsel for the prisoner did not think themselves authorized to enter into a compromise of that nature. The court, after a short consultation, and declaring that the sentence was mitigated in consideration of the defendant's circumstances, proceeded to adjudge,

That the defendant be imprisoned for three months; that he pay a fine of two hundred dollars; and that he stand committed until this sentence be complied with, and the costs of prosecution paid.

NOTE. For a discussion of the question of jurisdiction involved in this case, see Henfield's Case [Case No. 6,360]. Judge Chase's course appears to have greatly surprised not only the bar but the community; and several years afterwards Mr. Wolcott, in a letter to Mr. King (2 Gibb's Life of Wolcott, 78), attributes the popular doctrine of the unconstitutionality of the sedition law, to what he not very courteously calls the "persuasions" of the "metaphysical" Virginia lawyers, who led Judge Chase into the belief that the United States had no common law. But the oddest part of the case is that though Judge Chase expressly denied that there was jurisdiction, and though there must have been at best a divided bench, the court, "after a short consultation," imposed a sentence of unequivocally common law stamp. The most rational interpretation is, that Judge Chase had used this "short consultation" to acquaint himself with the views of his brethren on the supreme bench, about which, after Henfield's Case, there could then have been no doubt. Chief Justice Jay, it is true, had left the bench, but that his successor, Judge Ellsworth, entertained similar views on this great question, abundantly appears from his ruling in the Case of Williams [Case No. 17,708]. In Lynch v. Clarke, 1 Sandf. Ch. 651, is to be found a very lucid exposition of the law on this question by Vice Chancellor Sandford.

Case No. 16,767.

UNITED STATES v. WRAPE et al.

[4 Cin. Law Bul. 433.]

Circuit Court, D. Indiana. June 5, 1879.

CONSPIRACY—ILLEGAL VOTING.

[In order to sustain a conviction of entering into a conspiracy to procure persons to go into another county to vote illegally, it need not be shown that illegal votes were actually cast or offered or that any person went into the other county to vote illegally.]

[This was an indictment against Henry Wrape, James Wilkerson and others for a conspiracy to commit an offence against the United States.]

GRESHAM, District Judge (charging jury). Section 5440 of the Revised Statutes of the United States declares that if two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable, etc. The offenses which the indictment charges the defendants with having conspired to commit are found in section 5512 of the Revised Statutes. By this it is made an offense if at any election for representative or delegate in congress, any person knowingly does any unlawful act to secure an opportunity to himself or others to vote, or knowingly aids, counsels, procures or advises any person to vote at a place where he may not be lawfully entitled to vote. Two things are necessary to constitute the crime charged, namely, the agreement or conspiracy to commit an offense, and an act to effect the illegal object. That act need not be illegal in itself. Any act which is intended to effect the object of the conspiracy, and which tends in that direction, is sufficient. An agreement between two or more persons to commit any offense against the United States is a conspiracy, within the meaning of section 5440. Conspiracies are usually entered into in secret, and need not be established by direct evidence, their existence being often inferred from circumstances. They may be formed and exist without any express agreement, written or oral, and may accomplish their object without any formal meeting of the conspirators ever taking place. It is not necessary that the parties should all be acquainted with each other, or that each should know the exact part the others are to perform. It is sufficient if all have a common illegal purpose or design, and act in pursuance of it. Persons may join a conspiracy at any time, and become responsible for everything said and done by any of the members in furtherance of the common purpose.

If the defendants were united in a joint effort to induce or persuade men to go into Jennings county and vote at said election, understanding and believing, without fault or negligence on their part, that such persons were bona fide residents of that county, and had a legal right to vote therein, they are not guilty, although mistaken as to the fact of such residence. The defendants had a right to persuade men who had acquired a legal residence in the state to remove from other counties into Jennings county, and there acquire an actual residence, even if the motive for so doing was to have the benefit of such persons' votes in Jennings county at said election. If, therefore, the defendants on trial, or any two of them, or any one of those on trial, and one or more of those not on trial, conspired together as charged in the indictment, to import or cause to be imported, per-

sons into Jennings county to vote illegally at any of the designated polling places in that county, at a congressional election, and to make and to cause and procure to be made, false and fraudulent affidavits to the effect that such persons so to be imported were in truth and in fact bona fide residents of such county, and had a lawful right to vote at and in that county, at said election for representative in congress, to induce the officers of the election to receive votes from persons known by the defendants not to be residents of such county, it being the intention of the defendants to thereby secure opportunity to such persons to vote illegally, at all or any of the designated polling places in Jennings county, and that any one or more of the defendants did any act charged in the first count of the indictment, in furtherance of the common purpose, then all the defendants so conspiring are guilty. And if the defendants conspired together to aid, counsel, procure or advise persons to go from Jackson county or elsewhere into Jennings county, to vote illegally in that county at said election for representative in congress, and in furtherance of the conspiracy did any of the acts alleged in the indictment, they are guilty. It is not essential to a conviction that illegal votes were cast or offered, or that a single person went into Jennings county to vote illegally. The illegal agreement or conspiracy and an act done by any conspirator in furtherance of it are sufficient to constitute the offense. If two or more persons agree to act in concert in aiding, procuring or importing men into a certain county, township, or precinct, to vote illegally for a representative in congress, and one of them do any act which tends to accomplish the object in view, and there stop and abandon the illegal enterprise, still their offense is complete.

Case No. 16,768.

UNITED STATES v. The WREN.

[27 Law Reporter, 267.]

District Court, S. D. Florida. 1865.[1]

PRIZE—ENEMY'S VESSEL—CONFEDERATE OFFICER IN COMMAND—EVIDENCE—RIGHT OF SEARCH—TERMINATION OF HOSTILITIES.

[1. The carrying of military or naval persons in the service of the enemy to enemy ports subjects the offending vessel to condemnation.]

[2. The captured vessel was commanded by a Confederate naval officer, who had been frequently employed in purchasing vessels for the Confederacy. There were no instructions for the voyage on board, but previous to the capture there had been a flagrant destruction of papers, and the vessel contained a Confederate flag. The master was directed to deliver the vessel, not to the asserted owner, but to other persons, and he had in his possession an order, payable on delivery of the vessel in Liverpool, which was signed by the agent of the Confederacy at Havana, who, it was claimed, was also the agent of the owners, but no claim for the vessel was made by such alleged owners or such agent. *Held*, that a condemnation was justified.]

[3. In time of peace the naval vessels of one nation have no right, except under treaty stipulations, to search or visit the vessels of another nation.]

[4. Where, though no right of search exists, a seizure is made, and it turns out that the vessel has no right to the flag under which she was sailing, the nation to whom such flag belongs has no ground of complaint.]

[5. So long as the cruisers of an expired rebellion are still recognized as in any respect entitled to the privileges of national vessels of war, the claimants of vessels captured as belonging to the rebel organization cannot argue that the state of war has ceased to exist, especially when the captured vessels are sailing under the flag of a nation which at the date of capture continues to recognize a state of war as existing.]

[6. The liability of the captured vessel to condemnation is not affected by the right of the captors to prize money.]

[7. Nor is it affected by the fact that the capture was brought about by a revolt of the crew.]

In admiralty.

BOYNTON, District Judge. This vessel sailed in ballast from Havana, for Halifax and Liverpool, on the 12th day of June, 1865; on the morning of the 13th, before daylight, she was seized by a part of her crew; on the evening of the 13th she was brought into Key West, and delivered to the authorities. She has been libelled as prize, and claimed by the master as the property of John Laird, a British subject. The case has been heard upon the testimony taken in preparatorio, and further proof directed to be taken by the court. It is not pretended by the captors that the asserted voyage which the vessel was pursuing at the time of seizure was not the real one, nor that it was an unlawful one. Condemnation is sought on the ground of enemy ownership.

It is obvious that, beyond the important questions which come up in all prize cases, there are here exceptional ones, arising out of the time of the capture, and the manner of the capture. The vessel was seized after the enemy organization within the United States, which had waged the war, had ceased, or almost ceased to exist. The seizure was made at this time by a revolt of the crew, who had shipped and signed articles for a voyage from Havana to Liverpool. Perhaps clearness will be promoted by examining these questions separately.

The register of the vessel, dated Dec. 24, 1864, names as the owner, "John Laird, the younger, of Birkenhead, in the county of Chester, ship builder," and as the builders, "Messrs. Laird Brothers, Birkenhead," and states that she was built in 1864. The master testifies that the vessel "belonged to Laird, junior, of Liverpool, as he inferred from the register, and was informed," and "that he only knows the fact from the register." The chief officer, Jas. C. Long, states that he does not know anything about the ownership of the vessel. The purser, Mr. T. R. McGahan, says that he believes the vessel

[1][Reversed in 6 Wall. (73 U. S.) 582.]

belongs to Frazer, Trenholm & Co., of Liverpool, but has no personal knowledge; "that he has heard Major Helm at Havana, and Mr. Lafitte also at Havana, speak of Frazer, Trenholm & Co. as the owners of the vessel." John Duggen, the third officer, says "that he has been in the vessel since she left Liverpool; that he believes the vessel belonged to the Confederate government; that he had heard Captain Moore, her former master, say that she was Confederate government property; that she had a Confederate flag on board, which was frequently hoisted in the harbor of Havana; and that she displayed the Confederate flag on her flag-staff abaft in the harbor of Galveston, in the manner usually displayed by national vessels." These four witnesses were the only ones examined in preparatorio by the prize commissioner. A motion was made by the claimant to strike out the deposition of Duggen on the ground of his identity with a name signed to a letter sent by the captors to the admiral and by him forwarded to the prize commissioner, to which were attached ten names, all in one hand-writing, among them that of "Dugan." The court refused the motion, but in the order for further proof framed an interrogatory calling for the names of all the persons engaged in the seizure, under which all the persons in the ship might have been examined by either party on this point. Three of the captors were examined; they all give the names of all the persons whom they aver to have been engaged in the undertaking, and do not name Duggen. The master says, in answer to this question, "that the third officer, John Duggen, was on the bridge at the time and in charge of the watch, and he believes him to be one of the principal persons engaged in the mutiny." The purser, Mr. McGahan, says, that "from the conduct of a man called Hamilton and one called Harwood, and the carpenter and the third officer, Duggen, subsequent to the seizure, he believes they had knowledge of the undertaking before its commencement." These are the only witnesses who name Duggen. He was himself not examined by either party.

On his first examination upon the standing interrogatories, the master stated that he was appointed to the command of the steamer by Mr. Ramsay, of Havana; that there was no charter party; he was engaged to take the vessel to Liverpool, and deliver her there to Frazer, Trenholm & Co.; that all the papers on board were taken by the asserted captors, except two papers which were destroyed; and that he has known the vessel, on former voyages, to sail from and to the port of Galveston, Texas,—one of the blockaded ports under the forces of the United States; and that there was a Confederate flag on board,—that he does not know for what reason it was on board; he did not bring it on board, nor want it on board.

Mr. McGahan, the purser, states, "that he was born in South Carolina, and owes allegiance to that state; that the master was appointed to the command, as he understood, by Major Helm, at Havana; that the vessel had been trading to Galveston; that he destroyed three papers handed to him by the master after the arrival of the vessel at Key West; he was instructed to destroy them; he does not know their contents; he was told by the master that one of the papers was the instructions for the voyage. One of the papers, which was open, was in the handwriting of, and signed by, Charles J. Helm;" and that "he believes the real and true property of the vessel is in Frazer, Trenholm & Co." In answer to the further interrogatories propounded by the court, the same witness says, "that at the time of leaving Havana, deponent believed Major Charles J. Helm appointed Captain Stiles to the command; he arrived at that conclusion from hearing Major Helm speak of the resignation of the former master, Captain Moore, and of the vessel being about to go to England; he believes that Major Helm had control of the steamer. Deponent desires to add that since the arrival of the 'Wren' at Key West, he has heard Captain Stiles say that he (Stiles) was appointed by Mr. Ramsay, which he believes to be the fact." "That he believes Major Helm acted in the capacity of agent for Frazer, Trenholm & Co. in making the appointment of Captain Stiles to the 'Wren' as master, if he made it at all; has heard Major Helm say he was the agent of Frazer, Trenholm & Co., for the 'Wren' and other steamers at Havana; heard Major Helm make this remark in connection with a claim made by Addison Cormack for a debt asserted to be due to him from the Confederate States, for which he threatened to attach the 'Owl.'" To the fifth interrogatory he answers, "that he does not know who appointed Captain Stiles to the command; has already said that he believes the appointment was made by Major Helm. Previous to the time of the appointment of Captain Stiles, and witness believes also at the time of the appointment, Major Helm was regarded as the Confederate agent appointed by the government at Richmond. He has no knowledge of his having acted in any public capacity, but has heard him say that by the terms of his appointment he was not constrained to reside in Havana, but might reside anywhere else in the Island of Cuba; from this conversation deponent inferred that Major Helm was residing in Cuba by appointment of the Confederate government, in a public capacity."

Charles J. Helm is repeatedly spoken of in the mass of letters and papers found on board the "Wren," and returned by the prize commissioner, as "C. S. Agent at Havana," and he has been little less widely known in that capacity during the past four years than Mr. Davis, Mr. Mallory, and Mr. Trenholm have in the positions they have held.

In his second examination the master ad-

heres to his statement that he was appointed to the command of the vessel by C. G. Ramsay. Though the case had then been once argued, and condemnation demanded on the ground of enemy ownership, the master says, in answer to the question, "in what capacity and by what authority the person who appointed him to the command acted," "that he acted in the capacity of agent for the 'Wren' at Havana," and that his means of information in regard to Mr. Ramsay being the agent for the "Wren," at Havana, is derived from the fact that Mr. Ramsay gave him a letter to the British consul to consider deponent as the master of the "Wren," and that he has no other means of information on the subject. He does not say that Mr. Ramsay acted in the capacity of agent for Mr. Laird, the asserted owner, or for Frazer, Trenholm & Co., to whom he was to deliver the vessel, but that he acted in the capacity of agent for the "Wren," which is sufficiently indefinite, certainly. The chief officer, Mr. James C. Long, says on both examinations that he believes the master was appointed to the command by Mr. Ramsay.

It is worthy of note that in his first examination the master, speaking of the two papers which he says were destroyed, says one of them was "a letter to himself from the office of the agent of the vessel, Mr. Helm, at Havana," and the other, "an order in favor of deponent from Mr. Helm for the payment of forty pounds, payable on delivery of the ship at Liverpool." A letter dated Head-Quarters, district of Texas, New Mexico, and Arizona, office chief of artillery, Houston, May 10, 1865, addressed to "Commander Stiles, C. S. Navy, care C. S. agent, Havana, Cuba," and signed "G. V. Magruder, Jr.," says:

"My dear Captain, I am quite in despair about the condition of the Blakely guns recently sent on the 'Wren.' As usual, they came in unserviceable condition; the carriages have been left in Havana. I have written to Major Helm on this subject, as well as about the ammunition for the Whitworth guns, which should have been sent by the 'Wren.' I will consider it a great favor if you will impress upon Major Helm the great importance of getting in these stores without loss of time, as we may be obliged to abandon Galveston at any moment."

Another letter is as follows:

"Houston, April 5, 1865. Capt. Moore, S. S. Wren, Galveston: Sir,—Mr. John Williams will with this make known the object of his visit. Mr. Williams is desirous of visiting Havana, and applied to me for passage, but as I have made it a rule not to interfere in the management of the government ships, leave the matter entirely with you. Very respectfully, Henry Sampson."

It cannot be denied that all this points strongly towards Confederate ownership. There is nothing in the position or history of the master of the vessel at the time of capture to prevent this conclusion. Captain Stiles swears that he was born in Pennsylvania; he appears by the papers captured and returned, to have been for a considerable number of years an officer in the navy of the United States; in 1856 he was appointed United States consul at Vienna which position he held until about the spring of 1862.

The day on which he entered the Confederate service does not appear; but a book of letters and memoranda relating to the steamship "Cornubia" contains copies of the following letter and receipt:

"St. George's, Bermuda, December 9, 1862. Captain John Burroughs, Steamer 'Cornubia': Sir,—In reply to yours of yesterday, informing me that the steamer 'Cornubia' is coaled, stored, and ready to take in cargo, and that you have procured a crew to proceed in her, agreeing with them that in case of capture or loss of steamer they are to be sent to England at the expense of the Confederate government, and their wages paid up to the time of arrival in Great Britain, I have to state, that as soon as you can hand me inventory of stores, furniture, fixtures, &c., now on board of her, together with the list of articles sent out of her since her arrival in this port, that I am ready to receive the ship in the name of the Confederate States government, and to give you a triplicate receipt as agreed upon before leaving England. * * * [Signed,] Edwd. C. Stiles."

"Port St. George's, Bermuda, December 10, 1862. Received from Thomas Sterling Begbie, Esq., of London, by the hands of Captain John Burroughs, the British steamship 'Cornubia,' complete in masts, spars, rigging, machinery, boilers, boats and all stores, appertaining to the said 'Cornubia,' as per agreement in London. [Signed,] Edward C. Stiles."

The following order indicates that later in the month of December Captain Stiles was in Richmond:

"War Department, Ordnance Bureau, Richmond, December 24, 1862. Captain,—Having been appointed by the secretary of war to carry out certain instructions from this bureau, dated Dec. 24, 1862, you are hereby assigned the pay and allowance of a captain of artillery on ordnance duty, while on duty with this bureau, in executing the functions assigned to you in said letter. Respectfully, J. Gorgas, Col., Chief of Ordnance.

"Captain E. C. Stiles, on Ordnance Duty: You will be paid at the same rate from the first of November, or from date of taking charge of steamer 'Justitia.' J. Gorgas, Col., Chief of Ordnance."

By another order from the same department and bureau, approved by Jas. A. Seddon, secretary of war, and dated the same

day, he is directed to take the steamer "Cornubia" from Wilmington to Bermuda, and then "proceed to Liverpool and London, and communicate with Major Caleb Huse, relative to the purchase of a vessel such as you and he may think suitable for the purpose of carrying freight from Bermuda and Nassua to the ports of the Confederate States."

On the 2d of March, 1863, Caleb Huse, in London, addresses a letter to Captain Stiles, in which he says:

"Having read your instructions from Colonel Gorgas, in reference to the purchase of a steamer from the C. S. government, I have the honor to inform you, that having entire confidence in your judgment, I desire you to take the whole matter of selecting a proper vessel into your own hands."

Then follows this letter:

"71 Jermyn St., London, S. W., April 14, 1863. Captain Halpin: Dear Sir,—You will be pleased to consider Capt. E. C. Stiles as the registered owner of the S. S. 'Eugenie,' and receive all commands from him from this date. You are perfectly aware of the circumstances under which I became the registered owner of the 'Eugenie,' and as it is impossible for me to give the necessary orders, I prefer that Capt. Stiles should be my legal representative. I am, dear sir, yours truly, Saul Isaac."

On the 25th of May, as appears from his letter of appointment signed by S. R. Mallory, secretary of the navy, Edward C. Stiles was appointed a "lieutenant for the war in the navy of the Confederate States," and directed to report to the secretary of war for duty. On the same day he was directed by an order approved by James A. Seddon, secretary of war, to proceed to Wilmington and take general charge of the steamer "Eugenie"; on arriving at Bermuda, to confer with Norman Walker, Esq., special agent of the war department, and to bring back the steamer "Harriet Pinckney" loaded with bacon, provisions, etc. The following letter appears to have been written a few months later:

(Copy.) "Steamer H. Pinckney, August 10, 1863. Captain F. Johns: Captain,—My letter to you dated the 24th July, ordering you to go to Halifax, is hereby annulled. You will now proceed to St. George's, take in a cargo which will be furnished you, and then proceed under my direction to such port as I may designate. Should you have any doubts as to the ownership of this vessel, as she now bears an English register and flag, I am ready to make oath as to whom she really belongs, and to make such arrangements as will clear you from all responsibility in case of the loss of said vessel. As you have recognized my orders heretofore, I trust you will continue to do so. Edward C. Stiles."

Among the papers is a copy of a receipted account, or bill, in which "the Confederate States of America" are charged for three months services of Edward C. Stiles, "as commander of S. S. 'Harriet Pinckney,'" The receipt is signed by "Edward C. Stiles, C. S. N." On the 28th of September an order of the Confederate States navy department, signed by S. R. Mallory, secretary of the navy, grants Lieut. Stiles "leave of absence for the purpose of visiting Europe in connection with purchasing vessels for the volunteer navy of Virginia." Besides these papers there are more than a hundred other letters and memoranda by and between Edward C. Stiles, the authorities at Richmond, Caleb Huse, John Slidell, and various steamboat owners and agents and other persons, chiefly relating to negotiations for the purchase of steam vessels.

The cumulative testimony in this case renders it unnecessary to inquire how far any nation can, by changing its navigation laws so as to permit its ships to be commanded by foreigners, entitle foreigners belonging to nations at war to claim its ships in prize courts in time of war. Carrying military or naval persons in the service of the enemy to enemy ports subjects the offending vessel to condemnation. The Friendship, 6 C. Rob. Adm. 420; The Orozembo, Id. 430; The Caroline, Id. 463. If war existed between Great Britain and France, it would be ludicrous to see a distinguished French marshal or admiral claiming, as master, a neutral vessel captured on a voyage to France, in an English prize court, on the ground that the neutral nation permitted its vessels to be commanded by foreigners. In this case it is not denied that the vessel was bound to Halifax and Liverpool, and it is unnecessary to inquire whether or not the considerations apply, further than as they indicate the general improbability of the selection of belligerent naval officers to command vessels really neutral.

The evidence establishes the facts: That the vessel was captured in the possession of, and commanded by, a Confederate States naval officer; that not a word of written instructions for the voyage was on board, from the asserted owner or his agent, or any one else, unless such instructions were contained in the papers which were destroyed; that there was a flagrant destruction of papers by a master whose naval and consular education must have made him acquainted with the presumption which such conduct justifies; that there was a Confederate flag on board; that it had been for a long time the practice of the master to purchase vessels for the Confederate government, and cause them to be retained under foreign documentation; that the master was directed to deliver the vessel not to the asserted owner in Liverpool, but to other parties; that the master had an order for forty pounds, payable on delivery of the vessel in Liverpool, from a person who, whatever other positions he may have held, was certainly the Confederate States agent at Havana. In addition to this there are strong reasons for believing that the master was appointed to the command of the vessel by the same Confederate States agent; the cap-

tain himself says that one of the papers destroyed was a letter to him from the office of the agent of the vessel, Mr. Helm; and the purser says that the master told him one of the letters destroyed was the instructions for the voyage, and that he understood at Havana that Major Helm appointed the master to the command, and had charge of the vessel, in the capacity of agent for Frazer, Trenholm & Co., who, through communication with Havana, is so frequent, have not claimed, either personally or by agent. Also we have the letter from a person apparently of considerable rank in the Confederate service, in which the vessel is spoken of while at Galveston as a "government ship." This is exclusive of the testimony of Duggen, which it is not necessary to consider. When we remember that unexplained spoliation of papers alone (The Hunter, 1 Dod. 480; The Two Brothers, 1 C. Rob. Adm. 133; The Pizarro, 2 Wheat. [15 U. S.] 241) is not unfrequently accepted by prize courts as sufficient evidence to justify condemnation, we shall see that here it is impossible to hesitate, and that restitution must be denied, unless there are other features not yet considered, to necessitate it.

Though we have considered the main question from the point of view of capture in time of war, and proceedings in prize, it may be best in addressing ourselves specially to the question of the time of the capture, at first to consider it upon the hypothesis, that the state of war has entirely passed away and ceased to exist, and that peace has brought with it the rights and immunities which war to some extent modifies and restricts—among others, freedom of merchant vessels from search. The undoubted rule of international law at the present day is, that in time of peace the naval vessels of one nation have no right, except under treaty stipulations, to search or visit the vessels of another nation. The discussion of this question by the United States and Great Britain in 1858, resulted in so explicit an abandonment of the contrary doctrine, and every modification of it, by the only nation which strenuously upheld it, that it seems probable that the question will never come up again. But this state of facts and of law does not take away from any nation the right to seize its own vessels, under whatever concealments it may find them, nor give any other nation the right to object to such seizures. No nation undertakes to protect any vessel, except those belonging to its own citizens or subjects; procuring or retaining the documentation of any nation, by other persons, is fraudulent, and imposes no obligation of protection upon the government whose officers have been deceived, and whose flag has been illegally assumed, or illegally retained after transfer. The 18th section of the British merchant shipping act of 1854, declares that "no ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description: 1st. Natural born British subjects; 2d, persons made denizens, or legally naturalized; and, 3d, bodies corporate established under, subject to the laws of, and having their principal place of business in the United Kingdom or some British possession." Section 106 of the same act provides that "whenever it is declared by this act that a ship belonging to any person or body corporate, qualified according to this act to be owners of British ships, shall not be recognized as a British ship, such ship shall not be entitled to any benefits, privileges, advantages or protection, usually enjoyed by British ships, and shall not be entitled to use the British flag, or assume the British national character; but so far as regards the payment of dues, the liability to pains and penalties, and the punishment of offences committed on board such ship, or by any person belonging to her, such ship shall be dealt with in the same manner in all respects, as if she were a recognized British ship." Certainly if ships owned by British subjects may, in certain cases, not be "entitled to protection," the same may be safely predicted of all vessels owned by unqualified persons. The 103d section of the same act makes the acquiring of any interest as owner in a British ship by an "unqualified person," criminal, and forfeits the interest attempted to be acquired, to the crown. It is not necessary to refer to the shipping laws of other nations, upon a point so bald and undisputed.

In cases of such seizures as we are now considering, it is the duty of all parties to penetrate to the actual facts of the case. Though the right of search does not exist, still if a seizure is made in the belief that the facts exist to justify it, and it turns out that the vessel had no right to use the flag she was sailing under, that nation whose flag she had assumed is not injured nor insulted. The mode of proceeding may be other than distinctive prize proceedings, and the character and degree of proof different from the proof required in prize cases; but having reached the truth of the matter, the parties must all abide by the actual facts. The person intending to seize, weighs the proof in his possession and seizes at his peril; if he establish that the vessel had no right to the flag she wore, the question is a private one between himself and the seized vessel, under the laws before which the matter is adjudicated. In his note of April 10, 1858, addressed to the British minister at Washington, the secretary of state of the United States used this language: "A merchant vessel on the high seas is protected by her national character. He who forcibly enters her does so upon his own responsibility. Undoubtedly if a vessel assume a national character to which she is not entitled, and is sailing under false colors, she cannot be protected by this assumption of a national character to which she has no claim. As the identity of a

person must be determined by the officer bearing a process for his arrest, and determined at the risk of such officer, so must the national identity of a vessel be determined at the like hazard to him who, doubting the flag she displays, searches her to ascertain her true character. There no doubt may be circumstances which would go far to modify the complaints a nation would have a right to make for such violation of its sovereignty. If the boarding officer had just ground of suspicion and deported himself with propriety in the performance of his task, doing no injury, and peaceably retiring when satisfied of his error, no nation would make such an act the subject of serious reclamation." In the reply of Lord Malmesbury, the British secretary of state for foreign affairs, dated June 11, 1858, addressed to the British minister at Washington, he says: "Her majesty's government entirely agree in this view of the case, and the question therefore becomes one solely of discretion on the part of the acting officer." On the 26th of July, 1858, the Earl of Malmesbury announced in the house of lords, that on receiving the opinion of the law officers of the crown, her majesty's government had abandoned both the right of visit and of search. In supporting this action of the government, Lord Lyndhurst, in the debate which followed, made use of these words, which were listened to without dissent by the secretary for foreign affairs: "By our treaty with Spain we have, no doubt, the right to visit and search Spanish vessels, with the view to the suppression of the slave trade. But how can the treaty between Spain and us affect the rights of America? Why, common reason is decisive on the subject. Well, but what other course can we take? I say that the course is quite clear and plain. If one of our vessels sees a vessel with the American flag, and has reason to believe it is assumed, he must examine and inquire into the facts as well as he can. If he ascertain, to the best of his judgment, that the vessel has no right to use the American flag, he may certainly visit, and examine her papers, and if he finds his suspicions correct, he may deal with the vessel in a manner justified by the relation existing between England and that country to which the vessel belongs. America, in such a case, would have no right to interfere. The matter would simply be one between an English cruiser and the particular vessel seized." London Times, July 27, 1858. In the case of the "Marianna Flora," Justice Story, delivering the opinion of the supreme court of the United States, said: "It is true that it has been held in the courts of the United States, that American ships offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may afterwards be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation and search. The party, in such cases, seizes at his peril; if he establishes the forfeiture he is justified; if he fails he must make full compensation in damages." [The Marianna Flora] 11 Wheat. [24 U. S.] 39. Sir Wm. Scott, in the case of the "Fortuna," used this often quoted language: "All that the court has thrown out respecting the effect of the flag and pass is this; that the party who takes the benefit of them is himself bound by them. He is not at liberty, when they happen to turn to his advantage, to turn around and deny the character which he has worn for his own benefit, and upon the credit of his own oaths or solemn declarations. But they do not bind other parties as against him. Other parties are at liberty to show that these are spurious credentials, assumed to disguise the real character of the vessel. And it is no inconsiderable part of the ordinary occupation of this court to pull off this mask, and exhibit the vessel so disguised in her true character of an enemy vessel. Now, looking upon the deposition and documents, I think that no doubt can be entertained that she is an American vessel, at present owned by Americans, and only colorably transferred to a Portuguese for the purpose of deception." But the "Fortuna" was a vessel captured indeed and libelled as prize, but captured under the Portuguese flag and condemned as an American vessel, (Great Britain being then at peace with both Portugal and the United States,) on the ground that she was engaged in the slave trade, which was permitted by Portugal, but prohibited by the United States. 1 Dod. 81. The "Donna Marianna" was seized under the Portuguese flag, while Great Britain was at peace with Portugal, for being engaged in the slave trade, and not as war prize. In delivering his judgment, Sir Wm. Scott said: "The first question is whether this court is at liberty to inquire into the title of this ship, which was at the time of capture navigating under the Portuguese flag, and has been claimed as Portuguese property. It is obvious to remark that if no such authority exists in this court, there must be an end of the operation of the act of parliament. It cannot be considered any hardship upon the subjects of those countries which still carry on the slave trade, that it should possess such a power. It can be no unconstitutional breach of the law of nations to require, that where a claim is offered on the ground that the property belongs to the subjects of a country which still permits this trade, the burden of giving proof of the property should lie upon those who set it up." The vessel was condemned as being really British owned. 1 Dod. 92.

The Diana was a Swedish vessel seized while Great Britain was at peace with Sweden, for being engaged in the slave trade. She was restored by the same great jurist, on the ground that Swedish laws permitted their vessels to engage in that trade; but in giving his opinion he said: "I see no reason

to suppose that there were any other than Swedish interests involved in this transaction," intimating plainly that if the proof had developed interest or ownership in the subjects of any state which prohibited the slave trade, he should have considered himself at liberty to go into that matter and condemn the property. 1 Dod. 95. The same judge held constantly that the slave trade is not piracy, nor a violation of the law of nations. Le Louis, 2 Dod. 248, 252; The Eagle, 1 W. Rob. Adm. 249; The Diana, 1 Dod. 95.

This vessel has been libelled as prize, and the testimony taken in the manner usual in prize cases. The evidence is, and could not fail to be in any form of proceeding, overwhelmingly conclusive of the fact that the vessel was lately "Confederate" property, and is so still, unless, on the present hypothesis, we say that the enemy organization within the United States, which commenced and waged the war, has wholly ceased to exist, and that so the war has come to an end; and in this view of the case the title to the vessel has passed not to any subject of the state whose flag was worn as a cloak and disguise, but to the nation which has conquered in war; and the seizure becomes strictly a seizure of one of our own vessels, with which other nations have no concern. "Complete conquest carries with it all the rights of the former government; or in other words the conqueror by the completion of his conquest, becomes, as it were, the heir and universal successor of the defunct or extinguished state." Hal. Law War, 839, and law of conquest generally. From another point of view it may be said, indeed, that as to the ultimate rights of the United States, Confederate property has all along been, before capture, simply the property of the United States, or of citizens of the United States. But assuming that the Confederate enemy organization was for a time entitled to be considered an independent power; if the government of the United States has overcome that power in war to such an extent that the war has entirely ceased, all the property of the extinguished state has certainly passed to the United States.

But though the court has paid some attention to this point it has done so rather from a desire to patiently examine every point suggested, than because of any seriously entertained opinion that it is entitled to much consideration. In the suppression of a great rebellion, or in the conquest of a state, it is more difficult to say with certainty when the state of war ceases, than it is when peace is declared or stipulations entered into on a particular day, by independent nations which have been at war. During the breaking down and disorganization of the enemy power, the state of war may cease in some respects, and continue in others. But whatever refinements of argument this point may be susceptible of under another state of facts, while the cruisers of the expiring rebellion are still recognized as in any respect entitled to the privileges and immunities of national vessels of war, it cannot be argued by the claimants of vessels captured on the ground of belonging to the rebel organization, that the state of war has ceased to exist; certainly not, as to vessels captured sailing under the flag of any of those nations which, at the date of capture, still continued this recognition. The proclamation of the president rescinding the blockade of all the ports, including by name that of Galveston, with which this vessel had been trading since she came out from Europe, is dated the 23d of June, ten days after this capture. By this proclamation an intention is indicated to use the army and navy to enforce the laws in a manner unusual in time of unqualified peace. He opens the ports to foreign trade after the first of July, but even then makes it unlawful to introduce certain articles, which he designates as "contraband of war." It is the opinion of the court that the property was properly libelled as prize.

The remaining question relates to the manner of the capture. The court sees nothing in this case to take it out of the usual rule as to captures made by noncommissioned captors. The main question cannot be affected by the manner of the capture. The captors may or may not be entitled to prize money if the property is condemned; that is a question between them and the government. They are liable to damages if the claimant proves the neutrality of the property and the legality of the voyage; but the onus still lies on the claimant to show this; and if he fail to do so, condemnation must follow. Was the property neutral? Was the voyage a lawful one? These are the questions to which the claimant must address himself. And unless he establish the affirmative as to both, or as to the first, which really includes the other, restitution must be denied. Enemy property can never be restored under any circumstances, unless it has been captured in violation of sacred obligations in the nature of truce. There is one English case of an enemy vessel directed by the prize court to be turned over to the crown, with an intimation that it ought to be delivered to the nation from which it had been captured. But this was because the capture had been made by prisoners, who had been placed on board a cartel ship by their own desire, to be returned home for exchange, and who were bound to do no hostile act while they occupied that position. The Mary, 5 C. Rob. Adm. 200.

Undoubtedly the practice of capturing vessels by revolt of crew, is one not at the present day to be advised or encouraged. There is, in attempts of this kind, a personal violation of faith; and the strife and bloodshed which naturally ensue, unless, as in this case, the attempt is immediately and completely successful, are of a kind which it is impossible not to distinguish from legitimate war-

fare; still there is very little in the history of the action of different governments on this point to discourage the practice. The British declaration in council of 1665–66, defining the rights of the lord high admiral of England in time of hostility, which is still in force, unless recently changed, declares, among other things, "that such ships as shall voluntarily come in, either men-of-war or merchantmen; upon revolt, from the enemy, shall belong unto his majesty," and not to the lord high admiral.

There are as many reasons why the crew of a vessel captured in the usual manner should not, after receiving a prize crew on board and starting for the port of adjudication, repossess the vessel by force, as there are why the crew of an enemy ship should not revolt and bring the vessel in in the first instance. Indeed there are more reasons on the score of humanity, for if the capturing commander doubts the captured crew, he can, before parting with his prize, take such measures as shall make recapture from within the ship an impossibility. Yet the crews of captured vessels ought to be kindly and not cruelly treated. These considerations have not, however, prevented both Great Britain and the United States, when neutral nations, from refusing to deliver up captured vessels, which have been recaptured by their crews and carried into their ports. 3 Am. St. Papers (Foreign Relations) p. 576; U. S. Dip. Cor. 1862, p. 111. Attempted recapture will, indeed, be accepted by prize courts as almost conclusive evidence against captured property; but this is because of the presumption it gives rise to, that the captured master uses force, because the facts of his case will not bear examination. Certainly no vessel captured by the enemy, and recaptured by her crew, was ever restored to the enemy by the nation to which she belonged because of wrongfulness of the revolt and recapture by the crew. Yet a demand of this would be as reasonable, and as operating to prevent cruelty, more reasonable than a demand of restitution, on the ground that the original capture from the enemy was by revolt.

The case of the "Dickenson," an American vessel seized during the Revolutionary War, decided in the English high court of admiralty, by Sir George Hay, was not dissimilar to the present one. In that case the crew revolted against the master, took possession of the ship, and carried her into an English port, where she stood in the same light that the "Wren" does here, that of a rebel-enemy vessel, except that there the national character of the property stood bare, and here it is very thinly disguised. The vessel and cargo were condemned as "lawful prize." 1 Hay & M. 2. A distinction has been taken at the bar between that case and the present one, on the ground that there the vessel was owned by enemies, and had come out of an enemy port, whereas here the vessel was sailing under a neutral flag, and between neutral ports. But it is as lawful to capture enemy vessels when in disguise, as when undisguised, and as lawful to capture them sailing between neutral ports as between enemy ports. Captors have the right to avail themselves of any ground of condemnation which the testimony may develop. The captors, in this case, have this right; still they seem to have acted on the conviction that the vessel was owned by enemies of the government. Now, though condemnations for violation of blockade, carrying contraband, &c., are loosely spoken of, yet, in point of ultimate analysis, all prize condemnations are on the basis of enemy property. The Elsebe, 5 C. Rob. Adm. 176. If the neutral owner show that he has so acted that he cannot be considered an enemy in the particular case, his property must be restored. So that all causes of condemnation merge in, and together only make up the one ground of enemy ownership. If the proof establishes such ownership, the inevitable consequence follows; it must follow if any known ground of condemnation is made out; but, under the circumstances, it is not improper to bear in mind that the captors seem to have based their action on the broadest possible ground of capture, and to have hastened to deliver the vessel into the hands of the authorities.

It is unnecessary to pursue this question further. The claimant has failed to establish the neutrality of the property, and restitution must be denied. If the vessel is ultimately condemned in the supreme court, the government and the seizors can dispute the question of prize money, if they choose to do so. The claimant has no status in court to present that question, and no interest in it. [The Amiable Isabella] 6 Wheat. [19 U. S.] 66; [The Dos Hermanos] 2 Wheat. [15 U. S.] 99; 1 C. Rob. Adm. 286, 303.

It ought to be added, that there is another important question, which has not been and could not be presented by the present claimant: Was this capture made in violation of the neutral territory of Spain? It certainly was not completed within that territory, but the evidence is such as to make the question arguable, when properly presented. But captures made and completed in neutral waters are legal as between the belligerents. In such cases the claim ought to be by, and the restitution to, the nation whose sovereignty has been infringed. The Anne, 3 Wheat. [16 U. S.] 435; 3 C. Rob. Adm. 162; 6 C. Rob. Adm. 45; 1 Dod. 413. Any person properly authorized to raise this point, may move to have the decree opened.

A decree of condemnation follows:

[The case was appealed to the supreme court, where the decree was reversed, and the vessel restored, but without costs. 6 Wall. (73 U. S.) 582.]

Case No. 16,769.

UNITED STATES v. WRIGHT.

[Cited in U. S. v. Pacheco, Case No. 15,982. Nowhere reported; opinion not now accessible.]

Case No. 16,770.

UNITED STATES v. WRIGHT et al.

[3 Am. Law T. Rep. U. S. Cts. 17; 11 Int. Rev. Rec. 22, 35; 17 Pittsb. Leg. J. 20; 3 Pittsb. Rep. 192.]

Circuit Court, W. D. Pennsylvania. Jan. 11, 1870.

VIOLATIONS OF INTERNAL REVENUE LAWS—LIMITATION IN RESPECT TO PROSECUTIONS.

[By the act of April 30, 1790 (1 Stat. 112), all prosecutions for offenses not capital, or for fines or forfeitures under any penal statute, are barred unless the indictment or information is found or instituted within two years from the date of the offense. The act of March 26, 1804, in its third section, provides that any person guilty of any crime "arising under the revenue laws of the United States," or incurring any fine or forfeiture by breaches of said laws, may be prosecuted, etc., provided the indictment or information be found within five years from the date of the offense, any law or provision to the contrary notwithstanding. *Held*, that the act of July 13, 1866 (14 Stat. 98), entitled "An act to provide internal revenue to support the government," etc., is a "revenue law," within the meaning of the latter statute, and that prosecutions thereunder may be instituted within five years.]

Mr. Carnahan, U. S. Dist. Atty.

G. W. De Camp and S. S. Spencer, for defendants.

McKENNAN, Circuit Judge. The defendants are indicted for violations of the act of congress, entitled "An act to provide internal revenue to support the government, &c.," as amended by the act of July 13, 1866. 1st. By carrying on the business of distillers of spirits without having paid the special tax imposed by law. 2d. By carrying on the business of distilling without having given bonds. 3d. By engaging in the business of distilling, and making distilled spirits without having provided a bonded warehouse. To this indictment the defendants have pleaded specially that the offenses therein charged were not committed within two years before the finding of the indictment. It is admitted that the offenses so charged were not committed within two years, but that they were committed within five years before the finding of the indictment. The question is thus presented: Are the defendants protected by the statute of limitations?

By the act for the limitation of crimes, passed April 30, 1790, all prosecutions for offenses not capital, or the fines or forfeitures under any penal statute, are barred, "unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense, or incurring the fine or forfeiture aforesaid." If this act is applicable to the present case, it is clear that the defendants cannot be convicted. The third section of the act of March 26, 1804 (2 Stat. 290), enacts that any person or persons, guilty of any crime arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of said laws, may be prosecuted, tried and punished, provided the indictment or information be found at any time within five years after committing the offense or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding. The general terms of this section would seem to embrace offenses created by the act upon which this indictment is founded, but an elaborate argument has been made by the defendants' counsel to show that it is to be restricted in its application to offenses defined, or penalties imposed by laws relating to the importation of goods, etc.; and this for the reason that only such laws are to be regarded as revenue laws within the meaning of the act of March 26, 1804. The argument has failed to convince us of the soundness of such interpretation. Its fundamental infirmity is in confounding the instrumentality with the result. Taxation is the means by which revenue is raised, and revenue is, therefore, the product or fruit of taxation. It matters not in what form the power of taxation may be exercised, or to what subjects it may be applied, its exercise is intended to provide means for the support of the government, and the means so provided are necessarily to be regarded as the national revenue. Duties upon imports are imposed for the same general object, and because they are so imposed the money thus produced is considered revenue, not because it is derived from that particular source. So also with regard to the act upon which the indictment in this case is founded; its object is to furnish financial sustenance to the government; its title expressly declares it to be "An act to provide internal revenue," &c. The taxes imposed by it when paid are to be applied to vital national objects, and constitute part of the revenue of the government. It is, therefore, manifestly a revenue law, and as such comes within the purview of the act of 1804. If any confirmation of this interpretation is needed it will be found in the fourteenth section of the act of March 3, 1863 (12 Stat. 741), and in the opinion of Clifford, Circuit Justice, in U. S. v. Shorey [Case No. 16,281], in the circuit court, New Hampshire district. We must hold that the act upon which this indictment is founded is a revenue law, within the meaning of the act of 1804, and that the limitation for the prosecution, trial and punishment of persons guilty of offenses within it. is extended to five years. And the jury is so instructed.

[The case was submitted to the jury after the opinion of the court had been delivered, and a verdict of not guilty rendered.] [1]

[1] [From 11 Int. Rev. Rec. 22.]

Case No. 16,771.

UNITED STATES v. WRIGHT.

[1Cranch, C. C. 123.] [1]

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

COURTS—JURISDICTION.

A slave in Alexandria may be tried in this court for larceny.

Indictment [against Betty Wright, a slave] under the statute for stealing goods. Some question arose how she should be tried. Under the law of Virginia, she would have been tried by five justices of the county court, without a jury. Upon consideration of a former precedent in this court, she was tried by a jury in the usual form.

Verdict, guilty. Judgment, 20 lashes, 1 cent fine.

Case No. 16,772.

UNITED STATES v. WRIGHT.

[2 Cranch, C. C. 68.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

FORGERY—BANK-NOTES.

Possession of forged bank-notes, with intent to utter them as true, is not an indictable offence.

Indictment [against Walter Wright] for knowingly having in his possession forged bank-notes with intent to utter them as true.

Mr. Wallach and Mr. Law, for defendant, moved the court to quash the indictment; because: 1. It is only an intent to commit a crime, which intent is not indictable. Rex v. Higgins, 2 East, 5; 4 Bl. Comm. 21; St. 41 Geo. III. c. 39; East, P. C. 881. 2. It does not charge an unlawful intent to injure any person. Nothing can be inferred. At common law it is no crime simply to make a false bank-note unless some person be injured. 1 Hawk. P. C. c. 70, § 11; Rex v. Wheatly, 2 Burrows, 1127; Rex v. Munoz, 2 Strange, 1127. 3. It does not set forth the notes in hæc verba. Mason's Case, East, P. C. 975; Com. v. Morse, 2 Mass. 138.

Mr. Jones, contra. An inchoate act towards the consummation of a crime is indictable. Rex v. Higgins, 2 East, 5. There is a form of such an indictment in C. Cir. Comp. p. 286, for having counterfeit money in his possession with intent to utter it. This court in the case of U. S. v. Williams [Case No. 16,709], decided that in an indictment for forgery, it is not necessary to set forth the forged instrument in hæc verba.

THE COURT having some doubt, refused to quash the indictment; but after verdict, arrested the judgment.

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

Case No. 16,773.

UNITED STATES v. WRIGHT.

[2 Cranch, C. C. 296.] [1]

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

DEFRAUDING UNITED STATES—TRANSMISSION OF FORGED PAPERS—VENUE OF OFFENCE.

If forged papers be inclosed and sealed up in a letter written in the state of Tennessee, and there directed to the paymaster-general in the city of Washington and sent by the mail, with intent to defraud the United States, and the letter be received and opened by the paymaster-general in Washington, this is not an uttering and publishing of the said forged papers in the county of Washington.

[Cited in U. S. v. Plympton, Case No. 16,058; In re Palliser, 10 Sup. Ct. 1037, 136 U. S. 267.]

The indictment in this case charged that the defendant [Henry Wright] at the county of Washington in the District of Columbia, with intent to defraud the United States, feloniously uttered and published as true, and caused to be uttered and published as true, certain forged papers and documents respecting a pension, against the peace and government of the United States. Another count charged that the defendant at the said county of Washington, feloniously caused the said forged papers and documents to be uttered and published as true.

Upon the trial, N. B. Vanzandt, a witness sworn on the part of the United States, testified that he had received several letters from a person, who signed his name H. Wright. That the prisoner afterwards came to his office and conversed with him on the subject of the claims to which those letters referred. That he never saw him write. That the letters now shown to him are in a handwriting like that of the letters which he had received, signed H. Wright; but these letters were not produced.

Mr. Jones, for defendant, objected to Mr. Vanzandt's testifying as to the similarity of the handwriting, especially as the letters to Mr. Vanzandt were not produced at the trial, and as there was no evidence that they were written by the defendant.

Mr. Swann, contra, cited Phil. Ev. 364.

THE COURT (CRANCH, Chief Judge, doubting,) said that the presumption from those circumstances was so strong as to justify the admission of Mr. Vanzandt to testify as to the similarity of the handwriting.

The jury found a verdict, stating that the traverser did feloniously utter and publish the forged papers contained in the letter to the paymaster-general, with intent to defraud the United States, he then knowing the same to be false, forged, and counterfeit. But they also found "that the letter inclosing the same was written in the state of Tennessee by the traverser, and was sealed up by the traverser in the state of Tennessee, and directed and

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

sent by him, by the mail, to Nathan Towson, the paymaster-general then in the city of Washington; and that the said letter, being brought by the said mail, was opened by the said Nathan Towson, sometime in the month of January, 1821, in the city and county of Washington aforesaid; the traverser not being then, nor ever before or after, till the month of March, 1821, in the District of Columbia; and whether, under these circumstances the traverser is guilty of uttering and publishing the said forged papers in the county of Washington, is submitted to the court as a question of law. If the law should determine that the uttering and publishing so as aforesaid made, should be considered as in the county of Washington, then we find the traverser guilty as above stated in the said county; but if otherwise, we find him not guilty."

Mr. Key, for defendant. If the facts stated in the special verdict amount to an uttering or publication, it was complete in Tennessee, when the defendant put the letter into the post-office there. If the offence be complete there, he cannot be tried here for the same offence. He did no act afterwards. His crime could not depend upon the act of the paymaster-general. There is no law making the uttering and publication of such papers a crime. At common law, it must be of a paper of a public nature, and to the prejudice of another person's rights. It is no crime at common law to publish as true a forged paper at a place where it was not forged. 1 Hawk. P. C. 182, c. 70; 4 Bl. Comm. 247.

This court cannot send the defendant to Tennessee to be tried; and if it could, this is an indictment at common law, and there can be no common-law offences against the United States in Tennessee. All common-law offences there, are offences against the state of Tennessee, not against the United States. The United States courts have no common-law criminal jurisdiction.

Mr. Swann, contra. The publication of a forged release is indictable at common-law. Com. v. Searle, 2 Bin. 332. The receipt and opening of the letter in Washington, is a publication there. Rex v. Johnson, 7 East, 65. Inclosing and sealing them up in Tennessee was certainly no publication in Tennessee. He caused them to be uttered and published in Washington, by inclosing and sending them by the mail.

Mr. Jones, in reply.

The defendant had never been in the District of Columbia until long after the receipt and opening of the letter containing the forged papers. The case of Rex v. Johnson, cited from 7 East, 65, is a case of publication of a libel in London, written by the defendant in Ireland. The procurer and the publisher were both guilty of the publication; if it had been a case of felony, Cobbet, who published it in London, would have been the principal, and Johnson would have been an accessory; but in misdemeanors there are no accessories, and he was therefore a principal.

Judgment for the defendant, on the special verdict.

Case No. 16,774.

UNITED STATES v. WRIGHT.

[15 Int. Rev. Rec. 9.]

District Court, D. Massachusetts. 1871.

INDICTMENT—OFFENCE COMMITTED ON LANDS CEDED BY STATE.

In an indictment under the statute of April 5, 1866, c. 24, § 2 (14 Stat. 12), it is unnecessary to aver that the offence is not punishable by any law of congress, and is punishable by the state laws; and a conclusion "against the form of the statute" is correct.

Motion in arrest of judgment. The defendant [Ellery C. Wright] was indicted for an assault committed on land ceded in the year 1828, by the commonwealth of Massachusetts, to the United States, for the erection of a light-house. The offence was charged in a way which would be sufficient by the law of the state, but did not contain any averment that the offence was in fact punishable by the laws of the state, or that it was not punishable by the laws of the United States. It concluded "against the form of the statute." In Massachusetts assaults are common-law crimes.

E. L. Barney, for defendant.

The indictment should show clearly what law has been violated, else the defendant may be embarrassed. There is no averment to show what statute has been violated, and none has been violated. The conclusion is wrong.

E. P. Nettleton, Asst. U. S. Dist. Atty.

The indictment follows that in U. S. v. Davis [Case No. 14,930], and is sufficient. The law of the state is that in case of legal conviction, where no punishment is provided by statute, the court shall award such sentence as is conformable to the usage and practice in the state General Statutes, c. 174, § 1. The conclusion is right, because the offence is adopted by congress, and made part of the law of the United States. If wrong, it may be rejected.

LOWELL, District Judge. By the act of April 5, 1866, c. 24, § 2 (14 Stat. 12), if any offence shall be committed in any place which has been ceded to the United States, which offence is not punished by the laws of the United States, such offence shall, upon conviction, etc., be liable to the same punishment as the laws of the state in which such place is situated in force at the date of the act provide for the like offence. The laws of Massachusetts then and now in force punished assaults, by usage and practice, as offences at common law, and the General Statutes in several places recognize the crime and give ju-

risdiction to certain courts to punish it, and provide how such a prosecution may be disposed of in certain cases by an acknowledgment of satisfaction. The point was not taken that congress, by the act of 1866, intended to adopt only offences created by the statutes of the several states, and I think the fair meaning of the act is to adopt all the laws in respect to crimes. This being so, the question is whether the indictment ought to aver that this crime is not punishable by any law of congress, and is punishable by the state laws. I see no necessity for any such allegation. When congress adopted the laws, they became a part of the laws of the United States; and true pleading requires only the facts to be set out. Even if it were not so, the court must take judicial notice of the laws of Massachusetts, and the defendant must be presumed to know them, and it is unnecessary to allege them. Pennington v. Gibson, 16 How [57 U. S.] 65, 81. This assault was an offence against the form of the statute of 1866, else it could not be punished here at all. I do not see how it is possible under the decision of the supreme court to conclude any indictment otherwise than as "against the statute," because there is no common-law jurisdiction. But here, again, is the alternative that the modern doctrine undoubtedly is that this conclusion may be rejected as surplusage. Motion denied.

Case No. 16,775.

UNITED STATES v. WRIGHT.

[1 McLean, 509.] [1]

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

CIVIL OFFICERS OF THE U. S.—RIGHT OF RESIGNATION—RELEASE OF SURETIES—TRIAL —INSTRUCTIONS.

1. A civil officer has a right, at any time, to resign his office, and after his resignation has been received at the proper department, his surety is not bound for his faithful performance.

[Cited in Movius v. Lee, 30 Fed. 301. Cited, but not followed, in Edwards v. U. S., 103 U. S. 477.]

[Disapproved in State v. Clayton, 27 Kan. 445. Cited in Com. v. Hawkes, 123 Mass. 530; State v. Mayor, etc., of Lincoln, 4 Neb. 261. Disapproved in Coleman v. Sands, 12 Hans. (87 Va.) 697, 13 S. E. 150.]

2. If the resignation, in its terms, is not to take effect, until a successor shall be appointed, the effect may not be to relieve the surety.

3. The president has no power to refuse a resignation, and require the officer to continue in office.

[Cited in Reiter v. State, 51 Ohio St. 74, 36 N. E. 945.]

4. The instructions of the court must apply to the facts proved in the case.

[Cited in dissenting opinion in McCornick v. Sadler, 10 Utah, 210, 37 Pac. 334.]

5. If they have no such application, and could have had no influence on the verdict, they afford no ground for a reversal of the judgment, however erroneous they may be.

[Cited in Hamer v. First Nat. Bank, 9 Utah, 215, 33 Pac. 943.]

[In error to the district court of the United States for the district of Ohio.]

The district attorney appeared on the part of the plaintiffs, and the defendant [John C. Wright,] appeared in his proper person.

McLEAN, Circuit Justice. This case was originally commenced in the district court, and on the trial certain exceptions were taken to the rulings of the court, and on which the cause was brought before the circuit court by a writ of error. The action was brought on a penal bond for $18,000 given by J. P. Fogg, a collector of internal revenue, and signed by the defendant, as security. The declaration stated the bond which was dated 20th January, 1820, without setting out the condition. Defendant craved oyer of the condition, and pleaded—

I. Nil debet with the following notice of special matter in bar: (1) That Fogg faithfully collected and paid over all taxes and duties. (2) That defendant believing Fogg would not discharge his duty, notified the proper department in writing, and sent Fogg's written resignation, which was received 2d August, 1817; yet he was continued in office long afterwards, when wholly insolvent, and if there was any breach it was subsequent to his resignation. (3) That Fogg and sureties have paid all balances in full. The defendant also pleaded specially that Fogg went into office 20th January, 1817, and did his duty till 25th July, ensuing, when he resigned in writing, and that he did his duty up to the time his resignation was received.

II. That Fogg while in office collected all and paid over, &c.

The plaintiffs took issue on the plea of nil debet; demurred to the second plea because it contained no averment that the resignation was accepted by competent authority. The defendant joined in demurrer.

And in answer to the third plea the plaintiffs replied that Fogg, between January and December, 1817, received $10,000 in bonds which he did not collect or account for. That he did not collect or account for $10,000 due United States; that he received various sums in money, in bonds, and stamped paper which he did not account for.

The defendant joined issue in fact on all the above breaches. The second plea was abandoned, and a jury was sworn to try the issues in fact. The verdict found that the instrument declared on was the deed of the defendant; and that Fogg was not guilty of any of the breaches set forth in the plaintiffs' replication to the defendant's third plea.

The bill of exception states that the defendant to maintain the issue on his part, relating to Fogg's resignation and accept-

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

ance, gave in evidence Fogg's resignation dated 25th July, 1817, which was received by the commissioner of the revenue the 2nd August ensuing. And also defendant's letter to the commissioner of the same date requesting him to take steps to keep safely the books and other property, in the hands of the collector. That the funds or property of the government were not safe in his hands. And also the letter of the commissioner acknowledging the receipt of the resignation of Fogg and the letter to the defendant stating the absence of the president and requesting the collector to discharge his duties until his successor should be appointed. And there being no other evidence the court charged the jury that Fogg's resignation took effect 2nd August, and that defendant was not liable, as surety, after that time, to which the district attorney excepted.

Two errors are assigned on which a reversal of the judgment of the district court is prayed. First—That the charge of the district judge was erroneous, and secondly, the general error.

On the part of the defendant it is contended that the charge was right on the case made. That the office was a civil one, was resigned absolutely and the resignation was received by the proper officer. But that if the charge was erroneous, it was not injurious to the plaintiffs. There are three modes by which a civil office is terminated. First, its own limitation; secondly, removal by the executive or by impeachment; and thirdly, a resignation. The collector of internal taxes was appointed for years, but the limitation had not expired when the defalcation of Fogg is alleged to have occurred. I have always considered the construction of the constitution, which was given in the first administration in regard to the power of the president to remove from office, without the consent of the senate, as wrong in principle and injurious in practice. The senate constitutes a part of the appointing power, and was intended to be a check upon the executive. But, if the president may remove from office without consulting the senate, it is no effectual check. The power to remove is implied from the power to appoint; and, strange as it may seem, this implication is drawn in favor of the exercise of the power by the executive, to the exclusion of the senate. This is not only illogical, but it is against the spirit of the constitution. The attempt by some to find the power of the president to remove under that clause of the constitution, which requires him to see that the laws are faithfully executed, cannot be sustained. This clause refers to the exercise of that power in the president, to call out the physical force of the country, to carry into effect the laws. His ordinary executive duties are pointed out and required to be performed, in other parts of the constitution. There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. It is only necessary that the resignation should be received, to take effect, and this does not depend upon the acceptance or rejection of the resignation by the president. And if Fogg had resigned absolutely and unconditionally, I should have no doubt that the defendant could not be held bound, subsequently, as his surety. But it appears from his letter, which is made a part of the record, that although he resigned his office, he professed a willingness to continue in the office until his successor could be appointed. And the commissioner informed the surety, in answer to the letter, that the president was absent from the seat of government, and that the collector would be continued in office until the president should return, and a successor should be appointed; and the defendant was requested to apprize the commissioner, if such an arrangement would be injudicious. But it does not appear that he was advised on the subject. The collector, it was proved, as appears from the bill of exceptions, continued in the office from the time of his resignation, on the 2d of August, 1817, until the 12th of December following. The resignation was to take effect, by the terms of it, when a successor should be appointed. It may therefore be doubted whether the surety was not bound, so long as the collector remained in office. The resignation was qualified with the expression of a willingness to hold the office until a new appointment should have been made, in the same letter.

The bill of exceptions, after stating that the defendant, to prove the resignation of Fogg, gave in evidence the letters above referred to, states that "the plaintiffs on their part having proved that the said Fogg had continued in the full performance of the duties of said office from and after the 2nd day of August, 1817, and until the 1st December, 1817; and the said defendant having given no other or further proof in relation to that part of the defence, and the testimony being closed, the defendant moved the court among other things to instruct the jury that the said Fogg had resigned his said office, and that the said resignation took effect and became complete on the said 2nd of August, 1817; and that the defendant was not liable as his surety for any delinquency of said Fogg which occurred after that time; which instruction the court gave."

It does not appear from the bill of exceptions nor from any part of the record, that the plaintiffs offered any evidence of the breaches alleged in their replication to the third plea, on which issues were joined. The third plea was, that Fogg while in office collected and paid over, &c. To this the plaintiffs replied various breaches on which issues were joined. And to support these breaches, it does not appear that the

plaintiffs offered any evidence. And the question arises whether, if the instruction given as to the resignation was erroneous, the judgment on that ground should be reversed. If there was no evidence given or offered to show the breaches alleged in any one of them, it is very clear, that the verdict must have been for the defendant, had the instruction not been given. Without proof of damages the plaintiffs could not ask a verdict; and any instructions given, however erroneous, which had no application to the facts of the case, and could have had no influence on the verdict, can afford no ground for a reversal of the judgment.

The judgment of the district court is affirmed.

Case No. 16,776.

UNITED STATES v. WRIGHT.

[1 N. J. Law J. 4.]

District Court, D. New Jersey. Nov. 18, 1877.

POSTMASTER'S BOND—DISCHARGE OF SURETIES—FORBEARANCE OF GOVERNMENT.

1. Mere indulgence or forbearance on the part of the United States government toward a postmaster, whose accounts are confused, and who is in default to the government, for an indefinite time, in the absence of fraud, will not discharge his sureties from their obligations on his bond.

2. Although, in such case, there is laches on the part of the government in disclosing the defalcations of a postmaster, or in his continuance in office after the discovery of his unfaithfulness, his sureties will not be released on account of his subsequent misconduct.

3. The possession of the office of the postmaster by a special agent of the department for one day, while adjusting the accounts, does not release the sureties from all subsequent liability under section 3836 of the Revised Statutes. That section applies only to cases where the office is vacant.

An action of debt upon a postmaster's bond to recover from the sureties the amount due the government upon the defalcation of the principal. Parties waived a jury and submitted a statement of facts, upon which the court was to find a verdict for the plaintiff or defendants according to the law in the case. The facts agreed to were substantially and in brief these: Mr. Wright was appointed postmaster of Princeton March, 1870, and duly executed an official bond, with Messrs. Duryea, Cumming, Jewell and Bailey as sureties, upon which bond this suit is brought; that before July, 1872, Wright's accounts became confused, and the post-office department found, on investigation, that he was $400 in arrears; that this sum Wright made good; that about July, 1872, he was found again to be in arrears more than before, and again he settled it; that in November, 1872, he was $800 in arrears again; that then he claimed to have been robbed in Philadelphia, but made up the deficiency; that in January, 1873, another postmaster was appointed, but Wright continued to hold his position until March, 1873; that in settling Wright's accounts during the period between his appointment and the termination of his office, he was found a defaulter in $1100, for which deficiency this suit is brought. The sureties had not been notified of these previous defalcations nor of the several investigations of the post-office department.

A. Q. Keasbey, for plaintiff.
E. T. Green, for defendant.

NIXON, District Judge. 1. The first ground taken by the counsel of the defendants to bar the right of recovery is that the extension of time for paying over moneys due and owing to the United States, granted to the postmaster by the special agent and without notice to the sureties, discharges them. It is a sufficient reply to this to say that the statement of facts agreed upon by the parties furnishes no support to the proposition that any extension of time for payment was granted. On the contrary, there seems to have been a commendable vigilance on the part of the government officers in investigating the accounts of the principal, and in compelling him to pay promptly all sums due to the department. There was neither indulgence nor forbearance; although, if there had been, it will hardly be contended that mere indulgence or forbearance for an indefinite time, in the absence of fraud, would have discharged the sureties from their contract. Locke v. Postmaster General [Case No. 8,441]; U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720; U. S. v. Van Zandt, 11 Wheat. [24 U. S.] 184; U. S. v. Simpson, 3 Pen. & W. 437; Railroad Co. v. Schaeffer, 8 Am. Law J. 110.

2. The second ground is that the act of the United States in continuing Wright in office after he was known to the officers of the government to be a defaulter was a fraud upon the rights of the sureties and discharged them from all liability. This ground assumes that it was the right of the sureties to be notified by the government as soon as any confusion or difficulties arose in regard to the accounts of the principal, and that a failure to give such notice relieves the sureties from any continuing liability. In other words, it is an attempt to avoid contracts of guaranty on account of the existence of facts happening after the contract was executed, which would have rendered the contract void if they had existed at the time it was made.

It is a settled principle that a party taking a guaranty from a surety must not allow him to enter the contract under false impressions. If he knows anything in regard to the situation or character of the principal which increases the risk of the surety, and withholds his knowledge, it is a fraud which releases the grantor. Thus, a person has a clerk in his employ, whom he discovers to be dishonest; concealing the fact of the dishonesty, he demands security, and the person interested

in the clerk and ignorant of his unfaithfulness, enters upon his bond for the faithful discharge of his duties. Such suretyship, under the circumstances, is void; because the grantor had the right to infer from the silence of the employer that he regarded the clerk as a trustworthy person (Smith v. Bank of Scotland, 1 Dow, 272; Railton v. Mathews, 10 Clark & F. 934; and Insurance Co. v. Lloyd, 10 Exch. 532); although in the last-quoted case the principle was qualified by Pollock, C. B., by holding that in cases of guaranty the concealment, in order to vitiate the contract, must be fraudulent. But this is the doctrine in equity. Whether such a defence is available at law in a suit upon a bond remains an open question. In Everett v. Stone [Case No. 4,577], Judge Story was inclined to doubt its availability as a legal defence. And the supreme court in Etting v. Bank of U. S., 11 Wheat. [24 U. S.] 59, seems to have been equally divided upon the question. In that case the bank brought an action of assumpsit against Etting, as the endorser of a promissory note of one McCullough under the following circumstances: The president of the branch bank at Baltimore, McCullough, who was the cashier, and one Williams, one of the directors of the bank, became indebted to the bank in the sum of $3,497,700. Various conferences were held between the parties and the directors in regard to securing the debt. Terms of arrangement were finally agreed on, involving, amongst other things, the separate liability of each of the debtors for $300,000 instead of the joint liability of all for $900,000, and for which additional security was to be procured by each of the parties. A portion of the security offered by McCullough and accepted by the bank were sixteen merchants of Baltimore, who became bound as endorsers for $12,500 each, of whom Etting was one. The negotiations for the completion of the business were some time in progress, and were concluded on the 17th of May, 1819, and on the 18th of May McCullough was removed from the office of cashier, which he had held from the first establishment of the bank. When the note endorsed by Etting fell due, it was protested for nonpayment. Suit was brought by the bank, and the defence was made that the maker was a defaulter at the time the note was given; that his indebtedness to the bank was the result of his unauthorized and fraudulent appropriations of their funds to his own use; that the fact was known to the bank, but was not revealed to the surety when he became the endorser of the note; and that such concealment and the immediate removal of the cashier was a fraud upon the endorser, and released him from liability. On the trial in the court below the judge charged the jury "that in order to vitiate the note and endorsement in law and to bar the plaintiffs' right to recover thereon on the ground of a fraudulent misrepresentation, or fraudulent concealment of circumstances known to them, and unknown to the defendant, it was incumbent on the defendant to show that he applied to the plaintiffs for information, or held some communication with them for the purpose of receiving such information, and that on such application or communication the plaintiffs either misrepresented or concealed such circumstances; and that, in the absence of such proof, there was nothing in the facts given in evidence by the defendant to effect the right of recovery in the action." Judgment was rendered for the plaintiff and the cause was removed into the supreme court by writ of error. It was elaborately argued by the ablest lawyers—Mr. Webster and Mr. Taney for the plaintiffs in error, and the attorney general (Wirt) and Mr. Emmett for the defendants. Commenting upon the instructions given by the judge of the circuit court, the counsel for the plaintiffs in error maintained with consummate ability that the act of the defendants in error of continuing the cashier in office after his misappropriation of the funds was discovered in order to give him credit and thereby to procure the security in question, by which means the plaintiff in error was deceived and induced to endorse the note, was a fraud upon him, and vitiated the contract. Although the concealment had reference to facts and circumstances existing at the time the contract was made, the court were equally divided, and the judgment of the court below was, of course, affirmed.

But the question here is whether the laches of the officers of the government in disclosing the defalcations of the principal, or the continuance of the principal in office after the discovery of the unfaithfulness, releases the surety from liability on account of his subsequent misconduct. There are, it is true, several recent English cases, which give support to the contention and argument of the learned counsel of the defendants. Sanderson v. Aston, L. R. 8 Exch. 73; Burgess v. Eve, L. R. 13 Eq. 450; Phillips v. Foxall, L.R.7 Q.B.666. They are cases between private individuals, and in Phillips v. Foxall the court held, after full consideration, that "in a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and, instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterward have recourse to the surety to make good any loss which may arise from his dishonesty during the subsequent service."

Many substantial reasons, doubtless, could be assigned why officials having the settlement of the accounts of public officers should be required to give prompt notice to sureties as soon as they discover any misappropriation or maladministration of the funds in their hands; but it has not been the law in this country in controversies upon official

bonds that a failure to give such notice, or the retention of the principal in office after knowledge of his defection, was fraudulent neglect which released the sureties. On the other hand, there are a number of cases which go to the full extent of holding the sureties liable, although the government, after knowledge of the defalcation, continued to trust the officer with the receipt and disbursement of the public moneys.

The case of Postmaster General v. Reeder [Case No. 11,311], was an early one in this circuit, and was a suit against the sureties in the official bond of the postmaster of the city of Trenton, involving, among other things, substantially the defence which I am now considering. Judge Washington carefully reviewed the question whether the omission of the postmaster general to notify the sureties of the deputy postmaster of his delinquencies was actually or constructively fraudulent, and in the course of his opinion says: "Upon the subject of fraudulent concealment from the defendant of defalcations of his principal, it cannot be pretended that negligence or breach of public duty, much less fraud, is imputable to the postmaster general; since he is not required, either by the law of the land or by the dictates of morality, to communicate those defects to the sureties. When they entered into his contract they trusted in the integrity and fidelity of their principal, and he was in all fairness bound at all times to satisfy their inquiries in relation to his official conduct. What might have been the legal consequence of a refusal by the postmaster general to afford information to the sureties upon this subject in case it had been asked for, or to institute suits against the postmaster for his defaults, if this had been demanded, need not be decided in this case; since there is no evidence tending to prove that such request or demand had ever been made by the defendant or by his co-surety."

The supreme court in U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720, in U. S. v. Van Zandt, 11 Wheat. [24 U. S.] 184, and in Dox v. Postmaster General, 1 Pet. [26 U. S.] 318, have reached conclusions which render this defence untenable here. (The cases are sketched and a synopsis of the opinions given, after which Judge NIXON continues, referring to the last case:) Chief Justice Marshall, who delivered the opinion of the court, did not hesitate to say that they exhibited a gross neglect of duty on the part of the postmaster general. After reviewing and affirming the cases of U. S. v. Kirkpatrick and U. S. v. Van Zandt, he says: "These two cases seem to fix the principle that the laches of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond from the obligation it creates, as firmly as the decisions of this court can fix it."

3. The third ground assigned is that the possession of the office by the special agent of the department for one day, while adjusting the accounts in the year 1872, when the arrears were paid, released the sureties from all subsequent liability under the provisions of section 3836 of the Revised Statutes. The answer to this suggestion is that the section applies only to cases where the office is vacant, and was not intended to have any application where, as under the present circumstances, the postmaster still remains in office.

4. There seems to be no foundation in fact for the last ground assigned, to wit, that the suit is barred by the statute of limitations. The default occurred in February, 1873, and the suit was brought in the following September.

Case No. 16,777.

UNITED STATES ex rel. HENDERSON v. WRIGHT.

[20 Leg. Int. 181;[1] 5 Phila. 299; 2 Pittsb. Rep. 440; 25 Law Rep. 459; 10 Pittsb. Leg. J. 305.]

Circuit Court, W. D. Pennsylvania. 1863.

ARMY — ENLISTMENT OF MINORS — DISCHARGE — PAROLED PRISONERS OF WAR—CARTEL FOR EXCHANGE OF PRISONERS—POWERS OF MILITARY OFFICERS.

1. As decided in [Case No. 16,778], the enlistment of minors *held* to be illegal in the absence of the consent of their parents or guardians.

[Cited in Re McDonald, Case No. 8,752; Re Davison, 4 Fed. 509, 21 Fed. 623; Re Chapman, 37 Fed. 330.]

2. A prisoner of war paroled by the enemy, although a minor, is not entitled to his discharge until after his exchange.

3. His father's claim to his services must be subordinated to the public exigency, to the higher claims of the nation.

4. The parole or promise given by the son, was for his good, for his liberty, and although a minor, it is binding upon him independent of public or political reasons.

5. The government of the United States, from motives of humanity, have been compelled to treat the present Rebellion as a public war, and to apply to it the rules of civilized warfare.

6. Paroles given by prisoners of war are of sacred obligation, and the national faith is pledged for their fulfillment.

7. Cartels, or military agreements, for the exchange of prisoners, made by the officer in command, are of such force, under the law of nations, that even the sovereign cannot annul them.

8. Good faith and humanity ought to preside over the execution of these compacts and which are designed to mitigate the evils of war, without defeating its legitimate purposes.

9. These cartels have all the binding power of treaties, which, under the sixth article of the constitution of the United States, are a part of the supreme law of the land.

10. When the minor is in an attitude to enable the government to comply with the cartel of their military officer, and the minor has been duly exchanged, the rights of the parent will be properly regarded.

[This was an application by Andrew Henderson for a writ of habeas corpus to be directed to Captain E. S. Wright, of the United

[1] [Reprinted from 20 Leg. Int. 181, by permission.]

States army, for the purpose of procuring the release of an enlisted minor. The writ having been granted, the command thereof was obeyed by producing the body of the enlisted man in court.]

Mr. Keenan, for relator.
Mr. Carnahan, for the United States.

McCANDLESS, District Judge. If this case presented the single question as to the irregularity of the enlistment, the court would have little difficulty in deciding it. The fact of minority is established, and the right of relator to the services of his son is admitted. But grave considerations of a public character arise, to which all others of a domestic nature must be subordinated. The proofs show that John M. Henderson was enlisted in the month of August, 1861, in the 11th Pennsylvania regiment, Col. Coulter; that he was born on the 4th of August, 1843, and at the date of his enlistment, he was about eighteen years of age. He participated with this gallant regiment in the battle of Fredericksburg, was taken prisoner by the enemy in that bloody engagement, was removed to Richmond, and subsequently paroled. Upon his arrival within the United States lines, he was ordered to Camp Parole, at Annapolis, Maryland, from which he departed, without leave, and was recently arrested by a provost guard near his father's residence, in Westmoreland county. It appearing also that he was mustered into the service, without the consent, and against the wishes of his father, he would be entitled to his discharge, but for the reasons which the court will briefly proceed to assign.

The country is at war, and as the world acknowledges, "the greatest civil war known to the history of the human race." Although a rebellion, it has assumed such huge dimensions, with all the characteristics of a public war, that the government have been compelled, from motives of humanity, to treat it as such, and to apply to it the rules of civilized warfare. It has also been so recognized by the highest judicial authority of the country. As the supreme court of the United States say, in that great opinion recently delivered by my Brother Grier, in the Prize Cases [2 Black (67 U. S.) 666]: "The parties belligerent in a public war, are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations of sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other, who claims a right to renounce their allegiance, and are in rebellion against their sovereign. insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared, it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign state, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for the treason. The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars."

Belligerent rights, then, being conceded to the insurgents by both the executive and judicial departments of the government, let us see what is the usage and practice of nations as established by public law in cases of prisoners of war. Savage nations put them to death. During the wars of the middle ages a ransom was substituted. Only within the last century or two was the mild and humane system of exchange introduced among the polished nations of Christendom. Mr. Wheaton tells us in his volume of International Law (page 393), "that cartels for the mutual exchange of prisoners of war are regulated by special convention between belligerent states, according to their respective interest and views of policy. Sometimes prisoners of war are permitted by capitulation, to return to their own country, upon condition not to serve again during the war, or until duly exchanged. Good faith and humanity ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes. Breach of good faith, in these transactions, can be punished only by withholding from the party guilty of such violation, the advantages stipulated by the cartel; or in cases which may be supposed to warrant such a resort, by reprisals or vindicative retaliation." And in Vatt. Law Nat. 354, we find that these cartels or military agreements, are held to be of sacred and of public obligation. A prisoner released on his parole, enjoys the comfort of passing the time of his captivity in his own country, in the midst of his family, and the party who have released him rest as perfectly sure of him as if they had him confined in irons. Such prisoners are dismissed on their parole—bound by promise not to carry arms for a certain time, or during the continuance of the war. And as every commander, necessarily, has a power of agreeing to the conditions on which the enemy

admits his surrender, the engagements entered into by him for saving his life or his liberty, with that of his men, are valid, as being made within the limits of his powers, and his sovereign cannot annul them. It follows that these cartels have all the binding power of treaties, which, under the sixth article of the constitution of the United States, are a part of the supreme law of the land.

This young man made a promise, for the fulfilment of which the national faith is pledged. It must be redeemed, or the national character is dishonored. Under the law of nations the president could not discharge him until his exchange, and what the president of the United States cannot do, will not be assumed by the judiciary. The relator must yield his natural and domestic claims to the public exigency, to the higher claims of the nation, and when his son is in an attitude to enable the government to comply with the cartel of their military officer, his rights, as a parent, will be properly regarded. This may save his son from the danger of immediate execution, should he in future, by his rashness or misconduct, fall into the hands of the enemy. The parole or promise he gave was for his good, for his liberty, and although a minor, it is binding upon him, independent of public or political reasons. 2 Kent, Comm. 269. As the regiment in which he fought was one of the most distinguished of the Pennsylvania line, and as this court is of opinion he is, by law, entitled to his discharge, after exchange, if there be no military accusation against him, we refer him favorably to the secretary of war.

John M. Henderson is remanded to the custody of the United States provost marshal, to be returned to Camp Parole, Annapolis, Md., there to await the orders of the war department for exchange as a prisoner of war, and the relator is ordered to pay the costs of this writ.

Case No. 16,778.

UNITED STATES ex rel. TURNER v. WRIGHT.

[20 Leg. Int. 21;[1] 5 Phila. 296; 2 Pittsb. Rep. 370; 5 Leg. & Ins. Rep. 10; 10 Pittsb. Leg. J. 154.]

Circuit Court, W. D. Pennsylvania. 1862.

ARMY—ENLISTMENT OF MINORS—OATH OF ENLISTMENT—HABEAS CORPUS—DESERTION.

1. Act of congress of February 13, 1862 [12 Stat. 339], construed. The oath of enlistment, where the person enlisted is under eighteen, is not conclusive upon the courts, but is upon the recruiting officer, for whose protection the proviso was inserted in the act.

[Cited in Re Davison, 4 Fed. 509; Re Chapman, 37 Fed. 330.]

2. The return to the writ of habeas corpus, does not make the minor a deserter. There can be no criminal desertion if the enlistment was illegal.

[Cited in Re Zimmerman, 30 Fed. 181.]

[This was an application by Elizabeth Turner for a writ of habeas corpus, directed Capt. E. S. Wright of the United States army, to procure the release of an enlisted minor. Heard upon the return to the writ.]

Mr. Carnahan, U. S. Dist. Atty.

James H. Hopkins, for relator.

McCANDLESS, District Judge. Considering the reprehensible conduct of this young man, Theodore Turner, whose discharge is asked for, I do not feel disposed to grant it, unless required by the rules of law. He is neither an idiot nor a lunatic, but seems gifted with more than ordinary intelligence. And yet, to obtain the compensation as a substitute for a drafted soldier, he imposed not only upon him, but upon the military officers of the United States. Although but nineteen years of age, he represented himself as one month over twenty-one, and received the sum agreed to be paid. He may have designed to act in good faith, until maternal and family ties were interposed, but this cannot palliate the utterance of a falsehood, to which he added the semblance of truth, by giving to it the solemnity of a written declaration, almost, but not quite, sanctioned by an oath. This allegation, fortunately for him, in the printed affidavit, is mere matter of description, and is no part of the oath of enlistment. And Captain Luddington, the United States mustering officer, testifies that he did not swear him to his age. The mother, the surviving parent, asks his discharge upon the ground of minority, and the proof before the court is clear that he was but nineteen years of age on the 2d day of October last.

The first objection raised by the United States attorney is, that by the act of the 13th of February, 1862, the oath of enlistment, taken by the recruit, shall be conclusive as to his age. Conclusive upon whom? Upon the mustering officer, who is prohibited by the proviso of the section from mustering into the United States service any one under the age of eighteen. The act was passed to relieve the secretary of war from the herculean labor of passing upon the thousands of applications for the release of persons who had been mustered into the service without the consent of their parents or guardians. And while admonishing the mustering officer not to receive any under the age of eighteen, yet if he did so, the oath of enlistment taken by the recruit should be his protection. Because, by the act of 1802, to which we shall presently refer, the recruiting officer was subject to a penalty for enlisting a minor without the consent of his parent or guardian, which was to be deducted from that officer's pay and emoluments. Congress never intended that the oath, however false, should be binding on

[1] [Reprinted from 20 Leg. Int. 215, by permission.]

the courts, or give validity to a contract which an unrepealed statute declared to be illegal. Aside from this, there was no oath administered here.

This, then, is a contract made by a minor. Let us see whether it is sanctioned or prohibited by the acts of congress. The act of 1802 [2 Stat. 135] declares that no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent of his parent, or guardian, or master, first had and obtained, if any he had. The act of January 20, 1813 [2 Stat. 791], provided that this consent should be first obtained in writing. And the act of December 10, 1814 [3 Stat. 146], repealed this section of the act of 1813, but left intact the act of 1802, which requires the previous consent, but does not require that it should be in writing. It therefore appears in plain Saxon, that the contract of enlistment with a minor, being prohibited by the statute, is not merely voidable, but absolutely void.

This question is not so novel as I thought when I commenced its investigation. It was, in some of its features, discussed before Mr. Justice Coulter, not only an able and learned judge, but a statesman of national reputation, whose long and brilliant career in the house of representatives made him familiar with the acts of the national legislature. In the case of Com. v. Fox, 7 Barr [7 Pa. St.] 338, he says: "The enlistment and holding of the minor, under the circumstances mentioned in the act, is against the law, and the officer who enlisted him is guilty of an offence for which he may be amerced by the government. A penalty inflicted by statute for an act, implies a prohibition of the act, so as to make a contract relating to it void. 1 Bin. 118. Here there is not only a penalty imposed, but the act is declared by the statute to be illegal. I will not say that congress may not declare the enlistment of minors to be lawful and valid, but they have not done so in relation to the army of the United States." But until congress interposes, we must take the law as we find it, and regard the claim which the law of God, of nature, of the state, and of the United States, gives the father to the services of his child until he arrives at the age of majority, and which renders the minor unable to make a valid contract.

It is further contended, that as he perpetrated a fraud, not only on the government, but the drafted soldier, he is bound. But Mr. Justice Story says, in [Tucker v. Moreland] 10 Pet. [35 U. S.] 77, this has never been held sufficient, for it would otherwise take away the very protection which the law intends to throw around him, to guard him from the effects of his folly, rashness and misconduct.

Lastly, it is objected that he is a deserter, and subject to military law. The return to this writ does not make him a deserter. There can be no criminal desertion if the enlistment was illegal. It was a declaration, merely, of an intention not to be bound—a disclaimer of the contract which, under the act of congress, he had a right to make, in the absence of the consent of his parent or guardian. In the Case of Carlton, 7 Cow. 471, although the minor had represented to the officer enlisting him that he was over twenty-one years of age, and had no father or guardian, the court declared the contract and enlistment void, and discharged the soldier. And in the case in Barr [7 Pa. St.] referred to, Judge Coulter says: In the presence of an enemy, or in an enemy's country, even camp followers would probably be amenable to martial law; for if they were not, the safety of the army would be somewhat jeoparded by their desertion to the enemy. It could only be in that light that a person unlawfully enlisted, and held without authority of law, could be amenable to military punishment. But this is not a case of that kind. And although in that case the return showed that the minor was a deserter, and that like Turner here, had surrendered himself, the minor was discharged. However much we should like to see this young man expiate his offence by some reasonable punishment, the law of the case is clearly with him, and he is entitled to his discharge.

Theodore M. Turner is discharged from the custody of the provost marshal, upon payment to the United States marshal, for the use of David Klingsmith, the sum of one hundred and seventy-five dollars, and the costs of this writ.

[See Case No. 16,777.]

UNITED STATES v. WRIGHT. See Case No. 16,401.

UNITED STATES (WRIGHT v.). See Cases Nos. 18,097–18,099.

Case No. 16,779.

UNITED STATES v. YEATON.

[2 Cranch, C. C. 73.] [1]

Circuit Court, District of Columbia. April Term, 1813.

NON-INTERCOURSE LAWS—FORFEITURES.

Upon the seizure and condemnation of a vessel for violation of the act of congress of the 28th of February, 1806 [2 Stat. 351], "to suspend the commercial intercourse between the United States and certain parts of the island of St. Domingo," the United States are interested only in one half of the forfeiture.

The schooner Betsey and Charlotte, owned by the defendant, was condemned and sold for trading to St. Domingo, contrary to the act of 28th February, 1806. 2 Stat. 351. The defendant became the purchaser at that sale,

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

and gave his note for the purchase-money, upon which note the United States recovered judgment and issued execution. In the mean time the president of the United States remitted the forfeiture "as far forth as the United States were interested therein," and Mr. Jones, the district attorney, indorsed a memorandum upon the execution, that it was to be discharged by the payment of one half of the amount of the debt, and interest thereon and costs.

The defendant obtained a rule on the district attorney to show cause why the execution should not be quashed.

C. Simms, for defendant, contended that the whole forfeiture accrued to the United States, and could only be recovered in the name of the United States, and therefore the whole was remitted. That the subsequent distribution of a moiety among the revenue officers, was a matter between them and the United States. The whole forfeiture was under the control of the United States, until it was actually recovered, and, until recovered, the rights of the revenue officers did not accrue. The United States had a right to interpose and prevent the recovery.

THE COURT, however, was of opinion (nem. con.) that the United States were interested only in one half of the forfeiture, and that only one half was remitted.

Case No. 16,780.

UNITED STATES v. YELLOW SUN.

[See Case No. 16,212.]

Case No. 16,781.

UNITED STATES v. YORK STREET FLAX SPINNING CO.

[17 Blatchf. 138; 8 Reporter, 551.] [1]

Circuit Court, S. D. New York. Aug. 28, 1879.

VIOLATION OF CUSTOMS LAWS — FORFEITURE OF VALUE.

Under section 1 of the act of March 3, 1863 (12 Stat. 737, 738; Rev. St. § 2864), forfeiting imported goods, or their value, to the United States, for fraud in the entry of the goods at the custom house, if a suit is brought for such value, such value is not limited to the sum which the defendant received for the identical goods entered, on their sale by him.

[Cited in U. S. v. Auffmordt, 19 Fed. 901.]

At law.

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

C. P. L. Butler, Jr., Asst. Dist. Atty., and Sutherland Tenney, Asst. Dist. Atty., for plaintiffs in error.

Joseph H. Choate, for defendant in error.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 551, contains only a partial report.]

WAITE, Circuit Justice. This is a suit to recover the value of certain goods alleged to have been forfeited to the United States under section 1 of the act of March 3, 1863 (12 Stat. 737, 738; Rev. St. § 2864). This act provides, that, if an "owner, consignee, or agent of any goods, wares, or merchandise shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, * * * said goods, wares and merchandise, or their value, shall be forfeited," &c. After the close of the testimony on the part of the government, the defendant asked the court to instruct the jury to bring in a verdict for the defendant, on the ground that none of the acts charged in the declaration as causes of forfeiture had been proven. This was denied, and the defendant then asked for a verdict because no proof had been made of the value of the goods, such value being the statutory basis of recovery. The court thereupon ruled, "that the value of the goods, which must be taken as the basis of recovery, was the sum which the defendant received for the identical goods covered by the entries and invoices in the suit, in this country, the goods having passed into consumption, which sum, in the hands of the defendant, represented the goods themselves," and then, on the evidence as it stood, directed a verdict for the defendant. [Case unreported.] Many requests to charge were presented on behalf of the government, which were refused, but, as they were intended to break the force of this ruling, it will not be necessary to refer to them in detail.

The entire testimony is not embraced in the bill of exceptions, and, under the ruling of the court upon the first motion for a verdict, I must assume, that, so far as the acts of forfeiture were concerned, there was evidence sufficient to make it obligatory on the court to submit the case to the jury. If, then, there is error in the ruling of the court on the second motion, I must reverse the judgment, notwithstanding any doubt I may have on the case as it is presented here, about the propriety of subjecting the defendant to another trial on the merits, since the act of June 22, 1874 (18 Stat. 186), has made actual intent to defraud an essential element of recovery. I must also assume that the evidence established the fact that the goods had gone into consumption, as that seems to have been one of the ingredients on which the court based its ruling.

The question, as it comes here for determination, is not whether the value of the goods at the time of importation, or when they were sold or entered into consumption, or when the suit was commenced, is the proper basis of recovery, but whether the government is bound to accept, under its election to take the value, what the fraudulent importer himself got for them when they passed out of his hands. I know it is settled, that, when provision is made by statute for "a forfeiture of goods or their value," the

title to the goods remains in the original owner until the government elects whether to demand the goods or their value, and that, if, before the election is made, the goods are sold to a bona fide purchaser, the title passes by the sale, and the right of the government to proceed against the goods is gone. U. S. v. Grundy, 3 Cranch [7 U. S.] 338; Caldwell v. U. S., 8 How. [49 U. S.] 366. This, however, falls far short of deciding, that, when the goods are sold, or have entered into consumption, the government must accept, as their value, what the importer has seen fit to part with them for; and it seems to me that the learned judge below, in so holding, confined the basis of recovery within too narrow limits. The right to recover the value does not depend on any principle of subrogation, but on the statute, which, in effect, says, that, for this particular offence, the offending goods, or their value, shall be forfeited by the owner. The government is given the right to choose whether it will take the goods or the value, and this right of choice is kept open so long as the goods remain the property of the offender. As soon, however, as they pass from his hands into those of a bona fide holder, the right of election is gone, and the government is driven to its suit against the wrong-doer, not for what he has in the place of the goods, but for their value. The basis of recovery, in a suit for value, is not changed by the sale. That remains precisely as it was before. If this is not so, the government has never any real right of election. Before the sale, it must proceed for the goods, and after, for the proceeds. Such, I think, cannot be the rule. Until the sale the government may seize the goods, and realize their value by a sale, or it may pass by the goods and look directly to the wrong-doer for their value. The effect of a sale is to take away all right of proceeding against the goods, and leave the government to its original right of action against the fraudulent importer, for the value only.

It was contended, however, upon the argument, that there was no evidence which the jury could properly consider, tending to prove the value of the goods in this country, and that, if the ruling below as to the basis of recovery was wrong, it could do no harm, since, on the whole evidence, the court did right in taking the case from the jury. It is true, that no witness testified directly as to what the actual market value of the goods was in this country, either at the time of the importation, or at the time of the sale by the importer, or at the time of the commencement of the suit, or at any other time; but there was evidence legitimately tending to prove what was wanted. It did appear, that the particular style of goods in question was principally manufactured in Belfast, and that the trade in the United States was almost exclusively supplied from there. Then there was direct evidence as to the market value in Belfast at the time of the exportation. There was, also, evidence tending to show what this defendant supposed the market value was in New York at the same time, exclusive of duties and charges of transportation, for, the managing director testified as to prices he charged in Belfast to American purchasers, as the equivalent of what the New York branch of the house would charge to their customers. This was for the purpose of preventing any competition in prices between the house at home and the branch in New York. This, I think, was proper evidence to be taken into consideration, inasmuch as Belfast was the principal producing point, and the value in New York would ordinarily be regulated by the price at which the goods could be purchased there. The importations were all made during the year 1873, and the suit was commenced in March, 1874. The legal presumptions growing out of the evidence submitted were, as I think, sufficient to place the burden on the defendant, of showing that the market value in New York was less than was indicated. It is possible the value thus shown was less than the actual forfeitable value, but of that, certainly, the defendant cannot complain.

An action in the nature of an action of debt lies, even though there may be some uncertainty as to the amount of recovery. A sum certain must be due, or a sum which can be named to a certainty. Here, the difficulty is not as to the right to recover a sum certain, to wit, the forfeitable value of the goods, but as to the amount of that sum. This the jury is asked to find from the evidence. The suit is not for damages on account of the wrongful acts of the importer, but for the recovery of a certain sum, to wit, the value of the property, as it shall be shown to be.

There are several assignments of error upon exceptions to rulings below on the admissibility of evidence. These present questions are not likely to arise on a second trial, and it does not seem to me necessary to take time for their consideration.

For the single error in respect to the rule for ascertaining the basis of value, the judgment is reversed, and the cause remanded for a new trial.

Case No. 16,782.

UNITED STATES v. YOUNG.

[See In re Crittenden, Case No. 3,393.]

Case No. 16,783.

UNITED STATES v. YOUNGS et al.

[10 Ben. 264.] [1]

District Court, S. D. New York. Feb., 1879.

EVIDENCE—PRODUCTION OF BOOKS AND PAPERS BY THE UNITED STATES.

1. Although a bill of discovery will not lie against the United States, yet under Rev. St.

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

U. S. § 724, which is a re-enactment of the statute of 1789, c. 20, § 15 [1 Stat. 82], the United States will be compelled to produce the official weigher's returns of the weight of merchandise, on the motion of a defendant sued for a balance of duties alleged to be due thereon, the defence being that the duties are fully paid, and the motion being supported by affidavit that an inspection or copies of the returns is necessary to enable the defendant to prepare for trial.

[Cited in U. S. v. Hutton, Case No. 15,433.]

2. The remedy given by the statute is not confined to production of books and writings upon the trial.

Nash & Holt, for the motion.

Mr. Tenney, Asst. U. S. Dist. Atty.

CHOATE, District Judge. This is a suit to recover a balance of duties alleged to be due to the United States on certain sugars imported by the defendants [Thomas F. Youngs and others]. The answer alleges that the sugars were weighed by the government weighers and their true net weights so ascertained were duly entered in books of the government, and that the defendants have fully paid the duties on such weights. This is a motion to compel the production by the plaintiff of the official weighers' returns of the weights of the sugar, and the motion is supported by affidavits showing that an inspection or copies of these returns are necessary to enable defendants to prepare for trial.

The right to this discovery is claimed under Rev. St. U. S. § 724, and also under section 805 of the New York Code. Rev. St. § 724, which is a re-enactment of section 15 of the act of 1789, c. 20, provides that: "In the trial of actions at law the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default." In the case of Central Bank of Georgetown v. Tayloe [Case No. 2,548], it was held that the production of books and papers under this statute could be compelled before the trial, and to enable the party to prepare for trial as well as upon the trial. And in this circuit the practice has followed this construction of the act,—Jacques v. Collins [Id. 7,167]; Finch v. Rikeman [Id. 4,788],—although in the cases of Iasigi v. Brown [Id. 6,993], Mr. Justice Curtis held that the production of papers could only be compelled at the trial.

It is objected on the part of the plaintiff, that the books called for would not be in themselves evidence for the defendants, but the statute surely is not limited to those documents that prove themselves. As to most books and papers the production of which is compelled on motion or by bill of discovery, they are only admissible in evidence in connection with the testimony of a witness or witnesses. And in this case there is no doubt of the pertinency of these weighers' returns in connection with the testimony of witnesses who may be called. It is evident that an inspection or copies of these documents are necessary to enable the defendants to prepare for trial.

It is further objected that the documents called for are not in the possession of the district attorney but in the custody of the collector of the port, an independent officer of the government, holding them under statutes imposing this duty upon him. I cannot perceive that they are any the less "in the possession or power" of the United States on that account. The government here suing as plaintiff has many agents, like a corporation, but whatever is in the official custody of its agents is in its possession or power as truly within the meaning of this act as the books of a corporation are within its possession or power, though lodged with particular officers whose duty as to the custody of such books may be defined or prescribed in the charter or by-laws of the corporation. There seems to be no reason for excepting the United States from the operation of this act. It is not expressly excepted. The reasons for granting the relief apply with equal force to suits in which the government is a party as to suits between private persons. The reference in the statute to proceedings in chancery, evidently meaning by bill of discovery, is not used as limiting or designating the parties against whom the power of the statute may be invoked. It appears merely to and is used to define the cases and circumstances under which the power will be exercised, that is to say, the evidence must be of that kind which can be compelled by a bill of discovery and the circumstances necessary to be shown upon a bill of discovery as to the relevancy of the evidence and the necessity for its production, etc., must be shown to compel its production on motion. The fact therefore that a bill of discovery would not lie against the United States is immaterial. The reason it would not lie is that the United States could not be sued as a defendant, a merely technical obstacle to discovery in that way. The remedy by motion is free from any such technicality. When the United States comes into court as a suitor it subjects itself, like any other suitor, to be proceeded against by motion in the cause, in any matter in which parties in the action have by statute or the practice of the court the right to relief by motion secured to them.

The statutes prescribing the duties of the collector in the safe keeping of custom house documents and the regulations of the treas-

ury department made under the statute, authorizing the secretary of the treasury to prescribe rules for the government of the collector in that respect, have no relation to the production of these documents as evidence, either under subpœna duces tecum or on motion under this statute. There is nothing in the statutes of the United States withdrawing these documents from use as evidence in the courts of the United States, or even providing for the use of office copies of them in place of the originals, as is the case with papers in the executive departments. Motion granted.

Case No. 16,784.

UNITED STATES v. YOUNT.

[Hoff Land Cas. 49.] [1]

District Court, N. D. California. June Term, 1855.

MEXICAN LAND GRANT.

The validity of this claim was not disputed by the district attorney.

Claim [by George C. Yount] for two square leagues of land in Napa valley, confirmed by the board, and appealed by the United States.

S. W. Inge, U. S. Atty.

Thornton & Williams, for appellee.

HOFFMAN, District Judge. No objections whatever to the validity of this claim are raised by the district attorney, nor is any reason suggested why it should not be confirmed. The grant bears date on the twenty-third of February, 1836, and is two square leagues "as shown on the map which goes with the expediente." The land was accurately measured and juridical possession was given with the formalities required by the usage of the country, and a copy of the record of these proceedings on file among the archives of land titles in the jurisdiction of Sonoma district is found in the transcript filed in this court. All the conditions of the grant have been fully performed, and within the time limited, and ever since the date of the grant, 1836, the claimant has continued to reside on his land, and has made extensive and valuable improvements upon it. The genuineness of the grant is not disputed, and almost all the facts are proved by authenticated transcripts from the public archives. We are unable, on an examination of the record, to discover any objection to the validity of this claim. A decree of confirmation must therefore be entered.

[See Case No. 18,187.]

UNITED STATES (YOUNT v.). See Cases Nos. 18,187 and 18,188.

UNITED STATES (YTURBIDE v.). See Case No. 18,191.

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Case No. 16,785.

UNITED STATES v. ZANTZINGER.

[1 Hayw. & H. 136.] [1]

Circuit Court, District of Columbia. June 15, 1843.

PURSERS IN NAVY—ACTION ON BOND—EVIDENCE—COMMISSIONS ON PAYMENTS—INTEREST.

1. Where the defendant gave in evidence the red book of the navy department to prove that a commission was formerly given on payment made by pursers, it was admissible to give proof by parol that at the time the defendant was appointed or at any time subsequent thereto, no rule, usage or practice existed in the navy department, whereby pursers in the navy were entitled to a commission on payments made by them in the discharge of their duties as such pursers.

2. It is proper for the government to demand interest on bonds given in liquidation of a former account against the defendant.

3. A purser in paying requisitions approved by the commanding officer of the vessel is not obliged to enquire as to the knowledge of said officer as to the standing of the party who is to receive the articles.

Action on an officer's bond. The United States sued the defendant [William P. Zantzinger] on his bond, claiming that the defendant, a purser in the navy, was responsible for a deficit in his account of $9,149.75.

Philip R. Fendall, for the United States.

Jos. H. Bradley and Jas. Hoban, for defendant.

The defendant put in a counter-claim in the way of a set-off against the United States of $16,879.19, of which amount the sum of $74.57 was credited by the auditor of the treasury as being erroneously charged to him. Subsequently, the following agreement was entered into by the respective attorneys: That the treasurer's transcript, stating a balance of $8,902.22 to be due, shall be read as evidence of the indebtment by the defendant to that amount, subject, however, to such deductions by way of set-off as the defendant may be able to sustain before the court and jury, and as are claimed in the defendant's account.

The first set-off claimed by the defendant was for $279.12 advances paid by said defendant on requisitions approved by the commanding officer of the vessel of which he was purser. The plaintiffs, by their counsel, prayed the court to instruct the jury, that if they believe the evidence, the defendant is not entitled to the set-off claimed as to such advances as were made, unless the jury shall further believe from the evidence that they were original advances made by authority of the navy department to the men at the time of their enlistment, and that as to such advances as were made to men who afterwards died or deserted without having satisfied the said advances, the defendant is not entitled to the set-off claimed, unless the jury

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

shall further believe from the evidence that the said advances were made under a previous special order of the commanding officer of the vessel, besides, and over and above his general approval of the ordinary requisitions for the articles; and such special order was produced to the auditor on a certificate of the commander of the vessel that such order had been issued by him, either in writing or verbally; or unless the jury shall believe from the evidence that such general approval was given with a knowledge on the part of the commander of the vessel that the men for whom the said articles were required were at the time in debt to the United States; which the court refused to give.

The next set-off was a claim for pay for the time he was alleged to have been out of the navy under an erroneous construction of the act of congress of March 1, 1817 [3 Stat. 350] [2] by the secretary of the navy, in relation to increase of purser's bond. The United States, by their attorney, prayed the court to instruct the jury that the defendant is not entitled to the set-off claimed, unless he can satisfy the jury by competent evidence that he entered into bond with two or more sureties in the penalty of $25,000, as required by the act of congress of March 1, 1817; which instruction THE COURT (nem. con.) gave.

The following set-off was claimed by the defendant: 2½ per cent. commission on payments made as purser; that said allowance was of ancient date, as was evidenced by the red book of the navy department, page 18. The plaintiffs thereupon offered to prove by parol by clerks in the navy department, and officers of the treasury, that at the time the defendant was appointed as purser, or at any time subsequent thereto, no rule, usage or practice existed in the navy department whereby pursers in the navy were entitled to a commission of 2½ per cent. on payments made by them in the discharge of their proper duties as such pursers; to the admissibility of said evidence the defendant objected, but THE COURT, (nem con.,) overruled the objection and permitted the said evidence to be given.

The defendant further claimed a set-off for interest paid by him on bonds given by him in liquidation of a former account against the defendant, the justice of which he did not admit, but in order to obtain a nomination which was then pending in the senate, he consented to give. That it is not the usage or practice of the government to charge interest on amounts or balances except in case of suit or judgment recovered. The plaintiffs, by their counsel, prayed the court to instruct the jury that the defendant is not entitled to the said set-off; which THE COURT (nem. con.) gave.

The jury, under said instruction, brought in a verdict for $8,253.21 for the United States.

[2] Section 1. That every purser now in service, or who may hereafter be appointed shall, instead of the bond required by the act to which this is a supplement, enter into bond with two or more sufficient sureties, in the penalty of $25,000, conditioned for the faithful discharge of all his duties as purser in the navy of the United States, which said sureties shall be approved by the judge or attorney of the United States for the district in which such purser shall reside.

Sec. 2. That from and after the first day of May, next, no persons shall act in the character of purser who shall not enter into bond as aforesaid excepting persons on distant service who shall not remain in service longer than two months after their return to the United States, unless they shall comply with the provisions of the first section of this act. Chapter 24, 1817.

Case No. 16,786.

UNITED STATES v. ZEREGA.

[Betts' Scr. Bk. 535.]

District Court, S. D. New York. March 31, 1856.

DISCHARGE IN BANKRUPTCY—CLAIMS OF UNITED STATES.

[A discharge under the bankruptcy act of 1842 covered a debt due to the government on account of customs duties.]

On the 4th of July, 1840, 10th of August, 1840, 2d of September, 1840, 7th of October, 1840, 9th of November, 1840, 1st of December, 1840, and 5th of January, 1841, various judgments, amounting in all to 23, were obtained in this court, in favor of the United States, against the defendant [Augustus Zerega], on bonds executed by him to secure the payment of duties which had accrued upon importations of dutiable articles into this port. Executions of fieri facias had been issued by the plaintiff on several judgments, and returned by the marshal unsatisfied. On the 3d day of August, 1842, the defendant was duly declared a bankrupt, and received his certificate of discharge thereupon, pursuant to the provisions of the banking act, approved August 19, 1841. On the 23d of June, 1842, the plaintiff, through the United States attorney of this district, filed proof of debt in their behalf, consisting of the above 23 judgments. On the 3d of November, 1855, the plaintiff caused alias writs of fieri facias to be issued on these judgments, and to be delivered to the marshal of this district, who proceeded to make service thereof, and attach the property of the defendant. Thereupon the defendant served notice upon the district attorney of a motion to be made to this court for an order to set aside these executions and proceedings, or for a perpetual stay thereof.

BETTS, District Judge. This motion was brought to final hearing at the present term. The discussion of principles embraced in the application, and of the authorities quoted by the respective parties on the argument, will merit a more detailed examination than can be now conveniently given in writing. The present decision will accordingly set forth no more than the general conclusions to which

the court has arrived, upon consideration of the main points in controversy.

1. The court can regularly and properly take cognizance of this subject-matter, on motion, and grant relief, if a sufficient case is made for it. In many states of the Union, the proceeding by audita querela is obsolete, and there is ground at least for doubt whether audita querela, being an action with the properties and effect of a regular suit, can be maintained against the United States on the principles which govern that peculiar remedy, it being designed to afford a coercive judgment in damages by injunction against the party sued thereby.

2. The United States, when suitors in their own courts, seeking to enforce demands against individuals by use of the functions of courts of justice, are subject to the same rules of decision and limitation of remedies as are private parties, unless they have provided themselves exemptions or privileges by positive law, or unless they establish a prerogative or government exception in their own behalf. The advantage they possess over individual creditors, in celerity of processes or priority of payment against their common debtors for the recovery of debts, does not rest in prerogative, but is derived from statutory enactments alone.

3. The exceptional instances in which it has been held by the United States courts that the government is not bound by statutes of limitation, unless expressly named in them, establish no general principle upholding a prerogative of exemption from the operation of bankrupt or insolvent laws; the decisions not having been made in respect to laws of the United States, but to state statutes which become applicable only as rules of decision in the national courts.

4. The judgments and executions now sought to be enforced by the United States represent amounts of duties which had accrued on importation of merchandise into this port, and remained unsatisfied to the government. There is no inherent power in the government, without legislation, to constitute these causes of action debts, or to compel the payment of duties. They become debts, and are collected by process of law, solely by force of statutes. Natural reason would indicate that the legislative power is also competent to bar or extinguish the debt, or the means of enforcing it, without naming or referring to the government in the act. A debt, simply as such, to the government, for the purchase of property, or on obligation of suretyship, communicates no privilege superior to what individual creditors possess. It cannot arrest and imprison its debtors, in such cases, without producing direct warrant of law therefor; and there is strong parity of legal reason for holding that the government cannot, without a special reservation by statute, set up a claim to judgments, as subsisting in its favor, which it has by law made void or inoperative by a general enactment.

5. But the American cases, and even those of England, which assume an implied prerogative in the sovereign not to be barred by insolvent laws or statutes of limitation, when not named therein, concede that the intention of the legislature that such laws shall also embrace the government may be implied, and is to be ascertained and determined by the ordinary rules for the construction of statutes.

6. The presumption, from the provisions of the bankrupt act of August 19, 1841 [5 Stat. 440], and from facts preceding and concomitant to its passage,—the petitions, proceedings in congress-debates in both houses, and the acts of the government after it went into operation,—is exceedingly forcible that the intention of the enactment was that it should operate alike upon debts due the United States and individuals.

7. The amount of indebtedness pressing upon the community at the period was enormous. In this district alone, the sum inventoried in the bankrupt court, and affected by the act, as appears by the files of the court, was $120,580,415.

8. The United States, in their fiscal dealings, were brought to know the general pressure and embarrassments throughout the community, especially that of their particular debtors. During the years 1838, 1839, 1840, and to August, 1841, the government had instituted in this district 2,028 actions upon customhouse bonds. In the same period, judgments had been rendered in their favor, for duties unpaid at the maturity of the bonds, to the sum of $898,433.29, besides costs.

9. The bankrupt act [of 1841 (5 Stat. 440)] declares the certificate and discharge of the bankrupt, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under the act, and provided for a ratable distribution of the bankrupt's property among creditors, reserving a priority or preference to the United States, and persons who have paid the bankrupt's debts to the United States, as his sureties, out of the assets held by his assignees.

10. In the prior bankrupt act, approved April 4, 1800 [2 Stat. 19], it was expressly enacted, its provisions should not lessen nor impair any right to, or security for, money due to the United States. That clause is omitted in the re-enactment of the body of the same section in the act of 1841.

11. The debts composing the judgments in question are provable under the bankruptcy of the defendant. The term "provable" refers to the quality and character of the debt, and not to the means of verifying it.

12. These debts were proved by the U. S. attorney of this district, and his authority to do so will be implied (if it does not result legally from his official relation to the subject-matter) at this period of time, after the act done. This strongly implies the understanding of the government that the certificate of

discharge was to bar public debts, alike with private ones.

Upon the merits of the case, upon the law and facts disclosed upon this motion, the plaintiffs are, in my judgment, barred and concluded from proceeding against the defendant upon the executions now issued, in the hands of the marshal. It is therefore ordered that all further proceedings thereon be stayed, and that the marshal deliver up and restore to the defendant, or his lawful attorney or agent, all property levied upon or seized by means of said executions, or any of them.

Case No. 16,787.

UNITED STATES & FOREIGN SALAMANDER FELTING CO. v. ASBESTOS FELTING CO.

[10 O. G. 828.]

Circuit Court, S. D. New York. July 11, 1876.

INFRINGEMENT OF PATENTS—INJUNCTION.

The defendants restrained from using an arrangement which had been decided to be an infringement of the plaintiffs' patent in suits against parties supplied with the same by the defendants, who assumed and conducted their defense.

[This was a bill in equity for infringement of reissue patent No. 4,134, to Riley and Bissell (original, 95,517), for a composition for covering boilers.]

G. E. Belton, for plaintiff.

J. Marshall, for defendants.

BLATCHFORD, District Judge. The plaintiffs' patent has been established by the recoveries in Missouri and in Massachusetts. The affidavits on the part of the plaintiffs show that the defendants supplied the protecting arrangement that was used by the parties who were sued in the suits in Massachusetts, and assumed and conducted the defense of those suits; that such protecting arrangement was decided, in those suits, to be an infringement of the plaintiffs' patent; and that the defendants are now employing that same arrangement. These facts are not denied.

As to the Baumann patent, it was set up as a defense in the suits in Massachusetts, although not used in evidence.

I have examined the evidence in the interference case between Riley and Baumann, and it is entirely clear that Baumann was not the inventor at all of what was patented to him; that Riley, in fact, made the invention; that the patent to Baumann is invalid; and that the patent to Riley is valid.

I do not see that there is anything in the Hardy patent which anticipates what is covered by the plaintiffs' patent.

An injunction is granted as prayed for.

[For other cases involving this patent, see United States & F. S. Felting Co. v. Merrimack Manuf'g Co., Case No. 16,788; United States & F. S. F. Co. v. Haven, Id. 16,789.]

Case No. 16,787a.

UNITED STATES & FOREIGN SALAMANDER FELTING CO. v. ASBESTOS FELTING CO.

[18 Blatchf. 310; 5 Ban. & A. 622.] [1]

Circuit Court, S. D. New York. Sept., 1880.

PATENT INFRINGEMENT SUITS — RES JUDICATA — RECORD IN PRIOR SUIT.

In a suit in equity for the infringement of a patent, it appeared that a prior suit at law on the patent had been tried in Massachusetts against a defendant to whom the defendant in this suit had supplied the infringing article used by him; and that the defendant in this suit had employed and paid the counsel who defended the other suit. *Held*, that the record of the other suit was competent evidence for the plaintiff in this suit; and that the defendant in this suit was concluded as to patents and evidence shown by said record to have been set up as a defence in that suit on the question of novelty.

In equity.

George E. Betton, for complainant.

Jonathan Marshall, for defendant.

BLATCHFORD, Circuit Judge. This suit is brought for the infringement of patent No. 114,711, granted to the plaintiff on the invention of John Riley, May 9th, 1871. The bill sets up that the plaintiff brought a suit at law for the infringement of that patent, in the Massachusetts district, against the Merrimack Manufacturing Company; that the material used by the defendant in that suit was supplied and put in by the agent of the defendant in this suit and is the same as that made and used by the defendant in this suit; that the defendant in this suit defended that suit, its president being personally present at the trial and giving directions with regard to the same; that the answer in that suit set up, as a defence, a patent granted to one Baumann, No. 100,354, March 1st, 1870; that the judgment of the court was in favor of the plaintiff; and that the defendant is bound by said decision. The answer in this suit does not deny that the defendant in this suit defended the Massachusetts suit, but avers that the Baumann patent was not introduced in evidence in the Massachusetts suit. The plaintiff put in evidence in this suit the record in the Massachusetts suit, under an objection by the defendant that it was incompetent. It appears, by the proofs in this suit, that the defendant supplied the covering for boilers and pipes used by the defendant in the Massachusetts suit; that the president of the defendant employed the counsel who defended that suit; and that the defendant paid for the services of said counsel. The record in the Massachusetts suit shows that that suit was brought on said patent No. 114,711, with other patents; that the answer

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 5 Ban. & A. 622, and here republished by permission.]

in that suit sets forth that the things claimed in the Riley patent were, before Riley invented them, described in the patent No. 100,354, granted to Baumann March 1st, 1870, and known to and used by said Baumann; and that the finding of the court was that the defendant had infringed the first and second claims of the patent No. 114,711. On the foregoing facts it must be held that the record in the Massachusetts suit is proper evidence in this suit, and that the judgment in that suit concludes the defendant as to the Baumann patent and as to the alleged prior knowledge and use by Baumann. For the same reasons that judgment concludes the defendant as to the patent No. 76,773, granted April 14th, 1868, to Henry W. Johns, and as to any alleged prior knowledge and use by Johns. The Riley patent is not invalidated by the Hardy and Lay patent, No. 94,739, or the Selden and Kid patent, No. 83,414, or the French patent, No. 94,882, or any of the other patents or matters put in evidence by the defendant.

The proof is satisfactory that the defendant has infringed the first and second claims of the plaintiff's patent, and there must be a decree for the plaintiff for a perpetual injunction and an account of profits and damages, with costs.

[For other cases involving patent No. 114,711, see cases Nos. 16,788, 16,789, and also 4 Fed. 813, 816.]

UNITED STATES & FOREIGN SALAMANDER FELTING CO. (ASBESTOS FELTING CO. v.). See Case No. 570.

Case No. 16,788.

UNITED STATES & FOREIGN SALAMANDER FELTING CO. et al.
v. HAVEN.

[3 Dill. 131; 2 Ban. & A. 164; 1 Law & Eq. Rep. 16; 9 O. G. 253; 2 Cent. Law J. 758; 23 Pittsb. Leg. J. 58.] [1]

Circuit Court, E. D. Missouri. Oct., 1875.

PATENTS FOR INVENTIONS—REISSUES — ENLARGEMENT OF ORIGINAL CLAIM—NEW MATTER—NEW APPLICATION OF PREVIOUSLY INVENTED COMPOSITION.

1. A composition having been described in a prior patent, one who applies it to a new use can not claim the composition as his invention.

2. The court can not take notice of what was not set up in the answer against plaintiff's patent.

3. The legal rule is that, prima facie, a reissue is for the same invention as that originally patented.

4. Section 4916 of the Revised Statutes of the United States prohibits in a reissue, not only the introduction of new matter, but also the enlargement of the original claim, growing out of the subsequent advancement of the art. This rule controls both the patent office and the courts.

5. Every patent as to novelty or utility, depends on the state of the art at the time of the claim made or patent issued.

6. By new matter is not meant merely the introduction of a new ingredient in a patented composition, but any change in the original specification and claim whereby a new and substantially different composition and results are secured.

7. Johns' reissue No. 5,951, June 30th, 1874, division D, held to contain new matter and therefore void.

This was a suit in equity under the 3d and 4th claims of reissue No. 4,134, Sept. 27th, 1870, originally granted Bissell, Riley & Frazer, Oct. 5, 1869, for "improved composition for covering steam boilers," and under 2d and 3d claims of patent No. 114,711, granted Riley, assignor, 9th May, 1871, for the same subject-matter. Defendant made and sold two compositions, one composed of asbestos, lime putty, and kaolin, the asbestos being purified under Rosenthal's patents, 1872, and one under patent No. 149,689, April 14th, 1874, granted D. U. Snyder, who was [Nathaniel A.] Havens's principal, and defended the suit. The "file and contents" of Johns' reissue, No. 5,951, Div. D., put in evidence, show it was at first rejected as containing "new matter," whereupon Johns filed several affidavits under section 4916, Rev. St., which provides that "when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original specification," etc., and the reissue was accordingly allowed.

Saml. S. Boyd, for complainants.

Geo. B. Kellogg and H. T. Fenton, for respondents.

TREAT, District Judge. This is a case in equity for an alleged infringement of several patents of which the Salamander Company is assignee. The reissued patent, No. 4,134, dated Sept. 27th, 1870, is reissue of Oct. 5th, 1869, for a composition or cement composed of lime and putty combined as described, with paper pulp or other suitable fibrous non-conducting material, and with the other ingredients named, or their equivalents, etc., and claims the employment of lime putty, when combined with paper pulp or any other suitable fibrous non-conducting substance, as a material for preventing radiation from heated surfaces, or as an ingredient in any composition used for such purposes.

It is alleged that this patent was anticipated by French's patents, Sept. 14th, 1869, which were for the same purposes, as the foregoing; patent "A" (94,882) was for a composition of crushed asbestos mixed with an alkaline silicate, and "B" (94,883) an improvement on "A" by adding to the mixture a vegetable substance, as "saw-dust and oth-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 1 Law & Eq. Rep. 16, contains only a partial report.]

er woody matter, to make a lighter and cheaper coating."

The reissue of Johns, No. 5,951 (Div. D), dated June 30, 1874, of original patent, dated April 14, 1868, is of crushed asbestos and lime mixed with water to be applied. The defence is mainly for want of novelty—that the inventions claimed by plaintiffs were anticipated, etc.

Whatever there is in plaintiffs' patents for which defendant is to be held as an infringer, consists in lime putty mixed with non-conducting fibrous material. The subsequent patents on which they rest are for lime putty and crushed asbestos.

It seems from the evidence that plaintiffs are assignees of the French patent, also, but it is not set up in the bill, though mentioned in the amended answer as anticipating the Bissell & Riley, and also the Riley patents. While some of the Johns patents are set out, the reissue above is not mentioned in the answer.

It seems, from a cursory examination of the case, that if the Johns reissue (not mentioned in the answer, No. 5,951, of June 30, 1874), relates back to April 14, 1868, the plaintiff's patents as to asbestos and lime putty were anticipated. So if plaintiff claims all non-conducting fibrous substances mixed with lime putty, the claim is too broad.

If each reissue relates to the date of the original patent, then the Johns patent anticipated those held by plaintiff, and although Johns did not specifically state the use for non-radiation, etc., the plaintiffs can not, because of the new use to which they apply the composition, claim that they were the first and original inventors of the composition. The court, however, can not take notice of what was not set up against plaintiff's patent.

When this case was before the court previously, it was suggested that if the reissued Johns patent was valid, plaintiff's patents had been anticipated; and the attention of counsel was also called to the fact that the reissues to Johns had not been set up. By agreement of counsel those reissues are now before the court, as if made before his suit was brought, and as if fully set up in the defence.

The only additional point, therefore, is as to the validity of the Johns reissue in question, which is for precisely the same compound as that claimed and used by plaintiff. The legal rule is that prima facie a reissue is for the same invention as that originally patented.

Section 4916 of the United States Revised Statutes, copied from the act of 1870 [16 Stat. 198], prescribes for what, and under what circumstances a reissue may be had.

The repeated decisions by the courts, and especially by the United States supreme court, in the 1st, 17th, and 19th Wallace, indicate with sufficient distinctness, that not only no new matter shall be introduced, but that an enlargement of the original claim, growing out of the subsequent advance of the art, is not to be tolerated. The reason of the rule is obvious. Every patent as to novelty or utility depends on the state of the art at the time of the claim made or patent issued, and, therefore, if a party, after learning from a subsequent advance of the art, the worthlessness of his original invention, is to be permitted to claim a reissue incorporating what was not originally in his mind, and what had been afterwards suggested to him only by advances in the art made by others, then he could, it may be, even without any new invention, override all the elements which would serve to test the validity of the new application. In other words, having procured a worthless patent, and having subsequently learned from the advancing art how, by changing the terms of his patent, it could be made of value, he would, if a reissue, including the new matter, were permitted, have the reissue not only relate back to the date of the original patent, but absorb within its privileges all subsequent matters, wholly unknown to, and unthought of by him, originally.

This rule controls both the patent office and the courts. New matter must not be introduced. By new matter is not meant merely the introduction of a new ingredient in a patented composition, but any change in the original specification and claim whereby a new and substantially different composition and results are secured.

Such is the reissue in question. It is not only for a composition essentially different, but for one not within the purpose for which the original invention was designed. The plaintiff is entitled to a decree. Decree for plaintiff.

[Subsequently the following decree was entered of record:

[This cause coming on to be heard upon the pleadings, exhibits, and proofs herein, was argued by counsel, and thereupon, upon consideration thereof, the court doth order, adjudge, and decree that the said several letters patent mentioned and described in the bill of complaint herein are good and valid in law; that the plaintiffs are entitled to the exclusive use and rights under the same; that the said defendant, by the use, manufacture, and sale of the patented improvement described in said letters patent, has infringed upon the exclusive rights of the plaintiffs under the same. It is further ordered, adjudged, and decreed that the said defendant, his agents, clerks, servants, and workmen, and all and every of them, be, and they are hereby, enjoined and restrained from making, selling, using, or in any manner whatsoever disposing of any composition for covering steam-boilers, and for other purposes, embracing the patents or improvements of plaintiffs in their said bill of com-

plaint set forth. It is further ordered, adjudged, and decreed that the defendant pay the costs herein to be taxed, and that execution issue therefor.] [2]

[For other cases involving reissue patent No. 4,134 (original 95,517), see Case No. 16,789.
[For other cases involving patent No. 114,711, see Cases Nos. 16,787a and 16,789, and also 4 Fed. 813, 816.]

Case No. 16,789.

UNITED STATES & FOREIGN SALAMANDER FELTING CO. v. MERRIMACK MANUF'G CO.

SAME v. LAWRENCE MANUF'G CO.

[2 Ban. & A. 167; [1] 9 O. G. 202.]

Circuit Court, D. Massachusetts. Oct., 1875.

PATENTS—INFRINGEMENT—STEAM BOILERS.

1. The defendants coated the pipes of steam boilers with an inner coating of a mixture of clay and asbestus, crushed or ground, with the addition of a little hair and some other fibrous substance. The next coat was a mixture of clay and charred fiber of cocoa-nut, or ground cane, sawdust, wool or shoddy. Outside of this was a thin wash of lime with a slight mixture of hair. Outside and around the second coat in some instances was a mass of fiber wood covered with lime. *Held*, that this was an infringement of the first claim of complainant's patent for a composition for coating the exterior of steam boilers, pipes or other heated surfaces composed of asbestus and lime-putty, charcoal and pumice-stone, or their equivalents.

2. *Held* to infringe the second claim of complainant's patent for a composition for the same purposes, composed of asbestus and lime-putty.

In equity.

G. E. Betton, for complainant.
G. L. Roberts, for defendants.

SHEPLEY, Circuit Judge. These are actions at law against the defendants for alleged infringements of letters patent No. 4,134, dated September 27, 1870, reissued to the complainants as assignees of John Riley and Charles W. Bissell for an improvement in compositions for covering steam-boilers, steam-pipes, etc., and also for alleged infringements of letters patent No. 114,711, dated May 9, 1871, and letters patent No. 108,055, dated October 4, 1870, both to John Riley, of Troy, New York, assignor to the complainants, for an improvement in compositions for covering steam-boilers, etc.

The reissue No. 4,134 described the essential part of the invention as consisting in the employment of lime-putty, or lime mixed with water, so as to be of the consistence of glazier's putty, with some non-conducting fibrous material, such as paper-pulp, and with pulverized earthy materials, which are light, porous, and are non-conductors of heat, such as plaster of paris, water-lime, cement, sand, soap-stone, or black lead.

The invention described in letters patent No. 114,711 consisted in the employment of a combination of asbestus and lime-putty, either with or without the other ingredients hereinafter named, as a coating for steam boilers and pipes. The other ingredients named were charcoal and pumice-stone, or their equivalents.

The invention described in letters patent No. 108,055 consisted, so far as the invention related to the covering of steam-boilers, in the addition of ground gypsum, or plaster, or pumice-stone to the composition described in the reissued patent No. 4,134.

The defendants coat their pipes with an inner coating of a mixture of clay and asbestus crushed or ground, with the addition of a little hair and some other fibrous substance. The next coat is a mixture of clay and charred fiber of cocoa-nut or cane sawdust ground, wool, or shoddy. Outside of this is a thin wash of lime, with a slight mixture of hair. Outside of the second coat, in some instances, is a mass of fiber wound around the second coating. This covering of cord or fiber is covered with lime.

This coating is an infringement of the first and second claims of letters patent No. 114,711, the first claim being for a composition for coating the exterior of steam-boilers, pipes, or other heated surfaces, composed of asbestus and lime-putty, charcoal, and pumice-stone, or their equivalents, and the second claim for a composition for the same purposes composed of asbestus and lime-putty.

Defendants use the asbestus and whitewash, which is the same as lime-putty in this composition, and clay, which is also proved in this composition of matter to be a well-known equivalent for the lime-putty. They also use the combination of asbestus, lime-putty, and charcoal.

A large number of American and English patents are introduced in evidence as tending to show want of novelty. A careful examination of all these patents fails to afford any satisfactory proof that the patent No. 114,711 is void for want of novelty. The nearest approach to the composition of matter patented to the plaintiffs is to be found in the feltings or sheets of asbestus and lime, which were not plastic like the compositions of matter in the Riley patents, but were wrapped or fastened around the pipes or boilers. These, although most nearly approximating the invention of Riley, do not anticipate it.

Judgment is to be rendered for the plaintiffs against the Merrimack Manufacturing Company, for infringement of the first and second claims of patent No. 114,711, for three hundred and fifty dollars, and against the Lawrence Manufacturing Company for seven-

[2] [From 9 O. G. 253.]

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

ty and forty one-hundredths dollars damages, with interest from the date of the respective writs.

[For other cases involving reissue patent No. 4,134 (original 95,517), see note to United States & Foreign Salamander Felting Co. v. Asbestos Felting Co., Case No. 16,787.]

[For other cases involving patent No. 114,711, see Cases Nos. 16,787a and 16,788; also 4 Fed. 813, 816.]

Case No. 16,790.

UNITED STATES ANNUNCIATOR & BELL TELEGRAPH MANUF'G CO. v. SANDERSON et al.

[3 Blatchf. 184.] [1]

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

PATENTS — INFRINGEMENT SUITS — EXPERT EVIDENCE—PRELIMINARY INJUNCTION—BOND FOR DAMAGES—BELL TELEGRAPH.

1. In a patent suit, the mere opinion of an expert, that two pieces of machinery constructed to produce the same results, and working out those results by means so nearly identical as to create a strong presumption of a common origin, are essentially different in mechanical structure and mode of operation, when the expert does not point out clearly the particulars of difference or coincidence between the two, does not afford satisfactory proof that the judgment of the expert ought to be adopted by the court.

2. The points of identity between two annunciators or bell telegraphs, considered and pointed out.

3. Where the defendant was a bona fide purchaser of a bell telegraph, without notice of its being claimed to be a violation of the plaintiff's patent, and used it in a hotel kept by him, and it was constructed under and in conformity to a patent subsequent in date to the plaintiff's patent, and it appeared that the effect of a peremptory provisional injunction would be to close the defendant's business, this court, although the defendant did not contest the validity of the plaintiff's patent, or the title of the plaintiff to it as assignee, and although its validity had been sustained in this court by verdicts and judgments in two suits at law, and by an injunction granted on it, withheld such injunction, unless the defendant should fail to give bonds, in $5,000, to abide the final decision of the case.

In equity. This was a motion for a provisional injunction, to restrain the defendants [James M. Sanderson and Charles L. Mather] from the violation of letters patent originally issued June 24th, 1846, upon the invention of Timothy D. Jackson and Alfred Judson, to Edward Crehore, Horace Brooks, and Timothy D. Jackson, for a new and useful bell telegraph. There were two reissues of the patent, and, through various mesne conveyances, it was assigned to the plaintiffs, on the 23d of February, 1853. In two actions at law in this court, for violations of the patent, verdicts and judgments had been rendered sustaining it, and an injunction had been awarded by this court, in one case, to restrain its further infringement. The defendants in this suit did not, on this motion, contest the validity of the patent, or the title of the plaintiffs thereto. The defence was, that the machine used by the defendants, and which they used in a hotel kept by them, was constructed under and conformably to a patent granted to William Horsfall, October 4th, 1853, for an improvement in annunciators for hotels.

George Gifford, for plaintiffs.
George R. J. Bowdoin, for defendants.

BETTS, District Judge. It is manifest that the court is not possessed of means for determining the main point set up by the defendants in opposition to the motion for an injunction. The defence on the merits is, that the machine used by them is constructed upon different mechanical principles from that of the plaintiffs. To support this defence, models of the two machines have been exhibited to the court, and the defendants have produced the ex parte depositions of four witnesses, including Horsfall, the patentee of the machine complained against, stating their experience as mechanics, and averring that, in their opinion, the telegraph annunciator of the defendants does not interfere with, but is essentially different from the plaintiffs', in its mechanical structure and mode of operation. The facts supporting these conclusions are not stated by the witnesses; and the opinions of the respective witnesses are stated in nearly the same terms.

This evidence is, no doubt, admissible in law. But the mere opinion of experts, when not sustained by pointing out clearly the particulars of difference or coincidence between pieces of machinery constructed to produce the same results, and working out those results by means so nearly identical as to create a strong presumption of a common origin, cannot afford proof very satisfactory to the mind that the judgment of the witnesses ought to be adopted. The court would be very reluctant, upon such evidence, to disregard the verdicts of two juries, declaring the patent of the plaintiffs to be valid. Indeed, acting upon this motion without reference to those verdicts, it would not assume to determine the fact that the defendants' machine does not infringe the right of the plaintiffs, upon its own inspection of the two machines.

The structures are extremely alike—the front aspect of the faces—the mode of indicating, by stationary numbers, the rooms of the hotel from which signals are given—and a movable shade, adapted to conceal or disclose the numbers, by a force applied outside of the machine. In each, a small bar or stem is attached, by mechanical means, to the movable lid or shade covering each aperture in the face of the annunciator, and also to the bell hammer; and, in each, that stem is moved by a wire running from the

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

apartment where the signal is given. The single operation of pulling that wire in each discloses the number and sounds the alarm bell. And each has as many separate stems or bars, so connected and operated, as there are apartments to be served by the machine. In each, also, a wire passing out of the machine, behind, or below, or at its side, is employed, by means of a crank, or sliding lever, or simply by the hand, to replace, at a single movement, the covers on the disk over the numbers, simultaneously or successively, at pleasure.

There is, no doubt, a diversity of mechanical arrangements put in use internally in the machines, to effect these operations. It is easy to discover a variance of movement, and many changes in the forms of the instrumentality employed in the defendants' machine; but that it involves any new principle, distinct from that of the plaintiffs' machine, is by no means manifest. Whether it does or not, is a question which can be more satisfactorily investigated at law before a jury, with the witnesses in court, than through depositions taken on paper and ex parte.

It does not appear that the validity of the patent under which the defendants' machine is constructed was passed upon in the two jury trials, further than that point may be regarded as involved in the general question of the novelty of the plaintiffs' discovery; and, as it is suggested in one of the depositions on the part of the defendants, that those trials were not upon a full disclosure of the proofs against the plaintiffs on that head, I am not disposed to order a peremptory injunction in the present position of the case, as that would have the effect to close the business of the defendants, they appearing to be bona fide purchasers of the article, without notice of the plaintiffs' claim to it. I shall, therefore, direct that they give bonds, in $5,000, to abide the final decision of the case on the merits, or that an injunction issue.

[Patent No. 4,816 was granted to Jackson & Judson, October 17, 1846, and has not, so far as ascertained, been involved in any other cases.]

Case No. 16,791.

UNITED STATES BANK v. BINNEY et al.

[5 Mason, 176.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1828.[2]

PARTNERSHIP—INDORSEMENTS OF ONE PARTNER—SECRET PARTNERSHIP—ACCESS TO BOOKS—PRESUMPTIONS.

1. Where a partnership is carried on by a firm in the name of one partner only, and he indorses notes in his own name, the firm is not bound thereby, unless the notes were received or discounted, as notes binding the firm, upon a representation to that effect of the partner giving the same, and were made for the common benefit and business of the firm.

[Cited in Palmer v. Elliott, Case No. 10,690.]

[Cited in Stockwell v. Dillingham, 50 Me. 445; Bank of Rochester v. Monteath, 1 Denio, 405; Fosdick v. Van Horn, 40 Ohio St. 465; Burrough's Appeal, 26 Pa. St. 266; Cunningham v. Smithson, 12 Leigh, 44.]

2. "Secret" partnership means, in common usage, a partnership where some of the partners are kept secret; or are unknown, in contradistinction to open or notorious partnership. Where one partner publicly avows all the partners, so that they become and are known as such, and credit is obtained thereby, it is no longer a secret partnership, whether the firm be carried on in the name of one partner only or otherwise.

[Cited in Bisel v. Hobbs, 6 Blackf. 481; Deering v. Flanders, 49 N. H. 227; Chandler v. Coe, 54 N. H. 564. Cited in brief in Deford v. Reynolds, 36 Pa. St. 331. Cited in Benjamin v. Covert, 47 Wis. 382, 2 N. W. 629.]

3. The ordinary presumption is, that all the partners have access to the partnership books, and know the entries therein; but this is a mere presumption from the ordinary course of business, and may be repelled by any circumstances, which lead to a contrary presumption.

4. One partner can bind the other only for objects within the scope of the business of the firm. Secret restrictions of the rights of partners do not affect those persons, who deal with the firm in ignorance of them.

[Cited in Chapline v. Conant, 3 W. Va. 509.]

This was an action of assumpsit, brought by the United States Branch Bank, at Boston, against Amos Binney, John Binney, and John Winship, upon certain promissory notes, made by one Samuel Jaques, Jr., and indorsed by said Winship, which had been discounted at the bank, and protested for non-payment. The plaintiffs claimed to recover the amount of these notes of the defendants, upon the ground, that they were in partnership together under the firm of John Winship; and these notes were indorsed by Winship on behalf of the firm, and the money applied to the use of the firm.

Jaques, who was called as a witness by the plaintiffs, testified, that he knew, by general reputation, of the existence of a partnership between the defendants in the soap and candle business, but had never seen any articles of agreement between them; that it was generally understood, that they were copartners; that he and Winship both lived in Charlestown, and saw each other every day; and that Winship did no other business to his knowledge, than that connected with this concern; that he had dealings with Winship soon after the commencement of the partnership, and supplied him with rosin to the amount of $400 or $500 per year; that Winship sometimes gave a note for the balance, signed "John Winship," and that witness always took such notes on the credit of the Binneys, with full confidence, that they were interested, and were men of property; that from some time in the year 1823 until the year 1825, witness and Winship

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

[2] [Affirmed in 5 Pet. (30 U. S.) 529.]

were in the habit of exchanging notes, which were discounted at the different banks in Boston, sometimes signed by one and indorsed by the other, and vice versa; that Winship usually applied for the discounts, and that witness indorsed these notes on the credit of the firm; that Winship always represented them to be for the partnership account, and that witness never understood, that they were on his private account; that the notes in suit were generally presented by Winship for discount, but that witness might have presented some of them; that there were some notes for witness's private account, but that he believed those in suit to have been for the firm; that he could not state, what portion of the money obtained on those notes he had received, but that as he and Winship exchanged notes, he could not say, that he never received any of it; that some of these notes were given for renewals at this bank, and some to take up notes at other banks; that it was his impression, that some of the money, thus obtained, went to pay for rosin, and that one of the notes for $1500 was originally made to take up a note, which had been previously given at the Manufacturers and Mechanics Bank for rosin, that being a material used in defendants' factory; that he knew no particulars concerning the appropriation of the monies obtained upon these notes, and knew of no other, which Winship could have made, but for the use of the firm; that the business of the firm required a great capital, and that Winship often spoke of buying barilla and tallow for defendants' factory; but witness did not know he alluded to these particular notes, nor that the proceeds of them were applied to any other business; that Winship sometimes came to witness and stated, that he wanted witness's name instead of Amos Binney's, because Mr. Binney was absent, and that witness gave his name; that this business of exchanging notes continued until 1825, when witness and Winship stopped payment; that the particular occasion of witness's stopping payment was, the non-payment of his acceptance on a draft drawn on him by Winship for barilla; that witness told Mr. Amos Binney of it, who said he would do nothing about it; that witness furnished the factory of defendants with rosin from 1822 to 1825, and generally received payment in notes; that he had endeavored to trace the origin of the notes in suit, but could trace only two of them, one of $800 and one of $806; that no particular agreement ever subsisted between witness and Winship concerning the proceeds of their accommodation notes; that they sometimes divided the money and each took a portion; that he never knew any actual use, for the benefit of the firm, of the money obtained on the accommodation notes, unless the taking up of the rosin notes should be so considered; that he understood, that Winship was engaged in some shipments of the manufactures of the firm, and also of some other articles, but always supposed them to be on account of the firm, and that Winship always told him they were; that witness was called upon to take up one of these accommodation notes signed by him, and borrowed money of Amos Binney upon collateral security for that purpose, and that nothing was said to Binney about his being liable to pay the note, as the witness recollected. Charles Harris, the discount clerk of the plaintiffs, testified, that the notes in suit were all discounted at Winship's request, and the proceeds passed to his credit; that he considered them to be accommodation notes; that the bank had frequently discounted notes signed by Winship, and indorsed by Amos Binney. Abel Adams testified, that he understood from report, that the Binneys and Winship were concerned together; that when Winship failed, he owed witness from $20,000 to $30,000, for which he had security in bills of lading, policies of insurance, &c. assigned to him by Winship by deed; and that after satisfying his demands, witness assigned over the surplus to Amos Binney; that the property so assigned to witness was abroad in vessels chartered by Winship. John Skinner, partner of Adams, testified, that he knew by common report of the co-partnership between the defendants, and considered, that all his transactions with Winship bound the Binneys; that witness once inquired of Winship, in the early part of the season in which they failed, as to the existence of the firm; that Winship stated it, and offered to show the articles of agreement; that it was generally understood, that there was such a co-partnership; that witness did not know what sort of co-partnership it was, but knew of no other business than the soap and candle business, until the return of some shipments, which Winship had made in 1825; that it was not known that Winship had any other business, in which the Binneys were not concerned. Daniel P. Parker, who was a director in the bank at the time these notes were discounted, and who made himself a witness by disposing of his shares, testified, that it was understood by the directors, when they discounted these notes, that the Binneys were bound by them. Witness understood, that they were partners in the soap and candle business; that a number of notes of this kind were discounted, while other notes, endorsed by Amos Binney, were in the bank. Several other witnesses were produced by the plaintiffs, who testified, that it was generally understood, that a co-partnership existed between the defendants. The deposition of Charles Hood, cashier of another bank, in said Boston, was also read, going to prove, that notes similar to those in suit, had been discounted for Winship at that bank.

The defendants, on their part, produced the original agreement between themselves,

dated September 25, 1817, whereby, the Binneys agreed to furnish a capital of $20,000, for the purpose of manufacturing soap and candles; and Winship agreed to give his whole time and attention to the superintendence of the business, the Binneys to have half the profits and Winship the other half. They also produced a bond of the same date given by Winship to Amos Binney in the penal sum of $10,000, whereby, in consideration of Amos Binney's engagement to indorse his notes for the purchase of stock and raw materials for the purposes of this business, he binds himself not to endorse the notes or paper of, or become in any manner responsible as surety for, any person or persons, other than the said Amos Binney, for the term of two years from the 1st of October, 1817. They also produced John S. Tyler, who was the clerk and agent of Amos Binney at the time of Winship's failure. He testified, that soon after the failure of Winship, all the books and papers were put into his hands; that he examined the books thoroughly, and found no entries of any of the notes in suit, and none of any of which they are stated to be renewals, excepting the two notes of $800 and $806; that the regular business notes of the firm appeared to have been regularly entered in the books, and the payment of them entered in the cash book, but that no such entries appeared to have been made of these accommodation notes; that there were entries of notes signed by Winship, and indorsed by the other defendants severally, to a large amount; that the amount sunk and lost to the Binneys was about $70,000; and that Winship had made annual statements representing the business to be profitable; that in April, 1825, not long before the failure of Winship, the invoices of two shipments, one by the brigantine Susan, and one by the Paul Jones, of beef, pork, lard, &c. were entered in the invoice book of the concern, but that no other entries appeared to have been made of any shipments, excepting of articles manufactured by the firm, and that the outfits in them were about $6,000 or $7,000 each. William Parmenter testified, that he was clerk of the Binneys from 1814 to 1824, and did not know of any business transacted by Winship out of the course of the co-partnership business, and never heard of any of the accommodation notes. Several other witnesses were introduced by the defendants, who testified, that in as far as they had heard of the co-partnership between the defendants, they had heard that it was limited to the manufacture of soap and candles. The foreman in the manufactory also testified, that he kept the books of the concern, and that during the whole time, he never saw John Binney in the counting room, nor Amos more than once or twice before the failure of Winship; that he had carried on the business since the failure, and it had been profitable.

Loring & Hubbard, for defendants, contended, that the co-partnership between the defendants was, in contemplation of law, a secret co-partnership, and did not authorize the giving of credit to any other name than that of Winship. That the jury had a right to infer, from the evidence, notwithstanding the entries of the said shipments in the invoice book kept by Winship, that the Binneys had no knowledge thereof, and could not, therefore, be presumed to have adopted or ratified the conduct of said Winship in making said shipments. That by the tenor of the said recited articles of agreement and bond, the said Winship had no right or authority to raise money on the credit of the firm, or to bind the firm by his signature for the purpose of borrowing money. And they moved the court to instruct the jury, that if, upon the whole evidence, they were satisfied, that the co-partnership, proved to have existed between the defendants under the name of John Winship, was known or understood by the plaintiffs to be limited to the manufacture of soap and candles, they must find a verdict for the defendants, unless they were also satisfied, that these notes were given in the ordinary course of the co-partnership business, or that the monies obtained upon them went directly to the use of the firm with the consent of the Binneys; and that if they were satisfied, that any part of those monies did go to the use of the firm with such consent, that then they must find a verdict for the plaintiffs for such part only, and not for the residue. Secondly:—That if they were also satisfied, that the Messrs. Binneys furnished Winship with sufficient capital and credit for carrying on the business of the firm, no such consent could be implied from the mere fact, that Winship applied those monies, or any part of them, to the payment of partnership debts.

Blair, Blake & Webster, for plaintiffs.

STORY, Circuit Justice. The present suit is brought by the Bank of the United States, as holders of certain promissory notes, signed by Samuel Jaques, Jr., and indorsed by John Winship, which have been discounted at that bank, and protested for non-payment. The plaintiffs found their claim against the defendants upon the statement, that the defendants are partners in trade under the name and firm of "John Winship;" that the indorsement and discount were for the benefit of the firm, and that upon the dishonour of the notes, they are all jointly liable as partners. No question arises as to the due presentment of the notes for payment, and due notice of the dishonour to the defendants. The defence turns upon a point wholly distinct from that. The defendants admit, that they were partners in the soap and candle business with John Winship, in the manner, and to the extent set forth in the articles of co-partnership read at the bar,

and that the business was carried on in the name of "John Winship;" but they deny, that Winship was authorized to make or indorse any such notes, or to bind the partnership thereby; or that they were ever offered for discount, or discounted on account of the partnership, or the proceeds ever were applied to their use or benefit.

In respect to the general law regulating partnerships, there does not seem any real dispute or difficulty. Partnerships are usually divided into two sorts, general and limited. The former is, where the parties are partners in all their commercial business; the latter, where it is limited to some one or more branches, and does not include all the business of the partners. There is, probably, no such thing as a universal partnership, if, by the terms, we are to understand, that every thing done, bought, or sold, is to be deemed on partnership account. Most men own some real or personal estate, which they manage exclusively for themselves. In respect to both general and limited partnerships, the same general principle applies, that each partner has authority to bind the firm as to all things within the scope of the partnership, but not beyond it. Where the contract is made in the name of the firm, it will, prima facie, bind the firm, unless it is ultra the business of the firm. Where the firm imports, on its face, a company, as A., B. & Co., or A., B. & C., there the contracts made by the partners in that name bind the firm, unless they are known to be beyond the scope and business of the firm. But where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, there, in order to bind the firm, it is necessary not only to prove the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion, and for that purpose. In other words, it must be shown to be used for partnership objects, and as a partnership act. The proof of the signature is not enough. The plaintiffs must go farther, and show, that it is a partnership signature. In the present case, the signature of "John Winship" may be on his own individual account, as his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof, then, is upon the plaintiffs to establish, that it is a contract of the firm, and ought to bind them.

The case of Livingston v. Roosevelt, 4 Johns. 251, has been relied upon by the defendants' counsel, as containing the true doctrines of law, applicable to general and limited partnerships. I am not disposed to controvert it. These doctrines may be taken by the jury as correct; and I will quote the language, as it stands in the report, so as to direct the attention of the jury to it. (Here the judge read from the report.) In this case, it is stated, that partners, in limited as well as in general partnerships, are authorized to raise and borrow money, sign and indorse notes and bills for the common benefit, in transactions relating to the business of the firm. This doctrine has not been controverted at the bar; and indeed it must be true, if such be the ordinary course and usage of trade; for then such an authority must be presumed to be allowed by all the partners for the common benefit. And I know of no principle established to the contrary. Whether the present be a limited or general partnership is to be determined by the whole evidence in the case. It is certain, that by the articles it is a limited co-partnership, and confined to the soap and candle business. Those articles expired, by their own limitation, in two years, and had force no longer, unless the parties elected to continue the partnership on the same terms. That is matter of evidence upon the whole facts. The natural presumption is, that as the partnership was continued in fact, it was continued on the same terms, as before, unless that presumption is rebutted by the other circumstances in the case. There is no written agreement respecting the extension of the co-partnership, and therefore it is open for inquiry upon all the evidence. The present notes were made and indorsed long after the term of two years expired. The plaintiffs contend, that the partnership was then general; the defendants, that it was limited, as before. The jury must determine between them, upon weighing all the facts and presumptions.

It has been said, that this is the case of a secret partnership; that it was the intention of the Binneys, that their connexion with it should be kept secret, and that the management of the business in the name of "John Winship" shows this intention. In point of fact, there is no covenant or declaration in the articles of co-partnership, by which the parties have bound themselves to keep it secret; or that the names of the Binneys should never be disclosed to any persons dealing with Winship in the partnership concerns. In point of fact, too, if the evidence is believed, Winship, immediately after its formation, and during its continuance, constantly avowed it, and made it known, and obtained credit in the business of the firm thereby. He stated the Binneys to be partners; and this statement was generally known and believed by the public, and especially by persons dealing with Winship in respect to the business of the firm. If the jury believe this evidence, then in point of fact, whatever was the original intention of the parties, this was not a secret partnership in the common meaning of the terms. I understand the common meaning of "secret" partnership to be, a partnership, where the existence of certain persons as partners is not avowed or made known to the public by any of the partners. Where all the partners are publicly made known,

whether it be by one, or all the partners, it is no longer a secret partnership, for this is generally used in contradistinction to "notorious," and "open" partnership. And it makes no difference in this particular, whether the business of the firm be carrried on in the name of one person only, or of him and company. Even if some of the partners intend to be such secretly, and their names are disclosed against their wishes and intentions; still when generally known and avowed by any other of the partners, the partnership is no longer a secret partnership. If, therefore, in the present case, Winship, against the wishes and intention of the Binneys, did in the course of the business of the firm make known, that they were partners, and who all the partners were, so that they became public and notorious, I should say, it was no longer a secret partnership in the common sense of the terms; if secret in any sense, it must be, under such circumstances, in a peculiar sense. Sometimes "dormant" and "secret" partners are used as synonymous; but I take it, that "dormant" is generally used, in contradistinction to "active;" and "secret," to "open" or "notorious." However, nothing important turns in this case upon the accuracy of definitions, since it must be decided upon the principles of law applicable to such a partnership as this in fact was, and is proved to be, whatever may be its denomination.

In the present case, Winship was entrusted with the whole business of the firm, as the active partner, and it was to be managed in his name. The business was the manufacture of soap and candles. The particular terms and restrictions of the articles of co-partnership were not, as far as we have any evidence, ever made known to the public, or to any persons dealing therewith. Indeed, according to the very line of argument of the defendants' counsel they were intended to be kept secret. I agree, that the bond is to be taken in connexion with the articles of co-partnership, as a part of the same transaction, and binding the parties. But if neither the bond, nor articles, nor any conditions or limitations, or restrictions therein contained were ever made known to the public, then persons, ignorant thereof, and dealing with Winship in respect to the business of the firm, and trusting him on the credit of the firm with money, or goods, or receiving his notes in payment, had a right to act upon the general principles of law applicable to limited partnerships; and the acts of Winship, in respect to such persons, under such circumstances bound the firm. Winship must be deemed, as to them, to have the ordinary authority to bind the firm to the same extent, and in the same manner, as partners, as the active partners in limited partnerships of a like nature possess. If, indeed, the jury should come to the conclusion, that the partnership was ultimately general, or that the Binneys knew, that Winship held them out as his partners generally in all transactions of a commercial nature; or that they knew, that he obtained credit for the firm upon such representations of their joint responsibility; and that these notes were discounted upon such representations, so known to them, and not disavowed or contradicted by them, then the case might justify a broader doctrine. For, under such circumstances, their silence might be fairly construed as a confirmation of his acts; and they ought, in conscience and equity, as well as in law, to bind them. It would be for the jury to consider, how far the evidence would bear out such a conclusion. But supposing the partnership to be limited to the soap and candle manufacture, still if credit is given to the firm within the business of the firm, it binds all the partners, notwithstanding any secret reservations between the latter, which are unknown to those, who give the credit. If credit be given to the firm, within the scope of the business of the firm, no subsequent misapplication of the fund by the partner procuring it, to which the creditor is not privy or party, will exonerate the firm. Even in respect to secret partnerships, where the credit is given only to the ostensible party; yet if it be in the course of the business of the partnership, and for the common benefit, the secret and silent partners are bound; for those, who are to receive the benefit, are also bound to the burthens. If, therefore, Winship borrowed money on the credit of the firm, and applied it to the use of the firm, and the creditor was wholly ignorant of any restrictions contained in the private agreements of the partners, by which it was not necessary for the business of the firm, the firm would be bound, notwithstanding Winship might, in fact, have had at the time other sufficient funds in his hands. It would doubtless be different, if there was any fraudulent connivance between the parties, or a misapplication of the fund, to which the creditor was a party or privy. It is upon this ground, that one partner cannot pay his own separate debt by any contract or payment knowingly made to bind the firm, and which is not authorized by the firm. It has been said, that no conclusion could be drawn unfavourable to the Binneys from any entries contained in the books of the firm, as to their sanction of the proceedings of Winship. That would depend upon their knowledge of those entries. Whether they had such knowledge is matter of fact, upon the whole evidence in the case. The ordinary presumption is in cases of partnership, that all the partners have access to the partnership books, and might know the contents thereof. But this is a mere presumption from the ordinary course of business, and may be rebutted by any circumstances, which either positively or presumptively re-

but any inference of access, such, for instance, as distance of place, or the course of business of the particular partnership; and indeed any other circumstances raising a presumption of non-access.

In the present case the material considerations, then, are these: If Winship was the active partner, and authorized to conduct the business of the firm; and if the particular terms and restrictions of the articles of co-partnership were secret and unknown to persons dealing with him on account of the firm; he possessed, so far as respected such persons, the ordinary powers of partners in like cases of limited partnerships. It has not been denied, that these include (as the case in 4 Johns. 251, shows) a power to borrow money, and for this purpose, to sign and indorse notes and bills in the name of the firm for the business thereof, and to procure discounts thereof. Were these notes of that nature, and the discount thereof procured for the benefit and upon the credit of the firm in the course of its business, without any knowledge on the part of the bank, that Winship had no right under the circumstances to bind the firm therefor? If so, then the plaintiffs are entitled to recover, although Winship may have subsequently misapplied the funds so procured by such discounts, unless the plaintiffs were privy or party to such misapplication. The notes are all indorsed in the name of "John Winship." For aught, therefore, that appears on the face of them, they were notes only binding him personally. The plaintiffs must, then, go farther, and show either expressly or by implication, that these notes were offered by Winship as notes binding the firm, and not merely himself personally, or that the discounts were made for the benefit, and in the course of the business of the firm. It is not sufficient for the plaintiffs to prove, that the bank, in discounting these notes, acted upon the belief, that they bound the firm, and were for the benefit and business of the firm. They must go further and prove, that that belief was known to and sanctioned by Winship himself in offering the notes, and that he intentionally held out to them, that the discounts were for the credit, and on the account of the firm; and that his indorsement was the indorsement of the firm, and to bind them; and that the bank discounted the notes upon the faith of such acts and representations of Winship. The jury will judge from the whole evidence, how the case stands in these respects. The mere fact, that the discounts so procured were applied to the use of the firm, is not, of itself, sufficient to prove, that the discounts were procured on account of the firm. It is a strong circumstance, entitled to weight; but not decisive.

Another point made by the plaintiffs is, that the Binneys have subsequently ratified Winship's conduct, by procuring discounts of a like nature, so as to establish either an original authority in Winship to make such indorsements, and procure such discounts, or at least a ratification, which is equivalent to such an authority.

(The judge then summed up the facts on this as well as the other points, and left the case to the jury.)

Verdict for the plaintiffs.

[NOTE. On writ of error from the supreme court, the judgment was affirmed, with costs and damages at the rate of 6 per cent. per annum. 5 Pet. (30 U. S.) 529.]

UNITED STATES CARTRIDGE CO. (UNION METALLIC CARTRIDGE CO. v.). See Case No. 14,369.

UNITED STATES CORSET CO. (CARSTAEDT v.). See Cases Nos. 2,467 and 2,468.

UNITED STATES CORSET CO. (COHN v.). See Case No. 2,969.

UNITED STATES DISINTEGRATING ORE CO. (GOLD AND SILVER ORE SEPARATING CO. v.). See Case No. 5,508.

UNITED STATES EXPRESS CO. (UNITED STATES v.). See Case No. 16,602.

UNITED STATES INS. CO. (CRAIG v.). See Case No. 3,340.

UNITED STATES INS. CO. (HENNING v.). See Case No. 6,366.

UNITED STATES INS. CO. (MAREAN v.). See Case No. 9,064.

UNITED STATES INS. CO. (SCHWARTZ v.). See Case No. 12,505.

Case No. 16,792.

UNITED STATES LIFE INS. CO. v. ADAMS et al.

[7 Biss. 30.] [1]

Circuit Court, D. Indiana. June, 1873.

BOND OF INSURANCE AGENT—LOCATION OF AGENCY.

1. In Indiana it is not essential to the validity of the bond of the agent of an insurance company that he should have previously filed in the circuit court the papers required by the state statute.

2. The fact that the agency is not established in any particular county, does not avoid the obligation of the sureties.

This was an action of debt by the United States Life Insurance Company against Alfred B. Adams, the agent of the company, and his sureties. The declaration was on a bond in the penal sum of two thousand dollars, dated the 4th day of November, 1870, executed by the agent and other defendants, conditioned for the faithful performance by him of his duties as the agent of the insurance company, while transacting business in this state. The breach alleged in the declaration was that the agent did not pay over moneys to the principal which were collected by him in the course of his agency. To this

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

declaration there was a plea by the defendants that the insurance company was a foreign company, created under the laws of New York; that the agent was appointed for the southern half of Indiana, and that all the moneys received were received by him as agent for the southern half of the state; that no statement was made to the auditor of state, or certificate given by him to the agent, as the law required; that there was no written instrument filed authorizing the acknowledgment of service of process by the agent, and that the statement and the certificate of the auditor were not filed in the office of the clerk of the circuit court of the county in which the agency was established. To this plea there was a replication by the plaintiff that the statement and evidence were filed in the auditor's office, setting out all the facts required by law, and the statement was in the replication; by which it appeared that it was filed in January and July, 1870; and it was alleged that the certificate of the auditor was issued after these papers were filed, authorizing the agent to transact business in Indiana. It also stated that, as to not filing the papers in the clerk's office at the circuit court of the county wherein the agency was established, that was an omission of the agent and not of the company, and that the requirement of the statute in that respect was merely directory, and not a condition precedent to the transaction of business. To this replication defendants filed a demurrer.

Baker, Hord & Hendricks, for plaintiff.
McDonald & Butler, for defendants.

Before DRUMMOND, Circuit Judge, and GRESHAM, District Judge.

DRUMMOND, Circuit Judge. The first question is as to the validity of the bond. Was the bond, at the time it was executed and delivered to the plaintiff, a valid bond under the laws of this state? It is to be observed that it was executed after the certificate was given to the agent by the auditor, and although the agent had not filed the papers in the office of the circuit court of any county in the state, still there was nothing to prevent the execution and delivery of a bond covering the acts of the agent in the transaction of his business before that was done; so I know of no good reason why the bond, at the time it was delivered, was not a valid bond, at common law and under the laws of this state. The agent, by the certificate of the auditor, was authorized to transact business for his company in the state of Indiana, and the omission to file the paper in the office of the circuit court was of an act which the statute imposed upon him, the agent. It will also be observed that while the act of 1865 declares that it shall not be lawful for any agent of a foreign insurance company, directly or indirectly, to take risks or transact any business of insurance in the state, without first producing a certificate of authority from the auditor of state, it imposes no such condition as to filing papers in the office of the circuit court, so that we have to interpolate into the act of 1865 language declaring that it is a condition precedent, or to asume that, as a necessary implication of the statute. All the decisions which have been referred to on the part of the defense, of the supreme court of this state, under this or similar statutes (Daniels v. Barney, 22 Ind. 207; Barney v. Daniels, 32 Ind. 19; Hoffman v. Banks, 41 Ind. 1), and in which the court held or intimated that a bond given would be invalid as against the sureties, were made where the bond was given before the acts were done which were declared to be conditions precedent by the statute. And in the case of United States Exp. Co. v. Lucas, 36 Ind. 361, and in some other cases, the supreme court of this state concedes, that, although the agent may have collected money for a company, when the money was received in the performance of acts not warranted by law, yet, when received, the agent was bound to pay it over to his principal. So that as to the time and circumstances under which a bond was given, and which the supreme court of this state have held it invalid, it is different from this case, in that the law does not expressly declare that, until the filing of the papers in the clerk's office of the circuit court, any act done shall be unlawful. If the bond was valid when executed, in this case, and we think it must be so considered, it only became unlawful by matter ex post facto, and we can see no objection to its affording protection to the company for unlawful acts of the agent. In Daniels v. Barney, in 22 Ind., a case already referred to, the supreme court says, that if it was executed to cover illegal as well as legal acts, the bond was void ab initio. That would be undoubtedly true, provided, at the time it was executed it was absolutely illegal; but, as we have seen in this case, there was nothing to render the execution of the bond of the 4th of November, 1870, illegal. If every provision of the law were complied with prior to the transaction of business by the agent, and a bond were given, it could hardly be claimed that the bond would be inoperative as to the lawful operations of the agent simply because, in the course of his business, he might do something not authorized by the statute. The rule in such cases must necessarily be, that the bond would stand as to legal acts and fall as to those that were illegal. Now conceding that the agent did not, in this case, comply with the law in filing the papers in the office of the clerk of the circuit court of the county; yet, when he collected money for his principal, it was not only lawful for him to pay it over, but he was bound to do so. Then the obligation of the surety is to make him perform, as to that, a legal obligation. The law implies a promise on the part of the agent to pay the money, and it is on

that promise that the action is maintained against the agent, irrespective of the manner in which the money came into his possession, and it is for the doing of that which it is the agent's duty to do, and not for his illegal acts, that the surety is bound.

But, independent of all this, the plea alleges that the agent received the money in the course of his employment, and agency, in the business of the company in the southern half of Indiana, and does not aver that his agency was established in any county, or that the money was received there. The language of the statute is that the papers shall be filed by the agent in the clerk's office of the circuit court of the county where the agency is established. What if no agency is established in any particular county in the state? What if he is an ambulatory agent, as this one seems to have been, authorized to transact the business throughout the southern half of the state, and there was not, in point of fact, any agency established in any one county; what becomes then, of the obligations of sureties on a bond which they have executed? It may be conceded that the language used by some of the judges in the cases decided by the supreme court of this state indicates a general rule—that while the agent is liable to his principal for money received by him in transacting business not authorized by law, the sureties on a bond are not so liable. But considering the plain equity of this case, and the clear intent of the parties when they subscribed this bond as sureties, I do not feel inclined to relieve them of their obligations unless there is some decision of the supreme court of the state upon the identical question which is now before this court, and I think the cases which have been decided by that court may be distinguished from the one now before this court.

For the reasons given, therefore, the demurrer to the replication will be overruled.

I will say, in conclusion, that the only question made by the defendant's counsel is as to the point which I have been considering, viz: the consequences of not filing the papers in the clerk's office of the circuit court. No objection is made to the statements contained in the replication, and it is not contended but that they have in all respects complied with the demands of the statute, both as to what the statement shall contain, and also as to the authority of the agent to acknowledge service of process; and it will be recollected that the question here is not between the state or its citizens, complaining that the agent has omitted to do what the statute requires, but between the agent himself and his principal, and between the principal and the sureties of the agent. And I confess that distinction is a nice one which insists that the agent is responsible to his principal for money had and received, and yet at the same time asserts that he cannot give a bond obliging him to pay it over, nor can another for him as surety.

UNITED STATES MAIL S. S. CO. (HIGGINS v.). See Case No. 6,469.

Case No. 16,792a.

UNITED STATES MAIL S. S. CO. v. The JOHN POTTER.

[N. Y. Times, Jan. 29, 1855.]

District Court, S. D. New York. Jan. 27, 1855.

SALVAGE—NAVIGATION OF INFECTED SHIP.

[Where a steamer deprives itself of its third mate in order that he may navigate a ship which has lost its officers through yellow fever, and the steamer is merely delayed half an hour, and otherwise, except that more work is imposed on the other officers, no loss is incurred, the third mate, who endangers his life by going on the infected vessel, and brings her safe to port, is entitled to the major part of the salvage allowed.]

This was a case of salvage, brought by the steamer George Law against the bark John Potter and her cargo. The bark had sailed from Havana bound to New York, and the day after she sailed her master was taken sick with the yellow fever and died. Her mate also died and one seaman, leaving the vessel without anyone on board who understood navigation. The bark fell in with an English vessel, bound up the coast. The vessel could not spare a navigator, but told the John Potter to keep along in her wake, which was done. On the 22nd of August the George Law hove in sight, whereupon a signal of distress was set on the bark, and the steamer ran down to her, and learning her condition, put on board of her the third mate, Mr. Wendell, to navigate her to New York. The mate was himself attacked by fever, and was severely ill, but succeeded in bringing the vessel to New York in safety. It was a question whether the fever which he had was the yellow or Chagres fever. The bark and her cargo was worth about $16,000.

Clark & Rapallo, for libelants.

Beebe & Donohue, for claimants.

INGERSOLL, District Judge, said he did not think the question as to the kind of fever of much importance in determining the amount which should be paid to the mate. He knew that the bark was infected with the yellow fever, and that he was endangering his health by going on board, and he exposed himself to that peril for the benefit of the claimants. If he had the seeds of the Chagres fever in him, and was sick of that, he voluntarily deprived himself of all the medical aid which he could have on board the steamer, and that his service, therefore, was a very meritorious one, and should be recompensed as such. That the service rendered by the ship was technically a salvage service, but a very slight one. She was only delayed about half an hour; and owing to the absence of the third mate, there was some little inconvenience and extra labor imposed on the other officers of the steamer, but none on the crew.

Under all the circumstances, a decree may be entered for the libelants for $1,000—to be divided as follows: To Mr. Wendell, the third mate, $700; to the captain of the George Law, $65; to the first mate, $35; to the owners, $200.

UNITED STATES PATENT BUTTON, RIVET, NEEDLE & MACHINE MAN'F'G CO. (PLATT v.). See Case No. 11,222.

Case No. 16,793.

UNITED STATES RIFLE, ETC., CO. et al. v. WHITNEY ARMS CO. et al.

[14 Blatchf. 94;[1] 2 Ban. & A. 493; 11 O. G. 373.]

Circuit Court, D. Connecticut. Jan. 22, 1877.[2]

APPLICATION FOR PATENTS — ABANDONMENT — LACHES—PUBLIC USE.

1. C. applied for a patent in January, 1859. The application was rejected in February, 1859. No appeal was taken. In February, 1860, the application was withdrawn, and the balance of the fee was refunded. In May, 1868, C. filed a new application, which was rejected on the ground of abandonment. This decision was affirmed by the commissioner of patents, and his decision was reversed by the supreme court of the District of Columbia. The commissioner then declined to issue the patent. After the passage of the patent act of July 8, 1870 (16 Stat. 198), a new application was filed, and the patent was issued, it being for "improvements in breech loading guns." During the 8 years from 1860 to 1868, C. obtained 22 patents on his own application, 9 of them relating to breech-loading fire-arms, and though, during a part of the time, he was poor, and in debt, and in ill health, he prosecuted his other inventions with energy. During the same interval patents were granted to others embodying his inventions: *Held*, that, under section 35 of said act of 1870, which provides that, upon the hearing of the renewal, provided for by that section, of an application before rejected or withdrawn, "abandonment shall be considered as a question of fact," the decision of the commissioner on the question of abandonment is not final, but may be reviewed in a suit brought on the patent.

[Cited in Woodbury Pat. Planing Mach. Co. v. Keith, Case No. 17,970. Cited in brief in Fassett v. Ewart Manuf'g Co., 58 Fed. 364.]

2. No laches could be imputed to C. after May, 1868.

[Cited in Colgate v. W. U. Tel. Co., Case No. 2,995.]

3. His invention was abandoned before May, 1868.

[Cited in Colgate v. W. U. Tel. Co., Case No. 2,995; Kittle v. Hall, 29 Fed. 514; United States Electric Lighting Co. v. Consolidated Electric Light Co., 33 Fed. 871.]

4. The use of an invention for mere competitive examination, experiment, and test, is not a public use.

In equity.

Frederic H. Betts and George Gifford, for plaintiffs.

Benjamin F. Thurston, for defendants.

SHIPMAN, District Judge. This is a bill in equity, to restrain the defendants from an alleged infringement of letters patent [No. 126,446], granted to John W. Cochran, on May 7th, 1872, for "improvements in breech-loading guns." The plaintiffs are the owners of the patent, and E. Remington & Sons, for whose benefit the suit is brought, are the exclusive licensees thereunder. The answer of the defendants denies infringement upon their part, and also denies novelty of invention upon the part of the patentee, and alleges that the application of the said Cochran for a patent was filed on May 6th, 1868, and that, for more than two years prior to said date, the invention had been in public use and sale, with the consent and allowance of said Cochran, and that, prior to the said date, the invention had been abandoned to the public.

Mr. Cochran's application for a patent was made on the 11th of January, 1859, and was rejected February 8th, 1859. No appeal was taken from the original rejection by the primary examiner, and, on February 20th, 1860, the application was withdrawn, and twenty dollars, the balance of the patent office fee, was refunded to the applicant. On May 6th, 1868, Mr. Cochran filed a new application, which was rejected upon the ground of abandonment. The decision of the board of examiners was affirmed by Mr. Fisher, who was then commissioner, whose decision was reversed by the supreme court for the District of Columbia. The commissioner then declined to issue the patent, but, after the passage of the patent act of July 8, 1870 (16 Stat. 198), a new application was filed, and the patent was issued by the successor of Mr. Fisher. During the interval of eight years between the first rejection and the second application, Cochran obtained twenty-two different patents upon his own application, nine of which patents relate especially to breech-loading firearms. He was constantly occupied after 1859, and especially during the war of the Rebellion, in endeavors to perfect and to bring to the favorable notice of the war department and of the public, his inventions other than the one which is now in controversy. He sold, in the year 1865, an English patent for another breech-loading fire-arm, for the sum of $18,000 (of which sum $5,000 was spent in making models and procuring foreign patents), and went to England, on two occasions, for the purpose of introducing that weapon to the foreign market. He was, during a portion of this interval, very poor, in debt, and in ill health, and his habits were irregular, but he was prosecuting his other inventions with constancy and energy. There is no evidence that any arm embodying the invention in controversy was ever constructed by Mr. Cochran, or by any person on his behalf. Neither is there any evidence

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 2 Ban. & A. 493, and here republished by permission.]

[2] [Affirmed in 118 U. S. 23, 6 Sup. Ct. 950.]

that he ever sought means to renew his application, or that he said or did anything which indicated his idea that this invention was to be pressed, or was to be or become available to him. On the contrary, he apparently acquiesced in the action of the patent office, and entirely turned his attention to other inventions. He died on January 2d, 1873. Patents were granted to James Stillman in 1865, and also to Laidley & Emory in 1866, for improvements in fire-arms, which are embodied in the gun of the defendants, and constitute its peculiar features. It was said by Commissioner Fisher, in his opinion upon the second application, that the primary examiner reported that the devices mentioned in the first and second claims of Cochran's specification were found in eighteen patents which had been granted between 1860 and 1868. I have no means of verifying the truth of this statement.

As I think that the principal question in the case is in regard to the validity of the Cochran patent by reason of abandonment, or by reason of laches and want of diligence in procuring the patent, to the injury of the intervening equities of other inventors and patentees, I do not enter into the question of novelty, but assume that Cochran's invention was not anticipated by the persons named in the answer; and also assume, what was not seriously denied, that the Whitney gun contains, in substance, the Cochran invention.

The second application, which was rejected in 1869, was renewed after the passage of the patent act of July 8, 1870 (16 Stat. 198). The 35th section of this act provided, that, "when an application for a patent has been rejected or withdrawn prior to the passage of this act, the applicant shall have six months from the date of such passage to renew his application, or to file a new one; and, if he omit to do either, his application shall be held to have been abandoned. Upon the hearing of such renewed applications, abandonment shall be considered as a question of fact." Prior to the passage of this act, the practice of the patent office in regard to the granting of renewed applications for patents, after the lapse of years from the date of their previous rejection or withdrawal, was not uniform. It had been held that the withdrawal of an application, and the neglect to prosecute it within a reasonable time, was an abandonment of the invention. The contrary had been held both by the patent office and the courts. Inventors, whose applications had been rejected, were desirous of renewing them, and it was proper both that some limitation should be placed upon the time within which the new applications should be made, and that some stable principle should be adopted in regard to the question of abandonment. The section provided that this question should be regarded as a matter of fact, that lapse of time should not of itself be conclusive evidence of abandonment, but that the decision of each case should depend upon its peculiar circumstances, as a question of fact, and not of law.

Both parties, while uniting in this construction of the 35th section, differ materially in the effect to be given to the decision of the commissioner upon a renewed application, which was made subsequent to the passage of the act. The plaintiffs contend that this decision is conclusive upon the question of abandonment, and is not open to review collaterally, while the defendants insist that a patent granted upon a renewed application is still open to the same attacks which can be made upon any other patent.

The decision of the commissioner in regard to the questions which have been committed to his exclusive jurisdiction is final. His decision is conclusive in regard to the sufficiency and competency of the formal acts and proofs which the statute provides shall be a prerequisite to the issuing of a patent. He is, moreover, made the tribunal which is to decide both in regard to the existence of those facts upon which a reissue is to be granted, and upon which an extension of patents issued prior to March 2d, 1861, is to be made. By the 32d section of the act of 1870, he is to judge of the sufficiency of the reasons for delay, exceeding two years, in prosecuting applications which shall be thereafter made. Upon these three subjects which are submitted to him, his decision is conclusive. The statute also provides (section 24), that an inventor of an improvement not known or used by others in this country, and not patented, or described in any printed publication, in this or any foreign country, before his invention, and not in public use or on sale, for more than two years prior to the application, unless the same is proved to have been abandoned, may obtain a patent therefor; and (section 61), that, in an action for an infringement, or a suit in equity for relief against infringement, the defence of abandonment may be pleaded. The granting of a patent is prima facie, but not conclusive, evidence that the right to the invention had not been surrendered to the public. I am of opinion that the decision of the commissioner in regard to abandonment, upon renewed applications which were made under the 35th section, has no higher authority or more enlarged scope than his decision upon the same question upon an original application, and that all the defences which the statute authorizes, may be made as well in respect to patents granted upon applications renewed after the act of 1870, as in respect to those issued upon original applications. The question is, simply, whether the 35th section gave the commissioner the exclusive jurisdiction which is conferred upon him in the cases which have been mentioned. His decision upon a renewed application, prior to the act of 1870, had no conclusive effect. The provision, that "abandonment shall be considered as a question of fact," when it is admitted that

the object of the provision was primarily to make a distinction between questions of law and of fact, hardly confers upon the commissioner an exclusiveness of jurisdiction which he did not previously have, and which he has not since had upon any other class of applications.

The question of abandonment being, then, one of fact and now open to examination, it is plain that no laches can be imputed to Cochran after May 6th, 1868, and that the consideration of the question is confined to the eight years subsequent to his withdrawal of the first application. It is also true, that lapse of time, per se, constitutes no abandonment, and that upon the defendants rests the burden of clearly establishing, by affirmative evidence, a positive and actual abandonment, or such laches as clearly to indicate an intent to abandon. It may be also considered as true, that the original application is conclusive evidence that, at its date, the inventor did not intend to give his invention to the public, but it is not conclusive evidence that he did not subsequently conceive such intention, or that he was not subsequently guilty of such neglect in obtaining a patent, that he ought not to have a monopoly to interfere with the equities of those who did anticipate him in giving the public the benefit of their inventive skill and labor.

In considering this question of fact, the court is deprived of aid from the testimony of the inventor, who died in 1873. There is, also, an absence of the usual evidence from the declarations or the acts of the inventor in regard to his invention; and the court has, therefore, to consider only the evidence which the undisputed facts on the one side or the other disclose, and the inferences from those facts. The application was withdrawn in 1860, and was not renewed until eight years had elapsed. In the meantime, Mr. Cochran's attention was directed to other kindred inventions, and to inventions of cartridges, shot and shell, for which he solicited and obtained twenty-two patents in this country. From his letters, which tell, also, a sad story of poverty, it appears that his mind was constantly engaged in these various patents, and his energies were constantly directed to their development. If it could be shown that his poverty was a reason for his not renewing and pressing an application for this particular invention, such testimony would tend greatly to dispel the idea of laches; but poverty did not deter him from entering into the necessary expenses which his other patents required, and from devoting himself energetically to obtain a recognition of their merits from the government and from the public. His want of means was not, apparently, the cause of his not seeking to place the invention in its present position. He was absorbed in the attainment of success in the enterprises which occupied his mind, to the exclusion of this invention, which he did not regard as of as much value as the others. In the meantime, during the war of the Rebellion, inventive skill was greatly stimulated in regard to the perfection of breech-loading fire-arms, and the attention of other inventors than Cochran became engaged in the same line of thought and experiment which he had originally entered upon. In brief, the case shows that Cochran made an invention, and an application to the patent office, which, upon its rejection, he voluntarily withdrew, and for eight years neglected to renew, while he devoted himself to other inventions. He could have obtained a patent for this improvement, or he could, at least, have kept his application in the office. Meanwhile, his invention is patented by others, and is finally introduced to the public in the year 1867, by the present licensees, when Mr. Cochran presents it again to the patent office. The new petition did not, of itself, sever the second application from the first. Smith v. Dental Vulcanite Co., 93 U. S. 486. But the acts and conduct of Mr. Cochran show that the proceedings to obtain a patent, which were originally undertaken in 1859, had been abandoned, and that there was no apparent intent, at the time of the withdrawal, to file a new petition, but there was an acquiescence in the decision of the patent office. There was no continuity in the two applications.

The case presents very different circumstances from those which are disclosed in Smith v. Dental Vulcanite Co. [supra], in which case the original application was never withdrawn, but, from the date of the third rejection, in February, 1856, until March, 1864, when the successful petition was again presented, it is found that the inventor did not remit his efforts, but did everything in his power to obtain a patent, and no act amounted to an acquiescence in the rejection. In this case there was a withdrawal of the first application, the efforts to obtain a patent were remitted, nothing was done towards that end, there was an apparent acquiescence in the rejection, there was a devotion of the thoughts and energies of the inventor to other pursuits, a cessation of active interest in the invention, and a relinquishment of any attempt to perfect his title thereto.

A person "may forfeit his rights as an inventor by a wilful or negligent postponement of his claims, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement should have been made and introduced by others." Kendall v. Winsor, 21 How. [62 U. S.] 322. If there was no purpose on the part of Cochran to withhold his improvement from the public, there was a negligent postponement of his claims until after other inventors had acquired equities, which it seems unjust to destroy. The language of Judge Woodruff in Consolidated Fruit Jar Co. v. Wright [Case No. 3,135], though not neces-

sary to the decision of that case, is just and is pertinent to the facts which are here disclosed: "If an inventor, without substantial reason or excuse, abandons the use of his invention, and for nine years sleeps on his rights, and in the meantime, others, in good faith, employ their industry, skill and money in producing the same thing, and give the public the benefit thereof, putting it into extensive use and on sale, such a state of facts not only warrants the inference of abandonment by the first inventor, but it also creates, as between him and the others, the same equity as would arise if such others had gone further and taken out a patent. Whether the device be patented, or has 'gone into use without a patent,' should make no difference," Kendall v. Winsor, 21 How. [62 U. S.] 322. This is not because lapse of time, per se, deprives an inventor of his right, but because the circumstances giving character to the delay indicate abandonment; and, also, because the intervening rights of others make it inequitable that he should thereafter be permitted to assert any such exclusive title to the invention." To the same effect is the case of Marsh v. Sayles [Case No. 9,119].

I find no adequate evidence of public use by any one for two years preceding the date of the final application. Even if one of the guns, which was presented for competitive examination by the board of army officers at Springfield, in the year 1865, embodied the Cochran invention, it does not appear to me that the submitting of an invention to the test of examination by experts in competition with other inventions is the public use to which the statute refers. A use for the mere purpose of competitive examination, experiment and test is not a public use.

Let a decree be entered dismissing the bill.

[Upon an appeal to the supreme court, the decree of this court was affirmed. 118 U. S. 23, 6 Sup. Ct. 950.]

Case No. 16,793a.

UNITED STATES STAMPING CO. v. KING et al.

[See 7 Fed. 860.]

Case No. 16,794.

UNITED STATES STEAM-GAUGE CO. v. AMERICAN STEAM-GAUGE CO.

[1 Ban. & A. 30; Holmes, 309; 5 O. G. 208.] [1]

Circuit Court, D. Massachusetts. Jan., 1874.

PATENTS—LIMITATION OF CLAIMS—PRIOR STATE OF THE ART—STEAM-GAUGES.

1. In the construction of the first, third, and fifth claims of the reissued patent for a registering steam-gauge, granted to complainant, assignee of Elijah Clarke, March 5, 1872, *held* that, in view of the state of the art at the date of the invention, these claims must be limited to the combination of the particular elements which the patentee has described, or their substitutes, known at that time.

2. So limited, the claims are not infringed by the steam-gauge, for which letters-patent were granted to T. C. Hargrave, March 19, 1872.

[Bill in equity to restrain alleged infringement of letters-patent [No. 101,583], for an improved steam-gauge, originally granted Elijah Clarke April 15, 1870, reissued to the complainant March 5, 1872 [No. 4,775]; and for an account. The alleged infringement consisted in the manufacture and sale, by the defendant, of steam-gauges, constructed substantially according to a patent granted one T. C. Hargrave for improvement in registering steam-gauges, March 19, 1872. The principal questions in the case were, as to the proper construction of the claims of the reissue, and as to infringement.] [2]

Thomas W. Clarke, for complainant.

George L. Roberts and Reuben L. Roberts, for defendant.

SHEPLEY, Circuit Judge. Complainant is the assignee of letters-patent originally issued to Elijah Clarke, on the 15th of April, 1870, reissued to the complainant on the 5th of March, 1872, for a registering steam-gauge. It is claimed that defendant has infringed the first, third, and fifth claims of complainant's patent.

As, in the opinion of the court, none of the evidence introduced by the defendant on the question of novelty affects the validity of complainant's patent, or throws any reasonable doubt upon the question as to Clarke's being the original and first inventor of what is described in his patent, the prior patents in evidence in the case will be examined principally in view of the light they throw upon the state of the art, as affecting the construction of those claims in the patent which are in issue, bearing upon the question of infringement. They are the following:

1. In a registering steam-gauge, the combination of the following instrumentalities: viz., first, a registering-wheel; second, suitable mechanism for revolving the same in one direction, and for preventing its return; and third, suitable means for adjustment, so that the gauge will be operative as a register only at the prescribed limit of steam pressure, all constructed and operating substantially as set forth.

3. In a registering steam-gauge, the combination of the registering-wheel, I, the index-finger, P, the lever, F, the link, K, the pawl, H, and detent, J, for the purpose of denoting by the same impulse, at the same time, the number of excesses, and the maximum excess, of steam pressure, all constructed and operating substantially as set forth.

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and Jabez S. Holmes, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Ban. & A. 30, and the statement is from Holmes, 309.]

[2] [From Holmes, 309.]

5. In a registering steam-gauge, the combination of the set-screw, b, with the lever, F, for the purpose of the adjustment of the gauge to the zero of the prescribed limit of steam pressure, substantially as set forth.

The first claim of the patent cannot be construed broadly, as embracing the three described instrumentalities in the combination without reference to their construction or mode of operation, as three corresponding instrumentalities are found in combination in the steam-gauge described in the English patent of John Clarke, sealed on the eleventh day of December, 1860. The patent of John Clarke, and the complainant's patent for the invention of Elijah Clarke, each contain, in the organization of a steam-gauge, first, a ratchet, which effects registration of excesses of prescribed pressure; second, a lever, carrying a pawl operating to revolve the ratchet-wheel in one direction, and a detent operating to prevent its retrograde movement; and, third, suitable means of adjustment, so that the gauge will be operative as a register only at the prescribed limit of steam pressure. The first claim of the complainant's patent must therefore be construed in accordance with the literal meaning of the words used in the claim itself, as embracing this combination of those three instrumentalities in the organization of a steam-gauge, when constructed and operating substantially as set forth in the complainant's specification; and it is by reason of the differences in construction and operation that this claim of the patent is sustained, and sustained with the limitation to such described mode of construction and operation. The construction and mode of operation of these instrumentalities combined in the organization of defendant's gauge, manufactured under the Hargrave patent, differ as much from the corresponding combination of instrumentalities in the Elijah Clarke organization, as the latter combination differs from that in the English patent to John Clarke. There is, therefore, no infringement of the first claim.

It is not contended, and cannot be, with any show of reason, that the combination of mechanical elements enumerated in the third claim of the reissued letters-patent in suit is to be found in defendant's gauge. Complainant contends that the third claim embraces any mechanism in a steam-gauge, so organized as to denote at the same time and by the same impulse the number of excesses, and the maximum excess, of steam pressure.

In view of the state of the art, at the date of the invention of Elijah Clarke, this claim must also receive a more limited construction, and be confined to substantially the same instrumentalities as are enumerated in the third claim. Gauges indicating the maximum pressure were old and in common use, as well as gauges like that shown in the specification of the English patent to John Clarke.

In the specification of the letters-patent to David P. Davis, dated July 2, 1867, and of the English patent to Norton and Bailey, dated Jan. 7, 1868, mechanism is described combined with the ordinary mechanism of a pressure-gauge, by which a marking device is actuated by the weighing device, and makes a mark upon a sheet of paper, which is moved forward at the same time by clock-work. The pressure of the steam is recorded by the position of this mark upon the sheet of paper. Parallel lines are traced upon the sheet of paper, and these are intersected by other parallel lines, which last correspond with the movement of the clock-work, so that in a given unit of time the paper is moved a distance equal to the distance between the cross-lines. A record is permanently made upon the paper by the pencil or other marking device, so that upon comparison of the line, traced by the pencil with the two systems of parallel lines upon the paper, there is registered and indicated the actual pressure of steam at any and every given time, and, of course, necessarily the highest and lowest pressure, and when and how often the pressure has exceeded or fallen below any assumed point of pressure. In these last-named two organizations, it is true that there was the added instrumentality of a coiled spring, or a weight to move the paper. Yet these gauges both contained mechanism for denoting, by the same impulse,—that is, by the expansive force of the steam acting upon the spring or weighing device,—at the same time, the number of excesses, and the maximum excess, of steam pressure.

The evidence in the record disproves any infringement of the fifth claim. Treating the complainant's patent as good and valid, with the construction here given to the claims which secure to the patentee the right to the combination of the instrumentalities in the organization of a pressure-gauge which he has described, and secures him against infringement by any mere formal alterations or substitution of ingredients, well-known as substitutes at the date of his invention for any of the ingredients of his combination, yet a case of infringement is not made out against the defendant by the use of the Hargrave gauge. To show wherein the instrumentalities in this organization differ in construction and mode of operation from those in the combination in the Elijah Clarke gauge, so far as the combination in that gauge is new, would require more space than can well be devoted to this branch of the subject. as the views I have already expressed on the construction of the claims will show clearly to parties and counsel, that, entertaining these opinions in relation to the construction of the claims, I could come to no other conclusion than that the defendant does not infringe; and the differences in the two organizations could not be readily made intelligible to others by any mere verbal description unaided by models or drawings.

Bill dismissed.

UNITED STATES TEL. CO. (UNITED STATES v.). See Case No. 16,603.

UNITED STATES WIND-ENGINE & PUMP CO., In re. See Case No. 13,783.

UNIVERSAL LIFE INS. CO. (McKENTY v.). See Case No. 8,854.

UNNA (SELZ v.). See Case No. 12,650.

Case No. 16,795.

UNTHANK v. TRAVELERS' INS. CO.

[4 Biss. 357; [1] 5 Bigelow, Ins. Cas. 114.]

Circuit Court, D. Indiana. June, 1869.

ACCIDENT INSURANCE—WAIVER—EVIDENCE.

1. Where, by a policy, the defendant insured the plaintiff against bodily injuries arising by violence and accident, under this condition, that in case of such injury to the insured during the life of such policy, he should give the insurance company forthwith, by letter addressed to the company at Hartford, a notice stating the nature and extent of the accident and injury; and where, on the happening of the same, he omitted to give such notice,—*held*, that, where, on receiving proof of the injury by violence and accident, the company examined the proofs, and refused to pay the policy on other grounds than the omission to give such notice, the condition of the policy requiring such notice was thereby waived; and that, the other necessary facts being proved, the insured was entitled to recover on the policy.

[Cited in Timayenis v. Union Mut. L. Ins. Co., 21 Fed. 227.]

2. A letter offering to compromise, but containing a waiver, may be read in evidence, not to prove the offer, but to establish the waiver.

[This was an action by William Unthank against the Travelers' Insurance Company of Hartford, Conn., upon an accident insurance policy.]

Martindale & Tarkington, for plaintiff.

Collin, Bills & Howland, for defendant.

McDONALD, District Judge. This is an action of assumpsit on a policy of insurance. The defendant has pleaded the general issue; and pursuant to the act of congress on the subject, the parties waive a jury, and submit the trial of the issue to the court. 13 Stat. 501. The policy, among other things, provides that, if the insured should sustain bodily injuries by violent and accidental means, which should immediately and totally disable and prevent him from the prosecution of any and every kind of business, then, on satisfactory proof of such injuries, he should be indemnified against loss of time in a sum not exceeding twenty-five dollars per week for such period of continuous, total disability as shall immediately follow the accidents and injuries aforesaid—not exceeding twenty-six weeks from the time of the accident.

On this provision of the policy the present action is brought. And the declaration charges that, during the existence of the policy, the insured was engaged in the business of a horsetrader; and, having occasion to take a drove of horses to market, on his journey for that purpose, the horses taking fright, he was violently thrown from the horse he was riding, and thereby sustained such bodily injuries as immediately and totally disabled and prevented him from the prosecution of any kind of business for twenty-six weeks.

The evidence abundantly sustains these allegations in the declaration.

But the defendant insists that, on the evidence adduced, the plaintiff cannot recover, because he has failed to prove the notice required by the policy; and this is really the only point of any difficulty in the case.

One of the conditions contained in the policy is, that, in the event of injuries for which claim may be made under the policy, the insured should immediately thereafter give notice in writing, addressed to the Travelers' Insurance Company, Hartford, Connecticut, stating the full name, occupation, and address of the insured, with full particulars of the accident and injury. And it does not appear by the evidence that such a notice was given. There is indeed proof that, as soon as the plaintiff became aware of the nature of the injury, which was hernia, he applied to the defendant's examining physician, who ascertained the nature and extent of the injury, and who, at the request of the plaintiff, in writing notified the local agent of the defendant, then residing in the plaintiff's neighborhood, of the time, nature, and extent of the injury. And it is also proved that immediately after the discovery of the nature and extent of the injury, the plaintiff did, at the request of said local agent, forward to a branch office or agency of the insurance company at Chicago, the specifications and proofs of the injury in due form as required by the policy. And there is much plausibility, if not good reason, for the conclusion that this was a substantial performance of the condition touching the notice contained in the policy.

But the plaintiff's counsel seem disposed to rest this question concerning notice on another ground. They insist that there has been a waiver by the defendant of the necessity of the notice in question. This alleged waiver stands on a letter addressed to the plaintiff by the local agents of the insurance company. This letter was written after the aforesaid specifications and proofs had been forwarded to, and examined by, the defendant's branch office or agency at Chicago. The letter is as follows:

"Richmond, Ind., April 5, 1869. William Unthank, Spiceland, Ind.—Dear Sir:—We have just received the decision of the Travelers' Accident Company on your case. It is as follows: They agree to pay you for four weeks' compensation, which would be for a length of time in which they claim the rupture would be cured as well as it

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

ever would be. They offer this amount as a compromise; for the company does not admit that you have established the fact that the rupture was caused by the accident referred to in your proofs sent them. Shall we send and get the money—$100—for you? Let us hear at once. Truly, Coggshall & Doan."

The defendant has objected to this letter as evidence, on the ground, as is argued, that it is a mere offer to compromise, which was not accepted. It is certainly true that a mere offer to compromise, not accepted, is inadmissible as evidence. But if an offer to compromise is connected with other matters important as evidence in the same letter, the whole letter may be read in evidence. Thus an offer to compromise accompanied by an admission of an item of indebtedness, is admissible in evidence to prove that item. 1 Greenl. Ev. § 192. And so, no doubt, if the offer to compromise is accompanied by a waiver, it may be given in evidence, not to prove the offer, but to prove the waiver. To establish the latter, I think the letter in question is admissible in evidence.

But is this letter sufficient evidence that the defendant has waived the right to insist on the notice as a condition precedent? In this letter, the objection to the payment of the whole claim, as well as the denial of liability to pay any part of it, was not made on the ground that the proper notice had not been given, but solely on the ground that the total inability on the part of the plaintiff to perform any kind of business continued only four weeks after the accident, and that the proofs furnished by the plaintiff to the defendant did not establish the fact that the injury of which the plaintiff complained was the result of the accident to which he attributed it. We may perhaps well ask, if the defendant was disposed to resist the payment on the ground that the formal notice had not been given, why was not this objection noticed in the letter? And why did the company make the "decision" mentioned in the letter on other grounds than the want of notice, as it seems was done? And may we not here well apply the maxim that "Expressio unius est exclusio alterius"?

In Bodle v. Chenango Co. Mut. Ins. Co., 2 Comst. [2 N. Y.] 53, where, by the terms of a policy of insurance, the insured was required within thirty days after a loss to transmit to the secretary of the company a particular account of such loss, and where a defective account of the loss was transmitted, and the company at the time made no objections on that ground, the objection, being raised afterwards, was held to be waived.

It has been held in Connecticut that where an agent of an insurance company was acting for it in the case of a loss, he might by a waiver bind his company as to the omission to furnish preliminary statements of the loss. Rathbone v. City Fire Ins. Co., 31 Conn. 193.

In Brown v. Kings County Fire Ins. Co., 31 How. Prac. 508, it was held that where papers containing preliminary proofs of loss by fire are served on, and received by, the insurance company, without objection made at the time, it is too late at the trial for the company to object that these preliminary proofs were defective; especially so when the company had before suit refused payment on the ground alone that the risk had been increased after the policy was executed. To the same effect are the following cases: Sexton v. Montgomery Co. Mut. Ins. Co., 9 Barb. (N. Y.) 191; Clark v. New England Mut. Fire Ins. Co., 6 Cush. 342; Francis v. Ocean Ins. Co., 6 Cow. 104; Columbia Ins. Co. v. Lawrence, 10 Pet. [35 U. S.] 507; Tayloe v. Merchants' Fire Ins. Co., 9 How. [50 U. S.] 390.

It appears to me that Chancellor Walworth has put the doctrine of waiver, applicable to cases like the one under consideration, on the true basis. He says that "good faith on the part of the underwriters, requires that, if they mean to insist upon a mere formal defect of this kind in the preliminary proofs, they should apprize the assured that they consider the same defect in that particular, or to put their refusal to pay on that ground as well as others, so as to give him the opportunity to supply the defect before it is too late; and if they neglect to do so, their silence should be held a waiver of such defect in the preliminary proofs, so that the same shall be considered as having been duly made according to the conditions of the policy." Aetna Fire Ins. Co. v. Tyler, 16 Wend. 385. This is the honest doctrine; and its principle is fully applicable to the case at bar. And in view of all these authorities, as well as with a proper view to what is just, and right, and fair, I do not hesitate to hold that the defendant has waived all objection for the omission to give the notice required in the policy.

Accordingly, I find the issue for the plaintiff, and assess his damages at six hundred and seventy-three dollars.

NOTE. In a recent case in this Northern district of Illinois—Cahill v. Andes Ins. Co. [Case No. 2,289], 1873—Blodgett, J., held that where ar insurance company claimed cancellation of a policy, on the ground of the non-payment of the premium, and placed their refusal to pay the loss on that ground, they are estopped from afterwards, when sued on the policy, setting up a different ground of defense. This rule was also laid down in Harding v. Parshall, 56 Ill. 219.

Case No. 16,796.

UPHAM v. BROOKS et al.

[2 Story, 623.] [1]

Circuit Court, D. Maine. Oct. Term, 1843.

MORTGAGES—REDEMPTION—PARTIES IN EQUITY—TRUSTS.

1. Where, in a bill in equity, to redeem a mortgage given to secure the mortgagee against an incumbrance upon another estate purchased by him, the plaintiff claimed as owner of the equity of redemption, against the defendant, who was assignee of the mortgage, and the bill did not set forth, that the condition of the mortgage had been fully performed and the incumbrance extinguished; it was *held*, on demurrer, that although, in law, the mortgagor could not recover the land mortgaged from the mortgagee, and those in possession under him without an actual extinguishment of the incumbrance, yet that, in equity, he was entitled to maintain a bill to redeem upon an offer to redeem, and proving himself able and ready to discharge the incumbrance and procure releases thereof, and of claims on account thereof.

[Cited in Merrill v. Merrill, 53 Wis. 526, 10 N. W. 686.]

2. Where A. was the legal owner of land, which he held in trust for B. as security for advances made by him on account of the purchase by B., it was *held*, that A. was a necessary party to a bill brought by B. in respect of a claim arising upon such lands; and, as the bill did not make him a party, it was *held*, on demurrer, not to be maintainable.

Bill in equity. The bill was, in substance, as follows:

"The bill alleges that the orator, Nathaniel G. Upham, a citizen of Concord, in the county of Merimack, and state of New Hampshire, is the owner of a right in equity of redemption of a certain tract of land, situate on Pleasant street, in Portland, in the state of Maine, known as the John Mussey homestead, and sets forth: That said premises were the property of one Charles Mussey, now a citizen of Painesville, in the county of Geauga, and state of Ohio; and that on the 16th December, 1834, they were conveyed with full covenants of warranty by said Mussey to Robert Boyd, in part consideration of a conveyance by said Boyd to Mussey, his heirs and assigns, of one quarter part of 11,000 acres of land in Stetson, in the county of Penobscot, and state of Maine.

"The bill further alleges that the Stetson land, at the time of said conveyance by Boyd, was under encumbrance, by mortgage, to Amasa Stetson, of Dorchester, Massachusetts; and, to secure the payment of said mortgage, the said Boyd, at the time of said conveyance, reconveyed the Portland tract aforesaid to said Mussey in mortgage, with condition that he would pay or cause to be paid to said Amasa the amount of his encumbrance on said Stetson land.

"The bill further alleges, that afterwards, on the 16th May, 1835, said Mussey conveyed to Oliver B. Dorrance, and Marshall French and their assigns, with full covenants of warranty, said land in Stetson, and that subsequently said Dorrance and French entered into a contract with said Upham, the orator, to convey to him two thousand and twenty-four acres of said land, and received of him in consideration therefor large sums of money, amounting in all to more than seven thousand dollars; and in consideration of a further payment made in behalf of the orator by one Thomas C. Upham, for the remaining sum due on said land, the said Dorrance and French, on the 31st of October, 1837, conveyed said two thousand and twenty-four acres of land to said Thomas C. Upham by deed of warranty, which he, the said Upham, holds in trust for the orator, subject to the payment of the advance so made by said Thomas.

"And the orator further alleges, that said Mussey, contriving and intending to prevent the due application of the Portland tract, which was mortgaged as aforesaid, to secure to said Mussey and his assigns the covenants of warranty of said Stetson land, caused an assignment of said mortgage to be made to one Joshua Richardson, on the 16th November, 1838, which was long after said Mussey's sale of said Stetson land, with full covenants of warranty, to said Dorrance and French, and their assigns; and subsequently, with a similar fraudulent design, caused said mortgage to be further assigned by said Richardson to one Henrietta L. Brooks, a resident and citizen of Portland, in the county of Cumberland and state of Maine, on the 19th June, 1839, both which assignments are duly executed, acknowledged and recorded in the registry of deeds in said Cumberland, and the said Henrietta now holds said mortgaged property as a pretended security for some debt or claim, which she has against said Mussey, and which the orator alleges is wholly disconnected with any terms or conditions of said mortgage, and is fraudulent and groundless, as a claim under the same. Yet notwithstanding this, the said Richardson entered on said premises for condition broken, and to foreclose said mortgage; and said Henrietta has received the rents and profits of said estate from November, 1838, to the time of the filing of this bill, to be applied in payment of said pretended debt, and claims that said mortgage would have been fully foreclosed by her, had she not executed a writing extending the equity of redemption of the same to, and including the date hereof, and that from and after this date all right in equity of redeeming said estate will fully cease.

"The orator further alleges, that on account of the neglect and refusal of said Mussey to relieve the Stetson land of the mortgage to said Amasa Stetson, agreeably to his covenants with said Dorrance and French and his assigns, and from other causes, they, the said Dorrance and French, have been unable to take up said mortgage in order that the orator might derive any benefit by his title aforesaid from them; and the said Dorrance

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

and French, and the said Mussey and Boyd, have severally, since said time, become insolvent, and said Amasa Stetson and his assigns have entered upon said Stetson land, and have foreclosed his mortgage thereon, so that all title derived to the orator from said Mussey, and said Dorrance and French, has utterly failed; and your orator is left remediless for any part of his large advance as aforesaid, unless the said Mussey, or his assigns, shall cause the mortgage of said Portland tract to be applied in discharge of the covenants of warranty of said Stetson land, according to the design of said conveyance.

"And the orator further alleges, as heretofore named in said bill, that he is the holder and owner of the right in equity of redemption of said mortgage from said Boyd to said Mussey, conveyed to the orator by quitclaim deed of said Boyd, duly executed, acknowledged and recorded, and that said Mussey hath not been damnified or injured by any claim or demand by his grantees, or their assigns, of said land in Stetson, on account of his said covenants of warranty of the same, and that the orator, as holder and owner of said equity, on the 20th January inst. made a demand in writing ou said Henrietta L. Brooks, and on this 21st of January inst. on the attorney of said Mussey, for a true account of the sum due, if any, on the mortgage aforesaid, and of the rents and profits of said mortgaged estate, and tendered to each of them the sum of twenty dollars for any nominal breach of said mortgage, and full discharges and releases from the said Mussey's grantees, and their assigns, of all claims against him, the said Mussey and any other person or persons for his or their liability, as warrantor of said Stetson land, as a full discharge and release, so far as concerned said Mussey, of said Stetson mortgage, and of all claim to hold said Portland land therefor; and requested of said Henrietta, and also of the attorney of said Mussey, a full discharge and release of the mortgage on said Portland tract, which tender and releases as aforesaid are still proffered here in court; but the said Henrietta and said Mussey severally refused to discharge said mortgage, and said Henrietta claimed and still claims to hold said mortgaged premises for debts and sums in no manner secured by said mortgage, alleging that said Mussey, on the 19th June, 1839, by his promissory note owed her $800; which, since said time, up to April 16th, 1840, had been reduced by the rents and profits of said mortgaged premises to $666.83, when a new note was given her by said Mussey for that amount, and she claims to hold said mortgaged premises for said sum and the interest thereon, and that said mortgage will be foreclosed by her, if said sum is not paid on this 21st January inst.; and said Henrietta accounts for no rents or profits since said 16th April, 1840, and assigns no reasons why the same have not accrued and been collected by her. All which claims the orator charges to be wholly unsustained, and that all liability or claim of damage by said Mussey or said Henrietta, under said mortgage of said Portland tract, has wholly ceased, and that said mortgage is fully discharged. And the orator prays a decree of this court, requiring said Henrietta to execute and deliver a discharge of said mortgage on filing of the releases specified as aforesaid, and that said Henrietta render a full statement of all profits and income received from said mortgaged premises, and account therefor to your orator; and that he may have such further and other relief in the premises as may seem meet to said honorable court."

To the bill there was a demurrer. The demurrer was argued, at this term, by

F. J. O. Smith, for plaintiff.

Mr. Rand and W. P. Fessenden, for defendant Brooks.

The argument for the defendant was as follows: 1. The complainant has no title to bring this bill. If he claim as owner of the equity of redemption from Boyd, the answer is, that Boyd could only sustain a bill, when the condition was performed. This cannot be allowed. Mussey conveyed with warranty to French and Dorrance. They conveyed with warranty to T. C. Upham. Stetson has foreclosed. T. C. Upham, then, has his claim upon the covenants in Mussey's deed, which passed with the land to him. 2. He cannot claim as the owner of the Stetson land at any time; for he never had any such interest in it as would enable him to bring a suit. The conveyance was made to T. C. Upham. He has not released his claim upon the covenants in Mussey's deed. Even supposing Dorrance and French had given a release, such an instrument would be merely inoperative, for, having conveyed, they could not release the covenants, which had passed to T. C. Upham. T. C. Upham's remedy in the covenants is yet good, therefore, against Mussey. And so would be the remedy of Dorrance and French, if Upham asserted his claims upon the covenants in their deed. 3. It is not averred, that any release from Dorrance and French was tendered or offered. It was merely proposed. And such a paper, if tendered, should be set forth in substance, that the court might judge of its efficiency.

STORY, Circuit Justice. It is not necessary to consider any part of the argument of the plaintiff, which is properly addressed to the merits of the case, because the objections, which have been urged on behalf of the defendants, at the bar, mainly turn upon considerations of a preliminary nature. Two objections have been urged: (1) That there is a want of the proper parties before the court to sustain the bill. (2) That, upon the plaintiff's own showing, he has not made out a sufficient case for relief in equity. The latter objection mainly stands upon this, that the plaintiff has not shown, that, at the time

of the commencement of the present suit, the claim on the mortgage, stated in the bill, was extinguished, or otherwise satisfied; and unless it was, he has no title to relief. The argument is, that the plaintiff claims, as owner of the equity of redemption from Boyd; and unless the condition of the mortgage has been fully performed, the plaintiff has no more right to redeem than Boyd; and npon the facts stated in the bill, the condition has not been performed, nor the incumbrance on the lands in Stetson extinguished. If this were a case at law, the objection might well be maintained; for until an actual extinguishment of the incumbrance, the mortgage would stand good, and the mortgagor could not recover the land mortgaged from the mortgagee, or those in possession under him. But this is a case in equity; and although the language of the bill is very loose, and indeterminate on this head, yet it is sufficiently apparent, that the plaintiff means, by the allegations in the bill, to insist, that the mortgage either has been extinguished or satisfied, or that he is now ready and willing to satisfy whatever may be due thereon. And, besides; admitting that at the commencement of the suit the plaintiff had not absolutely procured a release of the covenants of warranty in the deeds of the Stetson lands by Mussey, and by his grantees to T. C. Upham, and had not absolutely extinguished the mortgage; still, if he is now ready and able to show that it is extinguished, and that he has procured, or can procure, the proper releases from the proper parties of those covenants, I am not prepared to say, that, if this were satisfactorily made out, upon a reference to a master, the plaintiff might not, under the present bill, be entitled to relief. This is often done in cases of bills for specific performance, where the plaintiff could not make a good title at the time of filing the bill; but is able to do so before, or at the hearing. At least, I should hesitate to decide this point upon the present demurrer. And at all events, I should give the plaintiff leave to amend the bill, so as to bring all the facts more completely before the court.

But the other objection is fatal to the bill in its present shape. It is manifest from the bill, that Thomas C. Upham is the legal owner of the Stetson lands under the conveyance to him; and admitting, that he holds the lands, partly in trust for the plaintiff, and partly for himself, as security for advances made by him on account of the purchase, it is plain, that he is a necessary and proper party to the bill. He would be a proper party, as trustee, to a bill brought by his cestui que trust. And he is also a proper party to represent and protect his own personal interest in the Stetson lands. Until his demands are satisfied, he is not compellable to surrender the lands to the plaintiff, nor can the covenants of warranty in the deed to him be deemed extinguished. And if not extinguished, how can the present bill be maintained? It appears to me, therefore, that before this court can proceed further in this case, Thomas C. Upham must be made a party thereto.

There are some other deficiencies in the structure of the bill, which may require to be examined and considered by counsel. But at present, I shall do no more than declare, that the demurrer be allowed, with costs to the defendant, for the want of proper parties; and if the plaintiff wishes, he may have leave to amend; otherwise the bill will be dismissed. Demurrer allowed.

[See Case No. 16,797.]

Case No. 16,797.

UPHAM v. BROOKS et al.

[2 Woodb. & M. 407.] [1]

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

MORTGAGES—CONVEYANCE OF MORTGAGED LANDS—REDEMPTION—INSOLVENCY—RENTS AND PROFITS.

1. Where A. mortgages land to B. to indemnify him against an incumbrance on other land in favor of S., and then B. conveys this other land to C. with covenants against incumbrances, and specially agrees to redeem that one to S., it seems that C. is entitled to indemnity from the mortgaged premises, if he has been evicted or been obliged to pay the incumbrance to S.

[Cited in Huxley v. Rice, 40 Mich. 81.]

2. His right to this is strengthened by being assignee and grantee of A. the mortgagor; and these enable him to recover possession of the mortgaged premises from D. an assignee of B., on paying any debt from B. to D. secured in the mortgage.

3. But when the mortgage of A. to B. has been assigned by B. to D., the land cannot be held by D. against third persons entitled to redeem for any sum due from B. to D. and not included in any mortgage.

4. If B. has become insolvent, and a remedy against him on his covenant would be worthless, yet C. if taking the land mortgaged by A. to B. should obtain releases to B. on his covenants to C. and others, or file a good bond of indemnity against them.

5. D. is trustee of this land to indemnify against the incumbrance to S.

6. In this case, D. in possession must pay rents, when they ought to have been received, whether actually collected or not.

7. Quære, if liable for rents received by a previous occupant.

8. When a debt or liability secured by a mortgage has been discharged by the mortgagor or his assigns, the mortgagee and his assigns are trustees to make a reconveyance, and a court of equity will enforce one.

9. All privies in title and interest, as well as the mortgagor, have a right to redeem.

10. Whether a decree could be entered for any surplus of rents, &c. received, quære.

[Cited in Jewett v. Cunard, Case No. 7,310.]

This was a bill in chancery [by Nathaniel G. Upham] against Mrs. [Henrietta S.] Brooks, and at some stages of the proceeding

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

included Charles Muzzy and Thomas C. Upham. But there having been no service on Muzzy, and no appearance for him, and no question arising as to Thomas C. Upham, the only points made relate to the liability of Mrs. Brooks. The bill was filed 21st Jan., 1842, and claims a right to redeem certain premises, situated in Portland in this state, held by the respondent, and mortgaged by one Robert Boyd to Charles Muzzy, 16th Dec., 1834, and by him assigned to Joshua Richardson, 16th Nov., 1838, and by Richardson to the respondent, 19th June, 1839. It further averred, that the respondent was taking the rents and profits, and refused to account for the same, or allow a redemption of the mortgage. The complainant derived his title in the manner following, as set out in the bill and evidence. [See Case No. 16,796.] Boyd and others on the 16th of Dec., 1834, purchased a tract of land in Stetson, Maine, of Amasa Stetson, and executed to him a mortgage of the same to secure two notes due from them to him, amounting to $13,125, with interest from May 24, 1832, payable, one note July 1, 1835, and one July 1, 1837. On the same 16th Dec., 1834, Boyd conveyed one fourth of this tract of about 11,000 acres to Charles Muzzy, and received in part payment therefor a deed of the premises now in dispute. He then mortgaged the same back to Muzzy as security against the incumbrance on the land in favor of Stetson; and which incumbrance Boyd was to remove, as a condition of the mortgage, and if not doing it, the premises were to be forfeited. On the 13th of May, 1835, Muzzy conveyed the one fourth of the tract in Stetson, purchased by him of Boyd, to Oliver B. Dorance and Marshall French, with the usual covenants of seizin and against incumbrances, and also with this provision in the deed, "subject to a mortgage to said Stetson, which I hereby covenant to redeem or cause to be redeemed." On the 31st of Oct., 1838, Dorance & French conveyed about 2024 acres of the tract to Thomas C. Upham, for and on account of the complainant, for more than $7000 paid therefor by him, which said Thomas, after holding in trust till the filing of this bill, is averred in a supplemental bill to have conveyed to the complainant in Feb., 1842. On the 29th of Jan., 1842, Robert Boyd conveyed to the complainant all his interest in the premises in controversy. It was next averred, that, by neglect of Boyd and Muzzy and Dorance & French, and their insolvency, the mortgage to Stetson was never redeemed by any of them, but the latter entered on the premises for condition broken, and has foreclosed the same. And the complainant is without remedy, unless Muzzy is required or his assignee to apply the premises and their rents, mortgaged by Boyd to Muzzy, to indemnify against the incumbrance to Stetson. It further avers, that the complainant, in order to secure himself from entire loss by the failure of his grantors to redeem the Stetson mortgage, has procured releases of all on their covenants from and under Muzzy, and that he in person, or through his assignees, has never paid any thing on account of this mortgage, or his covenants against the same, and has demanded of the assignee of Muzzy, the respondent, a redemption of the mortgage from Boyd to secure Muzzy against the Stetson mortgage, and his covenants in his subsequent conveyances. Finally, it alleges, that the respondent is combining with Muzzy to prevent the complainant from redeeming the premises, or obtaining any indemnity for the loss of his land, taken to satisfy Stetson's mortgage; that a remedy by a suit on the covenants against Muzzy would be worthless, as he is insolvent; and prays that the complainant be allowed to redeem the mortgage by means of the releases on Muzzy's covenants from all the grantees, including himself; and that Mrs. Brooks be made thereupon to yield up the premises and account for all the rents received by her and her assignees. It appeared in evidence. that Joshua Richardson, 19th Nov., 1838, gave a written notice to foreclose this mortgage after the assignment to him on the 6th of said November, and that, after his assignment of it to Mrs. Brooks, on the 19th of June, 1839, and before the three years for redemption had expired, she agreed with the complainant to postpone the time till the 21st day of January, 1841; and before the time expired, the complainant demanded an account of the rents, and an exhibit of the claims and payments by the respondent, which were refused, and made a tender of $20 to her to cover any nominal breach of the mortgage.

James Bell, for complainant.
Mr. Rand, for respondent.

WOODBURY, Circuit Justice. It may not be amiss to ascertain, first, the rights of the respondent in this case. She is not a mortgagee of these premises, to secure any debt due to herself; though both she and Richardson claim that Muzzy was indebted to them; and probably he made the assignment of Boyd's mortgage to them, with a view of furnishing some security for their claims. In this state of things, as regards third persons, it is well settled, that she has no rights in the mortgage or the mortgaged property beyond the debt or liability named in it in behalf of Muzzy. Loring v. Cooke, 3 Pick. 50; 2 Har. & J. 412; 1 Har. & J. 465; 2 Pick. 520, note; 1 Fairf. 161. And though in England under the doctrine of tacking a third mortgage to a first, the third may gain some advantage over the second (Com. Dig. "Chancery," 4, A, 10; 2 Vern. 691; 2 Story, Eq. Jur. § 1023, note; 2 Ves. Jr. 376), and though a pledge or assignment of a mortgage to C. held by B. against A. might raise an equity in C. to secure his claims against B., or

amount to what is called an "equitable mortgage" (4 Kent, Comm. 180; 2 Mylne & K. 417; 2 Ves. & B. 79; 12 Price, 597; 19 Ves. 209; Russel v. Russel, 1 Brown, Ch. 269), yet this could not avail as against A. or third persons who have before acquired interests in redeeming the original mortgage (4 Kent, Comm. 175; 1 P. Wms. 496; 2 Vern. 691, 764; 1 Ves. Sr. 123; 4 Ves. 121; 2 Wash. [Va.] 233; 2 Johns. Ch. 443; 2 Story, Eq. Jur. § 1010). Her rights are the same, then, here as Muzzy's, the original mortgagee. She is his assignee, and subject to all the equities against him. U. S. v. Sturges [Case No. 16,414]; Hills v. Eliot, 12 Mass. 26.

In the next place, what are the rights of the complainant? First, they are all which belonged to Boyd, the original mortgagor of the premises, he having released all his to N. G. Upham. In that position, the complainant is entitled to have the mortgage cancelled or to redeem it, on paying the notes to Stetson, which were the nominal condition, or relieving Muzzy, by releases of his covenants, from any risk and liability on account of those notes. Upham v. Brooks [Case No. 16,796]. In either event in equity, the sole design of the original mortgage will be accomplished, and the premises embraced in it ought to be restored to Boyd, the mortgagor, or rather to the complainant, who is now Boyd's assignee, and holds the equity of redemption. The right to redeem is indispensable from the contract, and is to be favored. 2 Story, Eq. Jur. § 1019. It belongs not only to the mortgagor, but his assigns, and indeed all privies in title or interest. Id. § 1023; Co. Litt. 208, note. Here, both of the former pre-requisites to redeem seem, from the evidence, to have been virtually complied with or performed by Upham as holder of that equity. He has let Stetson take the land in payment of the notes; and, till the contrary appears, it is prima facie sufficient in value to satisfy them. It is of no consequence how the debt is extinguished, if it be done. 1 Serg. & R. 312; 2 Burrows, 969; Hatch v. White [Case No. 6,209]; 1 Johns. 580. And he has, likewise, procured and tendered to Muzzy, or, in other words, to his assignees, releases of Muzzy from all liabilities on his covenants on account of the existence of the Stetson mortgage; and to secure him against these was the object, and indeed the whole gist or essence of the mortgage from Boyd. If any releases from any grantees are omitted, they should be specified, and then obtained, or a good bond of indemnity filed against any damage to Muzzy from his covenants in such cases.

Should these doings be regarded as an entire extinguishment of the mortgage debt or liability, rather than an equitable transfer of it to the complainant, then, as purchaser of the equity, he seems entitled to the premises. And, but for the contrary appearance of the records, he might perhaps rest safely on his rights to the premises, without a reconveyance. 14 Mass. 101; 2 Mass. 493; 4 Kent, Comm. 195. But the records standing otherwise, he seems entitled to a reconveyance or release. The mortgagee or his assigns, after a discharge of the debt or liability, is regarded as a trustee for the mortgagor and his assigns, and holds the property, if at all, under an obligation to reconvey, and thus fulfil that resulting trust. Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 441; Waltham Bank v. Inhabitants of Waltham [10 Metc. (Mass.) 334]; Bronson v. Kinzie, 1 How. [42 U. S.] 318.

In the second place, these rights of the complainant, in his capacity or character of the owner of the equity of redemption, are fortified by his position as one of the grantees of Muzzy under covenants by him against incumbrances. Having been evicted by Stetson under the prior incumbrance to Stetson, he has a right as against Muzzy to indemnity, on Muzzy's covenants. In order that Muzzy might make such indemnity in such an event, these very premises were mortgaged to him by Boyd, and should be applied by him to that object. In equity this can be enforced. The covenants run with the land (2 Johns. 1; 4 Mass. 408), and the remedy back on Muzzy is by the grantee evicted in the first instance (1 Conn. 244; 1 Fairf. 91); and that would be useless, since the insolvency of Muzzy, if a specific application of these premises was not made to relieve those injured by Stetson's incumbrance as originally contemplated.

Again, if the removal of that incumbrance by paying it with the land, or getting releases from the covenantees on account of it, transfers the rights to it in equity to him who does this, then the complainant having done it, is in this way virtually the holder of the debt, secured by the mortgage to Muzzy, and is in equity entitled to the mortgaged premises. 5 N. H. 432; 8 Mass. 557, 558; Upham v. Brooks [Case No. 16,796]; 2 Burrows, 978, 979; 4 Johns. 41; 2 Story, Eq. Jur. 291, note; 5 Johns. Ch. 590; Waltham Bank v. Inhabitants of Waltham [10 Metc. (Mass.) 334]. But it is not necessary to press that view of the case to a definite decision.

Finally, in another view still of the facts, the complainant is strengthened in his claim on equitable grounds. Muzzy not only had these premises as security against Stetson's incumbrance, but was bound in honesty and good faith to apply them in discharge of it, or to relieve his own and the subsequent grantees from loss through that incumbrance. Beside this, any other course would be injurious to Boyd, who furnished them, and who, if they are not so applied, would lose them, and still be liable on his own covenants. So it would be an advantage or gain to Muzzy never intended; as he would obtain and use these premises without ever paying any thing for them, and would apply them to discharge his own debts rather than the incumbrance of Boyd; and being insolvent, would never pay any thing for them even to subsequent grantees on their covenants

against him. Until Muzzy paid something on account of the Stetson mortgage, he would be entitled to only nominal damages (12 Mass. 304), and $20 was tendered here to cover that. It would, therefore, be no very forced view to consider Muzzy in equity as trustee of these premises for the purpose of discharging the Stetson mortgage, or relieving any grantee of that land from loss by means of the Stetson mortgage. 2 Story, Eq. Jur. § 730; 6 Johns. Ch. 398; Flight v. Cook, 2 Ves. Sr. 619; 2 Brown, Ch. 321. Much less would this be a strained construction, when Muzzy not only promised verbally to indemnify the grantees against the Stetson mortgage, and covenanted generally against all incumbrances, which of course included Stetson's; but made a special and additional covenant in his deed to Dorance & French, "to redeem or cause to be redeemed" that mortgage. Not doing this, he has, therefore, caused to the complainant the loss of the land he obtained from Muzzy; and a specific execution of that trust by Muzzy, or by those to whom he has assigned the premises, seems demanded by general considerations of justice no less than his express contract. On the power to enforce this specific performance, see U. S. v. Sturges [Case No. 16,414], and cases there cited.

Under these different aspects of the case, all adding force to the equities of the first view of it, we think the plaintiff entitled to a redemption of the Boyd mortgage. He must file the releases of the several grantees, as well as the evidence of Stetson's foreclosure, and then he will be entitled to a reconveyance or release from the respondent. The offer to redeem was properly made to her, as assignee and in possession. Wing v. Davis, 7 Greenl. 33; 7 Johns. Ch. 147. Should any of the grantees be shown before the master not to have released, the plaintiff must file a satisfactory bond of indemnity to save the respondent and Muzzy harmless from the covenants in such case. In respect to the account required and to be rendered by the respondent, the master is to consider the evidence already in the case, concerning the rents received, since Muzzy or Richardson took possession of the premises under the Boyd mortgage. He is authorized to examine the respondent and others under oath as to the sums received for rents, and the application of them, and as to any taxes paid, or permanent improvements made by them. 10 Pick. 398; 4 Kent, Comm. 167, 168, and note; 2 Burge, Col. Law, 205. If the premises were at any time not rented from negligence, or were occupied by the mortgagees or their assigns, he will compute a reasonable rent during such periods. Coppring v. Cooke, 1 Vern. 270; Gordon v. Lewis [Case No. 5,613]; 5 Pick. 159; Jenkins v. Eldredge [Case No. 7,268]. He will allow interest on each side from the time of any payments made, or receipts, or dues of certain amounts, from either party. 10 Pick. 398; Finch v. Brown, 3 Beav. 70. And after his report is made, unless the parties agree upon the same, the court will decide what amount the respondent is liable to pay for rents and profits. Some of the cases look like holding the last occupant liable for all the previous rents, probably because he is in possession of the trust property, and should not take it without being responsible for every thing chargeable on it. Whitney v. M'Kinney, 7 Johns. Ch. 144; 2 Cow. 297; 2 Johns. 612; Pow. Mortg. 152, 904, 953. If the responsibility is regarded rather as personal, it would seem unjust to extend the liability beyond the length of time the respondent herself has occupied or received rents. So if the entry by the mortgagee be merely to foreclose, and not to take the rents and profits towards extinguishing interest on the debt, the liability would seem to be limited to the actual receipts or actual occupation, and to the time since such an entry. Gibson v. Crehore, 5 Pick. 159. If it should turn out, that a balance is due from the respondent to the complainant on account of rents and profits, a still further question may arise, whether a judgment and execution for it can be given in this bill to redeem. Under some statutes it has been held, that this cannot be done in some states, but the party is obliged to sue at law for it. Taylor v. Weld, 6 Mass. 268. But it may be in this bill and in this court, that a judgment for it can be asked and sustained on general principles of equity, without reference to any particular statute. Or that the statute of this state is broad enough to warrant such a judgment; or that the powers vested in the courts of Maine are broad enough, and should be executed by us. On this last see Smith v. Babcock [Case No. 13,009]; Clark v. Sohier [Id. 2,835].

UPPERMAN (MOCKBEE v.). See Case No. 9,687.

Case No. 16,798.

UPTON v. BURNHAM.

[3 Biss. 431;[1] 8 N. B. R. 221.]

District Court, N. D. Illinois. Jan., 1873.

CORPORATIONS — LIABILITY OF STOCKHOLDERS — WHO ARE STOCKHOLDERS—ASSIGNMENT OF SHARES.

1. A provision in the by-laws of a corporation requiring transfers of its capital stock to be made upon its books may be waived by the company, and if waived at the request of a purchaser of the stock, or with his assent, he becomes a stockholder, and directly liable for future assessments.

[Cited in Bank of Commerce v. Bank of Newport, 11 C. C. A. 484, 63 Fed. 901.]

[Cited in American Nat. Bank v. Oriental Mills, 17 R. I. 558, 23 Atl. 795.]

2. Slight evidence of mutual recognition of the relation of stockholder may establish the legal position and liability.

[Cited in brief in Richmond v. Commercial Hotel Co., 106 Ill. 444; Basting v. Northern Trust Co. (Minn.) 63 N. W. 723.]

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

3. A purchaser of stock taking an assignment in blank may, nevertheless, be liable for future assessments.

In bankruptcy. Motion for a new trial, after verdict for an unpaid subscription to stock, in a suit by the assignee in bankruptcy. The defendant, Telford Burnham, in the spring of 1871, purchased of one M. F. Hale fifteen shares of stock, of $1,000 each, in the Great Western Insurance Company of Chicago, upon which only twenty per cent. had been paid. The certificates were what were called "non-assessable," having those words stamped across their face, and contained the further clause that they were only transferable upon the books of the company upon surrender of the certificate, and were indorsed by Hale in blank, and so delivered. Burnham never had the certificates transferred to him on the books of the company, but about the time of taking the certificates he inquired of the president of the company concerning their value, and stated that he did not wish them transferred to him, as he wished to avoid any liability. The insurance company became insolvent at the time of the fire of October 9th, 1871, but afterwards advertised that it would resume business, and the defendant, soon afterwards, going to the office of the company to inquire about its condition, was asked by one of the officers if he did not own some stock, to which he replied that he had taken some in a trade, but it had never been transferred to him; and on the request of the officer he showed him the certificate, from which a clerk in the office took a memorandum and entered defendant's name as a stockholder on the stock register, which they were then making up, all the books and papers of the company having been destroyed. The company afterwards was adjudicated a bankrupt on creditors' petition, and Clark W. Upton appointed assignee by the court, and an assessment was made upon the stockholders for the unpaid balances on their respective stock.

Boutell & Waterman, for assignee.
Hitchcock, Dupee & Evarts, for defendant.

HOPKINS, District Judge. Adhering to the views I expressed upon the trial, that the mere assignment of the certificate did not of itself constitute the assignee a stockholder, or create a liability upon the part of such transferee to pay the company the assessment in controversy, in support of which see Humble v. Langston, 7 Mees. & W. 517; Helm v. Swiggett, 12 Ind. 194; Mann v. Currie, 2 Barb. 294; Worrall v. Judson, 5 Barb. 210; Adderly v. Storm, 6 Hill, 624; Marlborough Manuf'g Co. v. Smith, 2 Conn. 579; and also that an equitable holder of stock is not liable to the corporation for stock assessments, Newry Ry. Co. v. Moss, 14 Beav. 64, still, I think I erred in directing a verdict for the defendant instead of submitting to the jury the question as to whether the conduct of the defendant was not equivalent to a request or assent on his part to the entry of his name upon the stock book as a stockholder, and also whether the company had not, by entering his name as a stockholder in the stock register, given him the position of a legal member, and recognized the transfer to him as sufficient, notwithstanding its want of conformity to the formal transfer contemplated by its by-laws. There was some testimony given tending to show such facts which, I think, should have been left to the jury.

The provision requiring the transfers to be upon the books was for the benefit of the company, and the company could waive it, and if waived at defendant's request or with his consent, express or implied, he would be liable directly to the company for future assessments.

The registry of his name upon the books as a stockholder gave him all the rights of a stockholder, the right to vote and participate in dividends, and converted that which was before an equitable into a legal relation, upon which his liability for assessments would attach. New Albany R. Co. v. McCormick, 10 Ind. 499. A new certificate was not necessary to constitute him a stockholder. Chester Glass Co. v. Dewey, 16 Mass. 94; Chouteau Spring Co. v. Harris, 20 Mo. 382. At the time of the assessment he was a registered stockholder, and as that gave him certain rights and benefits in the company, the law presumes that the registry was at his request. Tompkins v. Wheeler, 16 Pet. [41 U. S.] 106.

The assignment of the certificate with notice to the company conferred protection as against creditors of the assignee, and restrained the company from transferring or consenting to the transfer to any other party without incurring liability to him. Black v. Zacharie, 3 How. [44 U. S.] 483.

It was the duty of the defendant, as between him and the assignee, to pay all assessments after the transfer, although not registered. Brigham v. Mead, 10 Allen, 245; Shaw v. Rowley, 16 Mees. & W. 809; Walker v. Bartlett, 36 Eng. Law & Eq. 368; Huddersfield Canal Co. v. Buckley, 7 Term R. 36.

The cases hold that upon an assignment good as between the parties, this duty attaches. In Hall v. U. S. Ins. Co., 5 Gill, 484, it is held that when a purchaser of a stock certificate paid an assessment, without being registered as required by the charter, he was estopped from setting up such want of registry in an action afterwards brought to collect another assessment; that in paying he had acknowledged his obligation, and was liable to the company as a stockholder without being registered.

In Chittenham & G. W. Ry. Co. v. Daniels, 7 Eng. Ry. Cas. 728, it is also held that a purchaser may be estopped by his representations and made liable for calls before his name is actually substituted upon the registry. See also pages 735 and 870 for other

cases to same effect, and Eames v. Wheeler, 19 Pick. 442.

The doctrine seems to be well settled that a certificate to a party, or registry of his name upon the stock register, is not absolutely necessary to constitute the legal relation or privity. The purchaser may waive it and be held liable without either a certificate or registry of his name. The corporation may waive the formal transfer and register the purchaser's name without any other transfer than the assignment in blank of the certificate.

In view of these principles and the equitable obligations of the purchaser to pay subsequent assessments, slight evidence of mutual recognition by the corporation and purchaser of the relation of stockholder might be sufficient to change the equitable relation into a legal one, so as to make the purchaser liable directly to the company, and I am not prepared to say that the jury in this case might not have been warranted, upon the facts shown, in finding the defendant a stockholder, notwithstanding that a certificate of stock had never been issued to him.

The company after registering his name, as such, would be estopped from setting up that the formal transfer was not made, and after having registered his name it is very questionable whether it could collect of the original holder future assessments, or be allowed to question the sufficiency of the assignment. The company having accepted and substituted another party as stockholder, the liability of the original subscriber ought to terminate with his rights as stockholder. Shortridge v. Bosanquet, 17 Eng. Law & Eq. 331; Ex parte Bagge, 4 Eng. Law & Eq. 72; 1 Redf. R. R. § 41, and note. In this case the provision in regard to the mode of transfer is in the by-laws and not in the charter, and it may be that its observance is not as indispensable to vest the title in the assignee as it would be if it were in the charter. Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120; 1 Redf. R. R. § 42.

Certain principal facts were proven, not admitting of doubt or controversy, while certain others were proven, not of themselves decisive, but as forming the foundation of inferences or conclusions, which inferences or conclusions were for the jury to find. I take it, if the jury should find that both parties waived a formal transfer, they would be bound by such waiver.

In view of these considerations I think a new trial should be granted.

NOTE. At the next trial of this case, at the May term, 1873, before Blodgett, J., and a jury [Case No. 16,799], a verdict was rendered against the defendant for the unpaid balance on his stock, $12,000 and interest. The case is now pending in the supreme court. [Case unreported.] See, also, British & Am. Tel. Co. v. Colson, 6 L. R. Exch. 108, and Hebbs' Case, 4 L. R. Eq. 9, and cases there cited, where the defendants were held not stockholders, as having never duly accepted the allotment of shares. [See Case No. 16,801.]

Case No. 16,799.

UPTON v. BURNHAM.

[3 Biss. 520; [1] 5 Chi. Leg. News, 485.]

District Court, N. D. Illinois. May Term, 1873.

LIABILITY OF STOCKHOLDER FOR UNPAID BALANCE—NON-ASSESSABLE STOCK—SUBSTITUTION OF STOCKHOLDER—TRANSFER OF STOCK—ASSESSMENT BY COURT—INTEREST.

1. Under the Illinois statute a stockholder is liable to the creditors of the company for any unpaid balance upon his stock.

2. Though the words "non-assessable" written across the face of the stock certificate might constitute a valid contract as against the company, they are not binding as against the assignee.

3. If the company accept as a stockholder a person to whom the stock has been transferred in blank, he then becomes liable as a stockholder.

[Cited in Re South Mt. Consol. Min. Co., 5 Fed. 405; Bank of Commerce v. Bank of Newport, 11 C. C. A. 484, 63 Fed. 901.]

4. A provision that the stock is transferable only on the books of the company is for the company's protection, and a provision which they can waive, which they do by accepting such transferee. Entering his name by the company upon their books is such waiver as estops them from claiming of the original stockholder.

[Cited in Basting v. Northern Trust Co. (Minn.) 63 N. W. 723.]

5. An order of the court requiring each stockholder to pay a call on his stock within a specified time, is binding upon all the stockholders, whether they receive actual notice or not.

6. A stockholder is liable for interest on the call from the time it was payable.

In bankruptcy. This was an action on the case by Clark W. Upton, assignee of the Great Western Insurance Company, bankrupt, to recover eighty per cent. unpaid on $15,000 of stock held by the defendant. The defendant claimed that though he was the equitable, he was not the legal owner of the stock, which he insisted had never been regularly transferred to him, and therefore he was not liable upon it. The facts appear in the charge, and in the case of Upton v. Burnham [Case No. 16,798], and Same v. Hansbrough [Id. 16,801].

Boutell & Waterman, for plaintiff.

Hitchcock, Dupee & Evarts, for defendant.

BLODGETT, District Judge (charging jury). This suit is brought by the plaintiff, as assignee of the Great Western Insurance Company, to collect a balance of eighty per cent., alleged to be due upon stock in that company held by the defendant.

The undisputed evidence in the case seems to be this: The company issued to one M. F. Hale its certificate for one hundred and fifty shares, of $100 each, of its capital stock upon which twenty per cent. has been paid, and eighty per cent. is unpaid, the certificate

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

having the words "non-assessable" printed across its face. This stock thus issued to Hale was transferred to one Gunn, by indorsement in blank and delivery, and by Gunn it was transferred, in the same manner, to the present defendant, some time in the spring or early part of the summer of 1871.

The defendant did not present this certificate to the officers of the company for the purpose of having it transferred to him upon the books of the company. The by-laws of the company, it is conceded, required that the stock should be transferred upon the books of the company. About a month after the great fire in Chicago, in October, 1871, he called at the office of the company with the certificate in his possession, and while there, stating to the officers of the company that he held such a certificate, was asked to show it to the stock clerk, as he was called, and that clerk, upon the exhibition of the certificate to him by defendant, entered the name of the defendant as a stockholder upon the books of the company, taking a memorandum of this certificate, and describing it correctly upon the stock-books.

The charter and by-laws of the company, and various acts of the legislature of Illinois, in regard to the liability of the stockholders of this company, have been put in evidence before you, and they show as a matter of law and fact, that the stockholders of this company are liable for the payment of the eighty per cent. unpaid upon their stock where only twenty per cent. has been paid; or, in other words, that any stockholder is liable for any portion of the unpaid stock held by him.

It is not necessary that I should recapitulate these various items of proof, further than to state to you that they show, not only the power of the company to compel the stockholders to pay what is unpaid upon their stock, but also the duty of the stockholders so to do; and I instruct you as a matter of law, that notwithstanding the words "non-assessable," written or printed across the face of stock certificates issued by the company, still the stockholders are liable to assessment, and are liable to be compelled to pay whatever remains unpaid upon their stock whenever it becomes necessary that such payment should be made for the purpose of discharging the debts of the company. As between the company and its stockholders this contract or agreement, expressed upon the face of the certificate, might be binding; but where necessity arises to collect the assets of the company for the purpose of discharging its liabilities, then the obligation of the stockholders to pay whatever remains unpaid arises.

In this case the company has been adjudicated a bankrupt, and large claims have been proved against it, and it becomes the duty of the assignee, as an officer of the court, to collect from the stockholders whatever remains unpaid.

The question in this case is whether this defendant was a stockholder at the time this suit was brought against him, or at the time this company was adjudicated a bankrupt (February 6, 1872), so as to make him liable upon this certificate.

It is claimed, on the part of the defendant, that he never assented to the entry of his name upon the stock books of this company; that he never became a member of the corporation, and liable to assessment under its by-laws and charter; that he bought this stock upon the market with the intention of transferring it to some other person, as it had been transferred from the original holder to him, and that he has done no acts which make him liable to the company or its creditors.

I feel bound to instruct you, that if you find from the evidence that the company assented to or accepted the defendant as a stockholder, knowing that he was the owner of the stock in question, then he is liable to be called upon for the unpaid portion of that stock. The by-laws and regulations of the company which provide that the transfer of stock should be made only upon the company's books, were made by the company for its own protection, and is a condition which they could waive. It was for them to say whether they would waive it or not. So if it appears to you from the evidence that the company has assented to accept Mr. Burnham, the defendant in this case, as a stockholder, by placing his name upon the books, whether he requested them to do so or not, or whether he even assented, if they knew as a fact that he held stock, and the company assented to his becoming a stockholder by placing his name upon the stock books, such act is a waiver by the company of the clause in the by-laws and certificate which required the transfer to be made only on the books, and from that time forward his liability as a stockholder is fixed.

I will further instruct you that the entry upon the books is evidence of waiver. And the entry of the defendant's name upon the books in place of the original stockholder's, is such an act as will bind the company, and estop it from collecting from the original stockholder.

I further instruct you that the entry of the defendant's name on the books of the company, he being at the time the acknowledged owner of the stock, is an act on the part of the company accepting the defendant as a stockholder. The holder of a stock certificate by assignment and blank transfer, becomes thereby clothed not only with all the rights, but with all the obligations of a stockholder.

The record evidence introduced shows that after the adjudication in bankruptcy the court made an order directing all the stockholders to pay the amount of the call made

upon them within thirty days from the entry of the order. This order was entered on the 14th of July, and the evidence shows that notice was duly forwarded to each stockholder, notifying them of this call. Whether in all cases such notice was received or not, I do not deem material, because I instruct you that every stockholder in this company is bound to take notice of what the court does in winding up the affairs of the company. The order of the court was that all the stockholders should pay on or before the 15th of August.

If you find the defendant was a stockholder, in the light of the evidence and the instructions I have given, you will then compute the interest upon the unpaid portion of the stock, eighty per cent., held by him since the 15th of August, which will be the amount of the verdict.

I am asked to instruct the jury to find specially as follows: "The defendant asks that the jury be instructed to find specially, whether the defendant ever authorized or assented to the transfer on the books of the company." As I do not deem this question material, I will not submit it for a special finding. Also, "whether the defendant waived a formal transfer, and whether there was any transfer so as to make him a stockholder." This is also deemed immaterial, and I decline to submit it for a special finding.

Verdict for the plaintiff for $12,552.

NOTE. This case is now pending in the supreme court, on appeal. [Unreported.] It is held that one whose shares have been forfeited by the company for non-payment of calls, is not a stockholder, nor liable to the creditors of the company, even though the debt was contracted before the stock was forfeited. Mills v. Stewart, 41 N. Y. 384.

The court of appeals of New York, in a case where there had been no legal transfer of the stock, and where the statute provided that stock should be transferred only in a certain manner, has lately held that such provisions are for the benefit of the company and may be waived, and that where an equitable transferee is recognized as the owner, he becomes the stockholder in place of the original owner. Isham v. Buckingham, 49 N. Y. 216.

UPTON (ELLIOTT v.). See Case No. 6,547.

Case No. 16,800.

UPTON v. ENGLEHART.

[3 Dill. 496;[1] 3 Ins. Law J. 743; 8 West. Jur. 345.]

Circuit Court, D. Iowa. May Term, 1874.

CONTRACT TO PURCHASE STOCK IN INCORPORATED COMPANIES—DEFENCES—FRAUD IN PROCURING SUBSCRIPTION.

1. The three-fold relation of stockholders in an incorporated company to the corporation, to other stockholders, and to the creditors of the corporation considered.

2. The effect of fraud practiced by an agent of a company to induce a person to subscribe for stock therein, considered, and the doctrine asserted that as between the company and the person thus induced by fraudulent and deceptive statements to take the stock therein, the same principles apply as would apply to like contracts between individuals.

[Cited in Florida Land & Imp. Co. v. Merrill, 2 C. C. A. 632, 52 Fed. 80.]

3. In such a case the company cannot retain any benefit which it has obtained through the fraud of its agent, and it is ordinarily no answer to the claim of a person to be relieved against a contract procured from him by fraud, to show that by more inquiry he could have learned the truth.

4. Applying this rule it was held that there might be fraudulent representations concerning the laws of another state and the provisions of the charter of the company granted therein.

5. A contract to purchase shares induced by fraudulent representations or concealment is not void, but only voidable—that is, it is valid until disaffirmed, and not void until affirmed. And where the rights of creditors are concerned the contract must be repudiated promptly on discovering the fraud, or it will be held binding as to them.

[Cited in Foreman v. Bigelow, Case No. 4,934; Merrill v. Florida Land & Imp. Co., 8 C. C. A. 447, 60 Fed. 21.]

6. How repudiated, and when, see cases cited in the opinion, and see note, and Upton v. Tribleock [91 U. S. 45].

[Cited in Duffield v. Barnum Wire & Iron Works, 64 Mich. 301, 31 N. W. 314; Weisiger v. Richmond Ice Mach. Co., 90 Va. 798, 20 S. E. 362.]

On demurrer to second special defence pleaded in the answer. The action is by the plaintiff [C. W. Upton] as assignee in bankruptcy of the Great Western Insurance Company of Chicago, to recover of the defendant [Andrew Englehart] the amount due on a contract by which the defendant in September, 1870, became, as it is alleged, the purchaser of five shares of stock in that company. The petition sets out that the contract to purchase stock was verbal and that the company delivered and the defendant accepted certificates for five shares thereof of $100 each; that the company sustained heavy losses by the Chicago fire; that on the 6th day of February, 1872, it was adjudicated a bankrupt by the United States district court, for the Northern district of Illinois, which subsequently, July 5th, 1872, ordered that the assignee collect the entire amount unpaid on the capital stock of the company. The plaintiff has accordingly brought in this court numerous actions against persons alleged to be stockholders in the company, residing in this state, and they make substantially the same defences.

Nourse, Kauffman & Holmes, for plaintiff.

E. W. Eastman, H. B. Fouke, and J. L. Frazier, for defendant.

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

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

DILLON, Circuit Judge. Whoever becomes a stockholder in an incorporated company sustains a three-fold relation: First, to the artificial person called the corporation. Second, to the other stockholders in the same company, or in other words, his associates or partners, who by force of statute are clothed with corporate capacity. And third, to the creditors of the corporation. It is essential to bear these several relations in mind in determining the questions here presented. The capital is supplied by the shareholders, who alone participate in the gains or pecuniary advantages which may accrue from the carrying on of the corporate enterprise. The shareholders are the real parties in interest; the incorporating statute empowering them to contract and be contracted with through the medium of a corporate representative.

In the case before us, the plaintiff sues as the assignee in bankruptcy of the corporation, and therefore can enforce not only the rights which the corporation could have enforced if insolvency or bankruptcy had not supervened, but the rights of general creditors as well.

It appears by the pleadings, that the company was created by a charter of the state of Illinois, and that prior to the alleged contract with the defendant, it re-organized under the general incorporation act of that state (Gross's St. Ill. c. 53, p. 352). This act authorizes persons to associate themselves as an insurance company and adopt a charter and file the same in the office of the auditor of public accounts and publish notice thereof. This officer is to cause an examination to be made as to whether the required amount of capital in money, stock and bonds has been raised; and each company is required to make an annual statement of assets and liabilities, which is to be included in the auditor's regular report.

The section of the answer to which the demurrer under consideration relates, avers that the company sent an agent to Iowa to procure its stock to be taken, and sets forth the facts intended to show that this agent made false and fraudulent representations of a material character to induce the defendant to agree to become a stockholder therein. Among other representations one was that $20 per share would be full payment for the stock and that the remaining eighty per cent was "non-assessable." And such was the defendant's written agreement with the company set out in the answer, dated September 14, 1870. But the certificate of stock which the defendant received, though marked "non-assessable," does not otherwise state that the stock is fully paid for or that no more than the twenty per cent therein mentioned is to be called in.

The answer alleges that the purchase of the stock was induced by the fraudulent acts and representations of the agent of the company and that the "defendant is in no way bound thereby, and that he long ago repudiated said purchase by refusing to pay any more" of the installments.

And here the plea may be considered in a double aspect: First, does it set forth a sufficient answer if the action were one by the company before insolvency to enforce payment for the stock? Second, does it set forth a sufficient answer to such an action when brought in the interest of creditors of the company after it has failed?

Assuming that the statements in the plea are true, it appears that the defendant was induced to agree to become a shareholder by false and deceptive statements of the agent, and even of the company itself as shown by the character of the certificate it issued. The effect of fraud practised to induce a contract to subscribe to stock or purchase shares is, as respects the company and the person deceived, the same as in other contracts, with the modifications arising from the peculiar nature of the transaction as to repudiating or rescinding the contract, which will be adverted to further along. Speaking of contracts to become a shareholder, induced by the fraud of the company or its agents, Lord Romilly says: "Contracts of this description between an individual and a company, so far as misrepresentation or suppression of truth is concerned, are to be treated like contracts between any two individuals. If one man makes false statement which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated where a company makes a false statement which misleads an individual." Directors, etc., of Central Ry. of Venezuela v. Kisch (1867) L. R. 2 H. L. 99, 125; Smith's Case, 2 Ch. App. 604, 609.

The effect of agreements to purchase shares in companies has, of late years, been oftentimes before the courts of Great Britain and the general principles of law are well settled.

The rule sanctioned by the house of lords is that "where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations or by fraudulent concealment of the directors, and the directors seek to enforce the contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agent." Oakes v. Turquand (1867) L. R. 2 H. L. 325, 344, in which Lord Chancellor Chelmsford approves Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 145, decided on general principles. This principle has been so often decided and is so well established that it is not necessary to cite the many cases upon the subject.

The fraudulent misrepresentation or concealment must of course relate to material facts, but if it does, and has induced a person using reasonable caution and judgment, to enter into a contract to purchase shares, it is ordinarily no answer to his claim to be relieved of the contract that by more vigilance he might have discovered the deception. This point is expressly adjudged by the house of lords in Directors, etc., of Central Ry. Co. of Venezuela v. Kisch (1867) L. R. 2 H. L. 99.

In the case just cited, Kisch sought to be relieved of his contract to purchase shares in the railway company, and it was objected that he had "no ground of complaint because he had an opportunity of ascertaining the truth of the representations contained in the prospectus, of which he did not choose to avail himself; that in his letter of application to purchase shares he agreed to be bound by all the conditions and stipulations contained in the memorandum and articles of association of the company, which, if he had examined, would have given him all the information necessary to correct the errors and omissions in the prospectus." To this position the lord chancellor made answer: "But it appears to me that when it is once established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him he might have known the truth by proper inquiry." He has a right to retort upon his objector, "You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty." The same principle was announced in the same case by Lord Cranworth. L. R. 2 H. L. 121. See, also, Mead v. Bunn, 32 N. Y. 275, 280; McClellan v. Scott, 24 Wis. 81, 87. There seems to be some difference in opinion, however, on the point whether as respects creditors the purchaser of shares is not bound to take notice of the provisions of the articles of association. Oakes v. Turquand, supra; Reese River Silver Min. Co. v. Smith, L. R. 4 H. L. 64, 72; Downes v. Ship, L. R. 3 H. L. 343.

Considering that the transaction between the defendant and the company's agent set up in the plea took place in a state different from that in which the company was organized, and that its charter was on file in the auditor's office in Illinois, it is our opinion that it would be possible for the agent of the company to make fraudulent representations concerning the laws of Illinois and the charter of the company, and that if he did represent that, by those laws and the charter, eighty per cent. of the stock was "non-assessable," and the defendant relied upon this, he is entitled, in the absence of laches and acquiescence, as against the company, to resist payment of this eighty per cent. In this connection, it may be mentioned, that it is the duty of a person who has been fraudulently drawn into the purchase of shares to take prompt measures on discovering the fraud, to repudiate or rescind the contract. And the reason for this is two-fold: (1) Because his remaining in the company may mislead others into becoming members of it upon the credit of his name, when otherwise they would not do so. (2) Because it may likewise induce others to deal with it and give credit to it for the same reason. Directors, etc., of Central Ry. of Venezuela v. Kisch, supra; Bwlch-Y- Plwm Lead Min. Co. v. Baynes, L. R. 2 Exch. 326; Ashley's Case, L. R. 9 Eq. 263; Scholey v. Central Ry. Co. of Venezuela (bill by shareholders against company), Id. 267, note, decided by Lord Chancellor Cairns. In the case last cited the lord chancellor said: "He certainly thought that the court would be most careful to see, in a company going on and trading, in which the rights of shareholders and others varied from day to day, that a person coming to complain of misrepresentations of this kind, and coming to avoid a voidable contract came within the shortest limit of time which was fairly possible in such a case." It results from the foregoing considerations that if this were an action by the company for calls, or a suit by the defendant against the company to rescind the contract for the purchase of stock, and the facts were as set out in the answer, the law would be with the present defendant, provided it appeared that he had been guilty of no laches in discovering the fraud, and thereupon promptly repudiated the contract. How the contract may be repudiated or disaffirmed, see Bwlch-Y- Plwm Lead Min. Co. v. Baynes (sufficiency of plea), L. R. 2 Exch. 324; Ashley's Case, L. R. 9 Eq. 263; McNiell's Case, L. R. 10 Eq. 503; observations of Lord Chancellor Hatherley in Smith's Case, L. R. 4 H. L. 64, on page 73; Lord Westbury in same case, pages 77, 78; Lord Cairns, Id., page 70; same case below, 2 Ch. App. 604; Oakes v. Turquand, supra, and cases cited infra.

It remains to consider how far the foregoing principles are modified when the company has failed or become bankrupt and the rights of creditors, in addition to those of shareholders, are involved. As respects creditors "the stockholders are special partners, incorporated to carry on the business of the company, and the stock subscribed and secured by the several stockholders or partners constitutes the capital or fund publicly pledged to all who deal with them," and the stockholders are debtors to the company for their unpaid stock. Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380, 387.

Assuming this to be, as it unquestionably is, a correct view of the relation of stock-

holders to the company and to the public, the argument is made on behalf of the defendant, that if he was induced by the fraud of the company to agree to purchase its stock, he does not thereby become a stockholder, because an agreement obtained by fraud is void, and the person so injured has a right to repudiate it and treat it as utterly invalid from the beginning, as regards the company, and that the company's creditors have in this respect no higher right than the company itself. In other words, if the company has no right to collect the subscription or purchase money, for the shares, its creditors, who are not creditors of the subscriber to the stock or the shareholder, must claim through it and can stand on no better ground, and the right of the assignee in bankruptcy as the representative of creditors is simply the right to collect the assets of the company, and if the person claimed to be a stockholder is not by reason of fraud entitled to be held as such by the company, this answers any possible right of the assignee to a recovery. But the proposition is not a sound one, that the right of a person who has been drawn into the purchase of stock by the fraud of a company or its agents to relief is as against creditors as it would be against the company. If the contest is with the company, it is essentially one with the alleged shareholder's own partners or associates, and if their corporate representative or its agents have practised a fraud upon him, he is entitled to relief against it. But if a person has accepted a certificate of stock and becomes, to all external appearance, a stockholder, persons may have become creditors of the company on the faith of his membership and in law are presumed to do so, and as they cannot know the manner in which he was induced to become a stockholder, there is ground to maintain that as to them the manner is immaterial.

Upon consideration of the adjudged cases, and upon principle, our judgment is that a contract to purchase shares induced by fraudulent representations or concealment is not void, but only voidable, which means, as the house of lords has decided, that it is valid until disaffirmed, and not that it is void until affirmed. Oakes v. Turquand, supra; Reese River Silver Min. Co. v. Smith, L. R. 4 H. L. 64; same case below, 2 Ch. App. 604.

This doctrine, it will be seen, gives to the purchaser of shares, though his purchase was induced by fraud, the right to hold on to them if it should be profitable to do so; and as the rights of creditors may become involved, who can ordinarily know nothing of the fraud practised upon the shareholder, the law as a condition of relief to the latter requires that he shall be guilty of no laches in discovering the fraud and in repudiating the purchase.

Speaking of this subject, Lord Romilly, in Ashley's Case, above cited, after referring to the course of decision, says: "The leading principle in all these cases is this: A man must not play fast and loose; he must not say 'I will abide by the company if successful, and I will leave the company if it fails;' and therefore when a misrepresentation is made of which any one of the shareholders has notice, and can take advantage to avoid his contract with the company, it is his duty to determine at once whether he will depart from the company or whether he will remain a member." L. R. 9 Eq. 263, 268; McNiell's Case (1870) L. R. 10 Eq. 503.

Under the English companies' act of 1862, though there has been such fraud as will enable a subscriber to defend against calls and though he has repudiated the contract within a reasonable time, yet there seems to be a tendency to hold that he is liable to creditors if he has not taken active steps to have his name removed from the register of shareholders before proceedings are taken to wind up the company for insolvency. Oakes v. Turquand, supra; explained and principles applied, Reese River Silver Min. Co. v. Smith (1869) L. R. 4 H. L. 64; In re Aetna Ins. Co., Ir. R. 6 Eq. 298; and see McNeill's Case, L. R. 10 Eq. 503; Henderson v. Royal British Bank, 7 El. & Bl. 356; compare McNeill's Case, L. R. 10 Eq. 503.

These decisions are doubtless in some degree influenced by the special provisions of the companies' act, particularly that of 1862, but the general course of reasoning therein is applicable to cases of insolvent or bankrupt corporations in this country. There is no register of stockholders in Illinois provided for, and it is possible that the decisions in England requiring active steps by bill in chancery to have one's name removed from the register might not be applicable in their full extent here. Indeed, I am inclined to the opinion that if a company has fraudulently misrepresented or concealed material facts and thus drawn an innocent person into the purchase of stock, he at the time being guilty of no want of reasonable caution and judgment, and afterwards guilty of no laches in discovering the fraud, and he thereupon without delay notifies the company that he repudiates the contract and offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bankruptcy of the company subsequently happening will not enable the assignee to insist that the purchase of stock is binding upon him. But it is not necessary as the plea stands to rule the point. McNeill's Case, L. R. 10 Eq. 503, and cases supra. The plea is defective in that it does not show that the defendant made use of reasonable diligence to make himself acquainted with the matters of fact in respect of which the fraud is claimed, nor when or how he repudiated the contract, nor wheth-

er he offered to surrender the certificate of stock promptly on discovering the fraud.

For these reasons the demurrer to the second special defense or plea is sustained. Demurrer sustained.

NOTE. See and compare Upton v. Triblecock [91 U. S. 45], decided by the supreme court, October term, 1875, where this subject, in the general aspect discussed in the foregoing opinion, is considered. Farrar v. Walker, decided by Miller, Circuit Justice, on appeal, September, 1875, relates to this subject, and is reported from short-hand notes, taken at the time. [See Case No. 4,679.]

Case No. 16,801.

UPTON v. HANSBROUGH.

[3 Biss. 417; 5 Leg. Gaz. 60; 10 N. B. R. 368; 5 Chi. Leg. News, 242; 7 West. Jur. 238.] [1]

District Court, N. D. Illinois. Jan., 1873.

LIABILITY OF STOCKHOLDERS FOR UNPAID BALANCES —INCREASE OF CAPITAL—ESTOPPEL—ASSESSMENT BY COURT—FRAUD BY AGENTS—NOTICE DISCRETIONARY—RELEASE OF UNPAID BALANCE—PURCHASER OF STOCK LIABLE.

1. In an action by the assignee of a corporation organized under the Illinois statutes, against a stockholder to recover the amount unpaid on his stock, it is not a sufficient defense that the corporate proceedings have not been strictly in accordance with the statute.

2. Where an insurance company has attempted to increase its capital and filed papers for that purpose, received subscriptions for and sold stock under such increase, and incurred liabilities upon policies of insurance bearing upon their face evidence of such increase, this is sufficient to constitute the company a corporation de facto, so that neither it nor its stockholders can object that it is not a corporation de jure.

[Cited in Turnball v. Payson, 95 U. S. 421; Chubb v. Upton, Id. 667.]

[Cited in Fitzpatrick v. Dispatch Pub. Co. (Ala.) 2 South. 728.]

3. Where, to the public, a company had all the external indicia of being a corporation and legally entitled to exercise the rights and franchises it assumed, a person voluntarily taking stock in such company is not in a position, when sued for the balance due for such stock, for the benefit of creditors of the company, to deny the authority of the company to issue such stock, or his liability thereunder.

[Cited in Jackson v. Traer, 64 Iowa, 479, 20 N. W. 768; Clarke v. Thomas, 34 Ohio St. 63.]

4. A provision in the charter requiring the corporation to take securities for their stock to a certain amount, does not prohibit it from afterwards selling stock upon other terms, or without security.

5. A provision in the subscription and the stock certificate that the balance was to be paid on the call of the directors when ordered by a vote of a majority of the stockholders themselves, does not prevent this power being effectually exercised by this court.

6. Though no assessment or call pursuant to the terms of the subscription was made before proceedings in bankruptcy, this court became vested with all the power and control previously vested in either the chartered officers of the company or stockholders, or both collectively.

7. The fact that the agents and officers of the company represented to the stockholders at the time of their purchase that no assessment would ever be made, and that the stock was in fact non-assessable, or made other false and fraudulent statements in regard to the condition of the company, are inadmissible as evidence, and constitute no defense as against the creditors of the company.

8. This court having the power to require the stockholders to pay the balance due on their stock, it is discretionary whether it shall exercise it without notice to the stockholders. At all events, in a suit by the assignee against a stockholder such order cannot be reviewed.

9. The fact that the call was for more than was necessary to pay the debts of the company can not be tried in an action against an individual stockholder.

[Cited in Payson v. Stoever, Case No. 10,863. Cited in brief in Ward v. Farwell, 97 Ill. 597.]

10. A resolution passed by the directors of the corporation releasing the stockholders from the payment of balances unpaid upon the stock, in accordance with which the certificates of stock were stamped non-assessable, is not binding upon parties who had insured without knowledge of its existence.

11. The purchaser of a certificate of stock who surrenders it and has one issued to himself, and his own name entered upon the stock books, becomes subrogated to the rights and assumes the liabilities of an original subscriber.

[Cited in Foreman v. Bigelow, Case No. 4,934.]

[Cited in Coleman v. Howe (Ill. Sup.) 39 N. E. 728.]

In bankruptcy. The Great Western Insurance Company, of Chicago, was organized in 1857, under a special charter granted by the legislature of the state of Illinois, with an authorized capital of one hundred and fifty thousand dollars ($150,000). But little business was done by the company until the summer of 1870, when it was reorganized under the general law of 1869, (Gross' St. 1871, c. 53,) and acquired the right to increase its capital stock to five million dollars ($5,000,000), and actually increased it to about one million three hundred thousand dollars ($1,300,000), issuing certificates to various persons and only requiring twenty (20) per cent. to be paid in. The Chicago fire of October 9th, 1871, rendered the company completely insolvent, the most of the stockholders at that time having paid in but twenty per cent.; in a few cases forty per cent. had been paid. A petition in bankruptcy was filed against the company on the 17th of January, 1872, upon which adjudication was had February 6th, and on the 11th of April of the same year Clark W. Upton was appointed assignee, who soon thereafter filed a petition in the district court in bankruptcy for an order against all the stockholders to pay in the amount unpaid on the stock held by them respectively, and an order was entered requiring them to do so by the 15th of August, 1872. Default having been made, the assignee brought suits against the different

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 5 Leg. Gaz. 60, contains only a partial report.]

stockholders for the amount remaining unpaid by each of them. Motion for new trial after verdict by a jury for $11,700. This opinion applied directly to thirteen cases against different stockholders, in which judgment was rendered at this term.

Upton, Boutell & Waterman, for assignee.

Stockholders are liable to company or its creditors for the amount unpaid on its stock. Sagory v. Dubois, 3 Sanf. Ch. 509; Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 499; McClure v. Wilson, 43 Ill. 356. And this liability exists although the stockholder obtained his stock by assignment from another. Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530; Ang. & A. Corp. § 534; Huddersfield Canal Co. v. Buckley, 7 Term R. 36; Hall v. U. S. Ins. Co., 5 Gill, 484; Brigham v. Mead, 10 Allen, 245. The officers and stockholders cannot alter or modify the liability of stockholders to the prejudice of creditors of the corporation. Attorney General v. Fishmongers' Co., 2 Beav. 599. An agreement of the directors of a corporation not to make further calls upon the stockholders, is wholly nugatory and void. 2 Am. Ry. Cas. 539; Sagory v. Dubois, 3 Sanf. Ch. 509. Interest upon calls made will be charged from time the same were due. Sagory v. Dubois, 3 Sanf. Ch. 546. A defect in the proceedings to organize a corporation is no defense to a stockholder sued for amount unpaid upon his stock, or to any person who has participated in acts of user as a corporation. Ellis v. Schmoeck, 5 Bing. 521; Harvey v. Kay, 9 Barn. & C. 356; Eaton v. Aspinwall, 19 N. Y. 119; Abbott v. Aspinwall, 26 Barb. 202. Nor can any person incurring a debt to a company, set up as a defense thereto any irregularity which might show that the corporation never existed. The doctrine of estoppel en pais applies. McFarlan v. Triton Ins. Co., 4 Denio, 392; Schenectady & S. Plank-Road Co. v. Thatcher, 1 Kern. [11 N. Y.] 102.

Sleeper & Whiton, for defendant Hansbrough.

Hitchcock, Dupee & Evarts, Monroe, Bisbee & Gibbs, Edward Roby, Thompson & Bishop, and Cooper, Garnett & Packard, appeared for other defendants, and argued the cases.

HOPKINS, District Judge. This case, together with several others brought by the above plaintiff as assignee in bankruptcy of the Great Western Insurance Company, against parties alleged to have been stockholders in such company, to recover the balance due for the stock held by them, now comes before the court for review on motion for new trial filed by defendants against whom verdicts were rendered. The main points relied upon by the defendants were very fully discussed upon the trial and have also on this motion been elaborately presented by the counsel for the various defendants.

I expressed my views upon them so fully during the trials and in my charges to the jury, it seems almost a work of supererogation to go over them again, but as I have had more time for reflection and examination, I will briefly state my decision, and the reasons therefor. The first point urged by the defendants, and which was common to all, was that the plaintiff had failed to show the legal organization or existence of the bankrupt company, that the plaintiff had also failed to establish the right of the company to increase its capital stock. The plaintiff gave in evidence the charter of the company granted in 1857, and also the proceedings taken by it in 1869 and 1870 to increase its capital stock, which the defendants objected to as not in compliance with the statutes. The plaintiff also showed an issue of an increased amount of capital stock after such proceedings, and the transaction of the business of insurance in the ordinary way.

If I were to examine those proceedings with the same strictness in this case as in a proceeding on behalf of the state to annul or forfeit the charter, I might find some difficulty in upholding them. But I understand the rule to be well settled that where papers having color of compliance with the statutes have been filed with the proper state officers, and meet their approval, but are in fact so defective as to be incapable of supporting the corporation as against the state, they are, as against a subscriber to its capital, held sufficient to constitute a corporation de facto, if supported by proof of user. This company attempted to increase its capital, filed papers for that purpose in the office of the auditor, received subscriptions for and sold its capital stock under such assumed increase, received part payment thereon, and incurred large liabilities upon policies of insurance issued by it bearing upon their face evidence of such increase of its capital stock. This was sufficient to constitute the company a corporation de facto, so that neither it nor its stockholders can object that it is not a corporation de jure. Buffalo & A. R. Co. v. Cary, 26 N. Y. 75.

In the matter of the Reciprocity Bank, 22 N. Y. 9, 17, the court say: "If a party makes an actual purchase of shares from a company or an individual holder, and voluntarily allows himself in this manner to be represented to the world as a stockholder, he must take the responsibilities of that situation; the person who has caused or allowed his title to be registered on the books, cannot deny the truth of that representation and disavow the ownership when it ceases to be a benefit and becomes a burden." To the public this company had all the external indicia of being the corporation, and legally entitled to exercise the rights and franchises it assumed to exercise. A party voluntarily taking stock in such company, is not in a posi-

tion, when sued for the balance due for such stock, for the benefit of the creditors of such company, to deny the authority of the company to issue such stock and transact business lawfully. Eaton v. Aspinwall, 19 N. Y. 119; Harvey v. Kay, 9 Barn. & C. 356; Doubleday v. Muskett, 7 Bing. 110; White v. Coventry, 29 Barb. 305; Trumbull Co. Mut. Fire Ins. Co. v. Horner, 17 Ohio, 407; Parish v. Wheeler, 22 N. Y. 494; Steam Nav. Co. v. Weed, 17 Barb. 378; Doyle v. Peerless Petroleum Co., 44 Barb. 239; Dutchess Cotton Manufactory v. Davis, 14 Johns. 238; Henriques v. Dutch West India Co., 2 Ld. Raym. 1535.

These authorities settle the question that the defendants are estopped in these actions from questioning the right of the corporation to issue the stock held by them.

The next question discussed was, that as the company, by its charter, was required to take a certain kind of securities for the stock, to the amount of one hundred thousand dollars, such limitation should be held to apply to all stock issued by the company, and to prohibit it from selling stock without the balance unpaid being secured in that way; and as this stock was issued upon other terms, or upon the simple promise or implied obligation to pay the balance without any security therefor, it was claimed that the contract was contrary to the spirit and intent of the statute, and therefore void. I do not think the charter susceptible of such a construction; that provision was simply to require a certain amount of cash or secured capital before it commenced business, and after it had that amount I see nothing in the act or public policy to prevent it from disposing of its stock upon such terms as it might deem best. Hart v. Tims, 3 Edw. Ch. 226. Insurance companies are organized upon a different hypothesis from banks, railroads, and manufacturing companies. The capital of an insurance company is not active, or usually required to meet its ordinary obligations; hence it is usual to issue its stock upon the payment of a small per cent. and leave the balance unpaid, subject to call, as a part of its capital whenever the emergency arises. Such unpaid balance is regarded as a part of its capital as much as if it were collected and in its treasury. Insurance contracts are contracts of indemnity, and the premiums are usually so fixed as, under ordinary contingencies, to be sufficient to pay all losses that may accrue without using any portion of the capital; while with banks, railroads, and manufacturing companies the capital is required to be used and invested in the corporate business, so that the difference between the paid up capital of insurance and other moneyed corporations is usually very great.

Another point of objection was taken, based upon the peculiar terms of the subscription and the stock certificate, in reference to the payment of the eighty per cent. unpaid upon the capital stock of the company. Those terms were that the balance of eighty per cent. was to be paid on the call of the directors, when ordered by a vote of the majority of the stockholders themselves. The defendants claimed that they could not be made liable in any other way than by a call made in that manner; that the authority to assess could not be delegated so as to be effectually exercised, either by a court or any other parties; that there was no power vested in any court or body of men or directors to assess the stockholders, unless they directed or consented to it themselves. This presents certainly a novel question, being nothing more nor less than a claim that a party may legally and morally owe a debt and yet frame a contract so that its payment shall be wholly discretionary, and not subject to be enforced in the courts without his consent. It is not necessary to decide whether a provision of that kind would not be contrary to the principles of remedial justice as between the parties themselves, and therefore void; but whether so or not, the attempt to set up such a defense as against the creditors of the company who have entered into contracts with it without knowledge of any such stipulation, and whose only means of obtaining payment is by compelling stockholders to pay the balance due upon their stock, is without a parallel in judicial proceedings. Such a scheme I do not think ever has, or ever can, receive the sanction of the legislature or of the courts. A law which should deprive creditors of a corporation of all legal remedy would be invalid, as impairing the obligation of contracts. Curran v. Arkansas, 15 How. [56 U. S.] 394.

The insurance company became bankrupt by the losses sustained in the great fire in the city of Chicago, in October, 1871. Its means and capital consisted principally of these balances unpaid by the stockholders. It being unable to continue, the creditors proceeded against it in this court in bankruptcy. No assessment was made, according to the terms of the subscription, before the bankruptcy proceedings. The question therefore resolves itself into one of power of the bankrupt court. Such courts have original and exclusive jurisdiction to collect all the assets of the bankrupt, and to make final settlement and distribution of the bankrupt's estate. After the commencement of the proceedings in bankruptcy neither the chartered officers nor stockholders had any right to interfere with the collections or distribution of the estate. All power over the estate and the assets of the company became thereby vested in the bankrupt court, and I think it necessarily follows that such court became vested with all the power and control over the assets that were previously vested in either the chartered officers of the company or the stockholders, or both collectively, and that court could, by virtue of its authority, make or direct any assessment or call necessary or preliminary to the collection of the assets, as fully, to all in-

tents and purposes, as the stockholders or directors could have done if the company had not gone into bankruptcy. It was held in Ward v. Griswoldville Manuf'g Co., 16 Conn. 593, that the authority of the directors to make calls upon stockholders was modal only, relating to the time and manner of payment, and that such duty might be performed by the court of chancery. If the court had the power to do what the directors ought to have done in that way, why can it not do what the directors and stockholders ought to have done as well? No reason for a distinction is perceivable. In Adler v. Milwaukee Patent Brick Manuf'g Co., 13 Wis. 61, Dixon, C. J., in discussing the liability of stockholders to pay for their stock upon call of the directors, says when the company is indebted "this duty of the directors to make the call is one of the highest of moral obligations," and further, "if by the willful or stubborn inaction of the directors or stockholders the company fails to meet its obligations and perform its duties (to make assessment), a court of equity will, on a proper application, afford the requisite relief."

It is not within the ingenuity of man to devise a scheme that will enable insolvent debtors and persons indebted to them to withhold from the creditors of such insolvents the assets which in equity and good conscience should be applied to the payment of such creditors. Courts of equity, by virtue of their inherent jurisdiction over trusts and frauds, will enforce the proper application of the capital stock of an insolvent corporation to the payment of its debts.

It is the province of courts of equity—and of the bankruptcy courts, which to a certain extent have co-ordinate power—to furnish adequate remedies to reach and administer insolvent estates, and to secure to their bona fide creditors the application of all the property of such insolvent, and to dissipate all schemes and devices for the prevention thereof.

In connection with this, in some of the cases it was proven, or offered to be proven, that the agents and officers of the company represented and assured the parties when they took the stock that no assessment would ever be made; that it was, in fact, non-assessable, and made other false and fraudulent statements in regard to the condition of the company, to induce the parties to take the stock. I hold such testimony inadmissible and as not constituting any defense as against the creditors of the company; that it was too late for the stockholders, after the company had become insolvent and the investment was found to be unprofitable, to avoid the liability on such grounds or pretense. The case of Ogilvie v. Knox Co. Ins. Co., 22 How. [63 U. S.] 380, I think fully sustains my ruling on that point. The parties, when they became stockholders, had full access to the books, and could have examined them and ascertained the condition of its affairs, and are chargeable, as between them and the creditors, with knowledge of the contents, and are therefore to be held as having possessed full knowledge of the affairs of the company, and, to avail themselves of any false representations which had been made should have withdrawn immediately from the company.

The defendants also objected to the order of the court sitting in bankruptcy, requiring the stockholders to pay the balance due and owing upon their stock, on the further ground that the court had no power to make such order without notice to each stockholder. If the court had the power to make the order, as I have attempted to show it had, I think it was discretionary with it either to require notice or not; at all events in this suit its order in this respect cannot be reviewed.

I think the stockholders, who are the integral parts of a corporation, may be considered as quasi parties to the bankruptcy proceedings to such an extent as to be bound by the order without notice. If they were dissatisfied with the order, they, by their relation to the bankrupt corporation, had such a standing in the bankrupt court as enabled them to move in that court to set aside the order, if improvidently made, or to apply for a review in the circuit court under section two of the bankrupt act. Having omitted their plain rights in that respect they are concluded by the order in these suits. It was suggested by some of the counsel that the call was for more than was necessary to pay the debts of the company. That question cannot be tried in this case. The order of the district court, it having jurisdiction over that matter, is conclusive, and not inquirable into collaterally. Lord Eldon says in Ex parte Dewdney, 15 Ves. 498, "that a commission in bankruptcy is nothing more than a substitution of the authority of the lord chancellor, enabling him to work out the payment of those creditors who could by legal action or equitable suit have compelled payment."

That being so, the bankruptcy court had the same authority and jurisdiction over this company and its effects as the chancellor would have had upon a bill filed to reach its property and equitable assets. In such a suit he would appoint a receiver, and could direct a receiver to make an assessment upon the stockholders without making them parties to the bill. Ogilvie v. Knox Co. Ins. Co., 22 How. [63 U. S.] 380. If the chancellor in such a case could authorize his receiver to make a valid assessment collectible by the receiver at law, I think a court of bankruptcy could do the same. I was not referred to, nor have I been able to find, a case where a court of chancery required a notice to the stockholders before making, or directing its receiver to make, an assessment upon the stockholders for balances due from them to the company, and therefore am forced to believe that no such rule or practice exists in a court of equity. Upon principle they might

as well claim that the stockholders should be personally notified of and allowed to defend all debts proven against the estate, as their interests would be much more affected by those than by an assessment.

The defendants, for a further defense, gave in evidence a resolution passed by the board of directors some time in the year 1870, releasing its stockholders from the payment of the eighty per cent. unpaid upon their stock, after which they issued certificates stamped "non-assessable." The certificates upon their face, however, stated that only twenty per cent. had been paid, and the balance was subject to call in the manner hereinbefore stated. This resolution was not communicated to the public, but only to the stock agents and person employed in disposing of the stock. The officers, in their report to the state auditor, showing the condition of the company, as required by the statute, made no reference to such a resolution, but stated in their report of December, 1870, that there was eighty per cent. unpaid upon its stock, and made no exception as to stock issued after the passing of that resolution. I ruled on the trial that this resolution, if valid, virtually reduced the capital of the company four-fifths, and that it was not binding upon parties who had insured without knowledge of its existence. Its object manifestly was to enable the stockholders to enjoy the profits of the business, if successful, and avoid liability, if unsuccessful—casting the hazards wholly upon the creditors. Subsequent reflection has confirmed my impression upon that point. To sustain it as against the creditors would be against the fundamental principles of law and justice, and without hesitation I pronounce it legally fraudulent and utterly inoperative.

A secret arrangement of that kind between stockholders is so palpable a fraud upon the creditors dealing with the company without knowledge of it, that I shall not spend time in further discussing it. But it was claimed in connection with this, by the defendants' counsel that it was good as between the company and the stockholders, and that the plaintiff, as the assignee of the company could only enforce such claims as the company might. Such is not my understanding of the authority of an assignee in bankruptcy. I think he represents the interests of the creditors, is a trustee for the benefit of the creditors, and any defense that would not be good as against them in an equitable suit is not maintainable as against an assignee in bankruptcy. His position is analogous to that of a receiver appointed by a court of chancery.

In some of the cases the question was raised as to whether there was any liability on the part of the stockholders to pay the nominal or par value of the shares of stock held by them. The liability of some of the defendants was direct, as some of them were original subscribers, and agreed to take and pay for their stock. In other cases the parties had purchased stock from third parties, and had taken an assignment of the certificate and surrendered it, and accepted a new certificate in their own names, whereby they became registered members of the corporation, and entitled to all the privileges and advantages of an original subscriber, and succeeded to all the liabilities, as well as the rights, of the original subscriber. Seymour v. Sturges, 26 N. Y. 134; Sagory v. Dubois, 3 Sanf. Ch. 466; Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530; Huddersfield Canal Co. v. Buckley, 7 Term R. 36; Loomer v. Wheelwright, 3 Sanf. Ch. 161. The question as to whether there is any liability as against an equitable owner of stock, or whether the relation may be made out by any other evidence than the certificate and the company's stock book, is pending before me, in another case, and I do not now express any opinion thereon. I only hold that a purchaser of a certificate who surrenders it, and has one issued to him directly, and has his name entered upon the stock books, becomes subrogated to the rights and assumes the liability of an original subscriber to stock; that the acceptance of the certificate of which eighty per cent. was unpaid and subject to future call, created an implied obligation on his part to pay such balance, the same as an assignee of a lease is liable for rent directly to the landlord after assignment. Armstrong v. Wheeler, 9 Cow. 88; Churchwardens of St. Saviour's Southwark v. Smith, 3 Burrows, 1272; Eaton v. Jaques, 2 Doug. 461.

A question as to the sufficiency of the pleadings was raised by some of the defendants. I do not consider the objections well taken. In behalf of some of the defendants the motion was urged on the ground that the verdicts were contrary to evidence. I should have been as well satisfied if the verdicts in some of the cases had been for the defendants; but I do not think there is such a want of evidence to support them as to authorize me, in the exercise of a sound discretion, to set aside any of the verdicts on those grounds.

The motions by the defendants for a new trial are each and all denied.

NOTE. In an action against a stockholder for installments of his subscription the regularity of the organization of the company cannot be inquired into collaterally. Rice v. Rock Island & A. R. Co., 21 Ill. 93; Goodrich v. Reynolds, 31 Ill. 490. For the liability of a purchaser of stock, whose certificate has never been assigned on the books of the company, see Upton v. Burnham [Cases Nos. 16,798, 16,799, and 16,802].

The question of the liability of the stockholders of this company, was also decided by Judge Dillon, in the Minnesota district, who held substantially the same views as Judge Hopkins, supra. Payson v. Stoever [Case No. 10,863] June term, 1873. A similar ruling was also made by Judge Gary, of the superior court of Cook county, in a suit by the assignee against

Willins, a stockholder, the opinion being given after full argument, but never reported except in pamphlet form.

In the suits against the stockholders, in the circuit courts of Indiana, Judge Drummond, at the May term, 1873, held them liable for the assessment on their stock. Payson v. Withers [Case No. 10,864].

UPTON (HOBART v.). See Cases Nos. 6,547 and 6,548.

Case No. 16,802.

UPTON v. JACKSON.

[1 Flip. 413;[1] 4 Ins. Law J. 189.]

Circuit Court, W. D. Michigan. Dec. 17, 1874.

CORPORATIONS—AUTHORITY OF DIRECTORS—TRANSFER OF CHARTER—INCREASE OF STOCK—ESTOPPEL—TRANSFER OF STOCK—FRAUD—ASSESSMENTS—ASSIGNEE IN BANKRUPTCY.

1. Assignee in bankruptcy, who is the plaintiff, sued defendant, who is a stockholder, to recover for unpaid stock. *Held*, that if the original charter was transferred by directors without authority of stockholders, the transfer would be invalid, and the transferee would take nothing. On the other hand, if as stockholders the shareholders subsequently participated in the company's business under a new management, or permitted the scheme to be carried out without objection, they were estopped from denying the validity of the transfer.

2. The charter originally limited the amount of the stock, but on certain conditions, prescribed by the legislature, authority was given to increase it. Parties, claiming the right to do so, complied with the required conditions and issued additional stock. Now as between the purchasers or holders and the corporation or its creditors—the former are estopped from denying the validity of their proceedings, or the validity of the stock so issued.

3. If, through fraud or misrepresentation, parties purchase such stock, they may repudiate their contract of purchase and be relieved of liability, provided they act promptly and are without laches. But when repeated assessments have been paid by them, or they have in person or by proxy taken part in the meetings of stockholders, continuing to hold such stock a year or more, and until the insolvency of the company, it will be too late to obtain relief upon allegations of fraud and misrepresentation.

4. As against creditors, stockholders or directors have no power to exempt themselves from liability, when only twenty per cent. of the stock has been paid in, by passing a resolution declaring that the remaining eighty per cent. is non-assessable and printing the words "non-assessable" across the stock certificate.

5. The interests of creditors and likewise of the bankrupt are represented by the assignee, and he can recover so far as the question touches upon the validity of the stock, as if solely acting in the interests of creditors.

[This was an action by Clark W. Upton, an assignee in bankruptcy, against Samuel D. Jackson, to recover an assessment of unpaid stock in a corporation. See Cases Nos. 16,798, 16,799, and 16,801.]

Hughes, O'Brien & Smiley, for plaintiff.

J. W. Champlin and L. D. Norris, for defendant.

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

WITHEY, District Judge (charging jury). * * * This suit is said to be a test case upon the law and fact for a large number of cases pending in this court, brought by the plaintiff as assignee in bankruptcy of the Great Western Insurance Company of Chicago, to recover from alleged stockholders the unpaid stock held by them in that now bankrupt corporation. The ability with which it has been tried by the learned counsel must satisfy all parties concerned that their rights and interests have been placed before the court and jury in the fullest measure. Evidence has been put in under objections to its admissibility, subject to such rulings as the court should deem necessary in its instructions to the jury, and I shall further on inform you upon what basis you are to place your finding.

The Great Western Insurance Company was chartered by the legislature of Illinois, in 1857; organized in 1859, with an authorized capital of $500,000, and a subscribed capital of $100,000. From its organization up to some time in 1860 the company transacted the business of fire insurance, having its office in Chicago. In 1860 its capital was impaired by losses and the company ceased to do business. In 1869 the legislature of Illinois passed a general insurance law, which, among other things, authorized existing insurance companies to increase their capital stock, by amendment of their charters and conforming to certain requirements. With a view to bring this company within the provisions of that law, certain parties sought to acquire control of its charter. To show what was done, the plaintiff has introduced evidence tending to prove that some of the holders of the original stock transferred their stock to two or three of their associates, and these, as directors of the company, made a transfer of the charter to new parties, and thereupon stock in addition to the original $100,000 was issued under the charter which permitted $500,000 capital.

An attempt was then made under the law of 1869, by those exercising control, to effect an authorized increase of capital up to $5,000,000. To prove what was done in that behalf, documents properly authenticated under the great seal of the state of Illinois, have been put in evidence, being a consent by stockholders to such increase, a copy of the charter as amended, with a declaration of a desire to amend, a certificate of conformity by the attorney-general of the state, and one by the auditor of public accounts as to the condition of the capital, etc. There is evidence that the company, thus reorganized, opened an office in Chicago and transacted the business of fire insurance, issuing a large number of policies from July, 1870, up to the time of the great fire in Chicago, October 8 and 9, 1871; that stock was issued and sold up to about $1,000,000; that defendant, a resident of Grand Rapids, Michigan, purchased from an agent of the company, on the 25th day of November, 1870, $1,000 of the new

stock; that he paid twenty per cent. assessed thereon, and received a certificate for $1,000, across which was printed the word "non-assessable." After the time of the Chicago fire he paid ten per cent. additional on his stock, and before aware of the insolvent and bankrupt condition of the company.

There is also evidence that the company while so transacting business, caused circulars in pamphlet form to be printed and distributed, representing from time to time the authorized capital, the amount subscribed, the amount paid in, and the names of stockholders and officers. Its policies also contained statements of the actual capital and names of the officers. Defendant continued to hold his stock certificate from the time of its issue, in May, 1870, to the time of this trial, pending which he offered to surrender it. There is evidence of stockholders' and directors' meetings being held, and that owing to the Chicago fire, in 1871, the company became largely involved upon its policies. In January, 1872, a creditor commenced proceedings in bankruptcy, and in February the corporation was adjudicated bankrupt by the United States district court at Chicago. Plaintiff was appointed assignee, and received conveyance of the property and assets of the company. Such proceedings were thereafter had, that the bankrupt court made a call upon all stockholders for payment of their unpaid stock, of which due notice was given, and a personal demand was made upon defendant. He refused, and this suit is brought to enforce collection.

On the other hand, defendant has introduced evidence attacking the proceedings to reorganize the company in 1870, and to show want of authority to issue the stock sold to defendant. It is, that the holders of the original stock never parted with their stock, never by vote or otherwise authorized an increase of stock, and never authorized a transfer of the chartered rights of the company. There is also evidence tending to show that the required assent to an increase of stock was not signed by enough of the stockholders; that it was in part signed by persons owning no stock and by persons holding void stock, and that many of the names signed to the document consenting to an increase of stock, were forgeries.

I deem it unnecessary to make any further reference to the testimony; enough has been stated to indicate the material questions arising, and upon which instructions and rulings are required.

Substantially, the defense urge that the proceedings to reorganize the company and increase the stock, were without right or authority of law, and were fraudulent and void; that the directors could not transfer the charter and rights of stockholders without authority from the shareholders; and it is urged the latter never gave such authority. Again, that the stockholders never, by vote or otherwise, consented to an increase of stock; and that the paper filed in the office of the auditor of public accounts was not signed by shareholders, but was false and forged as to many of the names appearing thereon; and, therefore, that the stock issued and sold to defendant was void.

Assuming that the transfer of the charter was made by directors without authority of stockholders, the rule would be against the validity of the transfer, and the transferees would take nothing thereby. But there is evidence tending to show that the shareholders acquiesced subsequently in the transfer by the directors by acting as stockholders in meetings held under the reorganization or new management, and that some of them held office, purchased of the increased stock, and participated in various ways in the business of the company. I instruct the jury that such participation would amount to acquiescence on the part of such stockholders, and be a ratification of the action of the directors, which would estop the shareholders from denying the validity of the transfer. Those stockholders, if any, who remained silent and allowed the proceedings to go forward, and the scheme to be foisted upon the public without objection, permitting the company to be held out as authorized to issue policies, increase its capital, and deal with the public, would be equally estopped.

The charter of this corporation, as originally granted, limited its capital stock to $500,000. The rule of law is, that in the absence of further legislative sanction, any stock issued in excess of the $500,000 would be unauthorized and void. But when the legislature, in 1869, granted authority to existing insurance companies to increase their stock upon taking certain proceedings, and persons acting under color of authority took proceedings and attempted compliance with the law, and in pursuance of those proceedings actually issued additional stock, claiming to have obtained the right so to do, obtained control of the corporation affairs, and launched its new scheme; then, as between the purchasers and holders of such new stock and the corporation or its creditors, the shareholders are estopped from denying the regularity of the proceedings to increase the stock, and from denying the validity of the stock so issued. If through misrepresentation and fraud any one is induced to subscribe for or purchase of such stock, he may repudiate the stock and be relieved of his relation of stockholder, provided he does so promptly and uses reasonable diligence in measures to that end. But it will be too late to set up the misrepresentation and fraud after he has paid repeated assessments, participated, in person or by proxy, in the meetings of stockholders, and continued to hold his stock for a year or more, and until the company has, by reason of losses, become insolvent, and creditors seek to have its assets applied to the payment of their claims.

For the purposes of this suit, prosecuted by the assignee in bankruptcy of the corporation against a holder of the increased stock, and therefore brought in behalf and for the interest of creditors as well as the bankrupt company, I hold that there was legislative authority to reorganize and increase the stock of the Great Western Insurance Company, and that the documentary evidence, put into the case by plaintiff, of authenticated copies of papers in the office of the auditor of public accounts of Illinois, are legally sufficient to establish the right and authority to issue the increased stock. The documentary evidence, taken in connection with proof of user under the charter as amended, such as the opening and keeping of an office, the actual issue and sale of stock to the amount of a million of dollars, more or less, and the transaction of business for about a year and a half, not only constitutes prima facie evidence of the existence of the corporation under the amended charter, with power to increase and dispose of the capital stock, but concludes all stockholders who, by continued silence or participation in its affairs as stockholders or officers, permitted the company to palm itself off on the public as a corporation entitled to the exercise of such powers and rights. The alleged false, irregular, and defective proceedings in launching the new enterprise could have been inquired into by the state; but such stockholders will not be allowed to question the proceedings as against the rights of creditors. The practical effect of the rulings I have given would be to exclude much of the defendant's evidence. These rulings have not been made so much for the purpose of instructing the jury as to decide the questions raised at the bar, and so ably argued.

Gentlemen of the jury, the instructions which form the basis of your verdict are brief, and I now invite your attention to them. If you find that defendant, on or about November 25, 1870, became the holder, by purchase or otherwise, of one thousand dollars of the stock of the Great Western Insurance Company, and continued to hold and own the same up to the time of the insolvency and bankruptcy of the company, in February, 1872, and during that time paid thirty per cent. assessed by the company, and acted in person or by proxy at a stockholders' meeting; and if you find the company, during all that time, or up to its actual insolvency, was doing business as an insurance company, issued stock and policies, and kept an office, and advertised itself by pamphlets and circulars, representing and holding itself out to the public as a corporation authorized to do a fire insurance business, with an authorized capital of $500,000, a subscribed capital of $1,000,000, or about that, the amount thereof paid in, and giving the names of stockholders and officers; then I instruct you defendant is estopped from denying the validity of the stock held by him, and is liable to plaintiff for the amount thereof unpaid, with interest at six per cent. from August 22, 1872.

There is printed across defendant's certificate of stock the words, "non-assessable." Twenty per cent. had been paid when it was issued; hence, the remaining eighty per cent. was represented as non-assessable. Evidence is in the case showing that the company passed a resolution declaring eighty per cent. of all the new or increased stock non-assessable.

I instruct you that the directors and stockholders had no power to exempt stockholders from liability, or to limit their liability within the full amount of the stock held as against creditors of the corporation. The capital stock was held out as, and did represent part of, the assets of the company, upon the faith of which the public did business with it. The stock issued represented capital. Whatever was not paid was subject to be called for, if necessary, to meet liabilities.

The plaintiff, as I have said, sues as well in the interest of creditors as of the bankrupt, and no defense can be set up against his right of recovery which could not be set up if the suit was solely in the interest of creditors, so far as touches the validity of the stock in question. Under these brief instructions, I submit the case to the jury.

See Chubb v. Upton, 95 U. S. 665; Pullman v. Upton, 96 U. S. 328; Upton v. Tribilcock, 91 U. S. 45; Webster v. Upton, Id. 65; Sanger v. Upton, Id. 56; and Hawley v. Upton, 102 U. S. 315,—affirming the principles here laid down.

UPTON (MILLIGAN & H. GLUE CO. v.). See Case No. 9,607.

UPTON (ROBBINS v.). See Case No. 11,886.

UPTON v. TRIBLECOCK. See note to Case No. 5,541.

URANN (HARRISON v.). See Case No. 6,146.

URBANA, TOWN OF (LESLIE v.). See Case No. 8,276.

URQUHART (BOYD v.). See Case No. 1,750.

Case No. 16,803.

The U. S. GRANT.

[7 Ben. 195.] [1]

District Court, S. D. New York. March, 1874.

COLLISION IN NEW YORK BAY—TUG AND TOW—LIGHTS—STEAMER AND SAILING VESSEL.

1. A steamtug, the G., was going up the bay of New York, near the Narrows, at night towing astern on a hawser the brigantine C. They were heading north northwest. The G. had the usual side lights, and a bright light astern, but she did not have two bright lights set vertically, to indicate that she had a vessel in tow. The brig T. was going down the bay, heading

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

about south by west, with the wind about northwest. The lights of the G. were seen from the T. nearly ahead and crossing from port to starboard. The T. kept her course, and did not see the C. till she was but a short distance from the C., when the helm of the T. was starboarded. The helm of the C. was also starboarded, but the T. struck the C. a glancing blow on her starboard quarter. The owners of the C. filed a libel against both the G. and the T., alleging fault in the G. that she did not have the proper lights set, and did not keep the C. clear of the T., and fault in the T. that she was not on her proper course, but was heading too much to the west, and that she kept on her course and ran into the C. The answer of the G. charged fault in the T., that, after passing the G., she changed her course to the westward, and ran into the C., and the answer of the T. charged fault in the G., in not having the proper lights set to indicate that she had a vessel in tow. The C. was in charge of a pilot, who had the direction of both the C. and the G.: *Held*, that the courses of the vessels were crossing courses.

2. The tug and tow were to be treated as a single vessel under steam, and it was their duty to keep out of the way of the T.

[Cited in The Fred W. Chase, 31 Fed. 96.]

3. The T. was not off her proper course, and did not change her course improperly, and was not in fault in not sooner seeing the C.

4. Under the 4th article of the rules for preventing collisions (notwithstanding the 11th section of the act of July 25, 1866 [14 Stat. 228]), the G. was bound to have had two white lights set vertically, to indicate that she had a vessel in tow, and was in fault for not having them; and such fault contributed to the collision.

[Cited in The F. & P. M. No. 2, 36 Fed. 266.]

5. The C. must, as between herself and the T., bear the responsibility of the fault of the G. as to lights.

6. The T. was not in fault, and the C. was not in fault in starboarding.

7. In the absence of directions given to the master of the G. by the pilot on board of the C., the former was bound to keep the C. out of the way of the T., and the G. alone was liable for the damages sustained by the C.

In admiralty.

W. R. Beebe, for libellant.

D. McMahon, for the U. S. Grant.

R. D. Benedict, for the Tally Ho.

BLATCHFORD, District Judge. This libel is filed by the owner of the brigantine Lydia H. Cole against the steamtug U. S. Grant and the brig Tally Ho, to recover for the damages sustained by the libellant through a collision which took place between the Tally Ho and the Cole, on the evening of the 30th of January, 1869, after dark, in the bay of New York, just below the Narrows. The Cole was under bare poles, and was being towed by the Grant astern by a hawser. The Tally Ho was bound down the bay, under sail, going to sea. The Tally Ho struck the Cole a glancing blow on the starboard quarter of the Cole, a few feet forward of the stern of the Cole. There was a strong breeze from about northwest, free for the Tally Ho. The Cole had a pilot on board, who had the direction of the Grant and of the Cole. The Tally Ho had no pilot.

The libel alleges, that the green and red lights of the Cole were burning brightly; that the Tally Ho was seen by those on board of the Cole, bearing off her starboard bow, and, when the lights of the Tally Ho were discovered, she was broad off the Cole and evidently heading towards her; that the pilot of the Cole hailed to the Tally Ho to starboard, but she kept on until so near that a collision was inevitable, when she suddenly kept away and came into the Cole, striking her, slightly angling towards the stern, on her starboard quarter; that the Grant did not have the proper regulation lights set and burning, in that she did not have two bright mast head lights vertically set and burning, to indicate that she had a vessel in tow; that the Cole was at the time helpless, being in tow of and under the entire control of the Grant; that the collision was the result of the combined negligence of the Grant and the Tally Ho; that the Grant was in fault in not having stopped in time, or in time taken her course so as to avoid the Tally Ho, and in not having the proper lights set to indicate that she had a tow, to wit, two bright mast head lights vertically set and burning; and that the Tally Ho was in fault in not steering a proper course for a vessel bound to sea, down the channel, with the wind free, and in keeping on her course, and not giving way when she found out, or ought to have found out, by proper care, that there was a vessel in tow of the Grant, and when it was impossible for the Grant to avoid her, and in not having, with a proper lookout, if she had had one, discovered the Cole in time to avoid her.

The answer of the Grant sets forth, that she was moving slowly, and could not, with her tow, move from one side to the other easily; that the Grant had set her green and red lights, and a bright light on the stem forward of the cutwater, and a bright white light on a flagstaff aft, which were the only lights at that time used by tugs going in and out of the harbor of New York, and were not, in any sense or appearance, the lights of a steamship; that the fact, that the Grant did not have two bright lights vertically set and burning, did not at that time indicate she had not a tow, or contribute to the collision; that, while the Grant was proceeding along near the west bank, and as near thereto as was proper or customary for vessels in like circumstances to go, and on a course about north northwest, with the Cole in her wake, the pilot of the Grant observed the Tally Ho about half a mile off the starboard bow of the Grant, but to the leeward, on a southerly course, bound out; that at that time there was no danger of any collision, nor did the courses of the Grant and of the Tally Ho intersect; that, as soon as the Tally Ho had got about abreast of the Grant, and while some distance off to the leeward of the Grant, the Tally Ho, without any cause, suddenly luffed up and took a rank sheer to the westward, on a course across the

bows of the Cole; that the pilot of the Grant immediately stopped her; that the Tally Ho kept off slightly, so that her direction was towards the starboard side of the Cole, angling to the stern, and appeared to be starboarding her helm; that she might even then have avoided the Cole, if the Cole had not improperly put her helm to starboard, whereby the bow of the Cole was suddenly sheered four points or more to the westward, and her stern correspondingly to the eastward, which movement had a direction in the way of the Tally Ho, and contributed to bringing the two vessels together; that no blame is imputable to the Grant; that the Tally Ho was in fault in not steering a proper course for a vessel bound down the channel to sea with the wind free; and that the Tally Ho was without a pilot, and had no lookout forward, and her direction was such, at the time she took her said sheer, as would have made her run on the west bank, and her officers and crew had been making or were engaged in making sail.

The answer of the Tally Ho alleges, that the Tally Ho had her regulation lights all properly set and burning brightly, and a competent lookout vigilantly performing his duty; that, while the Tally Ho was heading down the channel on her proper course, it being very dark at the time, those on board of her discovered the lights of a vessel appearing from her lights to be a steamship, and not to have another vessel in tow, heading nearly towards the Tally Ho, but angling across her bows from about south southeast to about north northwest, and passing the Tally Ho in safety, but very near; that, soon after she had so passed the Tally Ho, those on board saw coming out of the darkness a short distance off, on about the same course which the steamer had gone, a vessel without sails and showing no lights and moving against the wind, from which it seemed that she was being towed, and apparently by the said steamer, by a long line which was invisible to those on board the Tally Ho, whereupon the helm of the Tally Ho was put hard a-starboard, and she obeyed her helm and fell off, but not enough to avoid a collision between the towed vessel and the Tally Ho; and that the collision happened without fault on the part of the Tally Ho, but was caused by the steamer's having set the proper lights of a steamship, and not having set the proper lights of a steamship having another vessel in tow, and not having a proper lookout performing his duty, and not going up with her tow on the eastern side instead of the western side of the Tally Ho, in crossing the bows of the Tally Ho to go up the western side of her, in not giving the Tally Ho a sufficiently wide berth, in towing the tow against the Tally Ho, and in not keeping her clear of the Tally Ho, and by the towed vessel's not having a proper lookout in a proper place, vigilantly performing his duty, in not having proper lights properly visible, and in not properly starboarding her helm in time to keep clear of the Tally Ho.

The answer of the Grant is authority for the statement that the Tally Ho was on a southerly course, and the Grant was heading north northwest, when the Tally Ho was first seen by the pilot of the Grant, half a mile off, on the starboard bow of the Grant. The answer of the Tally Ho is authority for the statement, that the Grant, when first discovered from the Tally Ho, was heading nearly towards the Tally Ho, but angling across her bows from about south southeast to about north northwest. These two statements substantially concur. They both of them make the courses of the two vessels intersecting courses, at an angle of two points, or 22½ degrees. The answer of the Grant says, indeed, that the courses of the two vessels did not intersect, but it must intend that such courses did not intersect ahead of the Grant. The Grant and the Tally Ho having passed each other safely, starboard to starboard, the inquiry at once arises, why the Tally Ho and the Cole collided with each other. The Tally Ho's answer sets up that she saw the lights of the Grant; that they appeared to be the lights of a steamship; that they did not indicate a steamship having another vessel in tow; that, after passing the Grant in safety, but very near, the Tally Ho saw coming out of the darkness, a short distance off, on the same course with the Grant, the Cole, without sails, and without lights, and moving against the wind, and, therefore, seemingly in tow by a stern hawser from the Grant; and that the collision was caused, in part, by the fact that the Grant had set the proper lights of a steamship, and did not have set the proper lights of a steamship having another vessel in tow, and, in part, by the want of proper lights, properly visible, on the Cole. The libel alleges fault in the Grant in not having the proper lights to indicate that she had a tow, namely, two bright mast head lights, vertically set and burning. The answer of the Grant alleges that the Grant had set her green and red lights, and a bright light on the stem forward of the cutwater, and a bright white light on a flagstaff aft; that these lights were not, in any sense or appearance, the lights of a steamship; and that the fact that the Grant did not have two bright lights vertically set and burning did not, at that time, indicate that she had not a tow, or contribute to the collision. The libel alleges that the Cole had her green and red lights burning brightly. The answer of the Grant does not allege any want of proper lights on the Cole, or on the Tally Ho. The libel does not allege any want of proper lights on the Tally Ho, while it admits that she had lights. Thus, on the question of lights, both of the other vessels set up a want of proper lights on the Grant as contributing to the collision, while the Tally Ho sets up a want of all lights on the Cole.

It becomes necessary, then, to inquire what lights the Grant ought to have exhibited. The 3d article in the rules established by the act of April 29, 1864 (13 Stat. 59; Rev. St. U. S. § 4233), provides, under the head of "Lights for Steamships," that "all steam vessels," when under way, shall carry the green and red lights and a bright white light at the foremast head. The corresponding article in the rules prescribed by the British order in council of January 9th, 1863, provides that those lights shall be carried by "sea-going steamships." The 4th article in the act of 1864, and in the British rules, is headed "Lights for Steamtugs," and is in these words: "Steamships, when towing other ships, shall carry two bright white mast head lights vertically, in addition to their side lights, so as to distinguish them from other steamships. Each of these mast head lights shall be of the same construction and character as the mast head lights which other steamships are required to carry." The 2d article requires that the lights mentioned in the 3d and 4th articles, and no others, shall be carried in all weathers, between sunset and sunrise. By the 11th section of the act of July 25, 1866 (14 Stat. 228), which was in force when this collision occurred, it is enacted, that "the provision for a foremast head light for steamships," in the act of 1864, "shall not be construed to apply to other than ocean-going steamers and steamers carrying sail." That section then goes on to prescribe lights for river steamers navigating waters flowing into the Gulf of Mexico, and then proceeds: "All coasting steamers, and those navigating bays, lakes, or other inland waters, other than ferry-boats, and those above provided for, shall carry the red and green lights, as prescribed for ocean going steamers, and, in addition thereto, a central range of two white lights, the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel, the head light to be so constructed as to show a good light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel, and the after light to show all around the horizon." As the Grant was not an ocean-going steamer, in the sense of the act of 1866, and was not a steamer carrying sail, but was a steamtug, without masts or sails, she was relieved, by the act of 1866, from carrying the foremast head light prescribed by the 3d article of the act of 1864. But for the act of 1866, she would, as a steamship, when not towing another vessel, have been obliged to carry the foremast head light and the green and red lights prescribed by the 3d article of the act of 1864. The 4th article of the act of 1864, shows that a steamtug is included, in that act, under the general denomination of a steamship, so as to be subject, whether towing or not towing, to all the regulations prescribed by that act for steamships and steam vessels, in addition to being subject, when towing, to the exceptional regulation in article 4. Under the act of 1866, the Grant fell within the description of steamers required to carry the central range of two white lights. But that regulation was one for her when not towing. The central range of two white lights took the place, by the act of 1866, in respect to the Grant, of the foremast head light in the 3d article of the act of 1864. But as, under the act of 1864, the two bright white mast head lights, vertically, were to designate a steamtug towing, she, when not towing, being bound to carry the foremast head light, so, even after the act of 1866 was passed, the two bright white mast head lights, vertically, or their equivalents, were to designate a steamtug towing, she, when not towing, being bound to carry the central range of two white lights. Before the act of 1866 made it unnecessary for the Grant to carry a foremast head light, and substituted therefor the central range of two white lights, she could not, merely because she did not have any foremast, in the sense in which a steamer carrying sail has a foremast, allege that she was not bound, when not towing, to carry the foremast head light, in substance and equivalency, or that she was not bound, when towing, to carry the two bright white mast head lights vertically, in substance and equivalency. The substitution, by the act of 1866, for vessels like the Grant, of the central range of two white lights for the foremast head light, was, manifestly, not because they could not, though without masts for sails, substantially comply with the requirement to carry a foremast head light. The intentional omission of the words "sea-going steamships," in the 3d article, and the substitution therefor of the words "all steam vessels," when otherwise re-enacting in the same words the British 3d article, in connection with the designation, in the 4th article, of tugs as steamships, and with the well known fact that such vessels as the Grant, without masts or sails, were, at the time of the passage of the act of 1864, in common use, and called steamtugs, is satisfactory evidence that it was understood, by the act of 1864, that such steam tugs could carry what would be in substance the mast head lights of articles 3 and 4 of that act. What is called, in the act of 1866, "the light at the head of the vessel," and "the head light," is there described as a light to be so constructed as to show a good light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel. This is the same construction as that prescribed for the foremast head light, by the 3d article of the act of 1864, and that same construction is prescribed, by article 4, for each of the two mast head lights which are to be carried vertically by steamtugs towing. Article 4 states that the carrying of the two mast head lights vertically is to distinguish the towing steamtug from other steamships, because other steamships would

carry only one mast head light. Therefore, where, under the act of 1866, a steamtug, not towing, would carry a light at the head of the vessel, and an after light, in a central range, she still was required by the 4th article of the act of 1864, to carry, when towing, two lights at the head of the vessel, and to carry them vertically, that is, one above the other, and to dispense with the after light, but still to carry the green and red lights. The object was that a tow, whether towed astern by a hawser or not, should be indicated to other vessels by the lights on the tug, so that they might give both tug and tow a sufficiently wide berth. Towing is extensively done, and was, when the act of 1864 was passed, in waters away from the ocean, by vessels of the character of the Grant; and whether under the act of 1864, or that of 1866, they were required to carry, when towing, substantially the two vertical lights prescribed by article 4 of the act of 1864, and the green and red lights, and no other lights.

Now, what lights did the Grant carry? Her answer sets up, in substance, that she carried the green and red lights, and the central range of two white lights. These were the lights for her when not towing. They were not the lights for her when towing. Whatever lights she had, she did not have two head lights set vertically one above the other.

For the purposes of the 15th article, which requires a steamship to keep out of the way of a sailing ship, if the two are proceeding in such directions as to involve risk of collision, the Grant and the Cole must, as respects the Tally Ho, be regarded as a single vessel under steam, the motive power of the Cole being, at the choice of the Cole, on board of the Grant, at some distance ahead of the Cole (The Cleadon, 14 Moore, P. C. 92, 97). The Grant and the Cole, as one vessel, and that a steam vessel, were bound, as between either of themselves and the Tally Ho, to keep out of the way of the Tally Ho, if the Tally Ho, on the one hand, and the Grant and the Cole, on the other, were proceeding in such directions as to involve risk of collision, although the Cole was being towed astern of the Grant; and it was the duty of the Tally Ho to keep her course. The Cleadon, supra; The Warrior, L. R. 3 Adm. & Ecc. 553.

The complaint in the libel is not that the Tally Ho did not keep her course, but that she did keep her course. It avers that the Tally Ho was heading towards the Cole, and, though hailed to starboard, kept on until so near as to make a collision inevitable, and that the Tally Ho was in fault in keeping on her course, and not giving way, so as to avoid the Cole. It alleges, however, that such course of the Tally Ho was not a proper course for a vessel bound to sea, down the channel, with the wind free, and that the Tally Ho was in fault in steering such course. The answer of the Grant alleges that the Tally Ho was on a course which involved no danger of any collision, and suddenly luffed up and took a rank sheer on a course across the bows of the Cole, and thus caused the collision.

The theory developed in the evidence on the part of the Cole, given by Beebe, the Sandy Hook pilot who was on board of her, is, that the Grant and the Cole were proceeding up along the west side of the channel, and as near to the edge of the west bank as it was safe to go with a vessel of the draught of water of the Cole; that they were heading north; that the Tally Ho, when nearly half a mile distant from them, and bearing northeast by north from the Cole, was heading about west southwest, while her true course down should have been about south; that her west southwest course would have carried her upon the west bank, if the collision had not occurred; and that, just before the vessels struck, the Tally Ho starboarded, so that she headed about south southwest at the time of the collision, and struck the Cole a glancing blow. It is not alleged that starboarding was an improper manœuvre on the part of the Tally Ho. On the contrary, it is contended that she should have starboarded sooner, and that thereby the collision would have been avoided. There is nothing in the evidence of Beebe which suggests a sudden luffing or change of course by the Tally Ho in an improper direction. The evidence of Sullivan, a witness for the Grant, who is a pilot, and was a passenger on the Grant, is to the same effect as that of Beebe. But, when we come to the evidence of Bullinger, on the part of the Grant, who was in her pilot house, and piloting her, and responsible for her navigation, we have a different theory put forward. He says that his course was north or north by west; that the Tally Ho, when he first saw her, was heading about south, and was about half a mile off from him, and on a course which would not intersect his course; that, soon after, he saw the Tally Ho luff up towards the stern of the Grant, so as to head southwest or southwest by west; that he hailed her to starboard her helm, and slowed the Grant, thinking that the Tally Ho might cross the towing hawser; that, when he found this could not be done, he started the Grant ahead again, so as to try and pull the Cole away from the Tally Ho; and that he did not change his course after seeing the Tally Ho. I place no reliance on the testimony of McCowen, a witness for the Grant, for reasons apparent on the face of his evidence and more apparent as it was given.

The impression left by the whole evidence is, that the Tally Ho did not change her course, and did not luff up, and was pursuing a proper course down the channel. According to the testimony of the master of the Tally Ho, he was standing by his wheel all the time, and was heading about south by west, and saw the lights of the Grant perhaps a

quarter of a mile off, a little on his port bow, but nearly ahead, and bearing about south, and did not change his wheel from that time till he starboarded on the hail of his lookout to do so, just before the vessels struck. He says the collision took place about half a mile to the eastward of the west bank, and makes the course of the Grant to have been about north northwest. His starboarding, he says, a moment before the collision, swung the Tally Ho probably two points, which would be to south by east. The answer of the Grant says, that the course of the Grant was about north northwest. Beebe says, that just before the collision he starboarded the wheel of the Cole and sheered her to the westward about a point and a half. This makes the Tally Ho and the Cole, before they either of them starboarded, on courses which drew on to each other at least one point, and makes them, when they struck, on courses which drew on to each other about two points and a half. On this view, it is easy to see how the collision occurred, in consistency with the claim of the Tally Ho. My conclusion is. that it is not shown to have occurred through any fault of the Tally Ho in sailing on an improper course or in improperly changing her course.

But there remains the question, whether the Tally Ho might not and ought not to have discovered the Cole soon enough to have avoided her, notwithstanding the duty incumbent on the Grant and the Cole to keep out of the way of the Tally Ho, and the duty of the Tally Ho not to embarrass them by changing her course. And here comes in the question of the lights on the Grant and on the Cole. While the omission to exhibit proper lights may be immaterial, if it be clearly shown that the absence of such lights did not contribute to the collision, yet, if it be shown that a vessel did not exhibit the proper lights, the burden lies on her to show that the failure to comply with the statutory rule was not the cause of, or did not contribute to, the collision. The Fenham, L. R. 3 P. C. 212, 216. The Grant did not exhibit towing lights, and, while the lights she did exhibit indicated to the Tally Ho that she was a steamer, the absence of the towing lights from the Grant might very well assure the Tally Ho that it was only requisite for the Tally Ho and the Grant to clear each other. As respects the Tally Ho, as a sailing vessel encountering the Cole towed by the Grant, the Cole must, as between herself and the Tally Ho, bear the responsibility of the fault of the Grant as to lights. The Tally Ho is not to blame for such fault, and, in so far as such fault caused the Tally Ho to collide with the Cole, it must operate to exonerate the Tally Ho, as respects the Cole.

It still remains to consider, whether, although excused so far as a warning came from the lights of the Grant, the Tally Ho ought not to have otherwise become aware of the presence of the Cole, and to have avoided her. It is contended that the Tally Ho ought to have sooner seen the Cole or her lights. As to the lights of the Cole, her green light would be more prominently presented to the Tally Ho than her red light would be likely to be. Jones, a witness for the Cole, says that the Cole had her green and red lights burning. Six other witnesses for the Cole were not examined as against the Tally Ho. Beebe, the pilot of the Cole, says that the Cole had her green and red lights burning brightly. The Cole, without sails up and under bare poles, presented no such appearance as the Tally Ho did, which was under full sail. The Grant must have been interposed to some extent between the Cole and the Tally Ho, and the light or lights of the Cole, if she had them, and if any more than her green light could have been visible to the Tally Ho, were not calculated to indicate to the Tally Ho a vessel other than and different from the Grant, particularly as the Grant showed no towing lights. The Cole herself did not loom up, as a vessel with sails up would. In the foreshortening, the Cole, though towed by a hawser astern of the Grant, would, to the Tally Ho, in the darkness, not be likely to present an appearance distinct from the Grant. As to the lights of the Cole, there is the testimony, before cited, of the master and of the steward of the Tally Ho, that she had none, or presented none visible to them. As to the want of a lookout on the Tally Ho, set up as a reason why the Tally Ho did not see the Cole, there is the evidence, before cited, that the Tally Ho had a lookout, although he is not produced as a witness. According to that evidence he was on the forecastle and did see the Cole, and, as a consequence, ordered the Tally Ho to starboard. But, apart from these considerations, the Tally Ho, having the right of way, was not bound to avoid the Cole, and it was the duty of the Tally Ho to keep her course even if she had seen the lights of the Cole as she did see the lights of the Grant, or even if she had seen the Cole herself. The Cole being in fact in tow, if the Tally Ho, seeing her or her lights, had starboarded at a greater distance off, and then the Grant, in discharge of her obligation to keep out of the way of the Tally Ho, had ported, pulling the Cole after her, and there then had been a collision, the Tally Ho would have been in fault; or if the Tally Ho, at a like distance off, had ported, and then the Grant had starboarded, and a collision had ensued, the Tally Ho would have been in fault.

On the whole case, then, I see no fault in the navigation of the Tally Ho, and the case is reduced to a contest between the Cole and the Grant.

The libel alleges that the Grant was in fault, (1) in not having stopped in time; (2) in not having in time taken her course so as to avoid the Tally Ho; (3) in not having towing lights set. The answer of the Grant al-

leges that the Cole was in fault in starboarding when the Tally Ho starboarded, and thus throwing the stern of the Cole in the way of the Tally Ho.

In the case of The Civilta [Case No. 2,775], where a sailing vessel under sail, in the position of the Tally Ho, collided with a sailing vessel not under sail, towed astern by a hawser by a steamtug, and was sunk thereby, and brought suit against both the tug and her tow, I held, that, although the tow had on board a pilot other than her officers, and the tug was subject to the order of such pilot, yet, in the absence of any special instructions from such pilot to the tug as to what was to be done by the tug to keep out of the way of the approaching vessel, it was the duty of the master of the tug to take care so to navigate the tug and the tow as to avoid a collision between either and the approaching vessel. The Secret, 8 Mitch. Mar. Reg. 116. No good reason is perceived why this duty is not one towards the tow as well as towards the third vessel. In the present case, it is not shown that any directions were given to the Grant by any one on the Cole, as to what the Grant should do in view of the approach of the Tally Ho. This left the Grant to continue to be, as she necessarily was before, the Cole being so far behind, under the control of her own master and officers, as to the movements of her helm and of her motive power. It was the duty of the Grant, under such circumstances, not only to keep out of the way of the Tally Ho, but to keep the Cole out of the way of the Tally Ho. She failed to do so, and shows no sufficient excuse for not having done so. I do not think the starboarding by the Cole in extremis can be imputed to her as a fault by the Grant, even if it was a mistake. It is unnecessary to decide whether the Cole, having allowed herself to be towed by a tug without proper towing lights, can allege such want of proper towing lights as a fault in the tug, in this suit by her against the tug.

The result is, that the libel, as against the Tally Ho must be dismissed, with costs, and that the libellant must have a decree against the Grant, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellant by the collision between the Cole and the Tally Ho.

Case No. 16,804.

The U. S. GRANT.

[7 Ben. 337.] [1]

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

TUG AND TOW — NEGLIGENT NAVIGATION — ICE — ADMISSIONS OF FAULT.

1. A tug took in tow a canal-boat loaded with coal, to tow her through Hell Gate. While so being towed, the canal-boat was run upon Flood Rock and sunk. The owner of the coal libelled the tug to recover the damages sustained by it. It was claimed for the tug, that there was ice in the river which crowded between the canal-boat and the boat next to her, and forced her bows off, and she therefore touched the rock. It was also claimed that, as the tow approached Flood Rock, she got into a field of soft ice which prevented her steering, and she was carried by the current on the rock. There was evidence that the owner of the tug had admitted his liability, which he denied. But he had paid the owner of the canal-boat for his damages, taking from him a statement to be used against the owner of the cargo: *Held*, that the allegation of ice forcing itself between the boats was not made out, but, if it had been, it would have been negligence on the part of the tug to have proceeded with the tow in that condition.

[Cited in The M. J. Cummings, 18 Fed. 184.]

2. If there was such a field of mush ice, as was claimed, the tug should have waited till it passed, before attempting to go through the Gate, or should have taken the ice in such a way as to have kept her tow clear of the rock.

[Distinguished in The Gen. Wm. McCandless, Case No. 5,322.]

3. The tug might well be held liable upon the evidence of the admissions of the owner, coupled with the transaction between him and the owner of the canal-boat.

[Cited in The Hattie M. Spraker, 29 Fed. 459.]

In admiralty.

T. E. Stillman and R. D. Benedict, for libellant.

Beebe, Wilcox & Hobbs, for claimant.

BENEDICT, District Judge. This action is brought by Elisha A. Packer and others, the owners of a cargo of coal laden on board the canal-boat O'Rourke, to recover for its loss by reason of the sinking of the canal-boat while being towed through Hell Gate by the steamtug U. S. Grant.

The charge is that through carelessness on the part of those in charge of the tug, the canal-boat, in passing the Gate, was forced upon Flood Rock and so sunk, and the cargo lost.

The negligence imputed to the tug is failing to keep the proper channel in passing Flood Rock. The answer as an excuse sets up, that while passing through the Gate the tow encountered ice, which forced its way between the boat O'Rourke and the one alongside, and rendered the lines so that the bow of the O'Rourke was forced away and separated from the other boats, and therefore touched Flood Rock, without any negligence on the part of the tug.

The proofs show that the boat O'Rourke was sunk by her stern catching on Flood Rock, as the tow was passing the Gate; but the evidence wholly fails to show that the striking on the rock was caused by any such forcing off of the bow of the O'Rourke from the rest of the tow as is described in the answer. It affirmatively appears that the navigation of the tow was not impeded by any ice which forced itself between the O'Rourke and the boat alongside. But if any such accumulation of ice had occurred, as to prevent

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

the proper management of the tow, it would not have excused the tug, for in such case it would be clear negligence in the tug to attempt to pass the Gate while so impeded. Another excuse, not set up in the answer, may be noticed, which is that after passing Astoria the tow encountered a large field of broken or mush ice, which made it impossible for the tug to keep in the proper channel, and, although her helm was put hard a-port, it forced the tow upon Flood Rock. The evidence scarcely makes out the presence of any such field of ice, but, if such a field did appear, the tug should have waited off Astoria, as she might have done, and allowed the ice to pass her; or if not, then she should have taken the ice in such a way upon entering it as would enable her to keep the proper channel.

Various charges of fault on the O'Rourke are made, none of which are supported by the evidence. A conclusion against the tug is therefore easily arrived at, upon the evidence of the circumstances attending the accident.

A similar conclusion would be justified by the evidence respecting an admission, that the accident arose from negligence on the part of the tug, made by the owner of the tug. As a general thing I put very little reliance upon the admissions of fault which are so often proved in this class of cases. Here a peculiarity appears in this, that not only did the owner of the tug admit his liability to the owner of the O'Rourke, and to the owner of the coal, but it also appears that he afterwards paid the captain of the canal-boat for the loss of the boat, at the same time taking from him a written statement respecting the accident, calculated to be, and which has been, here used for the purpose of defeating the action brought by the owner of the coal. Such a transaction throws great suspicion upon the case of the tug, and would of itself go far to justify a decree against her upon this admission of her owner.

Let a decree be entered in favor of the libellant for his damages, with an order of reference to ascertain the amount of the loss.

USHER (GIBBS v.). See Case No. 5,387.

Case No. 16,805.

USHER v. McBRATNEY.

[3 Dill. 385.] [1]

Circuit Court, D. Kansas. 1874.

CONTRACTS—LOBBY SERVICES—ESTOPPEL—JUDGMENT BETWEEN OTHER PARTIES.

A contract providing a compensation for obtaining legislation, or to prevent legislative investigation into the affairs of a railway corporation, is void:—this principle applied and *held* to vitiate the defendant's claim to the land in controversy, and the complainant's title was quieted.

[Cited in Sweeney v. M'Leod (Or.) 15 Pac. 279; Chippewa Valley & S. Ry. Co. v. Chicago, etc., Ry. Co., 75 Wis. 247, 44 N. W. 23.]

The land in question, section 14, T. 12, R. 20, in Leavenworth county, is part of the land which the Leavenworth, Pawnee, and Western Railroad Company was authorized to purchase by the treaty with the Delawares, of 1860 and 1861 (12 Stat. 1129, 1177). The name of that company was changed, and the Kansas Pacific Railway Company is its legal successor. The plaintiff [John P. Usher] has a title to the section of land in controversy, by deed from the Kansas Pacific Railway Company, the patentee, but subsequent in date to whatever rights the defendant [Robert McBratney] has under the agreement of April 9, 1862, and the title bond given to the defendant in consequence thereof, by the president and secretary of the railway company under its seal, dated December 15, 1862. On the 9th day of April, 1862, J. C. Stone, then acting for the railway corporation, made and delivered to the defendant a writing agreeing to convey to him "four sections of the land acquired of the Delawares, and four to be acquired from the Pottawattamies, provided that the treaty now pending before the United States senate for the purpose of securing said last named land shall be ratified without delay, and provided that no investigation of the affairs of the company shall be entered upon by the senate, with the consent of the Kansas senators, or any other act done which shall tend to delay the construction of the road. For the L. P. & W. R. R. Co. J. C. Stone, Attorney. Washington, April 9th, 1862." The bill prayed to quiet the plaintiff's title—he being in possession. The answer, after denying some of the allegations of the bill, set up that the contract under which the lands were acquired by Shoemaker & Co. were so acquired under a contract fraudulently entered into by the directors of the company, they being personally interested in the contract, of which the plaintiff had knowledge, and the answer also pleaded a recovery of the land in the state courts by the defendant, in a suit against the railway company, as an estoppel upon the plaintiff, whose rights were acquired before such suit, but whose deed was not obtained until afterwards. Replication and proofs.

J. P. Usher & C. E. Bretherton, for plaintiff.

Clough & Wheat and Griswold & Britton, for defendant.

DILLON, Circuit Judge. The legal title is in Mr. Usher, who is in possession, and is a purchaser for value. There is no proof of any authority from the railway company to Stone to make the agreement of April 9, 1862, which is the sole basis of the title bond

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

of December 15, 1862, or of McDowell to execute the title bond, but if such authority existed or is assumed, the paper of April 9, 1862, shows upon its face, and is also shown by the evidence, aliunde, to have been given for an illegal purpose, viz.: to suppress investigation and to influence the course of legislation.

The suit in the state court against the railway company is no estoppel as against the plaintiff. That was expressly decided by the supreme court of Kansas on the appeal in that case. Kansas Pac. Ry. Co. v. McBratney, 10 Kan. 415.

The defendant not being a stockholder in the railway company cannot set up that the Shoemaker & Co. contract was entered into by directors who had a personal interest in it, even if all the stockholders were not interested equally with the directors or did not ratify it by acquiescence or otherwise. As the plaintiff is in possession and as the title bond of the defendant is of record and the defendant asserts rights under it, the plaintiff is entitled to the relief he seeks against it and a decree accordingly may be entered. Decree accordingly.

NOTE. See Trist v. Childs, 21 Wall. [88 U. S.] 441; Weed v. Black [2 McArthur, 268]. The following is an extract from the brief of complainant's counsel on lobbying contracts:

(1) " 'All contracts for a contingent compensation for obtaining legislation are void by the policy of the law.' Grier, J., in Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 366. See, also, Clippinger v. Hepbaugh, 5 Watts & S. 315; Wood v. McCann, 6 Dana, 366; Bryan v. Reynolds, 5 Wis. 200.

(2) " 'A contract for a contingent compensation to use personal influence on legislators is void by the policy of the law.' Grier, J., Marshall v. Baltimore & O. R. Co., supra. Same doctrine, Clippinger v. Hepbaugh, supra; Rose v. Truax, 21 Barb. 361; Frost v. Belmont, 6 Allen, 159. In Rose v. Truax it is said that an agreement in respect to lobby services, and in effect providing for the sale of an individual's personal influence to procure the passage of a private law by the legislature, is void, as being inconsistent with public policy, and will not support an action; and if the contract be an entire one, and it be void in part, it is void in toto.

(3) " 'All agreements for pecuniary considerations to control the course of legislation are void as against the policy of the law.' Field, J., in Tool Co. v. Norris, 2 Wall. [69 U. S.] 45. See, also, Pingry v. Washburn, 1 Aikens, 264; Mills v. Mills, 40 N. Y. 543; Harris v. Roof's Ex'rs, 10 Barb. 489. The position of attorneys for public and open advocacy of such measures before legislative committees, or other similar bodies sitting in a quasi judicial capacity, is distinguished in Wood v. McCann, supra; Sedgwick v. Stanton, 14 N. Y. 289; Bryan v. Reynolds, 5 Wis. 200, and Lyon v. Mitchell, 36 N. Y. 235. Hunt, J., says: 'It is allowable to employ counsel to appear before a legislative committee, or before the legislature itself, to advocate or oppose a measure in which the individual has an interest, for an honest purpose, avowed to the body before which the appearance is made, and by the use of just argument and sound reasoning; this is lawful. Personal soliciting of legislators is not a lawful subject of contract.' In the later case of Mills v. Mills, much stronger and more sweeping language is used. The court said: 'It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to these results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action. It tends to subject the legislature to influences destructive of its character and fatal to public confidence in its action.'

(4) " 'Such agreements are void, although no improper influences were contemplated or used, and although part of the consideration was lawful.' Field, J., in Tool Co. v. Norris, 2 Wall. [69 U. S.] 45. Same principle, Filson's Trustees v. Himes, 5 Pa. St. 542; Bryan v. Reynolds, supra; Rose v. Truax, supra; Mills v. Mills, supra.

(5) "Such agreements are not merely voidable, or capable of rescission, but are mala in se, absolutely void, and without effect. Martin v. Wade, 37 Cal. 168; Rose v. Truax, supra; Hunter v. Nolf, 71 Pa. St. 284.

(6) "All contracts for a pecuniary consideration for influencing a public officer in the discharge of his duty are void. Cook v. Shipman, 51 Ill. 316; Bowman v. Coffroth, 59 Pa. St. 19; Hatzfeld v. Gulden, 7 Watts, 152; Fuller v. Dame, 18 Pick. 472; Filson's Trustees v. Himes, supra; Hunter v. Nolf, supra; Workman v. Campbell, 46 Mo. 305. Case of brokers for sale is distinguished in Lyon v. Mitchell, 36 N. Y. 235, disproving Tool Co. v. Norris on this point. But see the dissenting opinion of Grover, J., at page 682 of same volume. Winpenny v. French, 18 Ohio St. 469." See, also, Union Pac. R. Co. v. Durant [Case No. 14,377].

USHER (McBRATNEY v.). See Case No. 8,661.

USHER (MADDUX v.). See Case No. 8,936.

USTICK (POSTMASTER GENERAL v.). See Case No. 11,315.

UTICA, The (SMITH v.). See Case No. 13,123.

Case No. 16,806.

The UTILITY.

[1 Blatchf. & H. 218.] [1]

District Court, S. D. New York. March 26, 1831.

MARITIME LIENS—SUPPLIES—STALE CLAIMS.

1. In a case of supplies furnished in New-York to a vessel owned in North Carolina, where more than two years had elapsed, and no demand of payment had been made of the master who contracted the debt, or of those who owned the vessel when the debt was contracted, and the vessel had since made several voyages between New-York and North Carolina, and been sold at public auction to a bona fide purchaser without notice of the debt: *Held*, that the lien was lost.

[Cited in Saunders v. Buckup, Case No. 12,373; The H. B. Foster, Id. 6,291; The Boston, Id. 1,669; The Dubuque, Id. 4,110; The Bristol, 11 Fed. 162; The Rapid Transit, Id. 335; Re Wright, 16 Fed. 483; The J. W. Tucker, 20 Fed. 133; The Young America, 30 Fed. 792; The Lyndhurst, 48 Fed. 840.]

2. When a claim becomes stale in the admiralty, considered.

[Cited in The Romp, Case No. 12,030.]

This was a libel in rem against the schooner Utility, for supplies of ship-chandlery fur-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

nished her by the libellant at New-York. The vessel was owned in North Carolina. The supplies were furnished between the months of May and November, 1828. Her then master was part owner of her at that time. She left New-York after receiving the supplies, with the knowledge of the libellant, and without any attempt on his part to detain her. After that, she made several voyages between North Carolina and New-York, but there was no proof that her being in the latter port was known to the libellant. On the 9th of February, 1829, she was sold, in North Carolina, to one Oliver. He having become insolvent, she was sold, on the 31st of May, 1830, by his assignees in that state, at public auction, and was purchased by the claimant, without notice of the libellant's claim. No demand of payment was ever made by the libellant of the master who contracted the debt, or of the then owners of the vessel. The libel was filed on the 7th of December, 1830.

Edwin Burr and Erastus C. Benedict, for libellant.

John L. Mason, for claimant.

BETTS, District Judge. The civil law gave a privilege, or right to priority of payment, to artificers and material men, for all debts created in the building or refitment of vessels. "Quod quis navis fabricandæ, vel emendæ, vel armandæ, vel instruendæ causa, vel quoquo modo credideret, vel ob navem venditam petat, habet privilegium post fiscum." Dig. lib. 42, tit. 5, § 34 (Ed. Gothof) p. 1529. This privilege, which, in the Roman law, had the effect of a tacit mortgage, and took preference of express mortgages of a subsequent date (Domat, bk. 3, tit. 1, § 5; Dig. lib. 20, tit. 2), is recognised in the maritime law of the present day, and is enforced by courts of admiralty, as it was in the civil law, by proceedings in rem. 3 Kent, Comm. 169–171; Abb. Shipp. (Ed. 1830) 109. I consider these authorities as abundant proof of the jurisdiction of this court in respect to the subject matter of the present action, and shall therefore not enter now into a discussion of this doctrine as an open question.

It would seem most reasonable, that a privilege of such efficacy, and which is not made manifest by any public act or registration, should not be suffered to lie latent, to the prejudice of third persons who acquire interests without notice of its existence. To allow claims of this character to rest dormant indefinitely, would hardly comport with the wholesome equity of the civil law which gave origin to them, or with the principles upon which they are sustained and effectuated by the courts of modern times. The conveniences and facilities of commercial enterprise would not be promoted, but would be vexatiously incommoded by such a rule. Yet, no definite limitation to the time within which these privileges might be enforced, seems to have been declared by law. As they possessed the character of quasi mortgages, under the Roman law, they were undoubtedly enforced as mortgages. So long as the vessel remained in the port where her debts were contracted, she might well be considered as in pledge or pawn, and be immediately sold to satisfy the claim, upon the usual personal notice to the debtor. 1 Browne, Civ. Adm. Law (2d Ed.) 37. The statute of this state seems to regard the lien given in respect to domestic vessels, in the nature of a pawn, for, if the creditor permits the vessel to leave the state, he is divested of his lien. 2 Rev. St. 493, § 2.

Whether the tacit mortgage, when the thing bound remained in the hands of the creditor, was to be enforced by the action serviana, hypothecarious, or pignoratitious (Dig. lib. 20, tit. 1, § 4, and tit. 5, §§ 6, 7), and judicial sale (Code, lib. 8, tit. 28, § 4; Dig. lib. 34, tit. 3, § 1), in which other remedies might undoubtedly be had, as against the debtor, than merely subjecting the thing bound to a judicial sale or delivery to the creditor in satisfaction of his privilege, without regard to the time when the obligation was incurred or the action instituted, or whether the claim must have been set up and pursued whilst the subject of pledge remained in visu, does not appear to have been distinctly determined by the civil law. The modern law, in adopting the rule, seems to have left it with all its original uncertainty as to the time, if not the manner, of its enforcement. The statutes of limitation of the respective states are not understood to have any application to proceedings on the instance side of the court of admiralty (Brown v. Jones [Case No. 2,017]; Willard v. Dorr [Cases Nos. 17,679 and 17,680]), and, accordingly, there would be no other limitation to prosecutions of this character than what is necessarily connected with the nature of the claim, or is implied by the court in analogy to bars in similar cases at law.

Limitations to actions were known to the civil law, and did not vary essentially from those introduced into modern legislation, with this peculiarity as to one species—prescriptions—that, although a right by prescription might be acquired by three years' uninterrupted enjoyment of a thing, yet the action to try that right might be brought at any time within, in one case, twenty years, and in another, thirty years, after the claimant had lost possession. Though these limitations may have been applied to all cases resting in contract, and may, therefore, have embraced express mortgages, yet there appears to have been no provision in cases of tacit mortgages, either limiting the time within which the creditor might sell, or the mortgagor might satisfy the debt and repossess himself of the pledge. The general equity administered in the prætorian courts was competent to protect parties, in this respect, from any gross oppression. But this branch of their powers

does not appear to have called for any fixed and precise edicts or system of rules. If relief in this behalf was sought, it was accorded upon the special facts presented in the particular case, and not in conformity to any general law. The only general restriction, adopted by the courts of chancery and admiralty, upon the right to sue, where there is no statutory bar, is, that they will not take cognizance of stale demands. It is manifest that this limitation cannot have regard to lapse of time merely, because a demand may be delayed a long period, under circumstances affording a most equitable excuse, and will then be sustained, though it might be lost at law by the interposition of a positive bar. Neither would it comport with the interests of navigation, that these tacit liens should endure, as a general rule, until they might be termed in law, stale. Even in regard to seamen's wages, which are eminently first in the privileged class, the courts exact the most satisfactory reasons for a protracted delay in bringing suit for them (Willard v. Dorr [Case No. 17,680]); otherwise, their lien upon the vessel is lost (Trump v. The Thomas [Id. 14,206]). All the cases seem to regard this privilege as one, the advantages of which may be relinquished or lost by the party; and the facts presented by the particular case are scrutinized with a view to ascertain whether they afford evidence of either the extinction or the waiver of the privilege. A reasonable ground of presumption is all that is required, and, in forming its conclusion, the court will make every intendment against the continuance of the lien, which a jury ought to make on a trial before them. Willard v. Dorr [Id. 17,679]; Stevens v. The Sandwich [Id. 13,409], note; Hall's Emeri, 235, note; Trump v. The Thomas, supra. The lien given by the statute law of this state is divested after twelve days from the vessel's leaving port, or on her departure upon a foreign voyage. 2 Rev. St. 492, 493. And ordinarily, if a vessel subject to these silent liens, is suffered to leave the port where they are acquired, the presumption, in cases not governed by the statute, would be, that they had been waived. Artificers and material men would rarely consent to the departure of the vessel, unless satisfied with the responsibility of the owner, until other security was furnished them; and it would be a fair inference for a jury to draw, from the single fact of the vessel's being permitted to leave port, that other security had been substituted, or that the personal responsibility of the owner or master had been relied on. This, however, is not a conclusion of law, and the presumption may be rebutted by other circumstances. The more common, and, probably, the most satisfactory excusatory circumstances would be, that the master and owners were unknown to the creditor, and that the supplies were furnished with a view to fit the vessel for a return to her home port. I have always allowed the lien in such cases to pursue the vessel to her home port, or to a port of discharge or refitment, in case she was on a trading adventure; and, on evidence of due diligence to enforce it at either place, I should have no difficulty in sustaining the lien subsequently, whenever the vessel could be arrested. As, in this case, if it had been shown that the libellant's claim had followed the schooner to North Carolina, and that payment had been sought there without success, or that the vessel could not have been arrested until the time when the present warrant was obtained, I should not have considered the mere changes of situation of the vessel, or the lapse of time since the debt accrued, as a bar to its recovery in this mode. See The Mary [Case No. 9,186.] No explanatory proofs are offered; and, upon the bald case of a credit given in 1828, I should feel great repugnance to recognising it as a continuing lien on the vessel three years subsequently.

There is another material particular in this case. The vessel has been twice sold, and is now in the hands of a bona fide purchaser without notice of this claim. The last purchase was at public auction, and two years after a portion of this debt had been contracted. I am not disposed to hold that a sale will, per se, necessarily divest the lien. No act of the owner, before a reasonable time has been allowed the creditor to set up his lien, should destroy its efficacy. His right should retain its force until impaired by laches of his own, or superseded by the legal or equitable rights of others. To permit an owner to free his vessel from incumbrances of this character, by transferring her to another person, might operate as a bounty to fraud and collusion. Nor would a purchaser, particularly at private sale, be ordinarily misled or wronged by the existence of tacit liens. He knows well the liabilities incident to the property, and proper precaution would, no doubt, be taken against them in the payment of the purchase money.

These considerations apply chiefly, however, to purchases made during the voyage of the vessel home, or immediately on her arrival, and under circumstances calculated to intercept the application of any lien which may be in a course of enforcement. The French law, which is also adopted in the Civil Code of Louisiana, permits a creditor, who has a privilege on a vessel, to pursue it while the vessel is in the possession of any person who obtained possession by virtue of a sale during her voyage; but, if the vessel was in port at the time of sale, and afterwards made a voyage in the name and at the risk of the purchaser, without any claim by the privileged creditor on the vendor, the privilege is lost and extinct against the ship. Code, Commer. liv. 2, tit. 1; Civil Code La. arts. 3206, 3210.

The proofs do not show distinctly whether this schooner has sailed in the name and at the risk of either one of her purchasers; but the presumption is, that she is now navigated

in behalf of her actual owner, and, if the case turned upon this circumstance, the libellant would be required to prove the contrary, to avoid the application of the rule to him. Although we may not find the rule stated in the general maritime law with the minuteness and precision of the regulations of the French code, yet, it appears to me that those regulations rest upon a principle common to the maritime law wherever it is administered—that all liens upon vessels are temporary and evanescent, and can be continued no longer than until a reasonable opportunity has been afforded for their enforcement. This doctrine was clearly recognised by the supreme court of the United States, in Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 332. That was the case of a bottomry bond. The voyage had been performed, and an opportunity had been afforded for enforcing the bond. The ship subsequently made two voyages, and was then sold under executions in behalf of other creditors, and then the bottomry creditor attached her in admiralty. The circumstances of the case were urged in argument to show that the bond had been satisfied in fact, but the court relied upon none of those considerations. The case was decided upon the general doctrine, that the lien had the preference for the voyage on which the bottomry was founded. But, said the court, "it certainly can extend no further." They considered the right of preference lost by the delay. The voyage need not necessarily be limited to the particular run to the home port, but would, in equity, be regarded as continuing until the vessel reached a place where the remedy might be enforced. A deviation to other ports, accidental or designed, and a close of the voyage at a port not contemplated by the parties or brought to the knowledge of the bond holder, would undoubtedly not be regarded as terminating the period allowed for the enforcement of the bond. There seems to be no sound reason for allowing a longer continuance to a tacit than to an express lien, and I am satisfied that the rule is both wholesome and equitable, which denies the continuance of the privilege beyond a period reasonably necessary for its prosecution and enforcement. I shall accordingly order the libel in this case to be dismissed, with costs.

Case No. 16,807.

UTLEY et al. v. DONALDSON et al.

[Trans. of Record U. S. Sup. Ct., Oct. Term, 1876, p. 6255.]

Circuit Court, E. D. Missouri. March, 1874.[1]

CONTRACT OF SALE—MODIFICATION—GENUINENESS OF BONDS.

[Defendants made a completed contract to sell and deliver bonds to plaintiffs, payment to be made on delivery; but before delivery, and at the time of tendering the bonds, they wrote plaintiffs that if the bonds were accepted they must be at plaintiffs' risk as to genuineness; and they gave opportunity for examination of the bonds before acceptance. Plaintiffs thereupon paid for the bonds, and telegraphed defendants that the same were all right, whereupon defendants paid their vendors for the same. *Held*, that the acceptance of the bonds upon the conditions annexed to the tender was a modification of the contract, and, although there was no distinct consideration for such modification, plaintiffs were estopped to insist upon their rights under the original contract.]

This was an action by William R. Utley, George W. Dougherty, and Albert L. Scott against John W. Donaldson and Moses Fraley to recover damages for alleged breach of a contract of sale of certain bonds. The facts were found by the court as follows: On the 24th of May, 1871, Newman & Havens, bankers, of Leavenworth, telegraphed to Nichols, the cashier of the Commercial Bank of St. Louis, to "get rate for $15,000 California Central Pacific Railroad bonds, delivered to-morrow." The defendant offered "100½." Newman & Havens accepted by a telegraphic dispatch. On the 25th of May, Cashier Nichols received from Newman & Havens the bonds, and also a letter, in which they said: "The party selling these bonds is waiting here to get the money for them. He is an entire stranger to us." "We desire them sold without any recourse on us." On the same day, Cashier Nichols showed this letter to the defendants, and proposed to deliver the bonds without recourse. They refused to receive them on such terms, but offered to take them, and pay for them when ascertained to be good; otherwise, to return them. The cashier acceded to this proposition. On the same day, May 25th, the defendants telegraphed to the plaintiffs, who were brokers in the city of New York, "Make best bid for fifteen Central Pacifics, quick." The plaintiffs answered that they would buy at 102½. Their dispatch to this effect reached the defendants about 10 a. m. the same day. The defendants anwered by dispatch on that day, "We accept your offer." The bonds were delivered by the cashier to the defendants on the 25th of May, and were by them forwarded by express on that day to a bank in New York, with a draft on the plaintiffs for $15,375, the bonds to be handed over on payment of the draft. On the morning of that day the defendants addressed a letter to the plaintiffs, which is the hinge of this controversy. It is as follows: "In accordance with your offer for 15 Central Pac. 1st mort. bonds, 102½, we replied, 'We accept your offer, and have forwarded them by ex. to Bank North America, with draft attached for $15,375.' We would further add, that we have purchased the bonds from a party strange to us; and, not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine; consequently, please examine them, and, upon being found correct, telegraph immediately (Central all O. K.). We do not doubt the bonds, but, com-

[1] [Reversed in 94 U. S. 29.]

ing to us through strange parties, we use this as a precaution, and not willing to take any risk." This letter reached the plaintiffs on the 29th of May, a short time before the draft and bonds were presented. The plaintiffs had sold the bonds, "to arrive," to Rasmus & Lissignola. They could not be delivered after two o'clock. It was within a few minutes of that time when the messenger of the bank presented himself. One of the plaintiffs went with the messenger to the office of their vendees, and requested Rasmus to examine the bonds. He did so, said they seemed to be correct, and thereupon gave a check for the amount his firm had agreed to pay for them. This check was duly paid. On the same day the plaintiffs wrote to the defendants, "The Centrals all correct, and we telegraphed you to that effect." Such a dispatch had been sent. Upon receiving it, the defendants paid the bank for the bonds, and the money was remitted by the bank to Newman & Havens. On the 12th of June information was received for the first time in New York, or elsewhere, that there were in existence counterfeits of such bonds. On that day the plaintiffs wrote to the defendants, "Look out for counterfeit Central Pacifics; some appeared on market to-day." On the next day the plaintiffs telegraphed to the defendants, "Central Pacifics sold us probably counterfeit. Bonds shipped to Europe. Can't hear from them for several days." On the same day the plaintiffs wrote to the defendants to the same effect, and said further: "In case your parties are doubtful, it would be well to act at once as if the bonds were not genuine. There has been no suspicion of counterfeits until yesterday." On the same day, June 13th, the defendants replied by dispatch: "We sold without risk. Have purchased same day from Commercial Bank, and they from Newman & Havens, of Leavenworth, without risk." The bonds were counterfeit, and the plaintiffs refunded to Rasmus & Lissignola the amount they had paid. On the 12th of July the plaintiffs telegraphed to the defendants, "The Central Pacifics bought of you in May are declared counterfeit. We shall look to you for indemnity." On the same day the defendants replied by telegraph, and asked upon what ground it was proposed to hold them liable. Some subsequent correspondence took place between the parties, which it is unnecessary to refer to in detail. The plaintiffs asked a transfer of the claim of the defendants, whatever it might be, but without guaranty, against the bank. This the defendants refused to give. The money paid to Newman & Havens by the bank was not called for by the party from whom they received the bonds for two or three weeks after the money was paid to them.

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

DILLON, Circuit Judge. From the foregoing facts, the court is of opinion that the contract by telegrams was to sell and deliver genuine bonds, the delivery to be in futuro, and payments to be made upon delivery. The tender of delivery was accompanied with the express condition set forth in the letter from the defendants to the plaintiffs of date May 25th, 1871, to the effect that the bonds, as to genuineness, should, if accepted, be at the sole risk of the plaintiffs, and giving the latter opportunity for examination of the bonds before accepting them, stating the reasons why the defendants would not deliver the bonds except on the terms that the plaintiffs should assume the risk of their being genuine. This letter was received by the plaintiffs before the bonds were tendered to them, and they paid for the bonds, and telegraphed the defendants that they were all right. Before the contract made by the telegrams was executed by the delivery of the bonds, the defendants said, in substance, to the plaintiffs: "We will not deliver the bonds, except at your risk as to genuineness. You may examine and satisfy yourselves on this point, but we will not make any other kind of delivery." The plaintiffs would have had the right to refuse to accede to any such modification of the contract made by the telegraphic dispatches, and to have refused to accept the delivery on the terms proposed in the letter of May 25th, and to have held the defendants for damages for the non-delivery in compliance with the contract. But by not refusing to receive the bonds upon the conditions named in this letter, and by acting upon that letter, and by assuring the defendants, in response to it, that the bonds were all right, in consequence of which the latter paid their vendor for the bonds, the plaintiffs must in law be taken to have assented to the modification of the contract of sale made by the telegrams, and to have accepted the bonds in performance of it, or the plaintiffs are estopped to insist that the letter of May 25th does not affect the transaction or the rights of the parties to the contract, and this although there was no distinct consideration for the modification.

The loss in the transaction has arisen from the want of due precaution or diligence on the plaintiffs' part, after receiving the letter, to ascertain whether the bonds were genuine, and as no fraud was practiced by the defendants the loss must fall upon the plaintiffs; and this on the familiar principle that, where a loss must fall upon one of two innocent persons, it must be borne by him whose conduct occasioned it. In the absence of a contract to the contrary, it is undoubtedly true that there is an implied warranty of the genuineness and legal validity of bonds, notes, or choses in action sold by a private person or public broker. Jones v. Ryde, 5 Taunt. 488; Westropp v. Solomon, 8 C. B. 345; Gompertz v. Bartlett, 2 El. & Bl.

849; Watson v. Chesire, 18 Iowa, 203, and cases cited; Young v. Cole, 3 Bing. N. C. 724; Lambert v. Heath, 15 Mees. & W. 486; Merry v. Nickalls, L. R. 7 Ch. App. 733; Flynn v. Allen, 57 Pa. St. 482; Rieman v. Fisher, 4 Am. Law Reg. (O. S.) 433. But in this case the plaintiffs assumed the risk of genuineness. This is its distinguishing character. Such an assumption or contract is not void because it is against public policy. And in our judgment it cannot be deduced from the facts that it was void because of fraud, express or implied.

[Reversed in 94 U. S. 29.]

Case No. 16,808.

UTPADEL et al. v. FEARS.

[1 Spr. 559;[1] 21 Law Rep. 478.]

District Court, D. Massachusetts. Oct., 1858.

GENERAL AVERAGE—FISHING VOYAGES.

The shares of fishermen, in mackerel voyages, who sail under the agreements usual in those voyages, are subject to contribution for general average.

[Cited in The Antelope, Case No. 484; The Cornelia M. Kingsland, 25 Fed. 859.]

This was a libel in personam, promoted by several of the crew of the fishing schooner, E. C. Haskell, of Gloucester, against the owner, to recover a balance alleged to be due them on settlement. This balance was withheld, by the owner, to pay the contribution which he claimed was due from them toward certain salvage and general average expenses, which were incurred on the voyage. The only question of law involved in the case was, whether the shares of the fishermen, under the contract in this case, were liable to these deductions. There was evidence offered of a usage in the mackerel business, to make and allow these deductions, but the opinion of the court, on the law, rendered it unnecessary to pass upon this evidence.

C. G. Thomas, for libelants.

R. H. Dana, Jr., for respondents.

SPRAGUE, District Judge. The crew, in this case, shipped under the usual articles of mackerel voyages. By these articles, the fish taken and brought home and delivered to the owner, are to be sold by him on joint account, and the proceeds of the sale are to be equally divided, one half to the owner, and one half to the master and crew. There are also, by established usage, certain deductions to be made for the expenses of coopering, packing and inspecting, and for bait. In the course of this voyage, and after all the fish had been taken, the vessel was overtaken by a storm, off Prince Edward's Island, and to prevent the vessel's dragging, and being driven ashore, her masts were cut away. While she lay dismasted, she was taken in tow by another vessel, which carried her into Charlotte Town, Prince Edward's Island, and there libelled the vessel and cargo for salvage. This claim was settled by the owners, and the vessel released and taken home to Gloucester, and the fish sold in the usual manner. The general average for cutting away the masts was apportioned, according to the established principles of adjustment, on vessel and cargo, and the salvage expenses were apportioned in the same manner. In settling with the crew, the owner charges the whole fish with its contributory share of the salvage and general average expenses, according to the adjustment, and the half which belonged to the crew bore its half of this contribution. The crew contend that their shares, or lays, are, in fact, wages, and are, therefore, not liable to such contributions, but that it is the duty of the owner to bear all the expenses of sailing the vessel, including all expenses of general average and salvage, and that they are to have their clear half of the fish.

(The judge then examined the evidence on the subject of the cutting away the masts, and of the salvage, and decided that they were proper subjects of contribution, if the crew are bound to contribute, and that the adjustment was on correct principles.)

The salvors, in this case, had a lien on the fish, as well as on the vessel, and could, at their option, have proceeded by libel against both. If it had taken half of the fish to satisfy this lien, then only half of the fish caught could have been brought to port and delivered to the owner. Now, by the articles, it is not the fish caught, but the fish brought to port and delivered to the owner, out of which the payment to the crew is to be made. In such case, then, the crew could get only half of a half of the fish caught. If fish be lost by perils of the seas, it is a joint loss. Now, in this case, the owner paid the salvage, and thus relieved the fish from the lien. Instead of part of the cargo being thrown overboard to save the rest of the cargo and the vessel, the masts were voluntarily sacrificed to save vessel and cargo. On general principles, there can be no doubt that the crew, if to be treated as part owners of the cargo, should contribute to these expenses. And if, on the other hand, the fish had been taken by the salvor to satisfy his claim on fish and vessel, or if the fish had been voluntarily sacrificed to save the vessel and the rest of the fish, the crew would be entitled to a contribution from the owner, for his interest in the vessel and in the fish. This is the just, equitable and established principle governing joint interests, exposed to common perils of the seas. The fish in this case are brought home, in specie, but subject to certain expenses and liens. The crew are to be paid according to the value of the fish, as delivered by them to the own-

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

er. Its value is so much the less. It is as much the duty of the crew to bring the vessel and cargo back safely, as it is the duty of the owner to transport the fish safely in the vessel. The peril is a common misfortune, and the relief from it a joint charge. The case is the same, in principle, as if the salvors had been paid at Prince Edward's Island in fish specifically, for the contributory share chargeable on the fish.

It is argued, that the crew are in fact on wages, calculated on the fish brought in, and that whalemen and fishermen on lays, are always treated as serving on wages. Several instances have been cited from the books, where the shares or lays are said to be like wages, and in the nature of wages, and the crew are held not to be partners, or joint tenants with the owners in the oil or fish. Baxter v. Rodman, 3 Pick. 435; Bishop v. Shepherd, 23 Pick. 492. These cases go only to that extent. It has simply been found convenient to liken these shares to wages for certain purposes. In whaling voyages it has been held, that the amounts due the crew, when ascertained, are in the nature of wages. But this proposition gives us no aid. The question how the amount is to be ascertained still remains, and is the very question here. What deductions from the gross proceeds are to be made in ascertaining the amount due? And is general average contribution to be one of those deductions? If the money, when due, is to be treated as wages, still we must inquire, how much is due? But in some respects, the claims of the fishermen are not like wages. It is doubtful, if they have an action against the master, who is a joint shareowner with them. All the court can do is, in each case, and as to each question that arises, to determine whether the claims are, or are not, to be governed by the analogy of wages.

It is settled that seamen's wages are not liable to general average contribution. The only reasons I find assigned for this exemption are those given by Abbott and Kent. They are: 1st, because seamen might otherwise be unwilling to make jettison; and 2d, the hardship of diminishing their wages, without fault on their part, after all the perils, privations and labors they have undergone. Neither of these reasons is to me entirely satisfactory. The latter consideration has not prevented the enforcement of a forfeiture of all their wages, in case of a total loss of vessel and freight; and as to the former, it may with equal truth be said that if their wages are exempt from contribution, they may be too ready to shorten their labors, and seek relief too speedily from danger, by sacrificing the cargo, the property of others, which is under their charge. Another and better reason for the exemption is, that a seaman on wages does not stand on an equality of risk with those who have property in, or on board of the vessel. His wages are due to him by a contract for labor and skill, and for which, upon the general principles of hiring, he should be equally entitled to compensation, whatever may be the result of the enterprise. But from reasons of policy, in this particular kind of hiring, the wages are lost, if there be a total loss of the vessel and cargo; but the encroachment upon the general principles of contract has gone no further. It is only in case of an actual total loss of vessel and freight, that the wages are lost. If all that is saved is equal in value only to the amount of the wages, still they must be paid in full; as it is often expressed, the wages are nailed to the last plank. Wherever, therefore, the danger is only of a partial loss, the wages are in no peril, and they ought not to contribute to a sacrifice made to avert or diminish a danger to which they were never exposed. Take a case like the present, where the only danger is of stranding, at a place where it is quite certain that parts, at least, of the vessel and cargo will be saved. Why should seamen on wages contribute to a sacrifice of the masts, made merely to diminish a partial loss, which was to be suffered by the owners of the vessel and the property on board? And such cases are very frequent; indeed, it is only in cases of partial loss that any question of contribution can arise, and in those it can rarely be shown that a seaman on wages had anything at risk, or derived any benefit from the sacrifice. As a general rule, therefore, upon the true and strict principles of average, a seaman on wages ought not to be called upon to contribute. But fishermen stand in a very different position. Their compensation is so bound up in the fish which they have taken, that a partial loss of the latter carries with it an equal loss of the former. If by a peril of the sea, one-half or three-fourths of the fish are destroyed, the men lose the same proportion of their compensation. If, in this case, the vessel had gone ashore, and a portion of the fish on board had thereby been destroyed, the libellants would have lost the same proportion of the fruit of their labor. They have the same interest, therefore, in diminishing a partial loss, which the owners of the vessel or of other cargo have, and thus stand on an equality of risk. Beside this, in case of jettison, those who are to select the articles to be sacrificed, should be in a position of impartiality, which would not be the case with fishermen, if they could neither claim nor be subjected to contribution. They would be strongly tempted to select any other article, and sacrifice every other species of property, rather than the fish which they had taken.

General average rests on two principles: First, a principle of equity, that all who are equally exposed to a common danger, shall contribute to indemnify one whose property is sacrificed for the common good; and second, a principle of policy, that those who

are to determine personally, or through agents, what property shall be selected for the sacrifice, shall be placed in positions of impartiality. Fishermen, in my opinion, come under this principle of equity, and should be governed by this rule of public policy. I am, therefore, of opinion that the shares of fishermen, under these contracts, are liable to general average, and are entitled to the benefits of general average. Libel dismissed.

Case No. 16,809.

UTTERBACH et al. v. BINNS.

[1 McLean, 242.] [1]

Circuit Court, D. Kentucky. Nov. Term, 1834.

DEEDS—DELIVERY—INNOCENT PURCHASERS—RENTS AND IMPROVEMENTS.

1. The delivery of a deed is essential to its validity.

2. Where possession of a deed was fraudulently obtained by the grantee, and he conveyed to innocent persons, who entered upon the land and made lasting and valuable improvements, and were permitted to retain possession several years, they are entitled to compensation for their improvements.

[Cited in Tufts v. Tufts, Case No. 14,233. Cited in brief in Reamer v. Lamberton, 59 Pa. St. 463.]

3. In such a case the annual rents and profits will be deducted from the value of the improvements.

4. Where one party has refused to perform the contract, and the vendor, for instance, obtains possession of the land sold, the vendee, under such circumstances, cannot recover back the money paid.

[Cited in Dudley v. Hayward, 11 Fed. 546.]

[Cited in Ashbrook v. Hite, 9 Ohio St. 364.]

In equity.

Mr. Crittenden, for complainants.

Mr. Wickliffe, for defendant.

McLEAN, Circuit Justice. The complainants, in their bill, state, that a patent for about three hundred and seventy-eight acres of land issued to Charles Binns, particularly described; that settlements and improvements have been made on the land under an adverse claim by the complainants, or those under whom they claim. That a certain John Roberts declared he had bought the land, and produced and had recorded a regular deed of conveyance for it to him, from Binns. He sold and conveyed the land to complainants and received payment in full, except a small sum due from one of the complainants, before they had any notice of Binns's claim. They made valuable improvements on the land, and they state that Roberts had purchased the land from Binns, but did not pay him for it; but by some means having got possession of the deed, had it recorded and claimed under it, as above stated. Binns brought an action for the purchase money against Roberts, and obtained a judgment, which, on the ground of some pretended equity, Roberts enjoined; but the injunction was dissolved and the bill dismissed. Binns then filed a bill to enforce a lien for the purchase money and made Roberts and the complainants defendants. In this bill Binns stated that the deed was signed with the intention of being delivered when the purchase money should be paid. But that Roberts, by fraudulent means, got possession of the deed without paying the consideration, and that the deed was never delivered. Of all these facts, the complainants state they were ignorant, and so stated in their answer. This bill the complainants say was dismissed on the hearing. That Binns then brought a writ of right, and recovered. They represent that Roberts paid four hundred and fifteen dollars at the time of purchase. That the act of Binns amounts to a recision of the contract, and that they, claiming under Roberts have a lien on the land for said sum paid by Roberts and for all improvements. That in addition to their purchase, Roberts assigned to them the above payment, and they pray an injunction, &c. In his answer, Binns denies that complainants were purchasers without notice, that the above sum paid by Roberts was justly due, and he denies that he has rescinded the contract.

There is no evidence in the case which shows that the complainants, at the time of their purchase from Roberts, had any knowledge that he had, fraudulently, obtained possession of the deed. The delivery of a deed is as essential to its validity, as the signing of it; they are both essential to the execution of the deed. The complainants in their bill set out that the deed to Roberts was never delivered, and that he fraudulently obtained it. And they do not seek relief beyond a compensation for their improvements, and a return of the payment alleged to have been made by Roberts. There is nothing on the part of Binns, which shows a recision of the contract. On the contrary, he had endeavored in various modes to enforce the contract. But Roberts not only acted fraudulently in obtaining the deed, but he refused to make payment. He has endeavored by every means to defeat the recovery of the purchase money; and if it were clear that he made to Binns the payment as alleged in the complainants' bill, he has no right to recover the whole or any part of it back again. After not only utterly failing to perform his part of the contract, and defeating the repeated efforts made by Binns to enforce the payment, he cannot, now that Binns has, by legal measures, obtained a right of entry on the land, of which, indeed the deed to Roberts did not deprive him, he cannot in equity or at law claim a recision of the contract. We are clear, therefore, that no part of the four hundred and fifteen dollars, alleged to have been paid, can be recovered by Roberts or his assignee. But the claim for improvements, set up by the com-

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

plainants, stands upon different ground. They have acted in good faith. No fraud is alleged against them, nor is it proved that they had such notice of the fraud of Roberts, as to affect their consciences. He, apparently, at least, had a good and legal title; and they entered under bona fide contracts with him, and made valuable and lasting improvements on the land. The value of the land has been enhanced by the improvements, and under all the circumstances, we think that the complainants are entitled to compensation for their labor, in so far as it has not been made by the rents and profits. Commissioners will, therefore, be appointed to estimate the value of the improvements, and how much they have added to the value of the land; and also the annual amount of the rents and profits.

And at a subsequent day of the term the commissioners having reported the amount the complainants were entitled to receive, beyond the rents and profits, THE COURT decreed the same; and that on the payment of the same into the clerk's office, Binns should have the right to take out his writ of possession under the judgment on the writ of right.

V.

VACA (UNITED STATES v.). See Case No. 16,604.

Case No. 16,810.

VACCARI v. MAXWELL.

[3 Blatchf. 368.] [1]

Circuit Court, S. D. New York. Nov. 30, 1855.

CUSTOMS DUTIES—PROTEST—ASSESSMENT OF ADDITIONAL DUTY — FREIGHT AND COMMISSIONS — REAPPRAISEMENT — ACTS OF DE FACTO OFFICERS.

1. A protest "that no penalty of 20 per cent., under section 8 of the act of 1846, can be exacted except where the importer has added to his invoice price on entry," is a sufficient protest, under the act of February 26, 1845 (5 Stat. 727), to raise the question whether the collector is authorized to impose the penalty appointed by section 8 of the act of July 30, 1846 (9 Stat. 43), where no addition has been made by the importer to the value of his entry.

2. Under section 8 of said act of July 30, 1846, a collector has authority, upon an appraisement, to assess the additional duty for the undervaluation of purchased goods, which is there prescribed, although the importer has made no addition, in the entry, to the invoice value of the goods.

3. The cases of Goddard v. Maxwell [Case No. 5,492], and Morris v. Maxwell [Id. 9,834], cited and approved.

4. Where an invoice of lemons, though dated at Genoa, the place of departure of the vessel, stated the value of the lemons free on board at San Remo, which was a port 70 miles from Genoa, and on the track of the vessel to New York, and the chief market of the country for lemons, and added 2 per cent. commissions, and the lemons were taken on board at San Remo, and bills of lading were there signed, and the lemons were entered at New York as embarked from San Remo, and the invoice showed the true price of the lemons at Genoa and San Remo, and the public appraisers, and also appraisers on appeal, raised the invoice value, by adding the freight on the lemons from San Remo to Genoa, and also by increasing the charge for commissions, and, these additions increasing the invoice value by more than 10 per cent., an additional duty or penalty of 20 per cent. was imposed, under section 8 of said act of July 30, 1846, which was paid under a protest "that the expenses of transportation from the place of original shipment to Genoa are not dutiable charges, that the reappraisement is illegal, because the price is made to include charges, and that no penalty can be exacted for addition of charges:" *Held*, that this protest was, in connection with the invoice, a sufficient protest, under the said act of February 26, 1845, to notify the collector that the valuation by the appraisers of the charges of transportation between Genoa and San Remo was complained of.

5. The invoice and entry in a case may, ordinarily, be regarded as composing part of the protest.

6. The addition by the appraisers of the freight between San Remo and Genoa, was, under the circumstances, illegal.

7. The imposition of the additional duty or penalty of 20 per cent. under the said 8th section, in consequence of the addition of the freight and the increase of the commissions, was illegal.

8. Freight and commissions, although dutiable items, in proper cases, are not, under said eighth section, the subjects of penal duties in themselves, nor, by being added to the value of imports, can they be the means of imposing a penalty on the latter.

9. A clause in the protest, "that the merchant appraiser was not legally sworn in," when considered in connection with the oath annexed to the appraisal, which was before the collector, and showed that the merchant appraiser was sworn by an official appraiser, was a sufficient protest to the collector, under the said act of February 26, 1845. to raise the question as to the legality of such oath.

10. The reappraisement, which was made under section 17 of the act of August 30, 1842 (5 Stat. 564), was illegal and void, because the merchant appraiser was sworn by the official appraiser.

11. The rule that the acts of a de facto public officer are valid in regard to third persons, and cannot be questioned collaterally, although he has failed to give a bond or take an oath when required, is restricted to those who hold office under some degree of notoriety, or are in the exercise of continuous official acts, or are in possession of a place which has the character of a public office.

[Cited in Waterman v. Chicago & I. R. Co., 139 Ill. 666, 29 N. E. 691; State v. Roberts, 52 N. H. 496; Washington v. Nichols, 52 N. Y. 485.]

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

This was an action against [Hugh Maxwell] the collector of the port of New York, to recover back an excess of duties and a penalty. The jury found a verdict for the plaintiff [Joseph Vaccari], subject to the opinion of the court on a case.

John S. McCulloh, for plaintiff.
J. Prescott Hall, for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The plaintiff imported a shipment of lemons from Sardinia, and entered them at this port as embarked at San Remo. The cargo was laden on board at that port, and bills of lading were there signed. The invoice was dated at Genoa, where the vessel lay at the time, and stated the value of the lemons per box free on board at San Remo, adding two per cent. commissions to the amount. The latter port is seventy miles distant from the former, and on the track of vessels to New York, and is one of the principal, and, on the proofs given in this case, the chief market of the country for that product. It was also proved that the invoice represented the true price of lemons at Genoa and San Remo. The usual freight of lemons between San Remo and Genoa is from three to three and a half francs per box.

On the arrival of the vessel at this port, entry was made of the shipment, at the invoice valuation. The public appraisers raised the value of the lemons three francs per box. The plaintiff gave the notice required by law of his dissatisfaction with that appraisal, and the collector nominated a merchant appraiser to act with one of the general appraisers on the appeal. These proceedings were in conformity with the provisions of the 17th section of the act of August 30, 1842 (5 Stat. 564), and of the 3d section of the act of March 3, 1851 (9 Stat. 630). The general appraiser and the merchant appraiser united in adding to the invoice value of the lemons three and a half francs per box, and one-half per cent. commissions, being one-half of a franc increase in the appraiser's valuation, and also one-half per cent. in the commissions. This last appraisement, if legally made, became final, and fixed the true value of the goods at the period of their exportation. The additions made by the appraisement to the invoice prices raised the entry more than 10 per cent., and the defendant assessed duties according to that valuation, and also imposed a penalty of 20 per cent. on account of the excess. The duties and penalty were paid by the plaintiff, under a protest in writing and print, made by him at the time.

This protest is objected to as not fulfilling the requirements of the act of February 26, 1845 (5 Stat. 727), and as failing to point out distinctly and specifically the grounds of objection to the payment of the duties exacted. The first part of the protest consists almost entirely of matters having no relevancy to the questions raised in this case; but we think that the written clause specifies, with adequate precision, at least one objection, on which the plaintiff is entitled to the judgment of the court; and we are disposed to hold it to be, in its other particulars, legally sufficient—connected, as it must have been, with the actual transaction, in the view of the collector. It is in these words: "I claim that the merchant appraiser was not legally sworn in, and that the expenses of transportation from the place of original shipment to Genoa are not dutiable charges; that the reappraisement is illegal, because the price is made to include charges; that no penalty can be exacted for addition of charges; and that no penalty of 20 per cent., under section 8 of the act of 1846, can be exacted, except where the importer has added to his invoice price on entry." This latter clause, we think, complies with the most rigid requirement of the act of 1845; and it presents the question, whether the collector had authority, in law, to impose on these goods the penalty appointed by the 8th section of the act of July 30, 1846 (9 Stat. 43), there having been no addition made by the plaintiff to the value of his entry. Assuming that the appraisement was regular in form, and that it exceeded, by 10 per cent. or more, the invoice value, and that thereby the importation became liable to an extra duty or penalty, the question is, whether the act of 1846 applies to the case, and authorizes the one exacted by the defendant?

It is enacted, by the 8th section of that act, "that it shall be lawful for the owner, consignee or agent of imports which have been actually purchased, on entry of the same, to make such addition, in the entry, to the cost or value given in the invoice, as, in his opinion, may raise the same to the true market value of such imports in the principal markets of the country whence the importation shall have been made, or in which the goods imported shall have been originally manufactured or produced, as the case may be, and to add thereto all costs and charges which, under existing laws, would form part of the true value at the port where the same may be entered, upon which the duties should be assessed. And it shall be the duty of the collector within whose district the same may be imported or entered, to cause the dutiable value of such imports to be appraised, estimated and ascertained, in accordance with the provisions of existing laws; and, if the appraised value thereof shall exceed, by ten per centum or more, the value so declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected and paid, a duty of twenty per centum ad valorem on such appraised value; provided, nevertheless, that, under no circumstances, shall the duty be assessed upon an amount less than the invoice value, any law of congress to the contrary notwithstanding." In the case of Goddard v. Max-

well [Case No. 5,492], this court held, that an importer of purchased goods was subject to pay an additional duty of twenty per cent., when the invoice was raised by appraisement more than ten per cent., although the importer had not added to their value on entry. We regard the provision in the section above quoted, as conferring a privilege which the importer may omit to claim, at his option. We do not think that the law prescribes a course of proceedings as necessary to be taken by an importer, in order to bring his goods within the object and scope of that statute, and subject them to a penalty. Morris v. Maxwell [Id. 9,834]. Taken in conjunction with the 16th and 17th sections of the act of August 30, 1842 (which remain substantially in force), the enactment in question goes to relieve an importer from a penalty consequent upon an undervaluation in his invoice, by enabling him to make an addition to that value on his entry. If the addition leaves the price more than ten per cent. below the market value, then the penalty is to be enforced, as it would have been had the entry corresponded with the invoice. The supreme court inclines to the opinion that the 8th section of the act of 1846 only changes the law in respect to the penalty under the act of 1842, by a diminution of its amount from 50 to 20 per cent.; and that, in other respects, its provisions are tantamount to those of the act of 1842. Ring v. Maxwell, 17 How. [58 U. S.] 147, 150.

It is not necessary, in this case, to adopt or discard the decisions of this court before referred to, there being other points upon which the present decision will be placed. We advert to the point, to show that our attention has been directed to the distinction made on the argument, and to say that, although, on a critical reading of the provision in question, there may be ground to question our interpretation, we are, as advised at present, inclined to adhere to our construction, as meeting the intention and purpose of the enactment. And, in accordance with the ruling in Goddard v. Maxwell, we hold, in this case, also, that the collector had authority, upon the appraisement, to assess the additional duty, the goods being purchased goods, although the importer made no addition to his entry.

We consider the protest against charging the expense of transportation between Genoa and San Remo, because not a dutiable charge, to be sufficiently distinct and specific to satisfy the act of 1845, by the aid of the invoice, upon which the collector ordered the appraisement. That states that the lemons are to be delivered free on board at San Remo, and, therefore, independently of the bill of lading, was direct and clear notice to the defendant, that San Remo was the port of shipment, and that the plaintiff claimed he had rightfully entered the goods at the invoice price. The appraisers reported that, by the invoice annexed, the goods were imported from Genoa, and were so valued by them. This was a palpable misunderstanding of the invoice; and we think the assertion of the protest, "that the expenses of transportation from the place of original shipment to Genoa are not dutiable charges," was a sufficiently precise notice to the defendant, that a valuation, by the appraisers, of the charges of transportation between those places, was the error complained of. The testimony proves that that difference between the invoice and the appraisement is simply the price of transportation or freight between those places, and that the invoice value of the goods is the true one, in respect to both of those ports.

The protest is a mercantile and not a legal instrument, and, when its meaning is unmistakably plain, its phraseology will not be scrupulously criticised by the courts. Swanston v. Morton [Case No. 13,677]. We have always required that the collector shall have, by it, direct and certain notice of the grounds of objection to the duties assessed, but it never has been determined, as indispensable, that the entire notice must be incorporated in the protest. The invoice and entry may, ordinarily, be regarded as connected with and composing a part of the protest, being the things out of which the protest arises, and to which it relates.

The subject of appraisal, under the 16th and 17th sections of the act of 1842, is the actual market value or wholesale price of the goods, wares or merchandise imported and subject to duty. When that value is "appraised, estimated and ascertained," to such value or price are to be added all costs and charges, except insurance, including in every case a commission at the usual rates. These united compose the true value upon which duties must be assessed. Section 16. A reappraisement is to be made agreeably to the same provisions. Section 17. The 8th section of the act of 1846 requires the dutiable value of the imports to be appraised, estimated and ascertained in accordance with the provisions of existing laws, and provides that, if the appraised value thereof shall exceed, by ten per cent., &c., then, &c. We think that the true interpretation of this clause limits an appraisal under it to the goods imported; and, although it speaks of "dutiable value," as the subject of appraisement, we think that that expression is to be understood in the same sense in which it is used in the act of 1842, and does not comprehend the freight or commissions added thereto by the appraisers, as being subject to appraisal as part of the foreign market value of the invoice. We think that, if these goods had been transported from San Remo to Genoa, and been shipped at the latter port, though the value of freight or commissions would have been dutiable items, yet they would not have been, in themselves, subjects of penal duties. Nor, by being added to the value of the imports, can they be the means of imposing 20 per cent. additional duties on the latter. In our opinion, therefore,

on both of these points, the exaction of penal duties in this case was unauthorized by law.

The remaining ground assigned in the protest is, "that the merchant appraiser was not legally sworn in." We should not regard this, standing by itself, as a distinct specific notice to the collector, that the oath had been administered to the merchant appraiser by an official appraiser. The collector was entitled to be pointed to the officer whose authority was excepted to, that he might make the appropriate inquiry and examination into his competency, and have the error rectified, if one had been committed. We find, however, as part of the case, the invoice, entry, oath of the merchant appraiser, appraisement, and protest, connected with each other; and we are bound to assume that, as the invoice, entry and protest would necessarily be before the collector when the duties were imposed, the oath annexed to the appraisal was also before him. The protest would thus necessarily indicate to him the manner in which the merchant appraiser had been "sworn in." We feel the more constrained to adopt this presumption, for the reason that, for a considerable period, the court has been judicially cognizant of the fact, that the official appraisers were in the practice of administering the prescribed oath to merchant appraisers, and that the legality of that practice has been a subject of question at the custom-house and in this court. The objection to the competency of an appraiser to administer such oath has been repeatedly made and debated in this court within the last two years, but in no case has the protest been so shaped as to require the court to decide the question. We considered it our duty, however, to have an intimation given to the collector that we could find no authority in law for the administration of the oath by an appraiser. We think that the present protest, in connection with the other papers accompanying it, furnished to the collector a sufficiently precise statement of the ground of objection, to call upon us to determine whether the power to administer such oath existed in the official appraisers.

The 20th section of the act of March 2, 1799 (1 Stat. 641), directs that all officers and persons to be appointed pursuant thereto, shall, before they enter upon the duties of their respective offices, take and subscribe an oath or affirmation, to be taken before the collector. The 52d and 66th sections of the same act (Id. 666, 677), direct merchant appraisers, appointed to examine damaged goods, or those not accompanied with the original invoice, or suspected to be fraudulently invoiced, to be sworn or affirmed before the collector. The acts of July 31, 1789 (Id. 41, 42, §§ 16, 22), and August 4, 1790 (Id. 166, 169, §§ 37, 46), contain similar provisions. The official appraisers created under the act of March 1, 1823 (3 Stat. 735, § 16), being officers under the general revenue laws, would necessarily take the oath prescribed for them, in the manner directed by those laws, no different method being appointed in the latter act. The additional official appraiser authorized by the act of May 28, 1830 4 (Stat. 409, § 1), to be appointed for the port of New York, was to be qualified in the same manner.

Although the law is peremptory, that all custom-house officers shall be duly sworn or affirmed, before entering upon the duties of their offices, yet such provisions in respect to public officers have not been regarded by the courts as conditions precedent to their rightful authorization, or more than merely directory. The current of decisions, in respect to public officers appointed or elected, is, that their acts are valid in regard to third persons, and cannot be questioned collaterally, although they fail to observe the positive prescriptions of law to give a bond or take an oath before entering upon the exercise of their offices. Nason v. Dillingham, 15 Mass. 170; Bucknam v. Ruggles, Id. 180; Town of Plymouth v. Painter, 17 Conn. 585; People v. Stevens, 5 Hill, 616, 630; People v. Hopson, 1 Denio, 574, 579; People v. Covert, 1 Hill, 675; Weeks v. Ellis, 2 Barb. 324; Margate Pier Co. v. Hannam, 3 Barn. & Ald. 266.

We think, however, that the decisions in relation to the acts of officers de facto, are reasonably to be restricted to those who hold office under some degree of notoriety, or are in the exercise of continuous official acts, or are in possession of a place which has the character of a public office. The revenue laws look to the employment of others than strictly custom-house officers, in the collection of the revenue. The 20th section of the act of March 2, 1799, before cited, seems to make a distinction between officers and persons employed in that service, and requires each to take an oath of office. Merchants called in by the collector to estimate the value of merchandise, take no rank as public officers. Greely v. Thompson, 10 How. [51 U. S.] 225, 241. They rather hold the position of referees, or trustees, charged with the performance of a single act, or appointed to act in an individual case. We think that the statute in question is mandatory, and that the acts of a merchant appraiser, done without the sanction of an oath, are both irregular and void. Bryan v. Walton, 14 Ga. 185; 2 Grah. New Tr. (by Waterman) 196, notes.

The appraisement made and reported by the general appraiser and the merchant appraiser, which, in this case, was the basis of the duties imposed and collected, was, we think, without authority, and affords no protection to the defendant in this suit.

Judgment for plaintiff.

VAIDEN (NORDLINGER v.). See Case No. 10,296.

VAIL (AMERICAN MIDDLINGS PURIFIER CO. v.). See Case No. 308.

Case No. 16,810a.

V. VALARINO v. THOMPSON.

[23 Betts' D. C. MS. 45.]

District Court, S. D. New York. May, 1857.

SUIT AGAINST FOREIGN CONSUL.

[The state practice having been adopted by the standing rules of the court, plaintiff may obtain leave to file a double replication to defendant's plea.]

[This was an action of assumpsit by Augustin Valarino against William D. Thompson, consul. For opinion overruling a demurrer to the declaration, see Case No. 16,813a.]

Laroque & Barlow, for plaintiff.
Emerson & Pritchard, for defendant.

BETTS, District Judge. This is a common-law action of assumpsit, but necessarily prosecuted in this court, because of the official character of the defendant, he being admitted and approved by the president of the United States as consul of the republic of Ecuador for the port of New York. The declaration contained the ordinary counts upon an indebitatus assumpsit, to which the defendant pleaded the general issue and the statute of limitations. Thereupon the plaintiff applied to the court upon motion with notice and an affidavit stating the necessity of the privilege asked for, to the maintenance of his rights, for an order that the defendant show cause in court why the plaintiff shall not be allowed to file double replications to the pleas interposed by the defendant. The order was granted pursuant to the application, but, delays from term to term in bringing the motion to hearing having intervened, the papers have now been submitted for the judgment of the court upon the question of practice involved in the application.

The controversy rests upon a point of practice, and does not demand the consideration of the pertinency or sufficiency of the replications proposed. That point would more properly be raised by demurrer. But the question now discussed seems rather to be whether the court possesses any discretion in the matter, and, if so, if this is a proper case in which to exercise it. The ground taken on the part of the defendant is that the law regulating the procedure of this court does not allow the use of double replications to pleas, and that accordingly the plaintiff must limit his reply to a single point of defence. The plaintiff, on the other hand, insisting that if, there be any restrictions on the English practice, or that of this state, upon this point, the authority of the federal courts is untrammeled in that respect, and they may permit such multiplication of pleas or replications in a cause, as they deem advisable. Copies of the replications prepared to be filed are laid before the court, and, although those papers arrange into formal averments various propositions intended to avoid or counteract the special plea of the defendant, it seems to me they are, in substance, comprehended in the general issue, or denial that the bar of limitation pleaded to the action has accrued in this case. Still, as before suggested, I am not inclined to exclude the double replications, if, according to the practice of the court, it is allowable for me to permit both to be employed. The practice on the law side of the federal courts is not established by any specific enactment of the legislature, or code of rules, or special usages of the courts themselves. It is compounded in part of provisions in acts of congress; positive appointment by rules of the supreme court of the United States; statute rules of the circuit and district courts of the United States within the state where the court is sitting; rules of the king's bench in England; and, in cases where no replication applicable to a particular point is found in either or all those sources, then, in this district, the practice of the highest court of original jurisdiction in this state is the practice of the federal courts also. And as, again, the state practice is a composition of legislative enactments, positive rules, and long-established usages, it becomes a matter of no small perplexity, on points of infrequent occurrence, to determine exactly what the governing rule shall be. The process acts of the United States, in effect, establish the forms and modes of proceeding in suits in common law to be the same as those in use in 1792 in the supreme court of the respective states,—1 Stat. 93, § 2, note; Id. 276, § 2,—subject to such alterations as the United States courts may deem expedient to make, but not to be affected by subsequent changes in the state practice,—1 Kent, Comm. (6th Ed.) p. 342, note. The supreme court informed the bar that the practice of the courts of king's bench and chancery formed the outlines of the practice of the supreme court. Rule 7, Aug. 8, 1791; Hayburn's Case, 2 Dall. [2 U. S.] 411. No other specific regulation on the subject of practice was declared by the court prior to the process acts above referred to, and never has been since, affecting the question under consideration.

In the king's bench, and at common law, replications could not be double; nor was that class of pleadings included within the English act of 4 Anne, c. 16, § 4, which enabled the courts to authorize the use of double pleas. 1 Chit. Pl. 550. Still parties acquired, in substance, the effect of an allowance to use more than one replication to a plea by alleging distinct facts in different replications, when they all tended to a single point. Robinson v. Raley, 1 Burrows, 316; 1 Chit. Pl. 552, 553; Steph. Pl. 291. The same practice was pursued and sanctioned in the supreme court of this state before and after the organization of the federal courts,—Strong v. Smith, 3 Caines, 160; 1 Dunl. Abr. 500; Graham, Prac. 219,—before the privilege granted by statute to special

pleas was expressly extended to replications, —2 Greenl. 261; 12 Sup. L. N. Y. c. 28, § 1; 2 Rev. St. p. 352, § 23. The usages of the supreme court of the state were followed in the United States courts in this district in matters of pleading, except in cases specifically regulated by their own rules. Circuit court, 2d circuit. Dutch Creditors v. Bayard [unreported]. They thus become the rules of these courts also. Fullerton v. Bank of U. S., 1 Pet. [26 U. S.] 612. The codes of rules established by the circuit and district courts of this district in November, 1828, interchangeably adopted the rules of either court as the practice of the other in all cases not specifically provided for, so far as the same may be applicable; and, when there is no rule of those courts to apply then declared that the rules of the supreme court of this state, so far as the same may be applicable, shall govern. Cir. Ct. Rule 59; Dist. Ct. Rule 127. In the revision and re-publication of these rules in 1838, a similar provision was renewed, and extended to rules then in force, or subsequently adopted. Cir. Ct. Rule 102; Dist. Ct. Rule 240. The statute of Anne has been substantially re-enacted in this state.

In my opinion, then, under the established practice of this court anterior to its rules promulgated in 1828 and 1838, it would have been competent to the court to permit the plaintiff to reply to the defendant's plea in this case the different facts sought to be set up in bar to it, they being facts material to the defence. 3 Caines, 160; 10 Wend. 278, 284. But the adoption of the state practice by the standing rule of the court brings the regulations of pleadings under the Revised Statutes, within the scope of our own rules, and determines the right of the plaintiff in this case to interpose the replications he asks for. It is accordingly ordered that his motion prevail, and that he have leave to reply double to the plea of the defendant.

Case No. 16,811.

VALE v. PHOENIX INS. CO.

[1 Wash. C. C. 283.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.

INSURANCE—VALIDITY OF POLICY—CONCEALMENT OF RISKS.

1. In contracts of insurance, good faith, a fair, open, and candid conduct in both parties, is essential. Every material circumstance of the risk, should be communicated to the underwriter.

2. A concealment of facts, material to the risk, and within the knowledge of the insured, and which the insurer is not bound to know, vitiates the policy.

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

This was an insurance on goods, at and from Norfolk to Newbern, in North Carolina. When the captain left the bay, and after he got out at the capes of Virginia, the wind blew very hard. Captain Kenris, in a vessel destined for Newbern, left Norfolk three days later, being afraid of the weather; and when he arrived at Newbern, the unsound vessel had not arrived. The plaintiff endeavoured to get his goods insured at the Newbern office, but in consequence of the report brought by Kenris, of the vessel in question having left Norfolk before him, in bad weather, they refused to take the risk: apprehensions were pretty generally entertained, in Newbern, that a vessel was lost. The plaintiff knew that the cause of the refusal of the office to insure, was founded on those apprehensions. He wrote to his agent, in Philadelphia, to effect an insurance there; but mentioned nothing of the above circumstances. It was not perfectly clear, whether this information was received by plaintiff, at the time he wrote his letter, on the second of the month; but there was very strong ground to suppose he did then possess it, or on the fourth, when the letter was postmarked at Newbern.

WASHINGTON, Circuit Justice (charging jury). In contracts of insurance, good faith, a fair, open, and candid conduct, on the side of both parties, is essential. The underwriter is never supposed to know of the particular circumstances attending the property insured, other than is disclosed to him by the assured; taking the risk which the assured is unwilling to bear. He ought to have every means of estimating its extent, in the power of the assured to give; because, as he consents to run the risk for a stipulated consideration, and since the amount of the consideration is a matter of calculation, which must depend upon the degree of danger, he does not stand upon equal or fair ground with the other contracting party; unless he is equally informed of facts within the private knowledge of that party, which may be material to the risk. The rule therefore is clearly settled, that a concealment of facts material to the risk, and within the knowledge of the insured, and which the insurer is not bound to know, vitiates the policy. The first question then is, were the facts related by Captain Kenris, material to the risk? Would a missing ship, under the circumstances of this vessel, be insured at the same premium, with one exposed only to the common hazards of such a voyage? If you answer this affirmatively, the next question is, were these facts known to the plaintiff? I do not mean, is a knowledge of them brought home clearly to the plaintiff; but are you satisfied upon the evidence, that he must have heard of them before he wrote his letter, or before it left Newbern. He did not write for some days after the arrival of Kenris. The report he brought, and the apprehensions it occasioned in this small town, were general. It had got

to the ears of the new insurance office, and determined that conduct, and this was known to the plaintiff. There is strong ground to suspect, from the evidence, that he knew all this before his letter was sent off. Of this, however, you must judge; and, if you are of opinion that he did know it, and that the facts were material to the risk, your verdict ought to be for the defendants.

The jury found for the defendants.

Case No. 16,812.

In re VALENTINE.

[4 Biss. 317; 12 N. B. R. 389; 1 N. Y. Wkly. Dig. 101.] [1]

District Court, D. Indiana. March, 1869.

BANKRUPTCY—PROOF OF CLAIM BY CREDITOR—FULL NAMES.

In proving a claim against the estate of a bankrupt by a creditor, founded on a note made to him by the name of A. G. Wallace, the first Christian name of the creditor ought to appear in the documents offered in evidence, or in the record of the proceeding; and it is not sufficient that the initials of the creditor's Christian name alone appear.

In bankruptcy.

Eben W. Kimball, for creditor.

McDONALD, District Judge.—One A. G. Wallace, before Register Ray, offered proof and prayed allowance of a claim on the estate of the bankrupt. The claim consisted of a note of five hundred dollars, alleged to have been executed by the bankrupt to Wallace. The note on its face purports to have been made by William H. Valentine to A. G. Wallace, using the initials of the Christian names only. In this form the note was shown in evidence to the register. There was no allegation on paper and no evidence offered as to the full Christian names of either of the parties to the note. And for the want of this, the register refused to allow the claim. To this, Wallace excepted; and the case comes before me on the register's certificate touching this ruling.

It is a primary rule, subject to few exceptions, that in judicial proceedings, whenever it is necessary to refer to persons, the Christian names of such persons must be stated in full. Where, however, the person has two Christian names, it is enough to state the first in full. This rule is particularly applicable to the names of parties to actions. The reason of the rule is that all persons with whom courts are concerned in litigation ought to be identified; and a statement of their full Christian and surnames is the most satisfactory method of identifying them.

In this state, even in a justice's court, it is not sufficient to state merely the initials of the Christian names of the parties. If the present case had been an action of assumpsit by the payee against the maker of the note in question, no lawyer would doubt that the full Christian names of both parties should be stated in the pleading. The same reason for requiring this in that case, applies equally to the present proceeding. So far as concerns parties to legal proceedings, whether they be adverse or ex parte proceedings, I think the reason of the rule is equally applicable. And I know no case in which any person applying to any court of record for any kind of relief or redress, is not bound to give at least one full Christian name as well as his surname. Indeed, the ancient common law deemed it more important that the full Christian name should be stated than the full surname.

The decision of the register is approved.

NOTE. The pleadings should set forth the Christian and surnames of all parties, plaintiff and defendant, and also of others of whom mention is made in the pleading. Steph. Pl. 302. The full names of the parties should be stated. Hays v. Lanier, 3 Blackf. 322; Livingston v. Harvey, 10 Ind. 218. But the omission of the Christian name of the plaintiff in the statement of a claim against a decedent's estate, is only matter in abatement, and the objection may be obviated by amendment. Peden's Adm'r v. King, 30 Ind. 181. A middle name or initial is no part of a man's name, and its insertion or omission is immaterial. Edmundson v. State, 17 Ala. 179; McKay v. Speak, 8 Tex. 376; King v. Hutchins, 8 Fost. (N. H.) 561; Allen v. Taylor, 26 Vt. 599; State v. Manning, 14 Tex. 402; Thompson v. Lee, 21 Ill. 242; Erskine v. Davis, 25 Ill. 251; Bletch v. Johnson, 40 Ill. 116; Isaacs v. Wiley, 12 Vt. 674; Games v. Stiles, 14 Pet. [39 U. S.] 322.

The words "Junior" or "Senior" are no part of a man's name. Coit v. Starkweather, 8 Conn. 289; People v. Cook, 14 Barb. 259; Headley v. Shaw, 39 Ill. 354. Where there are two of the same name it will be presumed that the elder is meant, unless otherwise shown. Bate v. Burr, 4 Harr. (Del.) 130.

It has, however, been held that a single letter may be presumed to be an entire Christian name. Tweedy v. Jarvis, 27 Conn. 42; and Lord Campbell, C. J., has held that "Lee B." and "I. H." might be the Christian names and not merely initial letters. Reg. v. Dale, 5 Eng. Law & Eq. 360.

The courts can take judicial notice of the abbreviation of a man's name. Lenton v. Perkins, 3 Miss. 144. If one is in the habit of using only initial letters for his Christian name, a declaration against him by that name is good. City Council of Charleston v. King, 4 M'Cord, 487; Wood v. Bulkley, 13 Johns. 486.

VALENTINE (BETTON v.). See Case No. 1,370.

VALENTINE (BUERK v.). See Case No. 2,109.

VALENTINE (HAZLETON v.). See Case No. 6,287.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 1 N. Y. Wkly. Dig. 101, contains only a partial report.]

Case No. 16,812a.

VALENTINE et al. v. MARSHAL et al.

[4 Betts' C. C. MS. 52]

Circuit Court, S. D. New York. Feb. 22, 1845.

INFRINGEMENT OF PATENT—ACTION BY ASSIGNEE—VALIDITY OF ISSUE.

[1. One having only a partial interest in a patent right cannot alone sue for its infringement.]

[2. In an action by the assignee of a patent for an infringement, defendant cannot set up the fact that the assignment was not recorded, if he had actual or constructive notice of the assignment when the infringement was committed by him.]

[3. When a patent is claimed for an improvement, it is not necessary to set forth in the specification a detail of the old machinery, in order to determine the novelty and the utility of the improvement claimed.]

[4. By claiming particular things in a combination as new and his, the patentee does not relinquish his right to the entire combination, so far as it is contained or adjusted by him, with a view to his discovery, though in his summary he does not reiterate his method for carrying his invention into execution.]

[5. The inventor, to sustain his property in his discovery, is not bound to prove that he uses every particular mentioned in his description, but may be left to his discretion to employ or not such as he deems merely incidental, and not essential, parts of the invention, if those things material to the novelty and utility of the invention are retained.]

[This was an action by Henry Valentine and others against Andrew Marshal and others for the infringement of a patent.]

BETTS, District Judge. On the trial of this cause, various exceptions were taken by the defendants to the ruling of the judge, and a motion is now made for a new trial, on the bill of exceptions, because of errors in those decisions. A review of the case satisfies me that a new trial must be awarded upon the first exception, and I shall therefore not pass definitely upon the others, upon some of them, however, stating the present conviction of my mind, but leaving others open to further consideration on the after trial.

The action was commenced at April term, 1843, for the violation of a patent right granted on the 24th of April, 1840, to Daniel Fitzgerald, Jesse Fitzgerald, and Elisha Fitzgerald. The plaintiffs allege they are sole legal owners thereof. The declaration avers that on the 27th of November, 1840, the patentees assigned the said patent, &c., to Nestor Houghton, which assignment was duly recorded according to law. That on the 16th of April, 1841, Houghton assigned the same to Henry Valentine, plaintiff, and Winthrop Eaton, which assignment was duly recorded May 21, 1841. That on the 20th of April, 1841, the last-named assignees assigned to Alexander Cassilli, plaintiff, one-fourth part of said letters patent. That on the 31st of December, 1841, the said Winthrop Eaton assigned to said Henry Valentine one half of three-quarters (being his whole remaining interest), and plaintiffs made proof of the assignment. The plaintiffs, on the trial, produced the letters patent, and also the several assignments above stated, except that of Winthrop Eaton, of December 31, 1841, to Henry Valentine. The first assignment by the patentees, to Houghton, was not recorded till April 24, 1841 (more than three months after it was executed); and that to Cassilli, not till November 30, 1843, after this suit was brought.

The first exception touching the merits of the case is that the plaintiffs do not show themselves entitled to the whole patent interest; one half of three quarters thereof still outstanding in Winthrop Eaton. The court permitted the plaintiffs to proceed and take a verdict for an aliquot part of the interest; that is, the five-eighths proved to be vested in them. There is clearly error in this. The right to prosecute under letters patent is not partible, and susceptible of being exercised at the same time by different sections. The whole interest in the patent right must be represented in the action. 2 Wils. 423; 2 Sandf. 115, 116a. This was unquestionably so under the act of 1793, § 5 [1 Stat. 318]. [Tyler v. Tuel] 6 Cranch [10 U. S.] 324; Whittemore v. Cutter [Case No. 17,600]. The act of 1836, § 14 [5 Stat. 123], provides that damages may be recovered by action on the case, to be brought in the name or names of the persons interested, whether as patentee or assignee or as grantees of the exclusive right within and throughout a specific part of the United States. This changed the rule of construction applied to one part of the act of 1793,—[Tyler v, Tuel, 6 Cranch, 10 U. S.] 324; Whittemore v. Cutter [supra],—dispensing with the patentee as a party, even when his whole interest had not been assigned, and giving the right of action to parties having only a local or territorial, as well as limited, interest, under the patent. But the language of the statute cannot be fairly extended beyond those instances. Upon the language of the act, the right of action is plainly supposed to be entire and exclusive for the time being in the party suing, and at the place where the infringement is committed. As patents may now be divided up illimitably, and every description of interest be carved out of them, and the interests thus acquired be secured by the remedies given in the law, the court, at the trial, was inclined to hold that the equity of the statute would also permit actions in support of interests granted out of the patent, perfect in themselves, whether or not proved to be exclusive of the entire patent right, or only a portion thereof, and that accordingly the plaintiffs might recover damages in proportion to such estate or interest as they were able to prove vested in them. Manifestly, this is not the true exposition of the statute. When only a part of the patent interest is assigned, the assignee becomes copartner or joint tenant with the patentees in the patent right, and the action must be in common by them, because they are all neces-

sary to represent in court the full right or estate. The same rule must apply to all subsequent conveyances under the patent. No action will lie by virtue of them unless it is shown that the whole right or interest affected by the infringement is represented in the suit. It not appearing here that three-eighths of the patent right conveyed to Eaton, had been acquired by the plaintiffs, they were incompetent to maintain the action in their own names. The objection was properly raised at the trial. The declaration averred the whole interest to be in the plaintiffs by assignment, but they failed in the proofs to establish any conveyance from Eaton, and accordingly there was a variance between the allegations and evidence, fatal to the right of recovery. This point disposes of the case, so far as regards the motion for a new trial, but, in the possibility that the cause may be again brought to hearing before me solely, I think proper to state my conclusions upon some of the other exceptions, the questions raised having been fully argued.

I do not consider the plaintiffs fail to deduce title to themselves from the patentees, for the want of recording the various assignments, either within three months of the time they were executed, or at all. The fifth section of the act of 1793 has been construed to give no title to an assignee of a patent, but in consequence of his recording the instrument of assignment. Wyeth v. Stone [Case No. 18,107]; Dobson v. Campbell [Id. 3,945]. The act of 1836, § 11 [5 Stat. 121], varies from that provision so far in its phraseology as to justify a different interpretation, if not, indeed, to demand one. It enacts that every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing, which assignment, etc., shall be recorded in the patent office within three months from the execution thereof, for which the patentee or assignee shall pay to the commissioner the sum of three dollars. This phraseology is in consonance with that of registry acts generally, exacting something to be done, after a deed is duly executed and has vested title, for the security of the public and the protection of subsequent grantees, but is never construed to impair the full title under the deed, except in relation to those taking an after grant without notice. The case of Wyeth v. Stone [supra] was decided upon the terms of the act of 1793, § 4, which is that it shall be lawful for any inventor, &c., to assign the title and interest in the invention at any time, and the assignee, having recorded the said assignment in the office of the secretary of state, shall thereafter stand in the place of the original inventor, both as to right and responsibility, etc. Stress is laid upon the special wording of the clause, as indicating the purpose of congress that the recording shall be a step necessary to the full execution of the assignment, without which it is only inchoate and imperfect. The supreme court of Massachusetts, however, on that section, hold the assignment, without being recorded, valid inter partes. 14 Mass. 393. This is because of perfect knowledge between them of the fact, and that the recording could be required for no purpose other than that of notice. If the construction of the act of 1793, adopted by the circuit court,—Wyeth v. Stone [supra],—is the sound one, and the assignment be held inoperative and void ab initio for want of registry, the language of the act of 1836 takes away the foundation for applying such rule to present assignments, because they are valid and perfect, certainly for a period of thirty days, it not being necessary to put them on record before that time. I think, under the existing act, it is exceedingly doubtful whether any grantee, not a grantee under the patent, can set up the defence against an assignee that the assignment is not recorded; but, if he can when an entire stranger, yet, upon principles always recognized under the English and American registry acts (9 Ves. 407; 8 Johns. 137; 9 Johns. 163; 10 Johns. 457–466; 4 Wend. 585; 6 Wend. 213; 11 Wend. 442), the requisition of the statute is to be regarded satisfied, if the defendant actually knew of the assignment, or had notice in judgment of law of that fact, when the infringement was committed by him. Here the ruling of the court proceeded upon the assumption that it was proved incontrovertibly that the defendants had actual notice and knowledge of the assignment to the plaintiffs, when they committed the violations complained of; and I hold that there was no error in the decision of the court in this respect, and that the exception to the instruction in this behalf must be overruled.

I shall not discuss minutely the other exceptions, or assume to pass definitely on them. Still, as they have been argued by the respective counsel, it is proper to advert to them, that it may be seen they have not been overlooked by the court. They will properly come in review again on the retrial of the cause.

It has never been regarded necessary to set forth on the specification a detail of the old machinery, where a patent is claimed for an improvement, in order to determine the novelty and utility of the improvement claimed. Phil. Pat. 240, 278, and cases cited; Gods. Pat. 128. I do not, therefore, think the third exception can stand.

The fifth and eighth exceptions raise the objection that the patent secures to the patentee nothing beyond what is specifically claimed in the summary or claiming part. This is undoubtedly so as to matters of invention. Moody v. Fiske [Case No. 9,745]. That the proofs or instrumentality by which the result is attained are not, and need not be, given in the summary in alleging the particular improvement or invention claimed, is not to be regarded as disclaiming the means or machinery by which it was before stated to be effected. This must necessarily be so, when the invention consists in a new combination of known parts. Here, then, by claiming partic-

ular things in the combination as new and his, the patentee does not relinquish the right to the entire combination, so far as it is contained or adjusted by him, with a view to his discovery, although in his summary he does not reiterate his method for carrying his invention into execution. The description was given on the specification in all that is requisite, and he has every advantage of that secured him under the summary, except in so far as by the latter it is limited or disclaimed. The claim in this case is not, therefore, to the mere use of pressing rollers and guides, but to their use in combination in the manner and for the purpose described in the specification. That necessarily carries with it all essential parts of the machinery contrived to act in effecting the combination and result aimed at, as described by the patentee. The inventor, to sustain his property in the discovery, is not bound to prove he uses every particular mentioned in his description, but may be left to his discretion to employ or not such as he deems incidental and merely servicable in his discovery, and not essential parts of the invention, if those things material to the novelty and utility of the invention are retained; and if another drops or varies such incidental parts, or substitutes other things for them, he cannot thus entitle himself to use also what is important and essential in the discovery and is in use by the patentee under it. The identity of machines is considered to be that they operate in the same manner and produce the same results upon the same principle. Gray v. James [Case No. 5,718]. Differences that are merely formal are never regarded as establishing an important diversity. Barrett v. Hall [Id. 1,047]. The turning point on the issue of infringement has always been whether the defendant used substantially the same process, and produced the same result, as in the plaintiff's invention; and the variations of form, or omission of parts, or substitution of one thing for another, has never been regarded as protecting him against the patentee in such uses. Gods. Pat. 173; Hill v. Thompson, 2 B. Mon. 447. This case is distinguishable from Prouty v. Ruggles, 16 Pet. [41 U. S.] 336, because it is not shown that the parts of the combination omitted by the defendant in his machine were material and essential to constitute the invention claimed by the patentees. Upon the true construction of the specification, then, the plaintiffs, in my opinion, are entitled to the new combination of machinery described in it as constituting the discovery made by them, although that combination is not specified in the summary, and that upon the proofs in this case the pressing rollers and guides, though a new arrangement, were not essential to the combination of machinery constituting the discovery, and that the plaintiffs' right to their discovery would not be impaired if they omitted to use these particular parts, nor can the defendants, by omitting them, or substituting something different to effect the same object, entitle themselves to use the substantial and important parts of the patented discovery. A new trial is ordered, with costs to abide the event.

Case No. 16,813.

VALENTINE et al. v. REYNOLDS et al.

[3 Betts' C. C. MS. 54.]

Circuit Court, S. D. New York. May 25, 1844.

PATENTS FOR INVENTIONS — INFRINGEMENT — INJUNCTION—VIOLATION.

[Where an injunction has issued in an infringement suit after the verdict of a jury sustaining the validity of complainant's patent upon an issue made up and submitted to them, defendant cannot protect himself from the consequences of his violation of such injunction by an allegation of paramount right in himself, as that he had purchased prior patents that covered plaintiff's device.]

[Rule for attachment for contempt in the suit of Henry Valentine and Alexander Caselli against James Reynolds and Andrew Marshall.]

BETTS, District Judge. An injunction was granted in this case after a trial at law in which the validity of the patent was put at issue, and the verdict was for the plaintiff, and in affirmance of the patent. The defendants are proved to have been working machines similar to those for the use of which the action was brought, since the injunction was served on them, and, as the plaintiff alleges and proves by the deposition of one witness, are in substance identical with the machines first used. The defendants, by their own affidavits and those of other witnesses, contradict the plaintiff's witness in various particulars, and assert that they are using machines which act upon entirely a new principle, and no way violate the right secured to plaintiff by the patent under which he sues. They also deny the originality of the invention, and aver they have conformed their machines to those secured in patents older than the plaintiff's, and which the defendants have purchased since the trial. Most clearly, the defendants cannot protect themselves against the consequences of violating the injunction on an allegation of a paramount right in themselves showing it ought not to have issued. This matter must be brought in by answer, or in some method that will enable them to move to have the injunction dissolved. Carp. Pat. Cas. 102; Webster, Pat. Cas. 27, 28; Gods. Pat. 186. Whilst it remains in force, it must be implicitly obeyed. 6 Ves. 109; 2 Dickens, 797; 2 Ch. Cas. 203.

The testimony produced by the defendants is far from being satisfactory that the alterations and changes made by them in their machines is more than merely colorable. They must go farther than this to repel the motion. They must demonstrate to the court, beyond a reasonable doubt, that, in following the business on machines apparently the same as

before used, they are not in fact in any way violating the privilege secured the plaintiffs. That privilege, under the shield of the injunction already awarded, must be assured to him until the defendants, by regular course of process and hearing, satisfy the court the interdiction on them ought to be removed, Carp. Pat. Cas. 102; Webster, Pat. Cas. 27, 28; Gods. Pat. 186. The burthen in this respect is on them. The plaintiffs show enough prima facie to put the defendants under interrogatories, and they cannot be excused the test of the integrity of their conduct by general depositions, denying the accuracy of the opinion of those who have witnessed their operations, and judge them to be conducted on the plaintiffs' machines with only slight and colorable variations of the parts. 1 Hoff. Ch. 439. The attachment as prayed for must accordingly issue, unless the defendants stipulate to cease working their machines until the final hearing of this cause on the merits, or on a motion by them to dissolve the injunction. Order accordingly.

Case No. 16,813a.

VALERINO v. THOMPSON.

[22 Betts, D. C. MS. 216.]

District Court, S. D. New York. March, 1856.

SUIT AGAINST FOREIGN CONSUL.

[The consul of a foreign nation can be sued alone in the United States district court on a contract executed by him jointly with another person.]

[This was an action by Augustin Valerino against William D. Thompson, consul, impleaded with Sydney Mason. Heard on demurrer.]

BETTS, District Judge. The question to be decided in his cause arises on demurrer, and presents this point: whether in case of a debt owed jointly by two, one of them being a consul of a foreign government, resident and acting in the United States in that capacity, an action can be sustained solely against him in this court.

1. This court is designated by act of congress as the tribunal which shall have jurisdiction exclusively of the courts of the several states of all suits against consuls.

2. A joint debt is the absolute debt of each obligor. There is no separable part for which he is solely liable. His indebtment is not extinguished until the entire debt is satisfied. It accordingly enters no way into the vitality of the contract that it shall be enforced equally and at the same time by the creditor against all parties bound to discharge it. Nor is the creditor's right limited by principles of general jurisprudence to that method of redress.

3. It is a rule with courts proceeding according to the course of the common law that the remedy of a creditor upon a joint contract must be pursued against all who united in the agreement. It is unimportant to inquire into the foundation or reason of this dogma. It is a rule of pleading and practice, and not one composing or entering into the obligation of the contract, and is not recognized in England as a principle governing proceedings in equity (2 Spence, Eq. Jur. 213; 1 Story, Eq. Jur. 676), although it is in this state (2 Denio, 577). The authority which created the rule may probably rescind or modify it. It is not an invariable law with courts which recognize the common law as their rule of decision, any more than is its converse, that common and severable promisors shall be sued separately. Particularly by the general mercantile law, joint debts, like partnership debts, are several as well as joint. Master of rolls, Sleech's Case, 1 Mer. 564; Thorpe v. Jackson, 2 Younge & C. Exch. 553–562.

4. All rules of practice and pleading are subordinate to legislative authority. When the legislature authorizes a mode of action or remedy, courts are no longer subject to the customary method of exercising and obtaining rights within that remedy when the method does not conform to that law. This court, then, will not regard the doctrines or usages of common-law courts as impeding it in the employment of methods of practice expressly conferred by act of congress. The statute, by giving jurisdiction in all actions against consuls, does not make the grant conditional that the consul shall be liable to be sued separately in order to support a prosecution against him in this form. On the contrary, the statute is to be understood as giving the court cognizance against him individually of all responsibilities he is under in law.

5. The act of congress having granted jurisdiction positively to the district court in respect to consuls, may be deemed to dispense with other parties necessary in a proceeding against ordinary defendants, and to render contracts joint in form, entered into by a consul for another, several as well as joint against those officials in regard to the remedy in this tribunal.

6. Jurisdiction in civil actions against consuls is assigned by the constitution to the federal judiciary, and by act of congress is excluded from state courts. By this it is manifest that the jurisdiction is conferred upon considerations on national polity, and in contradistinction to municipal rules of procedure, the suability of the defendant being placed solely upon his official character. The law has not conferred this special jurisdiction upon circuit courts also, and the proposition that they take it because of the residence or citizenship of the defendants is by no means a necessary conclusion of law, and this court is not prepared to declare its jurisdiction ousted because of a supposable one in the circuit court, which might better subserve the specialties of the present case.

7. Without making points in this summary, upon the questions of pleading involved in

the demurrer, it is held by the court on the merits that jurisdiction over this cause belongs to this court, and it is ordered that judgment be rendered on the demurrer in favor of the plaintiff, and against the defendant.

Case No. 16,814.

In re VALK et al.

[3 Ben. 431; [1] 3 N. B. R. 278 (Quarto, 73).]

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

ARREST OF BANKRUPT BY ORDER OF A STATE COURT.

Where a bankrupt, having been arrested under an order of arrest issued out of a state court, during the pendency of the bankruptcy proceedings, is brought before the bankruptcy court on habeas corpus, that court cannot go into an inquiry whether, in fact, the debt for which the bankrupt was arrested was one which, under the 33d and 34th sections of the bankruptcy act [of 1867 (14 Stat. 533)], cannot be discharged by the discharge in bankruptcy, but can only inquire whether or not, from the face of the papers on which the state court acted, in ordering the arrest, it appears that the state court founded the order on such a debt.

[Cited in Re Alsberg, Case No. 261.]

Abraham Valk and James S. Valk filed their voluntary petition in bankruptcy in this court, on the 15th of December, 1868, and were adjudicated bankrupts on the 21st of December, 1868. They had applied for their discharges, but had not yet received them, when, on the 14th of September, 1869, an order was made by a justice of the supreme court of the state of New York, in a civil suit brought therein against Abraham Valk, James Valk, Morris Valk, and John Valk, by Benjamin Van Biema, requiring the sheriff of the city and county of New York to arrest Abraham Valk, James Valk, and John Valk, and hold them to bail in the sum of $38,000. On that order, Abraham Valk and James S. Valk were arrested by the said sheriff, on the 20th of September, 1869, and, being in his custody, by virtue of said order, were brought before this court, on a writ of habeas corpus, and their discharge was applied for, on the ground that they were imprisoned in violation of that clause of the 26th section of the bankruptcy act, which provides, that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." The order of arrest was founded solely on an affidavit made by the plaintiff in the action.

Beebe, Donohue & Cooke, for bankrupts.

John McKeon and P. C. Talman, for sheriff and creditor.

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

BLATCHFORD, District Judge. The only question to be inquired into, on the return to this writ, is, whether or not the affidavit on which the order of arrest was founded shows that such order was founded on such a debt or claim as the 33d and 34th sections of the bankruptcy act declare shall not be discharged by a discharge, namely, one created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character. This court cannot go into an inquiry as to whether or not the debt alleged to be due to Van Biema was in fact one so created. It cannot try that question on affidavits or by proofs. It can only inquire whether or not, from the face of the papers on which the state court acted in making the order of arrest, it appears that the state court founded the order on a debt so created. If this court sees, from the face of those papers, that the state court, in ordering the arrest, must have done so because it regarded the case made out by the papers to be one of a debt so created, it must regard the arrest as founded on such a debt, and must hold that the bankrupts were liable to such arrest. This was the doctrine laid down by this court in the case of In re Kimball [Case No. 7,768], and by Mr. Justice Nelson, in the circuit court, in the same case [Id. 7,769]. There are several causes for which arrests in civil actions are allowed by the state law of New York, which do not amount to such fraud, embezzlement, or defalcation as are specified in the 33d section of the bankruptcy act. Hence the necessity for an examination, by this court, of the papers on which the arrest is founded—not to determine whether the bankrupt was liable, by the state law, to arrest, or whether he was arrested on a debt which is in fact not dischargeable in bankruptcy—but solely to determine whether the state court intended, in ordering the arrest, to found it on a debt or claim which would not be discharged by a discharge in bankruptcy. The distinction is a plain one. If the bankrupt claims that, on the merits, the facts on which the state court acted in ordering his arrest did not exist, he must try that question in the state court, and not in this court. Therefore, I cannot look into the voluminous evidence which was taken on the reference made under this writ. I can only examine the affidavit of the plaintiff, on which the order of arrest was made. I have done so, and am satisfied that the state court must, on that affidavit, have believed that the debt in question was created by the fraud of the bankrupts, or by their defalcation while acting in a fiduciary character, and must, on that belief, have ordered the arrest. The writ must be discharged, and the prisoners be remanded to the custody of the sheriff.

Case No. 16,815.

VALK v. SIMMONS.

[4 Mason, 113.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1825.

BILLS OF EXCHANGE—NOTICE OF NONACCEPTANCE

A drawer, having no funds in the hands of the acceptor, or having withdrawn them without giving notice of the bill, and intercepting all other funds before they reach the acceptor, is not entitled to strict notice of non-payment. He has no right to expect the bill to be paid.

[Cited in Woodbury v. Crum, Case No. 17,969.]

[See Baker v. Gallagher, Case No. 768.]

Assumpsit on a bill of exchange, drawn by the defendant [Thomas Simmons] and his wife, upon one Francis Mott (trustee of the wife's property), payable to J. M. Ehrisk or order, endorsed to plaintiff [Jacob R. Valk], for nonpayment after acceptance. Plea, general issue. At the trial the defence was principally, that the defendant had not due notice of non-payment by the acceptor. It appeared in evidence, that Mott was trustee of the property of the defendant's wife, and as such was accustomed to receive the rents of her estate, which were drawn for in this manner by husband and wife. The defendant had drawn out all the funds in the hands of Mott before the acceptance of this bill; and, as the evidence was, had intercepted the other funds before they came into Mott's hands at any subsequent period. Mott, under these circumstances, refused to pay the acceptance; and there was no evidence that the non-payment was duly notified to the defendant.

Mr. Rivers, for defendant, cited French's Ex'rs v. Bank of Columbia, 4 Cranch [8 U. S.] 141.

Mr. Searle, for plaintiff, argued, e contrà, that the acceptor had no funds, and the drawer was not entitled to notice.

STORY, Circuit Justice. If the jury believe the evidence in this case, my opinion is, that the plaintiff is entitled to recover. No notice is necessary where the acceptor has not in fact, or in the expectancy of the drawer, any funds in his hands at the time of payment, nor had entered into any arrangement with the drawer at all events to pay the bill. In the present case, if the evidence is believed, the defendant, without any notice to Mott of the existence of this bill, withdrew all the funds in his hands before the acceptance, and has since intercepted all funds which might have come into his hands to pay it. What right can he then have to demand notice? He withdraws the fund without any notice to the drawee of the fact, that he has drawn on him; he prevents other funds from coming to his hands, and he provides no means of payment. He is then, to say the least of it, in the predicament of a party, drawing without funds, and having no right to expect his bill to be paid.

Verdict for plaintiff.

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

Case No. 16,816.

Ex parte VALLANDIGHAM.

[5 West. Law Month. 37.] [1]

Circuit Court, S. D. Ohio. May 16, 1863.

HABEAS CORPUS—ISSUANCE OF WRIT—ARREST OF CITIZENS BY MILITARY AUTHORITY—POWERS OF DEPARTMENTAL COMMANDER—CIVIL WAR.

[1. The writ of habeas corpus is not grantable as of course, but will only issue upon a sufficient showing; and a refusal to issue the writ is justifiable if the court is satisfied that the petitioner would not be discharged upon a hearing after its return.]

[2. The commander of a military department, as the agent and representative of the president, in a time of civil war, when the very existence of the government is threatened, has authority, under the constitutional provision making the president the commander in chief of the army and navy, even in a locality where martial law is not in force, to arrest citizens, not in the military or naval forces, for mischievous acts of disloyalty which impede or endanger the military operations of the government. Such arrests are justifiable on the ground of military necessity; and of the existence of that necessity, the commanding general, as the agent of the president, is the exclusive judge, and the courts have no authority by writ of habeas corpus to inquire into it.]

[3. The civil courts have no jurisdiction, upon application for writ of habeas corpus, to determine whether a military commission by which the prisoner was tried was legally constituted, and had jurisdiction of the case.]

[2][This was a petition for a writ of habeas corpus by Clement L. Vallandigham, a citizen of Ohio, alleging that he was unlawfully arrested at his home in Dayton, Ohio, on the night of the 5th of May, 1863, by a detachment of soldiers of the army of the United States, acting under the orders of Ambrose E. Burnside, a major general in the army of the United States, and brought to the city of Cincinnati, where he has been subjected to trial before a military commission, and is still detained in custody. The circumstances under which the arrest of the petitioner was made, were as follows:

[General Burnside, being in command of the military department of the Ohio, which included the state of Ohio, on April 13, 1863, issued the following general order, known as "General Order No. 38":

["Headquarters Dept. of the Ohio. Cincinnati, O., April 13, 1863. General Orders No. 38. The commanding general publishes,

[1] [The arguments of the attorneys in this case, together with the matter contained in the statement and in the note at the end of the case, were taken from the volume published in 1863 by Rickey & Carroll, Cincinnati, Ohio, and which contains a full account of the whole proceeding.]

[2] [From pamphlet report by Rickey & Carroll, Cincinnati, Ohio, 1863.]

for the information of all concerned, found within our lines, who commit acts for the benefit of the enemies of our country, will be tried as spies or traitors, and, if convicted, will suffer death. This order includes the following class of persons: Carriers of secret mails. Writers of letters sent by secret mails. Secret recruiting officers within the lines. Persons who have entered into an agreement to pass our lines for the purpose of joining the enemy. Persons found concealed within our lines, belonging to the service of the enemy, and, in fact, all persons found improperly within our lines, who could give private information to the enemy. All persons within our lines who harbor, protect, conceal, feed, clothe, or in any way aid the enemies of our country. The habit of declaring sympathies for the enemy will not be allowed in this department. Persons committing such offences will be at once arrested, with a view to being tried as above stated, or sent beyond our lines into the lines of their friends. It must be distinctly understood that treason, expressed or implied, will not be tolerated in this department. All officers and soldiers are strictly charged with the execution of this order.

["By command of Major General Burnside. Lewis Richmond,

["Asst. Adjutant General.

["Official: D. R. Larned,

["Captain and Assistant Adjutant General."

[The charges upon which Mr. Vallandigham was arrested and tried before the military commission were based upon the alleged violation of this order. The charge and specifications in full were as follows:

[Charge.

["Publicly expressing in violation of general orders No. 38, from headquarters department of the Ohio, sympathy for those in arms against the government of the United States, and declaring disloyal sentiments and opinions with the object and purpose of weakening the power of the government in its efforts to suppress an unlawful rebellion."

[Specifications.

["In this, that the said Clement L. Vallandigham, a citizen of the state of Ohio, on, or about, the first day of May, 1863, at Mount Vernon, Knox county, Ohio, did publicly address a large meeting of citizens, and did utter sentiments in words, or in effect, as follows, declaring the present war 'a wicked, cruel and unnecessary war;' 'a war not being waged for the preservation of the Union;' 'a war for the purpose of crushing out liberty and erecting a despotism;' 'a war for the freedom of the blacks and the enslavement of the whites;' stating 'that if the administration had so wished, the war could have been honorably terminated months ago;' that 'peace might have been honorably obtained by listening to the proposed intermediation of France;' that 'propositions by which the Northern states could be won back, and the South guaranteed their rights under the constitution, had been rejected the day before the late battle of Fredericksburg, by Lincoln and his minions,' meaning thereby the president of the United States and those under him in authority; charging 'that the government of the United States was about to appoint military marshals in every district, to restrain the people of their liberties, to deprive them of their rights and privileges;' characterizing general orders No. 38, from headquarters department of the Ohio, as 'a base usurpation of arbitrary authority,' inviting his hearers to resist the same, by saying, 'the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties, the better;' declaring 'that he was at all times, and upon all occasions, resolved to do what he could to defeat the attempts now being made to build up a monarchy upon the ruins of our free government;' asserting 'that he firmly believed, as he said six months ago, that the men in power are attempting to establish a despotism in this country, more cruel and more oppressive than ever existed before.' All of which opinions and sentiments he well knew did aid, comfort, and encourage those in arms against the government, and could but induce in his hearers a distrust of their own government, sympathy for those in arms against it, and a disposition to resist the laws of the land."

[Against his arrest and trial by the military commission Mr. Vallandigham, on May 7, 1863, filed the following protest:

[Protest of Mr. Vallandigham.

["Arrested without due 'process of law,' without warrant from any judicial officer, and now in a military prison, I have been served with a 'charge and specifications,' as in a court-martial or military commission. I am not in either 'the land or naval forces of the United States, nor in the militia in the actual service of the United States,' and therefore am not triable for any cause, by any such court, but am subject, by the express terms of the constitution, to arrest only by due process of law, judicial warrant, regularly issued upon affidavit, and by some officer or court of competent jurisdiction for the trial of citizens, and am now entitled to be tried on an indictment or presentment of a grand jury of such court, to speedy and public trial by an impartial jury of the state of Ohio, to be confronted with witnesses against me, to have compulsory process for witnesses in my behalf, the assistance of counsel for my defense, and evidence and argument according to the common law and the ways of judicial courts. And all these I here demand as my right as a citizen of the United States, and under the constitution of the United States. But the alleged 'offence' is not known

to the constitution of the United States, nor to any law thereof. It is words spoken to the people of Ohio in an open and public political meeting, lawfully and peacefully assembled, under the constitution and upon full notice. It is words or criticism of the public policy of the public servants of the people, by which policy it was alleged that the welfare of the country was not promoted. It was an appeal to the people to change that policy, not by force, but by free elections and the ballot box. It is not pretended that I counselled disobedience to the constitution, or resistance to laws and lawful authority. I never have. Beyond this protest, I have nothing further to submit. C. L. Vallandigham.

["Cincinnati, Ohio, May 7, 1863."

[Upon the presentation of the petition for the writ of habeas corpus, the court declined to issue the writ except upon a sufficient showing that it ought to issue. It therefore directed that General Burnside be notified of the pendency of the petition, in order that he might appear to oppose the granting of the writ. Having been notified accordingly, General Burnside submitted to the court the following statement in writing:

[Statement of Major General Burnside.

["Headquarters Department of the Ohio. Cincinnati, O., May 11, 1863. To the Honorable the Circuit Court of the United States within and for the Southern District of Ohio: The undersigned, commanding the department of the Ohio, having received notice from the clerk of said court that an application for the allowance of a writ of habeas corpus will be made this morning before your honors, on behalf of Clement L. Vallandigham, now a prisoner in my custody, asks leave to submit to the court the following statement:

["If I were to indulge in wholesale criticisms of the policy of the government, it would demoralize the army under my command, and every friend of his country would call me a traitor. If the officers or soldiers were to indulge in such criticisms, it would weaken the army to the extent of their influence; and, if this criticism were universal in the army, it would cause it to be broken to pieces, the government to be divided, our homes to be invaded, and anarchy to reign. My duty to my government forbids me to indulge in such criticisms; officers and soldiers are not allowed so to indulge, and this course will be sustained by all honest men. Now, I will go further. We are in a state of civil war. One of the states of this department is at this moment invaded, and three others have been threatened. I command the department, and it is my duty to my country, and to this army, to keep it in the best possible condition; to see that it is fed, clad, armed, and, as far as possible, to see that it is encouraged. If it is my duty and the duty of the troops to avoid saying anything that would weaken the army by preventing a single recruit from joining the ranks, by bringing the laws of congress into disrepute, or by causing dissatisfaction in the ranks, it is equally the duty of every citizen in the department to avoid the same evil. If it is my duty to prevent the propagation of this evil in the army, or in a portion of my department, it is equally my duty, in all portions of it; and it is my duty to use all the force in my power to stop it. If I were to find a man from the enemy's country distributing in my camps speeches of their public men that tended to demoralize the troops, or to destroy their confidence in the constituted authorities of the government, I would have him tried, and hung if found guilty, and all the rules of modern warfare would sustain me. Why should such speeches from our own public men be allowed? The press and public men, in a great emergency like the present, should avoid the use of party epithets and bitter invectives, and discourage the organization of secret political societies, which are always undignified and disgraceful to a free people, but now they are absolutely wrong and injurious; they create dissensions and discord, which just now amount to treason. The simple names 'patriot' and 'traitor' are comprehensive enough. As I before said, we are in a state of civil war, and an emergency is upon us which requires the operations of some power that moves more quickly than the civil. There never was a war carried on successfully without the exercise of that power. It is said that the speeches which are condemned have been made in the presence of large bodies of citizens, who, if they thought them wrong, would have then and there condemned them. That is no argument. These citizens do not realize the effect upon the army of our country, who are its defenders. They have never been in the field; never faced the enemies of their country; never undergone the privations of our soldiers in the field; and, besides, they have been in the habit of hearing their public men speak, and, as a general thing, of approving of what they say. They must not use license, and plead that they are exercising liberty. In this department it cannot be done. I shall use all the power I have to break down such license, and I am sure I will be sustained in this course by all honest men. At all events, I will have the consciousness, before God, of having done my duty to my country, and when I am swerved from the performance of that duty by any pressure, public or private, or by any prejudice, I will no longer be a man or a patriot.

["I again assert, that every power I possess on earth, or that is given me from above, will be used in defense of my government, on all occasions, at all times, and in all places within this department. There is no party, no community, no state govern-

ment, no state legislative body, no corporation or body of men that have the power to inaugurate a war policy that has the validity of law and power, but the constituted authorities of the government of the United States; and I am determined to support their policy. If the people do not approve that policy, they can change the constitutional authorities of that government, at the proper time and by the proper method. Let them freely discuss the policy in a proper tone, but my duty requires me to stop license and intemperate discussion, which tends to weaken the authority of the government and army; whilst the latter is in the presence of the enemy, it is cowardly so to weaken it. This license could not be used in our camps. The man would be torn in pieces who would attempt it. There is no fear of the people losing their liberties; we all know that to be the cry of demagogues, and none but the ignorant will listen to it; all intelligent men know that our people are too far advanced in the scale of religion, civilization, education, and freedom, to allow any power on earth to interfere with their liberties; but this same advancement in these great characteristics of our people teaches them to make all necessary sacrifices for their country when an emergency requires. They will support the constituted authorities of the government, whether they agree with them or not. Indeed, the army itself is a part of the people, and is so thoroughly educated in the love of civil liberty, which is the best guarantee for the permanence of our republican institutions, that it would itself be the first to oppose any attempt to continue the exercise of military authority after the establishment of peace by the overthrow of the Rebellion. No man on earth can lead our citizen soldiery to the establishment of a military despotism, and no man living would have the folly to attempt it. To do so would be to seal his own doom. On this point there can be no ground for apprehension on the part of the people. It is said that we can have peace if we lay down our arms. All sensible men know this to be untrue. Were it so, ought we to be so cowardly as to lay them down until the authority of the government is acknowledged? I beg to call upon the fathers, mothers, brothers, sisters, sons, daughters, relatives, friends, and neighbors of the soldiers in the field to aid me in stopping this license and intemperate discussion, which is discouraging our armies, weakening the hands of the government, and thereby strengthening the enemy. If we use our honest efforts, God will bless us with a glorious peace and a united country. Men of every shade of opinion have the same vital interest in the suppression of this Rebellion; for, should we fail in the task, the dread horrors of a ruined and distracted nation will fall alike on all, whether patriots or traitors.

["These are substantially my reasons for issuing general order No. 38; my reasons for the determination to enforce it, and also my reasons for the arrest of Hon. C. L. Vallandigham for a supposed violation of that order, for which he has been tried. The result of that trial is now in my hands. In enforcing this order I can be unanimously sustained by the people, or I can be opposed by factious, bad men. In the former event, quietness will prevail; in the latter event, the responsibility and retribution will attach to the men who resist the authority and the neighborhoods that allow it.

["A. E. Burnside, Major General,
["Commanding Department of the Ohio."

[Opening Argument of Hon. George E. Pugh.

[May it please your honor: I insist on my motion for a writ of habeas corpus, notwithstanding the defense attempted by General Burnside. And here I must be allowed to complain of the hardship to which Mr. Vallandigham has been subjected by the court on this occasion. The statement we have just heard, is, in effect, a return to the writ; it avows the caption and detention of the prisoner in manner and form as alleged by the petition; it proclaims the fact that he has been tried by a military commission, and for an offense unknown to the laws of the land; and yet, without having the body of the petitioner in court, so as to prevent the execution, possibly, of an illegal sentence, without any writ or order compelling General Burnside to stay the execution of such a sentence until your honor can determine this application, I am now required to proceed in the discharge of my duty as an advocate.

[Here LEAVITT, District Judge, observed that it was the settled practice of the court to give notice to the defendant, in cases of military arrest, before issuing a writ of habeas corpus; and that Judge Swayne had so announced, in a case from Champaign county, at the last term.

[Mr. Pugh. His honor may have intended that as a rule in future; but, inasmuch as the question was not then argued at the bar, I wish to be heard in opposition to the establishment of any such rule. I know that the practice of the court has been otherwise. I know that your honor granted me a writ of habeas corpus, at chambers, without any notice to General Mitchel, the defendant, less than two years ago; and that, sitting here, at October term, 1861, your honor commanded him to show cause why he should not be attached for contempt in disobeying the writ. And I feel confident that no decision or authority can be found, in America or in England, to countenance the rule which Judge Swayne has suggested. The petitioner is clearly entitled, if need be, to call upon the supreme court of the United States to review the proceedings of this court; and how can he do that effectually, according to the doctrine of Kaine's Case, 14 How. [55 U. S.] 103,

until a writ has been issued, or, at least, some determination made of record? And furthermore, as all authorities agree, the writ of habeas corpus is a writ of right; by which I do not mean that a petitioner can sue it out of the clerk's office, as he may a writ of summons or of subpœna, but that whenever, by his own showing or that of others, on affidavit, it appears that he is unlawfully imprisoned, the court has no choice, no latitude, no right even of postponement.

[LEAVITT, District Judge, observed that the granting or refusing of the writ was a matter of judicial discretion.

[Mr. Pugh. Of judicial discretion, assuredly; but that means a discretion guided by the principles of the law, not by considerations of convenience or favor.

[LEAVITT, District Judge. Certainly.

[Mr. Pugh. The doctrine is well announced by Mr. Justice Wilmot in his opinion to the house of lords, May 9, 1758: "A writ which issues upon a probable cause, verified by affidavit, is as much a writ of right as a writ which issues of course." Wilm. Op. 82. In the same opinion (pages 83, 84) the learned judge declares that writs of habeas corpus, mandamus, prohibition, supplicavit, and the writ of homine replegiando, are all writs of right; "but," he adds, "a proper case must be laid before the court, by affidavit, before the parties praying such writs may be entitled to them." And he continues: "They are the birthright of the people, subject to such provisions as the law has established for granting them. Those provisions are not a check upon justice, but a wise and provident direction of it." Anterior to the Revolution of 1688, in England, judges were appointed by the crown, and held their offices only during its pleasure. The consequence was, and naturally, that while the writ of habeas corpus could be obtained, in term time, on application to the court of king's bench, individual judges would not grant it in vacation, or delayed, under various pretexts, to hear and determine upon the case of imprisonment. To remedy these evils, and thus render the writ effectual in every case, the famous act or statute of 31 Car. II. c. 2, was proposed and adopted. "It is a very common mistake," observes Dr. Hallam, "and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Car. II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But, though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law, no freeman could be detained in prison except upon a criminal charge, or conviction, or for a civil debt. In the former case, it was always in his power to demand of the court of king's bench a writ of habeas corpus ad subjiciendum, directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided in Magna Charta, if indeed it were not much more ancient, that the statute of Car. II. was enacted; but to cut off the abuses by which the government's lust of power and the servile subtlety of crown lawyers had impaired so fundamental a privilege." Const. Hist. Eng. c. 8. This appears, also, from the language of the court in Bushell's Case, Vaughan, 135, decided nine years before the statute. Bushell and eleven others were the jury which acquitted Penn and Mead, at the Old Bailey sessions, upon an indictment for holding an unlawful assembly; Penn having attempted to preach in Great Church street, and Mead having accompanied him. The recorder of London was so exasperated at this verdict that he fined all the jurymen; sentencing Bushell, as foreman, to pay forty marks, and to be imprisoned in Newgate until they had been paid. Bushell sued out a writ of habeas corpus from the court of common pleas, and was thereupon discharged from imprisonment. The court said: "The writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty if he have been, against law, deprived of it. Therefore, the writ commands the day and the cause of the caption and the detaining of the prisoner to be certified upon the return; which, if not done, the court cannot possibly judge whether the cause of the commitment and detainer be according to law, or against it. Therefore, the cause of the imprisonment ought, by the return, to appear as specifically and certainly to the judges of the return as it did appear to the court or person authorized to commit."

[One peculiar excellence of the habeas corpus act, so called, was that it required the courts of Westminster in term time, and every judge in vacation, to grant the writ immediately, without excuse or evasion, and immediately proceed to examine and decide upon the cause of imprisonment. Another excellence was that, being the united act of king, lords, and commons, it could not be repealed, or superseded, or suspended in any manner, without the consent of all. Afterward, to be sure, James II. asserted, and attempted to exercise, what was called a "dispensing" power,—a power, namely, to dispense with the operation of an act of parliament in the case of particular individuals. But this arbitrary assumption was rebuked, and forever put to rest, by the famous Case of the Seven Bishops, 4 State Tr. 304, and cost King James the throne of his ancestors. The dec-

laration of rights, adopted, as a solemn covenant, when William and Mary were called to the place from which James had been expelled, condemns the "dispensing power" in every shape and form; since which time, for now almost two hundred years, the writ of habeas corpus never has been refused, or successfully evaded, or trifled with, in England, except in pursuance of an act of parliament suspending its privilege for a limited period, and in particular cases. Case of Watson, 9 Adol. & E. 731; Crowley's Case, 2 Swanst. 70–72; Rex v. Hobhouse, 2 Chit. 207. Even the privilege of parliament affords no protection against an attachment for disobeying the writ. Rex v. Earl Ferrers, 1 Burrows, 631.

[Our act of congress, entitled "An act to establish the judicial courts of the United States," approved September 24, 1789 [1 Stat. 73], declares: "Sec. 14. That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeably to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment: provided, that writs of habeas corpus shall, in no case, extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 81, 82. This act was construed by the supreme court of the United States in the case of Ex parte Watkins, 3 Pet. [28 U. S.] 193. Marshall, C. J.: "No law of the United States prescribes the case in which this great writ (habeas corpus) shall be issued, nor the power of the court over the party brought up by it. The term is used in the constitution as one which was well understood; and the judicial act authorizes this court, and all the courts of the United States, and the judges thereof, to issue the writ for the purpose of inquiring into the cause of commitment. This general reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiries into its use according to that law which is, in a considerable degree, incorporated into our own. The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ to examine the legality of the commitment. The English judges, being originally under the influence of the crown, neglected to issue this writ where the government entertained suspicions which could not be sustained by evidence; and the writ, when issued, was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil, the celebrated habeas corpus act of 31 Car. II. was enacted, for the purpose of securing the benefit for which the writ was given. This statute may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law."

[Mr. Pugh then read from 3 Bl. Comm. pp. 136–138, the several provisions of the act of 31 Car. II. c. 2, known as the "Habeas Corpus Act."

[And then, sir, we have an act of the congress lately in session, entitled "An act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March 3, 1863 [12 Stat. 755]: "Section 1. That, during the present Rebellion, the president of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus, in any case, throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the president; but, upon the certificate under oath, of the officer having charge of any one so detained by him, as a prisoner, under authority of the president, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the president shall remain in force, and said Rebellion continue." This act does not apply, in terms, to the present case; and for the obvious reason that the president of the United States, in whom (solely) the discretion of suspending the privilege of the writ of habeas corpus now resides, has not found it necessary to adopt a measure so unusual and extreme. He cannot exercise the authority thus conferred by a delegation of it to others: he must employ his own judgment, and in view of all the responsibilities of his great office. I take it for granted, also, that he will not decide a matter of such importance by writing a private letter, or sending a telegraphic dispatch: he ought to give notice by a formal proclamation, or in some manner equally authentic; so that all may be advised of the emergency, and govern themselves accordingly. For that is the true object of an executive proclamation. 12 Coke, 76. But, even then, as we have seen, the writ must be issued: it is the privilege of the writ only, that is, the right to be discharged or admitted to bail, which the president may suspend, and not the right of demanding the writ. And the officer, military or civil, hold-

ing a prisoner by the president's immediate authority, must so certify under oath, as a return to the writ when issued; and, thereupon, proceedings are to be stayed, but the writ is not to be dismissed, and far less, in the first instance, wholly denied. If the oath should be a false one, the officer would be liable to an indictment for perjury, and, of course, would be convicted. If this be the law, as clearly it is, when the privilege of the writ has been duly suspended, why must a prisoner languish in illegal confinement, day after day, and week after week, under peril of his life by a military sentence, at a time when the public safety does not, in the opinion of the president of the United States, require any obstruction of the ordinary course of justice? Respectfully, therefore, but none the less firmly, in the discharge of my duty as an advocate, I deny the right of this court to establish any rule of practice, in regard to the writ of habeas corpus, at all variant from the practice of the courts of England in modern times. That subject has been passed upon, adjudicated, and conclusively determined by the supreme court of the United States as the tribunal of last resort.

[The real question, and the only question, at present, is whether, upon the allegations of his petition, admitting them to be true, Clement L. Vallandigham is lawfully or unlawfully imprisoned. I repeat, sir, that General Burnside does not deny those allegations or any of them. On the contrary, in the statement which has been read, he says: "These are substantially my reasons for issuing general order No. 38, my reasons for the determination to enforce it, and, also, my reasons for the arrest of the Hon. C. L. Vallandigham for a supposed violation of that order, for which he has been tried. The result of that trial is now in my hands." The case before us, then, is the case of a citizen exempted from military arrest and jurisdiction, but who has, nevertheless, been arbitrarily and violently subjected to them. Can this be, sir, according to the constitution of the United States? General Burnside assumes, throughout the statement which has been read, that he is charged, personally, and above all other citizens, with the maintenance of the federal authority in this neighborhood,—an assumption which, with proper respect to him, is most erroneous and unwarrantable. His duties, as a major general in the army, are undoubtedly extensive: far be it from me to speak lightly of them, or to detract, in any manner, from their importance. But they do not include many subjects to which, in this statement, he has invited our attention; and they cannot excuse him for what he has done, and what he avows that he has done, in the case of the petitioner. And, first, that we may have a distinct view of his duties, as well as of our own duties, I will read the preamble and enacting clause in virtue of which the federal government exists: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America." There can be no Union except as intended by that compact. The people have not agreed to any other; and, without their consent, it is impossible that any other should be legitimately established. The justice to be administered in this court, and in all other tribunals, military and civil, must be such as the constitution requires. Domestic tranquility is a condition greatly to be envied; but it must be secured by observing the constitution in letter and in spirit. General Burnside admonishes us of a certain "quietness" which might prevail as the consequence of enforcing his military order: I answer him that quietness attained by the sacrifice of our ancestral rights, by the destruction of our constitutional privileges, is worse than the worst degree of confusion and violence. Touch not the liberty of the citizen; and we, in Ohio, at least, will be unanimous. We may not concur as to the causes which induced so mighty a rebellion; we may differ as to the best methods of subduing or of mitigating it; we may quarrel as partisans, or even as factionists; but we will, nevertheless, with one accord, sustain the general in the darkest hour of his despondency as well as in the day of triumph,—sustain him by our counsels, by all our means, and, if necessary, at the expense of our lives. But we cannot give him our liberties. That sacrifice would be of no advantage to him, and it would render us and our posterity forever miserable. It is not necessary to the common defense; it would not—it cannot—promote the common welfare. I know that General Burnside affects to scorn these and all similar suggestions. "There is no fear," he asserts, "of the people losing their liberties,"—but I will read his argument at large: "There is no fear of the people losing their liberties: we all know that to be the cry of demagogues, and none but the ignorant will listen to it; all intelligent men know that our people are too far advanced in the scale of religion, civilization, education, and freedom, to allow any power on earth to interfere with their liberties; but this same advancement in these great characteristics of our people teaches them to make all necessary sacrifices for their country, when an emergency requires." I not only fear, but I am well assured by the examples of history, that our liberties cannot survive a patient submission to arbitrary power. It is not the "cry" of demagogues; it is the voice of wisdom in all ages; it speaks to us from the tombs of an hundred republics, once happy, and proud, and confident of perpetuity. It is the watchword of patriots, and

the testament of martyrs; it should be the first lesson of youth, the last injunction of the aged to their children. "Eternal vigilance is the price of liberty!" We can have it for no less, and upon no other terms. "Religion, civilization, education!" These do not supply the place of liberty at all; nor have they been found sufficient to preserve it. Other nations, living under despotic forms of government, are quite as religious, and quite as thoroughly civilized, as we are; some of them are much better educated. The rude Roman was free; the Roman of the highest civilization became an abject slave:

"[Sævior armis,
Luxuria incubuit, victumque ulciscitur orbem."

[I will not intrust my sacred birthright to any man—let him be ever so great or good—upon his promise that, by and by, when he shall have conquered an enemy, or put down a rebellion, he will give it back to me. He may take it without my consent; he may be so strong that I cannot resist; these are misfortunes which I may not be able to avoid: but no words of flattery, no power on earth, can deceive me, or compel me, into any measure of compliance. Better the sharpest pangs of death; or, sharper than death, a life of exile, and poverty and constant hardship! Give me the crust of bread and the cup of water, with liberty, rather than the amplest luxury with servitude. Give me, instead of this genial climate, this fertile soil, this prosperous community, under an arbitrary government, the bleakest Arctic or Antarctic region, the almost insufferable winter, the night of one half-year in duration, the day which can hardly be called a day; but give me, withal, the consciousness—the proud, the noble, the priceless, the inexpressible consciousness—of being a free man! Whenever General Burnside speaks, therefore, of the government of the United States, I respond that such a government exists only, and only can exist, in virtue of the constitution. To that my allegiance and his allegiance are both due; by that I will stand firmly, and at all hazards; and in the name of that, uttering its very language, I now address him: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances." General Burnside holds an office created by act of congress alone,—an office which congress may, at any time, abolish. His title, his rank, his emoluments, his distinction above his fellow citizens, are all derived from that source. I take it to be absolutely certain, therefore, that he can make no "law" which congress could not make. He cannot abridge the freedom of speech, or of the press, or the right of the people to assemble and to consider of their grievances. And yet, sir, of what does he accuse Mr. Vallandigham? Let the specification of Captain Cutts answer: Of having addressed a public assembly of the electors of Ohio, at Mount Vernon, in Knox county, on the first day of this month. Nothing more; nothing whatsoever. It was an assembly of the people to deliberate upon their grievances, and to advise with each other in what way those grievances could be redressed. Into that forum—the holiest of holy in our political system—has General Burnside intruded his military dictation. Need I say more? What avails a right of the people to assemble, or to consult of their public affairs, if, when assembled, and that peaceably, they have no freedom of speech?

[General Burnside appears to think, because he cannot behave with contempt or disrespect toward the president of the United States, that a similar restraint applies to every citizen. He forgets, possibly, that the president, as commander in chief of the army, is his superior in military rank; at all events, that is the reason governing his case. The president is protected, as against him, by the very words of the sixth article of war: "Any officer or soldier who shall behave himself with contempt or disrespect toward his commanding officer, shall be punished, according to the nature of his offense, by the judgment of a court-martial." And so in respect of words written or spoken: "Art. 5. Any officer or soldier who shall use contemptuous or disrespectful words against the president of the United States, against the vice-president thereof, against the congress of the United States, or against the chief magistrate or legislature of any of the United States in which he may be quartered, if a commissioned officer, shall be cashiered, or otherwise punished as a court-martial shall direct; if a non-commissioned officer, or soldier, he shall suffer such punishment as shall be inflicted on him by the sentence of a court-martial." The general argues entirely, in the statement which has been read, from the premises of his own example. He commences by that: "If I were to indulge in wholesale criticisms of the policy of the government, it would demoralize the army under my command, and every friend of his country would call me a traitor. If the officers or soldiers were to indulge in such criticisms, it would weaken the army to the extent of their influence; and if this criticism were universal in the army, it would cause it to be broken to pieces, the government to be divided, our homes to be invaded, and anarchy to reign. My duty to my government forbids me to indulge in such criticisms; officers and soldiers are not allowed to so indulge, and this course will be sustained by all honest men." Assuredly so; and, therefore, such conduct as he reprobates cannot be tolerated on the part of soldiers and military officers. But General Burnside has overlooked an essential fact in this connection. The articles of war comprise a code for the regulation of soldiers and officers exclusively: that is declared by the first sec-

tion of the act of congress which ordains them, approved April 10, 1806 [2 Stat. 359]. It must be remembered, also, that those articles constitute an express contract between the government of the United States as one party, and each soldier and each officer as the other party; and are, in law, obligatory as a contract. This cannot be doubted after reading the famous opinion of Lord Loughborough, C. J., in Grant v. Gould, 2 H. Bl. 69. The soldier is enlisted by his own agreement; he has the articles read to him at that time, and he distinctly swears that he will obey them. Article 10. The officer—every officer—must sign the articles before entering upon his duties. Article 1. But neither as a statutory regulation, nor as a matter of contract, are citizens of the United States, other than those engaged in the military or the naval service, excluded from the privilege of speaking ever so disrespectfully, or contemptuously, of men in public station. It is, with them, entirely a matter of taste, or of individual discretion. I know of but a single excepted case: it is when the citizen has been called into the actual service of the United States as one of the militia of the state in which he resides. Then, sir, and for a reason too obvious to require any especial argument, his privilege as a mere citizen is temporarily suspended, and he becomes amenable to the articles of war until discharged from such service. The constitution expressly authorizes the congress of the United States to ordain this as a part of the law of the land; and it is ordained by congress, accordingly, in the 97th article: "The officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall, at all times, and in all places, when joined or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces; save, only, that such courts-martial shall be composed entirely of militia officers." I cannot here, without abandoning the line of my argument, especially observe the language employed by congress in this article; and much that I would say has occurred to others, probably, upon hearing it. Beyond the terms of exception thus defined by statute, and in obedience to the constitution of the United States (article 1, § 8, cls. 15, 16),[3] the right of the American people to deliberate upon and freely to speak of what General Burnside calls the "policy of the government" at all times—whether of peace or of war, of safety or of peril, of ease or of difficulty—is a right supreme, and absolute, and unquestionable. They can exhort each other to impeach the president or any executive officer; to impeach any magistrate of judicial authority; to condemn congressmen and legislators of every description. They can, at pleasure, indulge in criticism, by "wholesale" or otherwise, not only upon "the policy" adopted or proposed by their servants, military as well as civil, but upon the conduct of those servants, in each and every particular, upon their actions, their words, their probable motives, their public characters. And, in speaking of such subjects, any citizen addressing his fellow citizens, by their consent, in a peaceable assembly, may use invective, or sarcasm, or ridicule, or passionate apostrophe or appeal, or—what is, ordinarily, much better—plain, solid, unostentatious argument. There is no style of rhetoric to be prescribed for the people. They are the masters of every style, and of every art and form of utterance. General Burnside suggests that "the press and public men, in a great emergency like the present, should avoid the use of party epithets and bitter invectives." I esteem that as excellent advice on all occasions; but, unfortunately, the general and I must both succumb, with what grace we can, to the choice or fancy of the people. They will render his advice or my advice effectual, if they approve it, by not reading such papers and not listening to such orators as habitually violate or trifle with decorum. There is no other way; there can be no censorship, civil or military, in this regard. That would inevitably, and at once, destroy the liberty of speech and of the press: that presupposes an incapacity of the people to distinguish right from wrong, truth from falsehood, reason from intemperance, or decency from outrage. And, if we cannot confide in the good sense of the people as to these things, how can we confide in them at all? I know that much is written and spoken every day, and in the most public manner, at which honorable men feel indignant, or, at least, annoyed. But does it really affect the people at large? Does it alienate them from the government under which they live? Does it induce them to think less dearly of their kinsmen, their friends, their neighbors, in military service; or to be unmindful of the toils of any soldier in camp, or on the march, or of his sufferings in the awful day of battle? Does it palsy the ministering hand? Does it prevent the sympathizing tear? O, sir, no, no! General Burnside errs, and errs greatly, in supposing that. Our people are often excited by some false or foul word; but, by and by, assertion meets contradiction, violence encounters violence; and so, at length, slowly perhaps, but certainly, will justice achieve her victory and conclude the contest.

[I regret very much to learn by one paragraph in his statement, that General Burnside cannot appreciate the force of what all

[3] ["To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress."]

the great politicians of this country, in every generation, and with no distinction of parties, have unhesitatingly accepted as the fundamental doctrine of our system: "It is said," he observes, "that the speeches which are condemned, have been in the presence of large bodies of citizens, who, if they thought them wrong, would have then and there condemned them. That is no argument." I crave the general's pardon. That is an argument: it is the whole argument, and it is perfectly conclusive. Let us hear what he can say in opposition: "These citizens do not realize the effect upon the army of our country, who are its defenders. They have never been in the field; never faced the enemies of their country; never undergone the privations of soldiers in the field; and, besides, they have been in the habit of hearing their public men speak, and, as a general thing, of approving of what they say." It is generally true that the majority of those who attend a public meeting approve the greater part of what is there said: they agreed substantially, if not entirely, before they came—and they came because they agreed. As to the speaker,—in addition to the fact that much of what is said, in any meeting, is not objectionable,—it should be remembered that his hearers have known him personally, or by reputation, for years; that they have probably voted for him, or, at all events, sustained him; that they admire his character and cherish his good name. He knows all this; and knows, therefore, that he must speak to them upon the confidence of honorable men. This obligation is not as rigidly observed as it should be; but I can say, as well of my opponents as of my friends, in Ohio, that the consciousness of being trusted by their fellow partisans, together with a real desire to be worthy of such affection, is quite sufficient, ordinarily, to insure an honest, candid, and reasonably temperate discussion of political questions. I do not say that I agree with the conclusions of every speaker; but I say that he has declared what he honestly believes, and what a large majority of his hearers believed, or wished to believe, at all events, before they heard him. I can say, furthermore, that although it is not usual for an audience to contradict the speaker, they are apt to lose interest in him, and to depart summarily, when they discover that he is inimical to the cause of the country, to its essential glory, to the perpetuity of its free institutions. But, perhaps, I have not yet sufficiently answered General Burnside's objection. I ask him, then, whether he means to argue that citizens who have not experienced military service—"never been in the field, never faced the enemies of their country, never undergone the privations of our soldiers"—are, on that account, so devoid of intelligence, so spiritless in patriotism, that they cannot be trusted to discharge their duties at home, as citizens, in the way to which they and their fathers before them, for almost a century, have been accustomed? If so, what becomes of his other assertion, in a later paragraph, "that our people are too far advanced in the scale of religion, civilization, education, and freedom, to allow any power on earth to interfere with their liberties." O! but the effect on the soldiers. Well, sir, let us inquire into that. The soldiers have been citizens; they have been in the habit of attending public meetings, and of listening to public speakers. They are not children, but grown men,—stalwart, sensible, and gallant men,—with their hearts in the right place, and with arms ready to strike whenever and wherever the cause of their country demands. The general assures us of more, even, than this. "No man on earth," he says, "can lead our citizen soldiery to the establishment of a military despotism." And are these the men to be discouraged, and, especially, to feel weary in heart or limb,—unable to cope with an enemy in the field,—because Mr. Vallandigham, or any other public speaker, may have said something, at Mount Vernon or elsewhere, with which they do not agree? The soldiers have not chosen me for their eulogist; but I will say, of my own accord, that they are no such tender plants as General Burnside imagines. They know, exactly, for what they went into the field; they are not alarmed, nor dissatisfied, nor discouraged, because their fellow citizens, at home, attend public meetings, and listen to public speeches, as heretofore; they have no serious misgiving as to the estimation in which they are holden by the people of the Northern and Northwestern states without any distinction of sects, parties, or factions. Let the officers, and especially those of highest degree, observe their military duties; let them see to it, as General Burnside has well said, and as, I doubt not, he has well done, so far as his authority extends, that the soldiers are "fed, clad, and armed," and kept "in the best possible condition" for service. Allow them to vote as they please; allow them to read whatever newspapers they like; cease any attempt to use them for a partisan advantage; I do not accuse General Burnside of this,—but others, and too many, have been guilty of the grossest tyranny in regard to it. Protect the soldier against the greed of jobbers and knavish contractors,—against dealers in shoddy, in rotten leather, in Belgian muskets, in filthy bread and meat,—against all the hideous cormorants which darken the sky and overshadow the land in times of military preparation. Let the party in administration discharge these duties; and my word for it, sir, that the volunteers from Ohio, from Indiana, from Illinois, from every other state, will do and dare as much, at least, as the best and bravest soldiers in the world can accomplish.

[One more commentary on the statement of General Burnside, and it shall be as brief as possible. Undoubtedly, as he observes,

a great responsibility attaches to public men and to the conductors of the public press; but their responsibility is toward the people, and not toward him. "They must not," he declares, "they must not use license, and plead that they are exercising liberty." But every definition of "liberty" excludes the idea of his censorship; so that the distinction which he has attempted neither expresses nor admits of any imaginable difference. I might say more, and much more, of this extraordinary statement; but, having disposed of its principal suggestions, I leave the rest unanswered.

[The "charge" against Mr. Vallandigham, as defined by Captain Cutts, the judge advocate, is this: "Publicly expressing, in violation of general orders No. 38, from headquarters department of the Ohio, his sympathy for those in arms against the government of the United States, declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the government in its efforts to suppress an unlawful rebellion." But the "charge" is only a conclusion supposed, or invented, by the judge advocate, from the premises of fact alleged in the specification. I have merely to say, therefore, that it assumes, as indisputable, an authority at "headquarters department of the Ohio" to enact a law abridging the freedom of speech; and this in palpable defiance of the constitution of the United States. Let us proceed, however, to the language of the specification: "In this, that the said Clement L. Vallandigham, a citizen of the state of Ohio, on or about the first day of May, 1863, at Mount Vernon, Knox county, Ohio, did publicly address a large meeting of citizens, and did utter sentiments in words, or in effect, as follows." One or the other—"in words, or in effect"—as the judge advocate, at his pleasure, may regard equivalents. And here follows no connected form of speech, but merely disjointed phrases and sentences, taken from the context of a public address, and with no relation to what preceded, or accompanied, or otherwise explained or mitigated them. Is that the style of accusation by which, in this country, or in any civilized country, a man is put in peril of his life or his liberty? Is that the way in which my learned friend, the district attorney of the United States, would think of indicting a prisoner? But I will read the sentences which, "in words, or in effect," are so eminently disloyal. Mr. Vallandigham, as we are told, declared "the present war" to be "a wicked, cruel, and unnecessary war." And so President Lincoln, by one of his proclamations, declares it "unnecessary" as well as injurious; and is not every "unnecessary" war both cruel and wicked? I do not say on which side, or to which of the two parties, a condemnation thus grievous should be wholly, or for the most part, applied; I will speak to that question, if at all, when I have not in charge the interests of an imprisoned client. But Mr. Vallandigham said, in addition, that it is "a war not being waged for the preservation of the Union." Observe those words carefully; they do not mean that "the preservation of the Union" is not the avowed object, nor even that the administration may not so intend, but only that the war is "not being waged" in such a manner as to accomplish the object. Again, as we are told, he declared it to be "a war for the purpose of crushing out liberty and erecting a despotism." Well, if the proceedings in his case, in virtue of general orders No. 38, are to become a precedent for other cases, and to be sustained by judicial authority, that declaration will prove to be substantially true. But he said, also, that it is "a war for the freedom of the blacks, and the enslavement of the whites." We know that President Lincoln has, by two proclamations, dated September 22, 1862, and January 1, 1863, undertaken, "as a fit and necessary war measure," to emancipate millions of black slaves; whether he intends, if possible, to enslave white men, will be ascertained when he shall have acted on this particular case. Mr. Vallandigham said, furthermore, as the judge advocate assures us, "that, if the administration had so wished, the war could have been honorably terminated months ago." That allegation may be true; I have no means, except from what is alleged subsequently, of deciding whether it be true or false. Nor do I find myself much enlightened by the next sentence imputed to Mr. Vallandigham: that "peace might have been honorably obtained by listening to the proposed intermediation of France." I do not know what terms, if any, the emperor of the French suggested; but they would have to be very advantageous, as well as unmistakably honorable, before I would consent to his interference, or the interference of any other monarch, with the affairs of our distracted republic. And yet, if Mr. Vallandigham thinks otherwise, he has the same right to declare and to maintain his opinion as I have to maintain or to declare mine. But he made another accusation, and of much more serious importance: he said "that propositions by which the Southern states could be won back, and the South be guaranteed their rights under the constitution, had been rejected, the day before the late battle at Fredericksburg, by Lincoln and his minions,"—"meaning thereby," as the judge advocate kindly informs us, "the president of the United States and those under him in authority." I never heard that it was actionable, at common law, to say of one man, orally, that he was the minion of another; and, far less, that it could be a matter of state prosecution. As to the rest, the accusation is one of fact,—positive, distinct, with addition of time and circumstances. Is it true, or is it false? Sir, I do not know; but I do know that that is a vital question to the American people. Was it for making such an accusation that Mr.

Vallandigham has been arrested; and is it by imprisoning him, or otherwise stopping his mouth, that Mr. Lincoln would answer to such an accusation in the face of his countrymen, of the civilized world, of the tribunal of God and of history? As to General Burnside, whose personal sincerity in these proceedings, as well as at the battle of Fredericksburg, I do not intend to question, what living man is more interested to have the truth, or the falsehood, of that accusation publicly ascertained?

[The next sentence imputed to Mr. Vallandigham, by the specification, is this: "That the government of the United States were about to appoint military marshals, in every district, to restrain the people of their liberties, to deprive them of their rights and privileges." That refers to the appointment of a provost marshal in each congressional district, as provided in the act of March 3, 1863, commonly called the "Conscription Act." I have no time, at present, to argue whether the act be, or be not, open to such interpretation; but I have to say this: Mr. Vallandigham not only voted against it, while a representative in the congress of the United States, but characterized it more severely, more harshly, more bitterly, in a speech delivered to the house of representatives, on the 23d day of February, 1863. Did the house regard his words, on that occasion, as words, which, by the dictionary of General Burnside, "must now amount to treason"? He was not expelled; he was not censured; he was not even accused of having overstepped the limits of his privilege as a representative; but when he returned to his constituents (for every representative in congress, although chosen by the people of a district, represents the whole state) he is not allowed, in giving them an account of his stewardship, to repeat such language as he uttered, without any objection, in the hearing of the president, of the cabinet, of the two houses of congress, of the general commanding the whole army, of the army of the Rappahannock almost immediately at hand. Then, sir, as we are told, Mr. Vallandigham spoke of general order No. 38, headquarters department of the Ohio, as "a base usurpation of arbitrary authority." Well, except the first adjective, which is a flower of speech, in reference to which, considering his own style of rhetoric, in the charge and specification before us, I should hardly have expected any complaint on the part of the judge advocate, those words are literally true. It is authority usurped, because it is contrary to the constitution and laws of the land; and that it is arbitrary, ex vi termini, appears from the whole tenor of General Burnside's statement. But Mr. Vallandigham invited his "hearers to resist the same." Ah! and how? By telling them to take up arms against it? to fall into ranks for the purpose of obstructing its execution? by committing any act of violence or disorder whatsoever? O, no, sir! but "by saying" that "the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties the better." To give this information by their resolutions in primary meetings, by the voices of their favorite orators, by their votes in the ballot box. Nothing else is alleged; nothing else is pretended; nothing else could reasonably have been imagined. I quote the remaining sentences: "Declaring 'that he was, at all times, and upon all occasions, resolved to do what he could to defeat the attempts now being made to build up a monarchy upon the ruins of our free government.' Asserting 'that he firmly believed, as he said six months ago, that the men in power are attempting to establish a despotism in this country, more cruel and more oppressive than ever existed before.'" These are obviously conclusions of the speaker—correctly or incorrectly drawn—from premises of which little, very little indeed, is narrated by the specification. I do not undertake to say, and I cannot say, at present, whether such conclusions are correct or incorrect; but what are they—and, in asking this question, I would lay my hand, if possible, upon the heart of every freeman—what are they but the impassioned appeals of a sincere, conscientious, honorable, and, if you please, over-vigilant citizen? Granted—if you will have it so—that he is in error, and greatly in error: I do not ask you to approve his conclusions, or in any manner to accept his opinions; but I do ask you, in all truthfulness, whether these words bear any taint of treason or disloyalty? They were intended, most evidently, to arouse the people to a sense of the vast peril in which all of us now stand; and, although they are startling, and seem very bitter, should we not err upon the side of jealousy rather than upon the side of laxity and too much confidence in our rulers, at a time when, month by month, day by day, the Union of our fathers, the constitution by which that Union was ordained, and the liberty of which the constitution and the Union were intended as perpetual guarantees, are fading into a dim, a broken, and a most sorrowful vision?

[Mr. Judge Advocate appears to have felt the difficulty of sustaining his "charge" upon the words, simply, as quoted in his specification. He has added to them, therefore, this remarkable conclusion: "All of which opinions and sentiments he well knew did aid, comfort, and encourage those in arms against the government, and could but induce in his hearers a distrust of their own government, and sympathy for those in arms against it, and a disposition to resist the laws of the land." Here is what lawyers would call the scienter of an offense,—the imputation, that is, of guilty knowledge. But, clearly, unless the words themselves, simply as spoken, have the effect of aiding, comforting, and encouraging those in arms against the government, and of inducing such

as hear them, at any time, not only to distrust the government, but, also, to sympathize with those in arms against it, or, at all events, to resist the laws of the land, no guilt ever existed, and there could be, of course, no knowledge of any such guilt. Now, as to those in arms, not one of them attended the meeting at Mount Vernon, or would have known of Mr. Vallandigham's speech on that occasion, but for the arrest and imprisonment which ensued. In the next place, although his language may have induced (as he had the perfect right, if he could, to induce) all his hearers to distrust the persons who are now administering the government of the United States, and to seize the first constitutional opportunity of putting oher persons into their places, I cannot, for the life of me, discover one syllable directed against the government as such, and far less—that being necessary, also, by the terms of the judge advocate's conclusion—inducing the slightest degree of sympathy for those who, anterior to the transactions of which Mr. Vallandigham spoke,—and without any regard to the grievances which he enumerated, but wholly for excuses of their own, and manifestly against his wishes, had openly and formidably arrayed themselves in rebellion. And so, even admitting general order No. 38 to be, as certainly it is not, a part of the law of the land, no resistance whatsoever was suggested except by the ordeal of a peaceable election. The burden of complaint, therefore, as to Mr. Vallandigham, is, that he opposes, whether for a good reason or a bad one, the prosecution of this war; that he is greatly dissatisfied with the manner in which it has been conducted; that he believes, with or without sufficient evidence, that it might have been brought to an "honorable" conclusion—"by which the Southern states could be won back"—months ago; and that, consequently, he is in favor of electing other men than those present in office to administer our public affairs. That is all; standing upon the very words quoted in Captain Cutt's specification—garbled even as they are—I repeat sir, that is all. And for the supposed offense of entertaining such opinions, and of declaring them to an audience of his fellow citizens, by their request, at Mount Vernon, has Mr. Vallandigham experienced the tender mercy of general orders No. 38; the outer and inner doors of his dwelling house have been violently battered and broken, between midnight and day dawning, by a multitude of soldiers, without any warrant or even color of legal process; his person has been seized by overpowering numbers, in the presence of his terrified family, and secretly hurried to this city, and here confined in a military prison, in order to his trial by a "commission" of army officers, and according to some hitherto unknown course of judicial procedure. And this, America, is thy boasted freedom! Verily, to accept the consolation of General Burnside, thou needst have no "fear" of losing it.

[Since what time, I would inquire, has it become an offense of such magnitude for any citizen to propose the cessation of a war which he believes to be unnecessary and injurious? I am not advised of any alteration of our federal constitution since the 22d of February, 1848, when the general assembly of Ohio adopted resolutions denouncing President Polk for his prosecution of the war against Mexico, and calling upon congress to withhold further supplies of money and of men. I will read those resolutions as they appear in the statute book (46 Loc. Laws, p. 299): "That the state of Ohio repudiates, as a libel upon the constitution of the United States, the degrading and pernicious dogma which asserts that when the nation is once involved in a war with a foreign country, no matter by what means or for what ends, it is the prerogative of the president to determine the purposes for which it shall thenceforth be carried on, and the measure of its duration. That congress does possess, and may exercise, the right to interfere with this kingly attribute when asserted or claimed by the president; and that it can never be the duty of the representatives of the states and of the people tamely and submissively to bow to the dictates of executive will, and humbly to subserve its behests by transcribing into the form of legal enactments the imperious requisitions of the president for supplies of money and of men. That when an administration shall have become so reckless of the moral sentiment of the nation that, lured by the lust of personal or even of national aggrandizement, it avowedly prosecutes and procrastinates a war for the purpose of wringing from a reluctant adversary, already prostrate and in the dust, the whole or any portion of his rightful territory, it becomes the imperative duty of congress, upon the failure for that purpose of all other constitutional means, to put a stop to the effusion of blood by withholding all supplies for the further prosecution of the war; and doubly imperative does that duty become when, as in the case of the present contest with Mexico, the war was begun for questionable objects, by a most palpable executive usurpation of power, and, more especially, when the acquisition of the coveted territory would most fearfully threaten the disruption of the Union itself." War existed then, as it exists now; the same bitterness of crimination and recrimination prevailed; designs at once arbitrary and unconstitutional were imputed to those in power by their political opponents, and were answered, as at present, by charges of treason, disloyalty, and so forth. But no man was arrested, or even called to account for his opinions, by the civil, and, far less, by the military power.

[How is it possible—I would ask General Burnside, or his counsel, in view as well of

the statement which has been read as of the order (No. 38) therein mentioned—how is it possible that words, merely as such, should "amount" to treason? The crime requires an overt act; and not only must the particular act be charged in the indictment, but it must be proven, as charged, by the concurrent oath of two witnesses. Jefferies told the jury in Sidney's Case, 3 State Tr. 817, that writing a letter was an overt act, "sufficient to prove a man guilty of high treason," for that to write is to act,—"scribere est agere,"—but even he had not the audacity to pretend that words spoken would, by themselves, be sufficient. Sir Matthew Hale, discoursing upon the statute of treason (25 Edw. III.), says: "Regularly, words, unless they are committed to writing, are not an overt act within this statute; and the reason given is because they are easily subject to be mistaken, or misapplied, or misrepeated, or misunderstood by the hearers. And this appears by those several acts of parliament which were temporary only, or made some words of a high nature to be but felony. The statute of 3 Hen. VII. c. 14, makes conspiring the king's death to be felony; which it would not have done if the bare conspiring, without an overt act, had been treason." 1 Hale, P. C. 11, 112. Again: "Words may expound an overt act to make good an indictment of treason of compassing the king's death; which overt act possibly, of itself, may be indifferent, and unapplicable to such an intent. And, therefore, in the indictment of treason, they may be joined with such an overt act, to make the same applicable, and expositive of such a compassing." Id. 115. To this effect, only, is the instruction of Lord Chief Justice Holt to the jury in the Case of King, 4 State Tr. 593. I read now from the Institutes of Sir Edward Coke: "Divers latter acts of parliament have ordained that compassing, by bare words or sayings, should be high treason; but all they are either repealed or expired. And it is commonly said that bare words may make an heretick, but not a traytor without an overt act. And the wisdome of the makers of this law (25 Edw. III.) would not make words only to be treason; seeing such variety amongst the witnesses are, about the same, as few of them agree together." 3 Inst. 14. And he glorifies the statute of 1 Mary, Sess. 1, c. 1, as declaring the true intent of the statute of 25 Edw. III. on this subject: that there must be an overt act, and not merely words,—per apertum factum, non per apertum dictum. Sir William Blackstone says: "How far mere words spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances, in the reign of Edward the Fourth, of persons executed for treasonable words; the one a citizen of London, who said he would make his son heir of the Crown, being the sign of the house in which he lived; the other a gentleman whose favorite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly. These were esteemed hard cases; and the Chief Justice Markham rather chose to leave his place than assent to the latter judgment. But now it seems clearly to be agreed that, by the common law and the statute of Edw. III. words spoken amount only to a high misdemeanor, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted, or misremembered by the hearers; their meaning depends always on their connection with other words and things; they may signify differently even according to the tone of voice with which they are delivered, and sometimes silence itself is more expressive than any discourse. As, therefore, there can be nothing more equivocal and ambiguous than words, it would, indeed, be unreasonable to make them amount to high treason. And, accordingly, in 4 Car. I., on a reference to all the judges, concerning some very atrocious words spoken by one Pyne, they certified to the king that, though the words were as wicked as might be, yet they were no treason; for, unless it be by some particular statute, no words will be treason." 4 Bl. Comm. 80. And Sir Michael Foster, agreeing to the same doctrine, thus comments on two statutes of Queen Anne's time (4 Anne, c. 3, and 6 Anne, c. 7) for the punishment of such as "maliciously and directly, by preaching, teaching, or advised speaking," should deny her royal title: "1. The positions condemned by them had as direct a tendency to involve these nations in the miseries of an intestine war, to incite her majesty's subjects to withdraw their allegiance from her, and to deprive her of her crown and royal dignity, as any general doctrine and declaration, not relative to actions or designs, could possibly have; and yet, in the case of bare words, positions of this dangerous tendency, though maintained maliciously, advisedly, and directly, and even in the solemnities of preaching and teaching, are not considered as overt acts of treason. 2. In no case can a man be argued into the penalties of the acts by inferences and conclusions drawn from what he hath affirmed. The criminal position must be directly maintained, to bring him within the compass of these acts. 3. Nor will every rash, hasty, or unguarded expression, owing, perhaps, to natural warmth, or thrown out in the heat of disputation, render any person criminal within these acts; the criminal doctrine must be maintained maliciously and advisedly. Such caution did the legislature use in framing these statutes, made in the zeal of the times—a most laudable zeal it was—for purposes of no less importance than the security of her then majesty's person and government, and of the succession to the crown in his present majesty's royal house—a caution formerly used in similar cases, and not unworthy of imitation in framing future acts of the like kind, if any such shall be thought necessary, and which may serve as a faithful monitor in the conduct of prosecutions for words or writings supposed to be treasonable, but not relative to

any treasonable measure then on foot, or intended to be taken." Fost. High Treason, c. 1, § 7. Sidney was prosecuted upon the clause of the English statute (25 Edw. III.) which defines compassing of the king's death; and, as appears from the language of Hale, Coke, and Blackstone, already quoted, it was only in cases arising upon that clause—few as the cases are, and of no authority—that even the worst judges, in the very worst times, pretended to regard the speaking of words as an overt act of treason.

[Our federal constitution (article 3, § 3) employs this plain language: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." Two definitions are intended here, and both taken from the English statute: First, levying war; second, adhering to public enemies, giving them aid and comfort. As to the latter, it has no reference to any rebellion or insurrection; but only applies in a time of war with some other nation. So it was decided by this court in Chenoweth's Case [unreported], at April term, 1862, after examining all the authorities, English and American, and ascertaining them to be unanimous on the subject. At present, therefore, treason cannot be committed against the United States in any other manner than by "levying war" against them. U. S. v. Hoxie [Case No. 15,407]. I do not allege that each conspirator must have joined the warlike array; but I do allege that no prisoner can be convicted, or even charged, except by proving, or charging, what the law denominates an "overt" act. And what are such acts, in legal contemplation, Mr. Justice Foster has clearly defined in his Discourse of High Treason (chapter 2, § 8): "The joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor; in the one case, within the clause of levying war; in the other, within that of adhering to the king's enemies." "Furnishing rebels or enemies with money, arms, ammunition, or other necessaries, will, prima facie, make a man a traitor. But if enemies or rebels come with a superior force, and exact contributions, or live upon the country at free quarter, submission in these cases is not criminal." "And the bare sending money or provisions, except in the case just excepted, or sending intelligence to rebels or enemies, which, in most cases, is the most effectual aid that can be given them, will make a man a traitor, though the money or intelligence should happen to be intercepted. For the party, in sending, did all he could: the treason was complete on his part, though it had not the effect he intended." As to this, however, the learned author next intimates some degree of uncertainty; inasmuch as in all the reported cases, before his time, the prisoners had been charged, also, with compassing the queen's death. Again, same chapter (sections 9–11): "An assembly armed and arrayed in a warlike manner, for any treasonable purpose, is bellum levatum,"—war levied,—"though not bellum percussum. Listing and marching are sufficient overt acts, without coming to a battle or action. So, cruising on the king's subjects, under a French commission, France being then at war with us, was holden to be adhering to the king's enemies, though no other act of hostility was laid or proved. Attacking the king's forces, in opposition to his authority, upon a march, or in quarters, is levying war against the king. But, if, upon a sudden quarrel, from some affront given or taken, the neighborhood should rise and drive the forces out of their quarters, that would be a great misdemeanor, and, if death should ensue, it may be felony in the assailants; but it will not be treason, because there was no intention against the king's person or government. Holding a castle or fort against the king or his forces, if actual force be used in order to keep possession, is levying war. But a bare detainer, as suppose by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth (1 P. C. 146), will not amount to treason. But, if this be done in confederacy with enemies, or rebels, that circumstance will make it treason; in the one case, under the clause of adhering to the king's enemies; in the other, under that of levying war. So, if a person, having the custody of a castle or fort, deliver it up to the rebels, or enemies, by treachery and in combination with them, this is high treason within the act: in the former case, it is levying war; in the latter, it is adhering to the king's enemies." Once more, in the same chapter (section 13): "In prosecutions for these treasons, as well as for that of compassing the death of the king, an overt act of the treason must, as I have already observed, be charged in the indictment, and proved." No act of less degree than those just enumerated, and no act which does not immediately relate to an assemblage of men, in warlike array, for the purpose of subverting the government, or, by such means, resisting its authority, can amount to the levying of war. So said the supreme court of the United States in the Case of Bollman, 4 Cranch [8 U. S.] 126: "However flagitious may be the crime of conspiring to subvert, by force, the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried that, in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined that the actual enlistment of men to serve against the government does not amount to levying

war. It is true that, in that case, the soldiers enlisted were to serve without the realm, but they were enlisted within it; and, if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied. It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied,—that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose,—all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war." Again: "To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the United States in New Orleans, by force, would have been unquestionably a design which, if carried into execution, would have been treason; and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States. But no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war." [Ex parte Bollman], 4 Cranch [8 U. S.] 127. Mr. Chief Justice Marshall, who delivered this opinion, explained it, afterward, upon the trial of Aaron Burr, before the circuit court, at Richmond, August 31, 1807: "Some gentlemen have argued as if the supreme court had adopted the whole doctrine of the English books on the subject of accessories to treason. But, certainly such is not the fact. Those only who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition, both circumstances must concur. They must perform a part, which will furnish the overt act, and they must be leagued in the conspiracy. The person who comes within this description, in the opinion of the court, levies war." 2 Burr, Tr. p. 406 [Case No. 14,693]. And he proceeded, at length, to demonstrate that even "the advising or procurement" of treason, unless the party had also joined the warlike array, or done some overt act in pursuance of the conspiracy, would not amount to levying war. 2 Burr, Tr. 436–439 [Case No. 14,693]. How superfluous, then, is that portion of general orders No. 38 which denounces the penalty of death for an overt act of treason! The same penalty has been denounced by the constitution of the United States, and by the laws of congress in pursuance of it; only, instead of a military arrest, of charges and specifications, of a trial by captains, lieutenants, or other officers, and upon rules of evidence which are in effect no rules at all, the party accused must be arrested by a warrant in due form, upon probable cause supported by oath or affirmation—must be indicted by a grand jury of the district in which the crime is supposed to have been committed—must be tried in the circuit court of the United States for that district, by a petit jury of his countrymen, and according to the rule of evidence which the constitution itself has prescribed. For so the constitution (article 3, §§ 2, cl. 3) expressly requires: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may, by law, have directed."

[As to the residue of general orders No. 38, including "the habit of declaring sympathies for the enemy," if such a "habit" ever existed in this community or neighborhood, I must say, once for all, that the acts or utterances intended to be embraced, whatever their moral complexion, or how objectionable soever in any respect, do not and can not amount to treason. The constitution of the United States forbids that as plainly as language can be written. And the constitution is full of wisdom in this regard. It does not even intrust to congress the definition of a crime so perilous, so easily imputed, so apt to be imputed in times of great disorder. It even restrains congress in prescribing the measure of punishment.[4] The bloody experience of their English ancestors, commencing with the civil war between the adherents of Stephen and those of the Empress Matilda, before the middle of the twelfth century, and extending thence, with brief intermissions, almost to the epoch of American Independence, had sufficiently admonished the people of the eleven states which consented to the establishment of a Union consecrated to civil and religious liberty, that they must incorporate in its organical law, as things unalterable and unavoidable, in any circumstances, as well the provisions of the statute defining treason (25 Edw. III.), as the provisions of Magna Charta and of the habeas corpus act. I call upon the writers of the Federalist to bear me witness of this: "As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it; but, as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the congress, even in punishing it, from ex-

[4] ["Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."]

tending the consequences of guilt beyond the person of its author." Federalist, No. 43, written by Madison. Such admonition, also, the sages of the common law had previously, and most heartily, delivered. Lord Chief Justice Hale, after speaking of the diversities of judicial opinion before the statute of 25 Edw. III., and the consequent unhappy condition of the people, says: "Now, although the crime of high treason is the greatest crime against faith, duty, and human society, and brings with it the greatest and most fatal dangers to the government, peace and happiness of a kingdom or state, and therefore is deservedly branded with the highest ignominy, and subjected to the greatest penalties that the law can inflict; yet, by these instances, and more of this kind that might be given, it appears: First, how necessary it was that there should be some fixed and settled boundary for this great crime of treason, and of what great importance the statute of 25 Edw. III., was in order to that end. Second, how dangerous it is to depart from the letter of that statute, and to multiply and enhance crimes into treason by ambiguous and general words, as accroaching of royal power, subverting of fundamental laws, and the like. And, third, how dangerous it is by construction and analogy to make treasons where the letter of the law has not done it. For such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused, will carry men." 1 Hale, P. C. 86, 87. And Lord Chief Justice Coke tells us (3 Inst. 2) that the parliament which enacted the statute was called, on that account, the "Blessed Parliament,"—"Benedictum Parliamentum." But, sir, what becomes of our safeguards—what avails the experience of seven hundred years—where is that constitution which declares itself to be the supreme law of the land—if a major general commanding the department of the Ohio, or any other officer, civil or military, can create and multiply definitions of treason at his pleasure? The ancient Ruminalis put forth new leaves when all men supposed it to be dying; [5] whether the tree of American liberty will be able to supply the place of that splendid foliage which has been stripped from its branches, and scattered beneath our feet, by this rude blast of arbitrary and unlimited authority, is a question hereafter to be determined. That question does not concern my distinguished client any more than it concerns every other citizen. The partisans in power to-day will be the partisans in opposition to-morrow; then military command will be shifted from those who oppress to those who have been oppressed; and so, with the mutations of political fortune, must the personal rights and rights of property, and even the lives, of all be in constant hazard. I pray that my learned friends upon the other side will consider this in time; that they will use their influence not only with the defendant, but with those to whom at present he is amenable, to revoke—ere it be too late—the dreadful fiat of tyrrany, of hopeless confusion, of ultimate anarchy, which has been sounded in our midst.

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[The rights of individual citizens, as declared in the first eight amendments to the constitution of the United States, had not only been secured, but were perfectly understood, at the time when the thirteen colonies of North America revolted from British dominion. They were rights which every colonist had brought with him, as inalienable, to the shores and wildernesses of the Western hemisphere. The federal constitution being only a delegation of specific powers by the people of the several states, and not the creation of an unlimited government, its authors deemed a bill of rights unnecessary and superfluous. But, with that jealousy which ought ever to distinguish freemen, our ancestors required the addition of ten amendments; and these were added, at the first session of the First congress, without any opposition.

[Two other of those amendments I proceed next to consider: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." Article 5. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state or district wherein the crime shall have been committed (which district shall have been previously ascertained by law) and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." Article 6. These two articles (amendments) were added only from abundant caution; for, as we have seen, the original text of the constitution (article 3, § 2, cl. 3), expressly declares: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed," etc. But the judgment in cases of impeachment extends no further than to a removal from office, and, if necessary, a disqualification to hold any other office: so that, in effect, as the con-

[5] ["Eodem anno (A. U. C. 811) Ruminalem arborem in comitio, quæ octingentos et quadraginta ante annos Remi Romulique infantiam texerat, mortuis ramalibus et arescente trunco deminutam prodigii loco habitum est, donec in novos fetus revivesceret." Tacitus: Ann. lib. XIII. 58.]

stitution originally was, no man's life or limb, or even his liberty, could have been legally endangered except by the verdict of a jury, and the sentence of a court upon that verdict. Nevertheless, and, as I have said, from abundance of caution, these other declarations of rights were added by amendment: I. No man shall be put on his defense for any capital or infamous crime except by the indictment or presentment of a grand jury of the district wherein such crime is supposed to have been committed. This, too, is the result of a long and very memorable struggle in the experience of our English ancestors. It takes away the power of prosecuting for treason, felony, and such like offenses, by information of the attorney general, or at the relation of any private individual. That was the process by means of which the court of the star chamber inflicted such oppression and misery; and it was for their servile habit of employing that process, at the expense of the privileges of the people, that two infamous lawyers, Empson and Dudley, were doomed to death. II. No man shall twice be put on trial, "in jeopardy of life or limb, for the same offense." By this, therefore, as at common law, a verdict of acquittal is conclusive; it cannot be set aside by the judges, nor altered, reviewed, or questioned in any manner. But such is not the rule of military law. The sentence of a court-martial, whether it be of acquittal or of conviction, may be disregarded, wholly or in part, by the commanding officer. It has no validity without his confirmation. He can order a prisoner once acquitted to be again tried, upon the same charge and specification, by the court which acquitted him, or by a court composed of other officers. A military sentence, therefore, is the sentence of the military commander; the proceedings of the court-martial being only intended to inform his judgment or conscience, and so enable him to decide upon the particular case. III. No man shall be compelled to be a witness against himself in any criminal prosecution. IV. No man shall be deprived of his life, liberty, or property, except by due process of law. This repeats the twenty-ninth chapter of Magna Charta, as expounded by Lord Coke (2 Inst. 50), and, after him, by all the writers, English and American, upon constitutional construction: "Nisi per Legem Terræ. The words 'law of the land' import due process of law,—that is, by indictment or presentment, of good and lawful men where such deeds be done in due manner, or by writ originall of the common law." Again: "Without being brought in to answer, but by due process of the common law." "No man be put to answer without presentment before justice, or thing of record, or by due process, or by writ originall according to the old law of the land." V. No man's property shall be taken upon the excuse or pretense of a public necessity, without compensating him for its loss or deterioration. The sixth article of amendment, which I have quoted also, prescribes the essential requisites of a trial upon indictment or presentment: 1. It must be a public trial as well as a speedy one. 2. It must be by an impartial jury of the state and the district wherein the crime is alleged to have been committed. 3. The prisoner must be informed of the nature and cause of the accusation,—that is to say, of what crime he has been accused, and of the particular transaction, with time, place and material circumstances, which is supposed to constitute that crime. 4. He must be confronted, or brought face to face, while they are testifying, with the witnesses against him. 5. He must have, on demand, such a writ as will compel any person, anywhere within the jurisdiction of the United States, to attend the trial and give testimony in his favor. 6. He must have, as a matter of absolute right, the assistance of counsel learned in the law. These, except the third, fourth, and fifth, are not the rules of procedure in military tribunals. It is at the discretion of the commanding officer when a prisoner shall be arraigned for trial; and, at his discretion, also, or that of the court-martial, whether a trial shall be public or secret. Counsel are not allowed to address the court in defense of a prisoner, or upon any question of evidence; they are not even allowed to be present except by indulgence or special favor.

[The greatest objection yet remains; a trial by court-martial is not a trial by jury, nor its equivalent. The court may consist of thirteen officers, or it may consist of only five; and those officers are chosen by the military commander without any regard to the question of their residence in the state or district wherein the crime is alleged to have been committed. The prisoner has no peremptory challenge. But, sir, why do I waste time on so plain a distinction? Every man knows that trial by jury is a form peculiar to the common law; and that it has no equivalent in any other form of procedure, or in any other system of jurisprudence.

[I have already explained the cases of exception allowed by these two articles,—"cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger,"—as well as the reason which dictated such exceptions. I might say, in addition, that the rules and articles of war do not assume to punish, as a crime, any act which is declared to be criminal by the ordinary law of the land. They define what are known as military offenses, or offenses in violation of discipline and the good order of the service. Even an officer or a soldier cannot be tried by court-martial for a crime against the laws of his country: he must be delivered to the civil magistrate and tried by a court of civil judicature. So the thirty-third article of war distinctly provides: "When any commissioned officer or soldier shall be accused of a capital crime, or of having used violence or committed any offense against the person or property of any citizen of any of the United States, such as is pun-

ishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or company, to which the person or persons accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate, and, likewise, to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial. If any commanding officer or officers shall wilfully neglect, or refuse upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered." Instead of which General Burnside has undertaken to extend the jurisdiction of a court-martial over citizens not in military service, and to arrest, accuse, try, and condemn them for offenses alike unknown to the articles of war and to the ordinary laws of the land. That all the proceedings of the court are void; that every officer who participates in them, including the members of the court and the judge advocate, and, also, the provost marshal who executes any such sentence, is liable to an indictment as well as to an action for damages: these are propositions so clearly established—so entirely indisputable—that I should not conceive it decorous, in other circumstances, to urge them upon your honor's attention. Wise v. Withers, 3 Cranch [7 U. S.] 331, was an action of trespass, vi et armis, for entering the plaintiff's house, and taking away his goods. The defendant justified as the collector of a fine imposed on the plaintiff by sentence of a court-martial for not serving as a militiaman; to which the plaintiff replied that he was a justice of the peace for Alexandria county, in the District of Columbia, and, as such, exempted by statute from service in the militia. The circuit court sustained a demurrer to this replication, as insufficient, and thereupon gave judgment in favor of the defendant. On writ of error by the plaintiff, in the supreme court of the United States, it was contended for the defendant—First, that a justice of the peace was not one of the officers exempted by statute; and, second, that the court-martial had exclusive authority to hear and determine his claim of exemption. The supreme court overruled both propositions; and as to the second, with which only I have to deal at present, said: "It follows from this opinion that a court-martial has no jurisdiction over a justice of the peace: he could never be legally enrolled. And it is a principle that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers." Page 337. To the same effect is the language of the supreme court in the Case of Watkins, 3 Pet. [28 U. S.] 208, 209. Courts-martial may be restrained by writ of prohibition from the courts of common law,—"the general ground of prohibition being an access of jurisdiction," as Lord Loughborough termed it, "where they assume a power to act in matters not within their cognizance." Grant v. Gould, 2 H. Bl. 100. But the most remarkable case is that which resulted in the conviction of Governor Wall for murder, at the Old Bailey sessions, in January, 1802. Before narrating it, in the language of Lord Campbell, I must observe that the court-martial had jurisdiction of the party accused, and of the offense with which he was charged; but, inasmuch as all such courts are of special and limited authority, a defect which would not impair the sentence of a court of general jurisdiction will suffice to annul their sentences, even upon collateral examination. "Joseph Wall, who had served, from early youth, as an officer in the army, and had always been distinguished for gallantry and good conduct, was, during the American war, appointed governor of Goree, on the coast of Africa. With a very insufficient garrison, and with very slender military supplies, he had to defend this island from the French, who planned expeditions against it from their neighboring settlement of Senegal. Governor Wall performed his duty to his country, in the midst of formidable difficulties, with firmness and discretion; and the place intrusted to him was safely preserved from all perils till peace was re-established. He was then about to return home, in the expectation of thanks and promotion, but great discontents existed among the troops forming the garrison, by reason of their pay being in arrear. This grievance they imputed to the governor, and they resolved that he should not leave the island till they were righted. Benjamin Armstrong, a sergeant, their ringleader, was brought by him, irregularly, before a regimental court-martial, and sentenced to receive eight hundred lashes. Although this whipping was administered with much severity, he, in all probability, would have recovered from it, if he had not immediately after drunk a large quantity of ardent spirits; but this intemperance, together with the wounds inflicted upon him by the flagelation, and an unhealthy climate, brought on inflammation and fever, of which he died. Order was restored, and the governor returned to England. However, representations were made to the authorities at home, respecting irregularity and alleged cruelty, which had been practiced, and exaggerated accounts of the proceedings were published in the newspapers; stating, among other things, that the governor had murdered Armstrong and several other soldiers by firing them from the mouths of cannon. A warrant was issued against him by the secretary of state; he was arrested by a king's messenger, and he made his escape as they were conveying him from Bath in a chaise-and-four. He immediately went abroad, and

he continued to reside on the continent till the peace of Amiens; when, on the advice of counsel, he came to England, wrote a letter to the secretary of state, announcing his return, and surrendered himself to take his trial." Lives of the Chief Justices (volume 3, pp. 149, 150). Twenty years had thus elapsed: nevertheless, Wall was put on trial before a special commission; and the jury, after deliberating half an hour, returned a verdict of guilty, and sentence of death was immediately pronounced. Execution was respited until Lord Eldon and others of the ministry could examine the case; but, finally, the governor was hanged on a gibbet, in front of the jail of Newgate, and, as Lord Campbell informs us, "amidst the shouts and execrations of the most numerous mob ever assembled in England to witness a public execution." I mention this painful and singular case, not that I approve Wall's execution,—for, although he was rightfully convicted, I think he ought to have been pardoned,—but to show that the sentence of a military tribunal acting irregularly, and, a fortiori, acting upon persons beyond its jurisdiction, cannot avail as a defense to those who pronounce the sentence, or those who execute the sentence, when called to account, in due course of law, notwithstanding the lapse of many years. And thus, if your honor please, it ought to be. Otherwise, military officers would not only, as now, become too powerful to be restrained by the civil magistrates, but would purchase to themselves an immunity for all transgressions. The rights of the people, as enumerated in the several clauses of the constitution which I have read, cannot be affected in any degree by the suspension of the privilege of the writ of habeas corpus. Harsh as that suspension would be, and unnecessary (as I think) except in the states where insurrection and rebellion prevail, it would not authorize any arrest of a citizen by the military power while the ordinary course of justice remains unobstructed, nor even, without a warrant, except in the cases I have already specified, by a civil magistrate. It would not dispense with the necessity of a trial by jury, and upon indictment: it would justify none of the acts of General Burnside in this particular case. De Lolme, in his celebrated essay on the Constitution of England (book 2, c. 17, pt. 2, note), says: "At the times of the invasions of the Pretender, assisted by the forces of hostile nations, the habeas corpus act was indeed suspended. * * * But the executive power did not thus, of itself, stretch its own authority: the precaution was deliberated upon and taken by the representatives of the people; and the detaining of individuals, in consequence of the suspension of the act, was limited to a certain fixed time. Notwithstanding the just fears of internal and hidden enemies, which the circumstances of the time might raise, the deviation from the former course of the law was carried no further than the single point we have mentioned. Persons detained by order of the government were to be dealt with in the same manner as those arrested at the suit of private individuals; the proceedings against them were to be carried on no otherwise than in a public place; they were to be tried by their peers, and have all the usual legal means of defense allowed to them,—such as calling of witnesses, peremptory challenge of juries," etc. And such Lord Eldon, while attorney general, and addressing the jury in Hardy's Case, October 28, 1794 [1 East, P. C. 99], declared to be "the true constitutional meaning" of the act of parliament, then in force, whereby the privilege of the writ of habeas corpus had been suspended. * * *

[Argument of Hon. Aaron F. Perry.

[May it please the court: When General Burnside requested me to assist the district attorney on this occasion, he forebore to give me any instructions, except to present such considerations to the judgment of the court as should seem to me right and proper. I have a distinct impression that he has no preference that the questions here presented should be heard before any other jurisdiction or tribunal rather than this; and that he wishes his proceedings to be here discussed by his counsel, chiefly on the broad basis of their merits; that they should be made to rest on the solid ground of the performance of a high and urgent public duty. The main argument which I shall present to the court, will, therefore, be founded on the obligations, duties, and responsibilities of General Burnside as a major general in command of an army of the United States, in the field of military operations, for the purposes of war, and in the presence of the enemy. I shall not place it on any ground of apology, excuse, or palliation, but strictly and confidently on the ground of doing what he had a lawful constitutional right to do; and on the ground of performing a duty imposed upon him as one of the necessities of his official position. I shall make no plea of an exigency in which laws are suspended, and the constitution forgotten, but shall claim that the constitution is equal to the emergency, and has adequately provided for it; that the act complained of here is an act fully warranted by law, and authorized by the constitution. I shall support this claim by references to more than one opinion of the supreme court of the United States, and to other authorities. * * *

[Mr. Pugh has correctly argued that a habeas corpus is in the nature of a writ of error to examine into the legality of an arrest or commitment. If it appear that the arrest or commitment complained of was a legal act, the writ of habeas corpus will not issue; because its whole office is to inquire into the legality of the act, and the court will not do a nugatory and useless thing. A habeas corpus does not meddle with arrests legally made. There are well-known cases where

the civil magistrates and officers of the peace make arrests on sight and without warrant. In such cases the legality depends upon circumstances to make a case where an arrest is allowed by law without a warrant. These circumstances, if they exist, are a warrant, or equivalent to it. So, if war or any other state of affairs exists, which, by recognized principles, authorizes, requires, and justifies an arrest by military force, no habeas corpus can meddle with it. The order which sends an army to make war, is all the warrant it needs for every necessary act of war. It may capture and imprison enemies, and not those in arms only. "The whole," says Vattel on Law of Nations (page 346), "is deduced from one single principle from the object of a just war, for when the end is lawful, he who has a right to pursue that end, has, of course, a right to employ all the means which are necessary for its attainment." One of the undoubted means of war is to take life. As the greater includes the less, the right to take life implies the right to take everything. "All those persons belonging to the opposite party (even the women and children) he may lawfully secure and make prisoners, either with a view to prevent them from taking up arms again, or for the purpose of weakening the enemy." * * * "At present, indeed, this last-mentioned expedient is seldom put in practice by the polished nations of Europe: women and children are suffered to enjoy perfect security, and allowed permission to withdraw wherever they please. But this moderation, this politeness, though undoubtedly commendable, is not in itself absolutely obligatory, and if a general thinks fit to supersede it, he cannot be justly accused of violating the laws of war." Vatt. Law Nat. pp. 346, 352. Persons so captured or arrested are prisoners of war. "For the same reasons which render the observance of those maxims a matter of obligation between state and state, it becomes equally and even more necessary in the unhappy circumstance of two incensed parties lacerating their common country." Id. 425. The application to citizens in revolt of the rules of war is in the interests of mercy. If they should be put upon trial before a jury in such moments of overwhelming excitement, one of two results would follow. If the jury should not be so divided by the passions raging through the whole population as to disagree, and thus bring the law into contempt, their passions would take them to one side or the other. Men might be let loose, and certainly would be, whom the safety of the state required to be restrained, or more probably convicted and executed without sufficient evidence. When society is imperiled by intestine war, the passions rage which occasioned the war, the entrails of the volcano, covered for a while, have at length broken forth. Smoke and ashes obscure the sky. Fiery floods pour along the earth. No good man could be impartial. Who claims to be impartial impeaches himself. Believing his government to be in the right, interest, feeling, lawful duty, compelled him to uphold it with all his power. He has no decent pretext, certainly no lawful excuse, for throwing on others a duty to uphold the government which he shrinks from. It is each man's duty as much as any other's. Its enemies are, and in the nature of the case must be, his enemies; its friends his friends. The law allows him no other position. On the other hand, he who believes the government to be wrong has no choice but to sympathize with its enemies. He must assist them, and will assist them, either openly or by secret and suppressed sympathy. On one side or the other, men go to the jury box under the influence of deep feeling. The law of nations, and rather the laws of war, which in civil commotions authorize the opposing parties to treat each other as prisoners of war, is not, therefore, an aggravation of dangers, but an amelioration of them. Vatt. Law Nat. p. 426, assigns two reasons for it: One, lest the civil war should become more cruel. The other, the danger of committing great injustice by hastily punishing those who are accounted rebels. "The flames of discord and civil war are not favorable to the proceedings of pure and sacred justice." More quiet times are to be waited for. It appears, then, that in time of war the fact of war authorizes and legalizes arrests; and the order for an army to make war is its sufficient warrant for making such arrests as are justified by the laws of war. I am not now inquiring whether the arrest of Clement L. Vallandigham is justifiable by the rules of war. That inquiry will follow in its due course. I am now adverting to the laws of war, and showing that arrests of some kinds are authorized. These principles are, I suppose, undisputed and indisputable. It follows that such arrests are legal; and by showing the existence of circumstances making the arrest legal, a sufficient answer is made to a habeas corpus. The writ is not in such case suspended. It is respected, upheld, enforced, and performs all the office a habeas corpus can in any case perform.

[It is a logical consequence, unavoidably resulting from the premises, that while all wars, insurrectionary or foreign, bring into action the laws of war, they do not, necessarily, suspend the writ of habeas corpus. The legislature may enact a statute making some act a crime which was not so before, and authorizing persons guilty of it to be arrested and held; or authorizing a writ of civil capias, under which the body is seized and held in circumstances not before authorizing such an arrest. These things not only may be done, but are frequently done. No one thinks of them as a suspension or abolishment of habeas corpus. So, in war, the laws of war authorize arrests which were not authorized until those laws were brought into play by the fact of war. In these cases habeas corpus is no more suspended than in the

others. Full force and effect may be given it while enforcing the laws of war. And this is the constitutional view. The power to declare war is broadly given; the power to suspend habeas corpus is given distinctly from the war power, and in addition to it, "when in cases of rebellion or invasion, the public safety may require it." If the operation of the laws of war were a suspension of habeas corpus, everything had been said when congress was authorized to declare war. No further declaration was needed. It is against correct rules of construction to hold that habeas corpus suspension is intended to be merely one of the means of war. They might as well have provided for making war in one paragraph, and then have provided, as a separate and distinct power, authority to kill and capture enemies in battle. War may be made. In addition to making war, habeas corpus may be suspended in certain contingencies.

[Learned counsel, on the other side, has called our attention to the act of congress of March 3, 1863, and to another act of congress, showing that the offence with which petitioner is charged is an offence against the civil law, and punishable under a law of congress; one for which he may be held and tried before the civil tribunals. Neither of these acts interferes with my argument. The first section of the act of March 3, 1863, authorizes the president, in contingencies there named, to suspend the writ of habeas corpus. The learned counsel says he has not suspended it. Undoubtedly, if he had suspended it, there would be an end of this case. I do not claim that it is suspended. My whole argument proceeds on the ground that it is not suspended, but in full force. That act of congress is based upon the idea that arrests had before that time been made, and might again be made, which could only be sustained by a suspension of habeas corpus; in other words, arrests, not sustainable by the laws of war, or by any other law, except the extreme demands of public safety when "in cases of rebellion or invasion the public safety may require." The suspension of habeas corpus is a suspension of a right to inquire into the legality of an arrest; for, if it can be shown that the arrest was lawful, there is no need to suspend the habeas corpus. War had long before been recognized and legalized. Nothing is more certain in law than that military men, in time of war, are legally protected in doing the acts authorized by the laws of war. Such acts are in no sense unlawful. But this act of congress (section 4) provides an indemnity for acts done by the president, or under his authority, which was wholly unnecessary, unless it contemplated acts not defensible under the laws of war. The act neither reprobates nor prohibits. It contemplates the necessity, allows the act, and provides for it. One of two constructions is necessary. It refers only to such arrests as have been made under a suspension of habeas corpus, in which construction it does not apply to this case; or it provides for irregular arrests, without process or with defective process, which might, if habeas corpus was sustained, be discharged under it. But in no event does it contemplate the discharge of an arrest by habeas corpus, unless or until the steps there pointed out shall have been first taken, or the contingency there provided for shall have happened. If learned counsel, therefore, bring themselves under the operation of this act, they defeat their application here, and are remitted to another mode of relief. If this act does not apply, it is outside of the case, and need not be further discussed. If it does apply, it is fatal to this petition. I understand learned counsel to admit that it does not apply here, and in this, I agree with him. It is an undoubted principle of public law, that persons captured or seized under the laws of war are prisoners of war. They may be guilty of civil offenses, punishable by the civil tribunals. Imprisonment under the laws of war does not discharge them from their offenses. They are or may be held until they can be brought to a legal trial in a time of restored tranquillity. Necessity forbids their running at large; humanity forbids to put them on trial at a time so unfavorable to the proceedings of pure and sacred justice. Vatt. Law Nat. 426. The act of March 3, 1863, is expressly limited, in its operation, to prisoners, who are held "otherwise than as prisoners of war." The president's proclamation of September 24, 1862, suspending habeas corpus, and declaring martial law, is not referred to in the act of March 3, 1863, nor published in the regular edition of laws. I have no knowledge that it has been withdrawn or superseded, otherwise than as a matter of inference from the act of congress. If it remains in force, it ends this application. I choose rather not to rely upon it. There is no inference to be drawn from the act of congress against that part of it which proclaims martial law; but in the view I am urging of the principles of public law, such a proclamation can perform no office except to give publicity to a fact before existing. To whatever extent the fact of war brought into play the laws of war, those laws had their full force without a proclamation; to that extent a proclamation was proper, but unnecessary. Beyond that it was nugatory, and could not add one cubit to the stature of war. A proclamation of martial law is often confounded with, and considered equivalent to, a suspension of habeas corpus. But this is inaccurate. If the president had authority to issue such a proclamation, and has not rescinded it, nothing can be more clear than that congress had no power to rescind it. But I do not choose to embarrass the discussion by relying upon a document which there is plausible ground to suppose congress might not have considered in force.

[Having cleared the field of argument from such chances of misapprehension and confusion as prudence required, I recur to the proposition advanced by learned counsel on

the other side, and which I had intended to advance myself, though scarcely necessary to be mentioned. A proceeding of habeas corpus is in the nature of a writ of error, to inquire into the legality of the commitment or arrest. If the application shows the arrest complained of was a lawful one, the court will go no further, it will not put a defendant to show, by his answer, what is already shown by the petition. On this I suppose I have the happiness to agree with learned counsel on the other side. I have also the happiness to agree with him that the right of habeas corpus has not, in this case, been suspended, but is to be treated as in full force, with neither more nor less respect than is habitually paid to it in courts of justice. I claim, then, that the facts before this court, show that the arrest of Clement L. Vallandigham, by Ambrose E. Burnside, a major general in the United States service, commanding in the department of the Ohio, was a legal and justifiable arrest. For the facts showing its legality I rely: 1. On the petition and affidavit of the prisoner. 2. On facts of current public history of which the court is bound to take judicial cognizance. Among the facts of public history I need recall but few. Unfortunately, the country is involved in dangers so many and so critical, that its people neither do nor can divert their thoughts to other topics. There is on foot an organized insurrection, holding by military force a large part of the United States, and controlling the political organization of at least twelve states of the Union. It has put into the field armies of such strength that the armies of the United States have not been able to overcome them. Battles of great magnitude are fought, and prisoners mutually captured and exchanged. In short, we have, for two years, been in a recognized state of civil war, on a scale large and destructive, almost beyond historical comparison. This insurrection claims to have so much power as to be beyond the means of the government to overcome, and to be entitled to be recognized by foreign nations as an independent power. Were it possible to doubt the imminence of the danger and extremity of peril from what we see around us, we should be warned of it by the admonitions of foreign governments holding the relations of friendly governments, and claiming to be impartial. They freely express the opinion that our danger is not merely extreme, but irremedial; that the constitution, and all hopes founded upon it, must perish. This insurrection has, for impulse, feelings and opinions growing out of the past civil history of the country. As a matter of course it cannot be, and as a matter of fact it is not, limited to places, or described by a geographical description. In some parts of the country it dominates society; in other parts it is dominated by the regular civil administration. We hear of no place so dark but that some weak prayers are uttered for the constitution; and of no place so bright but that lurking treason sometimes leaves its trails, or shows, through all disguises, its sinister unrest. The power and wants of the insurrection are not all or chiefly military. It needs not only food, clothing, arms, medicine, but it needs hope and sympathy. It needs moral aid to sustain it against reactionary tendencies. It needs argument to represent its origin and claims to respect favorably before the world. It needs information concerning the strength, disposition, and movements of government force. It needs help to paralyze and divide opinions among those who sustain the government, and needs help to hinder and embarrass its councils. It needs that troops should be withheld from government, and its financial credit shaken. It needs that government should lack confidence in itself, and become discouraged. It needs that an opinion should prevail in the world that the government is incapable of success and unworthy of sympathy. Who can help it in either particular I have named, can help it as effectually as by bearing arms for it. Wherever in the United States a wish is entertained to give such help, and such wish is carried to its appropriate act, there is the place of the insurrection. Since all these helps combine to make up the strength of the insurrection, war is necessarily made upon them all when made upon the insurrection. Since each one of the insurrectionary forces holds in check or neutralizes a corresponding government force, and since government is in such extremity as not safely to allow any part of its forces to withdraw from the struggle, it has no recourse but to strike at whatever part of the insurrection it shall find exposed. All this is implied in war, and in this war with especial cogency. "If war be actually levied, —that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose,—all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." [Ex parte Bollman] 4 Cranch [8 U. S.] 126.

[The constitution being paralyzed and suspended to the extent described, we may notice the situation and condition of the state of Ohio, where the petition states the arrest to have been made. Geographically it is midway between east and west, bordered on the south by Virginia and Kentucky, both states occupied by contending armies, and over which the tide of war advances and recedes according as its fortunes incline to one side or the other. On the north is Lake Erie, over which England and America hold a divided sway. In the event of a war with England, on the very verge of which we have sometimes seemed, a contest for supremacy on that great lake would be inevitable. Such a war is one of the hopes of the insurrection,

and has been schemed for with amazing audacity. A military occupation of either line of railroad running through Ohio, from the river to the lake would sever the Northwestern from the Northeastern states. The population of the state is made up of all the conflicting elements now lighting the blaze of civil war in the country. The feelings of all are represented here. None of the extremes and none of the means are wanting. That these elements should be carrying on a bloody strife in the immediate neighborhood, and no strife be kindled here, is improbable in theory and untrue in fact. The insurrection in Ohio is dominated by the federal authorities, and operates in disguise, but it meets and receives constant attention. The arguments for insurrection made in South Carolina are openly repeated in Ohio. The charges there made against the government and those who administer it, as a provocation for rebellion, are openly made here, and with not much difference in the degree of animosity. The South Carolina orators, it is true, draw a different conclusion from their arguments and charges from that which is drawn here from the same arguments and charges. There, for the reasons stated, they declare eternal hostility to the Union; here, eternal fidelity to it. The means to accomplish these diverse results, however, are the same. In South Carolina they propose to overthrow Lincoln and his minions, in order to destroy the Union; here it is proposed, in order to save the Union. There and here each foot steps in the other's track; the toes all point in the same way, but they claim to be traveling in opposite directions. It is not very long since the marshal of this district was obliged to call for military force to suppress a revolt in Noble county in this state; still later was a military force necessary to save Dayton from the ravages of a similar revolt. In numerous instances in Indiana military force has been necessary. These are all fingers of the same hand. Your honor does not forget how recently the records of this court were removed, in order to save them from the contingencies of an invasion by insurrectionary forces; nor how recently, by voluntary labor, the people of this city raised embankments and forts protected from the insurrection. Nor is your honor uninformed that these defenses are kept, day and night, in a state of preparation, armed and supported. This court is sitting, as it were, in garrison. We are deliberating under the protection of the guns of Newport and Covington. At various parts of the state are camps. The streets of our cities are patroled by military guards. Has our government nothing to do that it should vex itself and waste its means by these precautions, if not known to be necessary? An inference is unavoidably drawn of the importance of a given field of operations, by the officers placed in charge of it. General Wright, who was first sent to command this department, was a man eminent for military science and clear abilities. His undemonstrative habits and retiring manners prevented the high popular appreciation which he deserved. The next commander sent us is General Burnside, of Hatteras Inlet, of Roanoke Island, of Newbern, of South Mountain, of Antietam, of Fredericksburg; a general not inferior in ability, not second to any other in the affections of his countrymen. With him comes that famous army corps, young in organization, but already old in sacrifices and in glory. Next in command, for Ohio, they send us the very Bayard of American volunteers, whose cool heriosm at South Mountain was looked upon as an ample response to the high expectations formed of him from his accomplishments and previous services, and who crowned them all at Antietam creek, by performing there, with Ohio troops, trained under his own eye, a feat of arms fit to be compared with the far-famed passage of the Bridge of Lodi. If the government can afford such generals for the safe places, what can it afford to the dangerous places? Why are these men here? Have they, at any time, since the war began, sought any other but the place of danger? They are here,—they are sent here for war: to lay the same military hand upon this insurrection wherever they can find it, in small force or large force, before them or behind them, which they have laid upon it elsewhere. They are not here to cry peace, when there is no peace; not here to trifle with danger, or to be trifled with by it. They are patriot generals, commanding forces in the field in the presence of the enemy, constrained by their love of country, and in the fear of God only, to strike. Are they to fold their arms and sleep while the incitements to insurrection multiply around them, and until words shall find their way to appropriate acts? Are they to wait until the wires shall be cut, railroad tracks torn up, and this great base of supplies, this great thoroughfare for the transit of troops, this great centre and focus of conflicting elements, is in a blaze, before they can act? Must they wait until apprehended mischief shall become irremediable before they can attempt a remedy? Jefferson Davis would answer "Yes!" Traitors and abettors of treason would everywhere answer "Yes!" I seem to hear a solemn accord of voices rising from the graves of the founders of the constitution, saying "No!" And I seem to hear the response of loyal and true friends of liberty everywhere swelling to a multitudinous and imperative "Amen!" * * *

[The petition exhibits and sets forth a copy of the charge under which he was arrested. It shows us exactly the ground of his arrest. By referring to the charge and specifications, we have before us the case. It is not a little remarkable that no part of the charge or specification is denied. It stands for the purpose of this inquiry, as admitted.

[Mr. Perry read the charge and specifications as published in another place.

[It appears from this that he publicly addressed a large meeting of citizens. He was not expressing in secrecy and seclusion his private feelings or misgivings, but seeking publicity and influence. The occasion and circumstances show the purpose to have been to produce an effect on the public mind, to mould public feeling, to shape public action. In what direction? The charge says by expressing his sympathies for those in arms against the government of the United States, by declaring disloyal sentiments and opinions. He declared the war to be wicked and cruel, and unnecessary, and a war not waged for the preservation of the Union: a war for crushing out liberty and erecting a despotism. What is this but saying that those who fight against the United States are in the right, and that it would be cowardly and dishonorable not to fight against the United States? In what more plain or cogent language could he urge his audience themselves to take up arms against their government? If those who heard him could not be incited to fight against a government by persuading them it was making an unjust and cruel war to crush out liberty, how else could he expect to incite them? If he did not hope to persuade them to join their sympathies and efforts with the enemies of the United States, by convincing them that these enemies are in the right, fighting and suffering to prevent the overthrow of liberty, standing up against wickedness and cruelty, what must he have thought of his audience? What else but the legitimate result of his argument can we impute fairly as the object of his hopes? To whatever extent they believe him, they must be poor, dumb dogs not to rally, and rally at once, for the overthrow of their own government, and for the support of those who make war upon it. But he did not leave it to be inferred. He declared it to be a war for the enslavement of the whites and the freedom of the blacks. Which of the two was in his opinion, the greater outrage, he does not appear to have stated. It is one of the unmistakable marks of the insurrection, by which it can always be identified, that its declarations for liberty are for a selfish and brutal liberty, which includes the liberty of injuring and disregarding others. If his white audience were not willing to be enslaved, that is to say, not willing to endure the last and most degrading outrage possible to be inflicted on human nature, they must, so far as they believe him, resist their own government. If he himself believed what he said, he must take up arms to resist the government or stand a confessed poltroon. A public man, who believes that his government is guilty of the crimes he imputed, and will not take up arms against it, is guilty of unspeakable baseness. If his audience believed what he told them, they must have looked upon advice not to take up arms as insincere or contemptible. No public man, no private man, can make such charges, and decently claim not to mean war. All insurrections have their pretexts. The man who furnishes these is more guilty than the man who believes them and acts on them. If the statements of Vallandigham were true, the pretexts were ample, not merely as pretexts, but as justification of insurrection. They were more: they were incitements which it would be disgraceful to resist, and which human nature generally has no power to resist. The place where such things are done, is the place of insurrection, or there is not and cannot be a place of insurrection anywhere. If these laboratories of treason are to be kept in full blast, they will manufacture traitors faster than our armies can kill them. This cruel process finds no shelter under the plea of political discussion. Whatever might be said about ballots and elections, the legal inference is that it is intended to produce the results which would naturally flow from it. If the president, with all the army and navy, and his "minions," is at work to overthrow liberty and enslave the whites, every good man must fear to see that army victorious, and hail its disasters with joy. Every good man must strike to save himself from slavery now, while he can. The elections are far off, and may be too late. It cannot be claimed that the motive was to influence elections, because the argument does not fit that motive. It fits to insurrection, and that only. He pronounced general orders No. 38 to be a base usurpation, and invited his hearers to resist it. How resist it? How could they resist it, unless by doing what the order forbade to be done? What was there to be complained of, except by persons wishing to do, or to have done by others, the acts by that order prohibited? He invited them to resist the order. The order thus to be resisted prohibited the following acts, viz.: Acts for the benefit of the enemies of our country, such as carrying of secret mails, writing letters sent by secret mails; secret recruiting of soldiers for the enemy inside our lines; entering into agreements to pass our lines for the purpose of joining the enemy; the being concealed within our lines while in the service of the enemy; being improperly within our lines by persons who could give private information to the enemy; the harboring, protecting, concealing, feeding, clothing, or in any way aiding the enemies of our country; the habit of declaring sympathies for the enemy; treason. These are the things prohibited in order No. 38, which Mr. Vallandigham invited his audience to resist. "The sooner," he told them, "the people inform the minions of usurped power that they will not submit to such restrictions on their liberties, the better." "The minions" here referred to were the commanding general of the department, and others charged with official duties under their own government. The "liberties" not allowed to be restricted, were liberties to aid the enemies of the United

States. He declared his own purpose to do what he could to defeat the attempt now being made to build up a monarchy upon the ruins of our free government. This resistance could mean nothing but resistance to his own government, which he had before declared to be making attempts to enslave the whites. These appeals to that large public meeting are charged to have been made "for the purpose of weakening the power of his own government in his efforts to suppress an unlawful rebellion," all of which opinions and sentiments "he well knew did aid, comfort, and encourage those in arms against the government, and could but induce in his hearers a distrust of their own government, and sympathy for those in arms against it, and a disposition to resist the laws of the land." Not one syllable of all this is denied, and yet the arrest is complained of as unconstitutional. It must be so apparent as to need no further demonstration, that an arrest of some kind had become necessary for the preservation of public decency. Either General Burnside and his soldiers should have been arrested, or Vallandigham. The only open question is, which was the proper party, and whether a mistake was made as to the man. If Vallandigham was right, General Burnside and every other officer of the army or navy, every member of the cabinet, even the president himself, should be forthwith put under arrest. The federal congress, which voted supplies for the army engaged in such a foray on the rights and interests of mankind, ought to be promptly dispersed. On the other hand, if the president and the government of United States are not all criminals, if our generals and soldiers are not all minions and pimps of a wicked scheme to enslave the people, Vallandigham ought to have been arrested. The acts which General Burnside was sent here to perform, and the acts of Vallandigham, considered as separate acts, or as lines of action, could not possibly go on together. They were, in their essence and nature, incompatible things, and mutually destructive of each other. If General Burnside might have arrested Jefferson Davis, and held him a prisoner, why not Clement L. Vallandigham? If we suppose the constitution was intended to authorize two such incompatible and mutually destructive lines of action at the same time, we impute an incredible absurdity. If it authorizes the drafting of one part of the population, the organizing of armies, and marching to battle, to suppress insurrection, it cannot at the same time authorize the other part of the population to thwart, defeat, and annul their efforts. On the other hand, if it authorize a portion of the people to attack and resist, and discredit the government, it cannot require the other portion to make war to defeat them. If the object of the constitution was to provide for its own destruction and protect its enemies, the arrest of Vallandigham was a mistake: Burnside was the man. But if the object was to provide for the safety of the constitution, and protect its friends, no mistake has been made, Vallandigham is the man to be arrested. It never could have been intended to allow them both to take the field at the same time.

[It is claimed that, since Vallandigham was not a military man, this arrest should have been made by the civil authorities. I understand the argument of learned counsel to be placed on this ground. Beyond or in addition to the ordinary arrests by civil process, none other are allowed under the constitution, except such as are authorized by military law. Military law, he shows us, consists chiefly in the rules and articles of war, and applies only to persons engaged in the military service of the government. The objection, therefore, is not one which relates to time, place, or circumstance. It denies authority to make such arrests at any time, in any place, or under any circumstances. I am not aware that language can state it more broadly than it was stated by learned counsel. Any arrest or capture made by the army of persons not in the military service, or so connected with it as to be subject to the rules of military law, is, he argues, an unlawful arrest. All such arrests must be discharged on habeas corpus, unless it happens that habeas corpus has been suspended. A state of war, civil or other, does not, of itself, he thinks, suspend habeas corpus. It is a part of his theory that habeas corpus has not yet been suspended. The unavoidable result of this argument is, if it be the law, that no prisoner has been taken during the war, who could not have had his discharge on habeas corpus. The prisoners taken by General Burnside at Roanoke Island, and by General Grant at Fort Donelson, were dischargeable on habeas corpus. General Banks can make no such arrests in Louisiana; Rosecrans none in Tennessee; Grant none in Mississippi; Hooker none in Virginia; Hunter none in South Carolina. Most of the prisoners seized by these generals are citizens of the United States, not engaged in the military or naval service thereof, nor called into actual service as a part of the militia. They could copy the form of the present petition, and conscientiously make oath to every material fact stated in it. It may be said that in those cases the prisoners taken were taken in the act of war. flagrante delicto. But if there was no authority to take them, under any circumstances, the fact supposed can make no difference. In order to rest a distinction on the fact of flagrant war, where it exists, it must be admitted that in some cases the authority does exist, which being admitted, the whole proposition goes into collapse and disappears. The inquiry then comes down to an inquiry as to time, place, and circumstance, which is a very distinct and different inquiry. In truth, however, much of the supposed difference in circumstances does not exist. As generals commanding different armies of the

United States, or in the field for purposes of war, and engaged in actual war, the authority conferred on them by the constitution must be the same. One may be limited by special instructions, another not; but without reference to such limitation, their general authority and duties as generals must be equal. The exigencies of war may press sometimes more heavily on one, sometimes on another. But if this is allowed to make a difference in the general authority exercised, the question is reduced to a question of circumstances, which learned counsel by no means admits. Nor does his proposition allow of an exception, if it happen anywhere that the civil administration, and the judiciary as a part of it, be forcibly obstructed and overthrown. This again would reduce it to a question of circumstances. His argument is that this kind of arrest is absolutely forbidden by the constitution; and being so forbidden, of course, no circumstance can make it lawful. The denial is far-reaching and fundamental. It follows, as a necessary corollary from the proposition, that, if at any time, in any part of the United States, an insurrection can make so much head as to obstruct or overthrow civil administration, it will have gained impunity. If those engaged in it may not be arrested by the army sent against it, they may not be shot. If they cannot be persuaded, nothing can be done. The application of restraint is imprisonment; and unless military imprisonment be allowed, no imprisonment can take place. For in the case supposed, the civil administration is no longer practicable. It may be said that in such instances habeas corpus must be suspended. This does not meet the argument. We are inquiring what arrests may be lawfully made. Suspension of habeas corpus makes no arrest lawful which was before unlawful. It merely suspends one remedy for unlawful arrests. It does not necessarily suspend other remedies, such as actions for false imprisonment and trespass. These are usually provided for by acts of indemnity which are not needed for lawful arrests. In England, these acts of indemnity may be passed by parliament after the war is over; for there is no constitutional prohibition against ex post facto laws. But here an indemnity act must pass before the imprisonment, to be available as an indemnity. The question now under consideration is, what acts are lawful and need no indemnity? What need can there be to suspend habeas corpus, when the civil tribunals, which alone should issue such writs, are already overthrown? The question is, whether every act of battle or of war by our soldiers against an insurrectionary force, is a civil trespass, and needs an act of indemnity? For if our soldiers may kill their enemies, they may capture them. Reduced to its last analysis, it is a question whether it is lawful, by force, to put down an unlawful and forcible opposition to the civil authorities; whether it is an unconstitutional act to enforce the constitution. If the gentleman's proposition be true, must it not be also true that every forcible attempt to overthrow the constitution has the guarantee of that instrument to protect it from harm and insure its success? It is attacked by force, and its friends may not strike without committing trespass.

[Let us examine the grounds on which he founds his proposition. He cites several well-known provisions of the constitution: "The trial of crimes, except in cases of impeachment shall be by jury; and such trial shall be held in the state where the said crime shall have been committed." * * * "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." * * * "No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" [Const. Amend. art. 5]. And some others. These are parts of the constitution, very valuable parts, but not the only ones. If the constitution had provided no means of enforcing the rights here mentioned, it would have been very ineffectual to secure them. Its guarantees of these rights might or might not have been worth the paper on which they were written. The argument of learned counsel leaves the constitution precisely where the framers of it would have left it, if they had put in it no other causes but these. I ask him what is to be done if it happen that by civil war the courts are overthrown, juries dispersed, and, in the state where the crime was committed, all civil administration is rendered impossible? I ask him what is to be done if it happen that throughout any large portion of the United States, the constitution, and all the officers under it, all its recognized legal processes and tribunals, be forcibly overcome and defied; and if those proclaiming the protection of the constitution, by unlawful violence there, not allowed to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures? What if the enemies of the constitution, in arms against its authority, do attack and seize its friends without probable cause, without charges, upon oath, and without warrant? What if they do deprive them of life, liberty, or property without

due process of law, and take private property for public use without due compensation? In a word, what if the enemies of the constitution suppress, expel, or demolish every vestige of constitutional administration, and substitute therefor war,—war by large armies, war by small bands, war by individual assassinations, hatreds, revenges, physical force, war everywhere, so that not one shred or patch of the constitution remains in that whole region? The question to be answered here is, what is to be done in such a state of affairs? I have listened to the argument of my learned friend with respectful attention. I have wandered with him over many fine fields of declamation, all about liberty and the constitution, but I find no answer. Unfortunately the condition of the country urgently requires an answer. I find that answer in other parts of the constitution. The instrument would have been nugatory, and idle and perhaps cheerful composition, but wholly unworthy of its framers, if it could furnish no answer. If it could furnish no answer, we should find ourselves involved in a situation unprovided for, never contemplated as possible, and one which would be a law unto itself. Being without law for the situation, we should rightfully act upon the necessity before us. But my argument is that the constitution does provide an answer,—a well-expressed and adequate answer. That answer, in substance, is, to meet war with war. I refuse to be dazzled by glittering fragments of a broken constitution, or to follow their illusory lights into a bottomless bog of anarchy. On behalf of the people I demand the whole constitution. On that rock we found our liberty, and the gates of hell shall not prevail against it. It is not necessary to repeat here the numerous passages of the constitution intended to establish justice and secure liberty. They do not purport to create, but to guard and secure. Justice existed before, but the concern of the framers of the constitution was to "establish" it. Domestic tranquility was an object of general desire, yet government was needed to "insure" it. The common defense might be, indeed, had been, conducted by them successfully without a constitution, but they deemed it expedient to "provide" for it. Liberty had been, by them, successfully asserted, but they felt the necessity of a government to "secure" its blessings. Therefore, they did "ordain and establish this constitution of the United States of America." Its framers understood perfectly that, without it, liberty might exist, but it would have no establishment or security. They would have wasted their many weary years with profitless endeavor to behold at last the object of desire "speed away on cherub pinions,—the guide of homeless winds and playmate of the waves." How, then, did they secure liberty? In the order of securities we find, first, certain declaratory clauses. It is one step toward establishing and securing rights to agree upon them and declare them. The citizens of each state shall be entitled to all the privileges and immunities of the several states. Private property shall not be taken for public use without due compensation. No person shall be deprived of life, liberty, or property, without due process of law; and other clauses before quoted. It is observable that in these declarations are embraced rights of a different grade,—rights called absolute and indefeasible, and rights merely conventional or secondary. But they are all declared with the same solemnity, and secured by the same guarantees. Materials of different degrees of solidity and costliness were fitted to their respective places in the edifice. The whole structure was necessary for the purpose contemplated, and all its parts and details were necessary to the structure. They do not tell us which of them could be taken away without danger to all. It was necessary to go further and provide for the enforcement of these declarations. The first step was to provide for electing a chief executive officer, to preside over and enforce the laws. Without him the whole machinery would fail. Except in the manner there provided, there can be no president elected, but an election of president implies other things. When elected, he is to perform duties and exercise his faculties. Another practical security is provided by ordaining the election of a legislative body, and prescribing its functions, and declaring "that this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." But, further than this, the constitution provides for courts, judges, and marshals, to adjudicate and enforce the laws. It does not stop there. In all ages of the world men have been found not obedient to the judicial decisions; sometimes numerous and strong enough to overthrow and defy all the processes of civil administration. The constitution does not fail to provide for such an emergency. It crowns the guarantees before offered by providing for an adequate physical force to overcome all opposition. It speaks of a well-regulated militia as necessary for the security of a free state. It provides authority to "raise and support armies, to provide and maintain a navy, and to declare war." It provides for organizing, arming, and disciplining the militia; for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. It makes the president "commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States." Thus placing at his disposal the

entire resources of the country, it requires of him, before entering upon his office, to invoke the sanction of Almighty God, and clothe himself with an oath: "I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States." The president is no longer a free man in the chimerical sense of freedom which we hear so much of. But he is not less free than other citizens who are all bound to support the constitution. It is not one of the liberties secured by the constitution,—to select some particular right there guaranteed, to maintain it as distinct from and in opposition to the rest, or to hold fast to that one and let go the rest. Each holds his rights upon one ineradicable condition,—that he shall, to the extent of his ability, maintain and defend every part of the constitution. He can not throw off his allegiance, defy the government, make war upon it, and, at the same time, claim its protection. When he lifts his arm against the constitution, the arm may be cut off, without giving him a right to complain of cruel and unusual punishments. When he lifts his voice against the liberties of his countrymen, his voice may be silenced in the interests of freedom of speech. When he arms himself to assail the defenders of the constitution, those arms may be taken from him, in the interest of the general right to bear arms. When he makes of his house a shelter for traitors, and barricades it from the approach of patriots, it may be broken open and searched in the general interest of freedom from unreasonable searches and seizures.

[In the civil administration different remedies are applied, each after its kind. A writ of capias seizes the body, but it does not violate the constitutional guarantees of personal liberty; an attachment lays hold of goods, but does not violate property rights; a replevin breaks open houses, but does not conflict with the right to be protected from unreasonable searches and seizures. The common law furnishes redress in some instances; equity in others; maritime law in others. Each of these is so far exclusive as, when properly appealed to, not to be interfered with by any other; and, while in progress, to be governed exclusively by its own rules. War is the last resort, but when properly appealed to, its processes are due and reasonable processes, and, like the rest, must be allowed to work out results exclusively by its own rules. "The body of a nation cannot, then, abandon a province, a town, or even a single individual who is part of it, unless compelled to it by necessity, or indispensably obliged to it by the strongest reasons, founded on the public safety. Since, then, a nation is obliged to preserve itself, it has a right to everything necessary for its preservation. For the law of nations gives us a right to everything without which we cannot fulfill our obligations; otherwise, it would oblige us to do impossibilities, or rather, would contradict itself in prescribing us a duty, and, at the same time, debarring us of the only means of fulfilling it." * * * "A nation or state has a right to everything that can help to ward off imminent danger, and keep at a distance whatever is capable of causing its ruin, and that from the very same reasons that establish its right to the things necessary to its preservation." Vatt. Law Nat. 5, 6. The right of nations here described has been fully preserved to the United States by their constitution, so far as the question under debate is affected. The power to make war is given without limitations. So far as war may be a means of preservation, or for warding off imminent danger, and keeping at a distance whatever is capable of causing its ruin, the nation is safe. The rights of war are as sacredly guaranteed as trial by jury, or personal liberty, or any other right whatever. The president cannot claim to have preserved, protected, and defended the constitution, to the best of his ability, until he shall have used all the ability given him by the utmost rights of war. He who declares he is willing to support the war, provided it creates no disturbance, only declares he is willing to support it, provided it shall be so conducted as to be really something else, and not war. The constitution does not define the meaning of habeas corpus, or trial by jury, or liberty, or war. They were to be ascertained elsewhere. I have before shown a definition of civil liberty. One of its conditions is an abridgement of natural liberty. Liberty was not abridged of the right to call in war to her defense, but she could not be endowed with a capacity for impossibilities. She could not require of human nature that which would be impossible to God himself,—repose and commotion, peace and war, at the same time. War could do little for Liberty, if she should hang forever sobbing on his neck, pinioning his arms, and holding him back from being War indeed. No! in this solemn time of domestic sorrow and of public peril, it is little better than sacrilege thus to potter with the meaning of words. By liberty was intended such liberty as was possible to mankind. By war was intended not a hollow pretext of war, but a lifting high of the red right hand of avenging justice. A thorough, condign, effectual laying hold of enemies, a summary breaking-up of their hiding places, and a terrifying deathly pursuit, until they shall cease to exist, or cease to be enemies. In Scott's Military Dictionary, a recent work, which, he says, was not prepared in view of existing disturbances, he states the following rule (page 273): "With regard to the requisition of military aid by the civil magistrate, the rule seems to be that when once the magistrate has charged the military officer with the duty of suppressing a riot, the execution of that duty is wholly confided to the judgment and skill of the mili-

tary officer, who thenceforward acts independently of the magistrate until the service required is fully performed. The magistrate cannot dictate to the officer the mode of executing the duty; and an officer would desert his duty if he submitted to receive any such orders from the magistrate. Neither is it necessary for the magistrate to accompany the officer in the execution of his duty. The learning on these points may be gathered from the charge of Mr. Justice Littledale, to the jury, in the trial of the mayor of Bristol, for breach of duty in not suppressing the riots in that city in 1831."

[I have spoken of military law, which is claimed, by learned counsel on the other side, to be a law for military men. This law is often mistaken for or confounded with martial law, but the terms are very far from convertible. Martial law is often defined as no law at all; but this definition is rather an objurgation against than a description of it. I venture to define martial law to be the rule of action adopted by all nations, and at all periods of the world, by which, in times of war, to guard against dangers that often arise, and by reason of the necessity of it, such discretion is given to the military commander, measured by the requirements of the situation, as shall insure to his force the best chances of success. It is that established practice, that common law of nations, by which, under the compulsion of right reason, when they have called an army into the field for war, and confided to it the safety of the commonwealth, they allow it, without hindrance or interruption, to perform its work. Counsel for petitioner reads to us many authorities to show that military law applies only to military men. Beyond this his argument is comprised either in a broad denial that martial law means anything more than is intended by military law; or, if it does, an equally broad denial that it does or can exist in Great Britain or the United States. His limitation of the military law, so called, appears to me rather more narrow than the authorities justify; but for the purposes of this argument, I have no controversy with him there. Let him take for granted all that I understand him to claim, as to the rule concerning military law. The questions remain whether martial law, or the laws of war, or the rights of war—phrases interchangeably used by the supreme court of the United States in discussing the theme, and by writers—mean more than military law; and if they mean more, whether they can exist in Great Britain or the United States. On both these questions counsel for petitioner takes the negative. If I can show him to be wrong here, I shall have defeated his whole argument. For, although his argument is not confined to these inquiries, all other parts of it depend upon them. I have already cited Vattel to how that the same rules or laws of war apply, or ought to apply, to civil as to foreign war. The only doubt is, whether persons in insurrection against their own government, can rightfully claim the same treatment applied in mitigation of the rigors of war to foreign enemies. The most merciful rule is the one to which Vattel inclines for reasons of expediency and humanity. It is the rule applied by our own government in this war. It is quite unnecessary to cite authorities to show that in foreign war the authority of a general is not limited to the military force under his command. During the Peninsular war, Wellington governed Spain and Portugal, and afterward a part of France, in the exercise of well-known and commonly-acknowledged rights of war. In our war with Mexico, General Scott promulgated and enforced a plan for the government of Mexico. Some debate was raised at home whether the constitution conferred so much power on a general. It was acquiesced in and approved. There could be no doubt of the authority to make war, and this was a necessary incident. Under the same rule, Rosecrans controlled civil administration in Tennessee, and Banks in Louisiana, and Curtis did in Missouri. Doubtless persons captured in flagrant acts of treason may be hung. As the greater includes the less, the right to hang implies the right to inflict the lesser evil. They are, therefore, allowed to be treated as prisoners of war. I am now speaking of the existence of rights of war, laws of war, or martial law, and showing them not to be limited to military men, and to be much more comprehensive than military law,—indeed, entirely distinct and different from it. I am now making the application to Vallandigham. That is a question of circumstances. I am replying to the argument which denies the existence or application of such a law under any circumstances.

[To maintain his denials counsel cites many English authorities,—among them Sir Matthew Hale,—and he claims, as the result of those authorities, that martial law has been definitively abandoned and prohibited in England. These authorities do, some of them, show that certain gross abuses, which were practiced by the Stuarts in England, under the pretext and name of martial law, but which found as little justification under martial law as under any other, have been prohibited. Perhaps he could show, with smaller research, that measures had been taken to prevent a repetition of the infamous and bloody assizes of Jefferies; but this would not go very far to discredit trial by jury. Trial by jury yet exists in England; and martial law is applied there as often as occasion requires. If anything may be fairly assailed by holding it responsible for abuses, the judiciary would be one of the first institutions of government to fall. Looking over the history of past ages, it is apparent that military men would have some difficulty in establishing a claim to a leadership in the abuses inflicted on mankind. Most of the historical struggles for liberty

have resulted from a real and natural antagonism between peoples and their rulers; rulers claiming, by some heritable superiority, to govern, and people feeling the government mainly in its oppressions. Whether judges or military men are most responsible for the cruelties inflicted in such struggles may be doubted. From a somewhat patient reading of law books, I am, however, prepared to admit that judges have felt much less alarm and indignation at stretches of power practiced by themselves, than they have felt at the assumption of undue power by military men. If there were no history except what we find in law books, judges would have a decided advantage over generals. There are, also, specimens of popular forensic eloquence, originally delivered as the voice of the people against despotic governments (some of them quite out of hearing), which never lose their attractions. We rather like to hear them launched against our old government; that is to say, ourselves. The difficulty of playing both people and tyrant at the same time is scarcely appreciable in these popular amusements.

[I am relieved from stating my own conclusions concerning the numerous English authorities cited, by finding an examination of them, and an opinion concerning them, by Mr. Attorney General Cushing. 8 Op. Attys. Gen. U. S. p. 365. The attorney general, after remarking upon English authorities, sums up: "In fine, the common-law authorities and commentators afford no clue to what martial law, as understood in England, really is; but much light is thrown upon the subject by debates in parliament, and by facts in the executive action of government." This is a report to his own government by one of the most learned and laborious attorneys general the United States ever had. He quotes Sir Matthew Hale also: "Martial law is not in truth and reality, a law, but something indulged rather than allowed as a law: the necessity of government, order, discipline in the army, is that only which gives these laws a countenance." Hale, Com. Law, p. 39. Mr. Attorney General says: "This proposition is a mere composite blunder, a total misapprehension of the matter. It confounds martial law and law military; it ascribes to the former the uses of the latter; it erroneously assumes that the government of a body of troops is a necessity more than that of a body of civilians, or citizens. It confounds and confuses all the relations of the subject, and is an apt illustration of the incompleteness of the notions of the common-law jurists of England in regard to matters not comprehended in that limited branch of legal science." "Even at a later day, in England, when some glimmerings of light on the subject began to appear, the nature of the martial-law remained without accurate appreciation in Westminster Hall." He cites the case of Grant v. Gould, 2 H. B. 98, decided by Lord Loughborough, who said: "The essence of martial law consists in its being a jurisdiction over all military persons, in all circumstances." And because military men are triable for many offenses, and have their personal rights, for the most part, regulated by law, "Therefore," he says, "it is totally inaccurate to state martial law as having any place whatever in the realm of Great Britain." Mr. Attorney General says, "This is totally inaccurate," and explains why. Mr. Attorney General then quotes 11 Steph. Comm. p. 602, note. "Martial law," says Stephens, "may be defined as the law, whatever it may be, which is imposed by military power; and has no place in the institutions of this country (England), unless the articles of war, established under the acts just mentioned, be considered as of that character." The attorney general proceeds: "Here again is pitiable confusion; for the articles of war are not a law 'imposed by the military power,' nor is martial law confined in its origin to the military power as the source of its existence." The confusion among English lawyers, remarked by the attorney general, will account, probably, for some inconsistencies of expression among English statesmen on this subject, though the action of English statesmen is sufficiently clear and consistent. The question whether martial law has "a place in the realm of Great Britain," as denied by Lord Loughborough, or "a place in the institutions of England," as denied by Mr. Stephens, is purely a question of historical fact, and history is against them. Nor is the question open to doubt. Martial law, such as I claim, has been unquestionably adopted and enforced in Great Britain and her provinces as often as any occasion has been felt for it. I may here dismiss the English authorities.

Mr. Attorney General Cushing, in his opinion, makes a most learned examination of the topic, and says: "Looking into the legislation of other countries, we shall find all the legal relations of this subject thoroughly explained, so as to furnish to us ideas at least, if not analogies, by means of which to appreciate some of its legal relations in the United States." [8 Op. Attys. Gen. U. S. p. 370.] These legal relations appear to be better defined in France than elsewhere. Three conditions or states are there provided for: 1. Peace. In the state of peace, all military men are subject to the law military, leaving the civil authority untouched, in its own sphere, to govern all persons, whether civil or military, in class. 2. The state of war. When it exists, the military authority may have to take precedence of the civil authority, which, nevertheless, is not deprived of its ordinary attributes, but, in order to exercise them, must, of necessity, enter into concert with the military commander. 3. The state of siege. When it exists, all the local authority passes to the military commander, who exercises it in his own person, or delegates it, if he please, to the civil magistrates,

to be exercised by them under his orders. The civil law is suspended for the time being, or, at least, made subordinate, and its place is taken by martial law, under the supreme, if not direct administration of the military power. "The state of siege may exist in a city, or in a district of country, either by reason of the same being actually besieged or invested by a hostile force, or by reason of domestic insurrection." Of these different stages, Mr. Cushing concludes, the state of siege is equivalent to the proclamation of martial law in England and the United States. I remark upon this, that these distinctions, after all, between a state of war and a state of siege, are not very valuable. Martial law is a thing of necessity, and is limited by the necessity, so that the less urgent the necessity, the less extensive the power. It places in the hands of the general a discretion, as discretion is placed sometimes in the hands of judges and chancellors. It is said that martial law is no law; and it is said that equity is the length of the chancellor's foot. But the chancellor, like the general, is required to exercise a "sound discretion," a "reasonable discretion," a "wise discretion, in view of all the circumstances." The New American Cyclopedia says: "Martial law is often confounded with military law; but these terms are by no means convertible." Speaking of martial law, it says: "It proceeds directly from the military power which has now become supreme. Yet, remotely and indirectly, martial law expresses the will of the people." "Martial law has often been confounded with military law, but the two are very different. Military law, with us, consists of the 'rules and articles of war,' and other statutory provisions for the government of military persons, to which may be added the unwritten or common law of the 'usage and custom of military service.' It exists equally in peace and in war, and is as fixed and definite in its provisions as the admiralty, ecclesiastical, or any other branch of law, and is equally with them, a part of the general law of the land. But, in the words of Chancellor Kent, 'martial law is quite a distinct thing.' It exists only in the time of war, and originates in military necessity. It derives no authority from the civil law (using the term in its more general sense), nor assistance from the civil tribunals, for it overrules, suspends, and replaces both. It is, from its very nature, an arbitrary power, and 'extends to all the inhabitants (whether civil or military) of the district where it is in force.' It has been used in all countries, and by all governments, and it is as necessary to the sovereignty of a state as the power to declare and make war. The right to declare, apply, and enforce martial law, is one of the sovereign powers, and resides in the governing authority of the state, and depends upon the constitution of the state, whether restrictions and rules are to be adopted for its application, or whether it is to be exercised according to the exigencies which call it into existence. But even when left unrestricted by constitutional or statutory law, like the power of a civil court to punish contempts, it must be exercised with due moderation and justice; and, as 'paramount necessity' alone can call it into existence, so must its exercise be limited to such times and places as this necessity may require; and, moreover, it must be governed by the rules of general public law, as applied to a state of war. It, therefore, cannot be despotically or arbitrarily exercised, any more than any other belligerent right can be so exercised." Atty. Gen. Cushing, 8 Op. Attys. Gen. U. S. p. 365 et seq.; Wolfius, Jus Gentium, § 863; Gro. De Jure B. lib. 2, cap. 8; Kluber, Droit des Gens, § 255; O'Bri. Mil. Law, p. 28. Halleck, Int. Law, 373. "Martial law, then, is that military rule and authority which exists in time of war, and is conferred by the laws of war in relation to persons and things, under and within the scope of active military operations in carrying on the war, and which extinguishes or suspends civil rights, and the remedies founded upon them, for the time being, so far as it may appear to be necessary in order to the full accomplishment of the purpose of the war,—the party who exercises it being liable in an action for any abuse of the authority thus conferred. It is the application of military government—the government of force—to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military law or military action." Benet, Courts-Martial, 14. "We remark, in conclusion, that the right to declare, apply, and exercise martial law is one of the rights of sovereignty, and is as essential to the existence of a state as is the right to declare or carry on war. It is one of the incidents of war; and, like the power to take human life in battle, results directly and immediately from the fact that war legally exists. It is a power inherent in every government, and must be regarded and recognized by all other governments; but the question of the authority of any particular functionary to exercise this power, is a matter to be determined by local and not by international law. Like a declaration of a siege or blockade, the power of the officer who makes it is to be presumed until disavowed, and neutrals who attempt to act in derogation of that authority, do so at their peril." Halleck, Int. Law, 380. "The English common-law authorities and commentators generally confound martial with military law, and, consequently, throw very little light upon the subject, considered as a domestic fact; and, in parliamentary debates, it has usually been discussed as a fact, rather than as forming any part of their system of jurisprudence. Nevertheless, there are numerous instances in which martial law has been declared and enforced, in time of

rebellion and insurrection, not only in India and British colonial possessions, but also in England and Ireland. It seems that no act of parliament is required to precede such declaration, although it is usually followed by an act of indemnity, when the disturbances which call it forth are at an end, in order to give constitutional existence to the fact of martial law." Id. 374.

[I will now ask attention to two cases discussed in the supreme court of the United States, which give the sanction of that court to the doctrine that I am endeavoring to sustain.

[The constitution provides that private property shall not be taken for public use without due compensation. Yet a general, going to war, could not post his sentinels without committing what would be, in peace, a trespass. Every mile of his march, with ordinary military precautions, every encampment, would be a violation of law. In Mitchell v. Harmony, 13 How. [54 U. S.] 115, the plaintiff below had sued an officer of the army of the United States for taking his property during the war with Mexico. It was taken on error to the supreme court of the United States, on exceptions to the charge of the circuit judge to the jury. Chief Justice Taney said (page 133): "Upon these two grounds of defense, the circuit court instructed the jury that defendant might lawfully take possession of the goods of the plaintiff, to prevent them from falling into the hands of the public enemy; but, in order to justify the seizure, the danger must be immediate and impending, and not remote or contingent. And that he might also take them for public uses, and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise." The charge, as thus stated, was sustained. Again, on page 134, the chief justice said: "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed, to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service, or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser." * * * "It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified. In deciding upon this necessity, however, the state of the facts, as they appeared to the officer, at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation." Mr. Justice Daniel delivered a dissenting opinion on other points. But on this point he said (page 139): "The principle itself, if properly applied, of the right to take property to prevent it from falling into the hands of the enemy, is undisputed." And again (same page): "I have no doubt of the right of a military officer, in a case of extreme necessity, for the safety of the government or army, to take private property for the public service." Again (page 140): "The safety of the country is paramount, and the rights of the individual must yield in case of extreme necessity." Observe that this is not placed on the ground that, in extreme necessity, the constitution is suspended, and the laws properly broken; but it is held to be a lawful act. They do not look upon it as trespass, excusable from great urgency, but they declare it not to be a trespass. The officer is clothed with a lawful right to do it. But this property right is guarded by the same sanctions in the constitution with the right of personal liberty. Inasmuch as a person may give the enemy more help, or expose our own army to greater dangers, than property could, the reason is more cogent when applied to persons.

[During the celebrated Dorr rebellion, the legislature of Rhode Island passed an act declaring the state under martial law. One Martin Luther being charged with aiding and abetting the rebellion, his house was broken open and entered, and he was arrested, or, in the language of the petition in this case, he was "seized by overpowering numbers." He brought an action against the parties who made the arrest, in trespass quare clausum fregit. They justified under the statute declaring martial law. It appears that there was not, in that case, more than in this, "any warrant issued upon probable cause, supported by oath or affirmation." In that action martial law, as a topic, came under discussion in the supreme court of the United States. Luther v. Borden, 7 How. [48 U. S.] 1. Chief Justice Taney delivered the opinion of the court, from which I shall presently read. But, before doing so, I propose to read from the dissenting opinion of Mr. Justice Woodbury, and to invite the attention of learned counsel on the other side to his descriptions of martial law, and the distinction he made between what is called military law and martial law.][6]

[Mr. Perry here commented at length upon the opinion of Mr. Justice Woodbury, criticizing severely his definitions and distinctions.]

[7] [I may now turn to the opinion of the court as delivered by Chief Justice Taney (page 45): "The remaining question," says the chief justice, "is whether the defendants, acting under military orders, issued under the authority of the government, were justified in breaking and entering the plaintiff's house. In relation to the act of the legislature declaring martial law, it is not necessary, in the case before us, to inquire to what extent, or under what circumstances, that power may be exercised by a state. Unquestionably a military government, established as the

[6] From pamphlet report by Rickey & Carroll, Cincinnati, Ohio, 1863.

[7] From pamphlet report by Rickey & Carroll, Cincinnati, Ohio, 1863.

permanent government of a state, would not be a republican government, and it would be the duty of congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities, and, unquestionably, a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the state, as to require the use of its military force, and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And, in that state of things, the officers engaged in its military service might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is used for purposes of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable." "We forbear to remark upon the cases referred to in the argument, in relation to the commissions anciently issued by the kings of England to commissioners to proceed against certain descriptions of persons, in certain places, by the law martial. These commissions were issued by the king at his pleasure, without the concurrence or authority of parliament, and were often abused for the most despotic and oppressive purposes. They were used before the regal power of England was well defined, and were finally abolished and prohibited by the petition of right, in the reign of Charles the First. But they bear no analogy in any respect to the declaration of martial law by the legislative authority of the state, made for the purposes of self-defense, when assailed by an armed force; and the cases and commentaries concerning these commissions can not, therefore, influence the construction of the Rhode Island law, nor furnish any test of the lawfulness of the authority exercised by the government." This decision does not determine in what branch of the government resides authority to declare martial law. But it recognizes martial law as a legitimate means of preserving the government in emergencies calling for it. It shows that the ground taken by counsel on the other side, that no such authority is lodged in any branch of the government, is untenable. On page 44 the court replies to the same kind of argument we have heard here, of the danger of intrusting so much power to the president: "It is said that this power of the president is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, at the same time, equally effectual. When citizens of the same state are in arms against each other, and the constituted authorities unable to execute the laws, the interposition must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the president, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against willful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals." 7 How. [48 U. S.] 44.

["Moreover, when a military force is called out to repel invasion or suppress a rebellion, it is not placed under the direction of the judiciary, but under that of the executive. Suppose the military force, legally and constitutionally called into service for the purposes indicated, should find it necessary, in the course of its military operations, to occupy a field or garden, or destroy trees, or houses, belonging to some private person; can a court, by injunction, restrain them from committing such waste? It can do so in time of peace, and, if its powers are to continue in time of war, the judiciary, and not the executive, will command the army and navy. The taking or destroying of private property, in such cases, is a military act, and act of war, and must be governed by the laws of war; it is not provided for by the laws of peace. In the same way, a person taken and held by the military forces, whether before, or in, or after a battle, or without any battle at all, is virtually a prisoner of war. No matter what his alleged offense, whether he is a rebel, a traitor, a spy, or an enemy in arms, he is to be held and punished according to the laws of war, for these have been substituted for the laws of peace. And for a person so taken and held by the military authority, a writ of

habeas corpus can have no effect, because, in the words of the United States supreme court, 'the ordinary course of justice would be utterly unfit for such a crisis.'" Halleck, Int. Law, 378. The same writer states circumstances in the history of this country, which your honor will find it easy to verify. From this statement it appears that the practice, now complained of as strange and unprecedented, was commenced under the administration of Washington. Jefferson and Jackson are also implicated. When Vallandigham shoots his poisoned arrows at President Lincoln, if there should prove to be strength enough in the bow, the same aim will pierce a succession of illustrious defenders of liberty. Here is the statement: "During the administration of President Washington, in the Pennsylvania 'Whisky Insurrection' of 1794 and 1795, the military authorities engaged in suppressing it disregarded the writs which were issued by the courts for the release of the prisoners who had been captured as insurgents. General Wilkinson, under the authority of President Jefferson, during the Burr conspiracy of 1806, suspended the privilege of this writ, as against the superior court of New Orleans. General Jackson assumed the right to refuse obedience to the writ of habeas corpus, first in New Orleans, in 1814, as against the authority of Judge Hall, when the British army was approaching that city; and afterward, in Florida, as against the authority of Judge Fromentin." May it please your Honor! I have spoken some words of praise of the character and services of General Burnside. I can now be silent. The patriot who, in these times, can get himself abused for following in the footsteps of Washington, Jefferson, and Jackson, has triumphed over all need of my poor commendation. The wrath of his country's enemies has been made to praise him.

[The authorities relied upon to show that the laws of war, or martial law, are not any more allowed in Great Britain, I have shown to be in error. The statements, though made by parties whom we might expect to be informed, and which have probably misled counsel on the other side, are shown by Mr. Cushing, attorney general under the late President Pierce, to have resulted from misapprehension and confusion of ideas. But this showing depends not on the authority alone of his name, strong as it may be. The errors referred to are so demonstrable to reason, and so utterly at variance with history, it is quite unnecessary to go into a further exposition concerning them. In the dissenting opinion of Judge Woodbury, which I have freely adverted to, he was misled into a similar statement; but he let into it a sufficient number of exceptions to correspond with all the occasions there have been in Great Britain for martial law within the last hundred years. He insisted, however, that they had no constitution, and such acts were only done by parliament in virtue of its unlimited power. I must again say that the question is not, who may do it? but, can it be done? For the purpose of my argument, it is sufficient if done by parliament, but the fact is otherwise. The quotation from Hansard's Debates shows that once, at least, it has been done by the executive. I have no doubt the same is true in other instances. The important matter is, however, it has been done, both in Great Britain and this country, every time there has been occasion for it. It is a rule of action in both countries. The misconception of terms and confusion of ideas among common lawyers, on this topic, are not confined to England. A much clearer perception is shown by American writers on the main question involved; but even Mr. Cushing and Mr. Halleck fall into error in some particulars. The relations of suspension of habeas corpus to martial law are less well defined. They explain these to us in a jumble of words, which need more explanation than the facts sought to be explained. It has been the good fortune of Great Britain and the United States to experience so few occasions for the laws of war within their own borders, and those occasions have been of duration so brief, that a prompt and unflinching recognition and use of martial law, when the occasions have happened, is all that I need show. Peace turns attention to thoughts of peace. The judges then take their turn, and, danger being over, they sometimes bite their thumbs at the generals in a very affecting manner. We are told that acts of indemnity are passed in order to cover the illegality of the laws of war, as if a law could be illegal! When lawyers and judges fall to using rigmarole, it is not common for politicians and pamphleteers to allow themselves to be outdone. In the passage quoted from Hansard, Lord Castlereagh is made to say: "I maintain that it is a constitutional mode for the executive government to exercise martial law in the first instance, and to come to parliament for indemnity afterward. * * * They did it on the principle that they were authorized by the king's prerogative, provided they did not transgress the necessity of the case." This call for indemnity is often said to signify that the act was unlawful. What indemnity could be needed for a lawful act? So, then, it would appear to be a constitutional mode to do the unconstitutional thing, intending presently to apologize for it. Mr. Grey (afterward Earl Grey) was not impressed with the clearness of this explanation. He says: "It was better that the executive government should resort to what had been called (he thought not legally) its prerogative of proclaiming martial law. That was no prerogative of the crown, but, rather, an act of power sanctioned by necessity, martial law being a suspension of the king's peace." Here, then, is a blaze of light. It was better to resort to that which did not exist, to wit, the prerogative. It was an act of power "sanctioned" by necessity, "martial

law being a suspension of the king's peace." This luminous expounder had arrived at the conclusion that in war peace must be considered as suspended. It did not, however, occur to him that it is war itself which suspends peace, and not the laws of war, which of necessity exist when war exists.

[Our own writers follow in the same train. Mr. Attorney General Cushing, in the opinion before quoted says: "We have in Great Britain several recent examples of acts to give constitutional existence to the fact of martial law." Mr. Halleck says: "It seems that no act of parliament is required to precede such declaration, although it is usually followed by an act of indemnity, when the disturbances which called it forth are at an end, in order to give constitutional existence to the fact of martial law." They are explaining the laws of England, and on this part of the topic relax their vigilance, repeating merely the incongruous failures which they find. Passing over the idea that parliament can make a thing constitutional which is not,—an absurdity,—they are not boggled at the declaration that an act already gone by and ended can be made to have been constitutional, which was at the time not so. On the theory thus furnished by Englishmen, and incautiously followed by some of our best writers, indemnity acts, if truly expressing their meaning, would read as follows: "Whereas, certain acts have been done which are known to have been unconstitutional and illegal, therefore they were and are constitutional, legal acts." This is carrying the power of parliament to a pitch compared with which Omnipotence is feeble. If I may venture to suggest the explanation they were manifestly groping for, it is in the fact alluded to by Earl Grey: the king's peace is suspended. This suspension of peace being usually accompanied by more or fewer proclamatory documents, and these documents being the only part taken in war by judges and legislators, they have mistaken the documents for the war. They have omitted to remember that a failure of documents would not change the fact of war. The war, and not the documents, suspends peace. Of this the writers are sufficiently aware in other parts of their discussion. Mr. Attorney General Cushing says: "When martial law is proclaimed under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact." In this statement Mr. Halleck concurs. Indeed, nothing can be more obvious. Yet most of the antipathy and all the arguments I have met with, directed against martial law, are arguments against enforcing it during peace. In other words, they are arguments against inflicting the rigors of war under false pretexts. A part of the confusion is occasioned by speaking of martial law as if it were distinct and different from the laws of war, or rights of war. No one doubts that, when war exists, it is a thing of such a paramount and supreme nature that its laws must prevail. The existence of war is not a suspension of habeas corpus; but, for all arrests authorized by the laws of war, the answer that war exists, and that the arrest was made in accordance with its rules, is a lawful and sufficient answer to a habeas corpus. General Burnside has expressed it very well: "We are in a state of civil war, and an emergency is upon us which requires the operation of some power that moves more quickly than the civil. There never was a war carried on successfully without the exercise of that power."

[Indemnity acts are sufficiently accounted for without supposing them to be necessary as a legal justification for acts of war. They are commonly enacted in civil wars, in which the application of the rigors of war is startling to people long accustomed to peace and civil administration. A concurrence of all branches of government in any public acknowledgment of its necessity, either before or after the fact, cannot fail to produce a valuable effect on the public mind. Such acts may, also, in England answer a good legal purpose. They may close the courts to vicious and experimental litigation, by which persons engaged in the public service in time of war, might, on the return of peace, be ruined or compelled to flee their country. Counsel on the other side, I understood him to say, by instruction of his client, has, at some length, called our attention to the number and variety of civil actions, to which, on his theory, General Burnside has exposed himself, as well as all who acted under his orders. On his theory, no act of indemnity can shield our soldiers. The right he claims is a constitutional right, which legislation cannot affect. On his theory, every act of war by our soldiers is a trespass, and no act of indemnity can reach them. Hard as the fortunes of soldiers may be in war, on his theory, peace will bring them no repose. Our poor country, defended by their valor, enriched by their blood, however grateful it may be, can only welcome them home to the embrace of bailiffs. We may ring bells, kindle bonfires, and pour out our hearts in thankfulness to God for returning peace, but the noble boys who won it for us must skulk in hiding places, to dream only of writs and constables and the law's delays; certain that their danger in peace is in proportion to their valor in war, and that he only can be hopeful who can prove himself to have been useless. This is not an exaggeration, but a necessary, logical result of the doctrine advanced here on behalf of Mr. Vallandigham. The proposition is that the right to personal liberty, freedom of speech, etc., are absolute, inalienable rights, guaranteed inflexibly by the constitution, and not to be suspended in any emergency, nor made to yield to any public necessity. I repeat that the question argued by counsel on the other side is not a question under what circum-

stances these rights may be abridged, but he denies the legal possibility of such abridgment. These rights extend to all citizens,—to persons subject to military duty as well as the rest. Yet the same constitution which guarantees these inalienable rights authorizes the making of war and the calling out of the militia. Pressed by this fact, counsel do not seek to deny that the liberty of the soldier is, for the time of his service, abridged. This is too palpable for denial. He seeks, therefore, to get round it by reading from an English decision to the effect that the soldier gives up his liberty by contract. This poor evasion does not apply to persons who are drafted against their will; but it is itself a denial that these rights are inalienable, for it speaks of alienating, by contract, an inalienable right. The conclusion is inevitable. These rights, so carefully enumerated in the constitution, and so often referred to by learned counsel, are liable to be abridged under particular circumstances. The constitution contemplates and provides for such abridgment. This abridgment is especially provided for in time of war. And since no limits are fixed to the means to be used in war, everything may be done which the necessities of war require. The laws of war are, for the time, as much a part of the constitution as the laws of civil procedure are in time of peace.

[My argument is founded on the idea that the laws of war are a necessary incident of a state of war, and, therefore, depend for existence only on the fact of war. It is quite unnecessary to refer to proclamations or advertisements of the fact. Order No. 38 is a proclamation, if it were a question of proclamations. Every branch of government, state and federal, has made numerous annunciations of this war. Counsel calls our attention to certain proclamations of the president relating to emancipation of slaves, which define, for that purpose, the insurrectionary districts; and counsel insists that these must be held as limiting martial law to those districts. Those proclamations do not include Missouri, Kentucky, Tennessee, Western Virginia, or portions of Eastern Virginia, or Norfolk, or Portsmouth. If the laws of war depend on these proclamations, they are excluded from the places where the war has been most active. They did not purpose to define the limits of war, but the limits of emancipation. If my argument is sound, neither the presence nor absence of proclamations can materially affect the question. It is a question of the existence of war. It may be said that this argument, if correct, reduces us to a state of dependence on military power. Far otherwise. It is not a state to be argued into or argued out of. If, when threatened by generals and armies who are traitors and enemies, we are obliged to depend upon generals and armies who are patriots and friends, nothing can be gained by denying the fact, or by keeping up a false pretext of being in some other condition. The danger, whatever it may be, is not very much diminished by going into hysterics; nor is it greatly changed in its character by the names applied. It is sometimes called "no law," "an abrogation of law," "a suspension of law," because for a time the ordinary civil administration is suspended or subordinated to a great public necessity. But the law provided for such occasions is in force. It is appealed to, to protect us when other laws fail. The laws of war have their appropriate checks and limitations. The general in command of an army, in the field of his operations, for purposes of war, is expected to act with promptness, and sometimes with secrecy. He is not expected to write out and deliver his opinions, or to wait for briefs. This may be his misfortune; it certainly is not his fault. His action in this sense may be called "arbitrary," and his administration "despotic." But, after all, he is limited and restrained. If he push beyond the rights of war, the laws of war do not protect him. In applying those laws, he is further restrained by a sense of propriety and duty. He acts in peril of the disapprobation of higher authority, who may displace, or, in some cases, impeach, him; in peril of the disapprobation of the Supreme Being, and of his countrymen; in peril of that sure infamy which awaits all who unnecessarily aggravate the evils of war. It is not easy to conceive a situation appealing to higher sanctions than that of a general commanding in war. "At all events," says General Burnside, "I will have the consciousness before God of having done my duty to my country."

[May it please your honor: I have pursued this branch of the argument at some length. If the view of the constitution here presented be, as it appears to me, well grounded in reason, and sustained by authority, the main proposition on which the petitioner rests his application is overthrown, and, with it, the claim to a writ of habeas corpus. I did not understand counsel to argue that, in the case of Vallandigham, there were circumstances to render this arrest illegal or unnecessary, provided such arrests can in any case be justified. I did distinctly understand him to disclaim the idea that the constitution permits a military arrest to be made, under any circumstances, of a person not engaged in the military or naval service of the United States, nor in the militia of any state called into actual service; and to rest his case on that broad denial. The whole petition is framed on this idea, for none of the charges are denied. Upon first impression, your honor may have inclined to the belief that petitioner had assumed an unnecessary burden, and might have more easily made a case by putting General Burnside to show the propriety of this arrest; admitting the general right to make such arrests as were indicated by the necessities of the service, but denying any ground for this arrest. But your honor will find that no mistake has been

made by learned counsel on the other side, in this particular. The circumstances shown justify the arrest, if any arrest of the kind can be justified. If General Burnside might have arrested him for making the speech face to face with his soldiers, the distance from them at which it was uttered can make little difference. He might make it in camp; and unless he could be arrested, there would be no way to prevent it. The right of publication, of sending by mail and telegraph, is of the same grade with freedom of speech. If utterance of the speech could not be checked, its transmission by mail and telegraph could not be. And I so understand the argument of the counsel of Vallandigham. It appears to claim, and go the whole length of claiming that it can do the army no harm to read such addresses; nor, of course, to hear them. It is necessary the argument should not stop short of that, in order to meet the question, and it does not. Yet this is not the whole extent to which it must go to avail the petitioner. It must go to the extent of showing that this court is authorized to determine that such addresses may be heard by the army, the opinion of the commanding general to the contrary notwithstanding. It goes and must go the extent of transferring all responsibility for what is called the morale and discipline of the army from its commanding general to this court. Is it not certain that, if these addresses shall persuade nobody, their authors will be disappointed? Is it not certain that any soldier persuaded to believe that his government is striving to overthrow liberty, and for that purpose is waging a wicked and cruel war, can no longer, in good conscience, remain in the service? The argument leads to one of two conclusions. We are to be persuaded by the men who make the speeches that the speeches will not produce the effect they intend,—a persuasion in which their acts contradict their words,—or we are to consent to the demoralization of the army. The constitution authorizes and even requires the army to be formed, but at that stage of the transaction interposes an imperative prohibition against the usual means of making it effective. It is said, however, that the charges against Vallandigham are triable in the civil tribunals. So are a large proportion of all the charges which can be brought against any one engaged in an insurrection. No Rebel soldier has been captured in this war, no guerrilla, who was not triable in the civil tribunals. The argument in this, as in other particulars, necessarily denies the applicability of the laws of war to a state of war. * * *

[May it please your honor: I must bring this argument to a close. Are we in a state of war or not? Did the constitution, when it authorized war to be made, without limitations, mean war, or something else? The judicial tribunals provided for in the constitution, throughout twelve states of the Union, have been utterly overthrown. In several other states they are maintaining a feeble and uncertain hold of their jurisdiction. None of them can now secure to parties on trial the testimony from large portions of the country, to which they are entitled by the constitution and laws. The records of none of them can be used in the districts dominated by the insurrection. Counsel tells us that, except the Union provided for in the constitution, there is no legal Union. Yet that Union is, temporarily I hope, but for the present, suspended and annulled. This court can have no existence except under that Union, and that Union, now, in the judgment of those who have been intrusted by the constitution with the duty of preserving it, depends upon the success of its armies. The civil administration can no longer preserve it. The courts which yet hold their places, with or without military support, may perform most useful functions. Their jurisdiction and labors were never more wanted than now. But they were not intended to command armies. When generals and armies were sent here, they were sent to make war according to the laws of war. I have no authority from General Burnside to inquire, and I have hesitated to inquire, but, after all, will venture to inquire, whether an interference by this court with the duties of military command must not tend to disturb that harmony between different branches of government, which, at this time, is most especially to be desired? * * *

[Argument of Hon. Flamen Ball.

[May it please the court: In rising to address your honor on behalf of General Burnside, I cannot refrain from expressing the feeling which I entertain in regard to the great importance of this application; for the result of your decision, whatever it may be, must be looked upon with the greatest interest, not only by the applicant, in whose behalf it has been invoked, but by the people of our country, whose national rights are, nay, whose very existence as a great nationality is, imperiled by a gigantic rebellion against the constitution and the laws of the United States,—a rebellion, I take leave to say, originating in a deeply-laid and maturely-planned conspiracy for the overthrow of the constitution, fostered and encouraged by official perjury and official plunder, and prosecuted, without just cause, with cruel and relentless hate, and with remorseless energy, against a government whose sway over the people for more than seventy years has been exercised with the utmost benignity; carefully guarding the rights of all, and jealously protecting the liberties of all. The darkest pages of the history of the world furnish no parallel to the scene now presented in the United States. The quiet paths of domestic peace, which, until lately, were trodden by the industrious pursuits of honest labor, have been suddenly invaded by an armed rebellion, whose sole object is the overthrow of the in-

stitutions of the republic, established by the valor, the patriotism, and the wisdom of our ancestors, and the erection, upon their ruins, of an absolute despotism. I yield to no man in reverence for the sacredness and inviolability of that great guarantee of personal liberty, the writ of habeas corpus, which has been applied for in this case; for, next to the principles and precepts of religion, the value and importance of that writ, as the safeguard of the humblest citizen, were inculcated in my mind in youth, and have become, as it were, a part of my very existence; but while I fully recognize the right of every citizen, who may be restrained of his personal liberty, to have the cause of that restraint judicially inquired into, I must also recognize the great fact that, by reason of this rebellion, the very existence of our whole country, as a nation, is in jeopardy; and that, while on the one hand the personal rights of the citizen are to be protected (unless by reason of crime he may have forfeited those rights), we must all remember that our country has rights, and that, in this great crisis in her history, those rights must be asserted and maintained. Among those rights the right of self-preservation is paramount. If, by reason of the continuance of the civil war now so wickedly waged against the government, the abstract rights of the citizen should be brought into question, I think it may not be regarded as claiming too much for me to insist that the private and personal rights of the individual, when their exercise by him conflict with, and tend to overthrow, the great national right of self-existence, must give way to the rights of the nation. It has been well remarked by De Lolme, in his treatise on the Constitution of England, that: "There have been times of public disturbance when the habeas corpus act was indeed suspended, which may serve as a proof that, in proportion as a government is in danger, it becomes necessary to abridge the liberty of the subject; but the executive power did not thus of itself stretch its own authority; the precaution was deliberated upon and taken by the representatives of the people; and the detaining of individuals, in consequence of the suspension of the act, was limited to a certain fixed time." It is evident that the power of suspending the writ was vested solely in parliament, because the people of England, taught by the severe lessons of experience, in the invasions and encroachments upon their liberties by the executive tyranny of ancient times, were jealous of the kingly prerogative, and were determined to limit and restrain it, in all cases where the right of the subject to the enjoyment of personal freedom might be drawn in question. Hence it became a received and well-settled principle of constitutional law, that the sovereignty of the British constitution is lodged in parliament, in whose collective capacity of the crown, the lords, and the commons, the "omnipotence" of parliament resides; therefore, the power to suspend this great writ is conceded to rest solely within the discretion of parliament. The right to the writ exists at common law. It is not conferred by statute; for the several statutes of Car. I., Car. II., Wm. & M., Geo. III., and other enactments on that subject, do not confer the right, but are simply declaratory of that which had existed beyond the memory of man, or are directory to the courts and judges, in respect of the practice to be pursued by them, in cases where the writ is demandable. The suspension of this writ may become necessary when the state is in real danger; and, when such an emergency shall arise, parliament may authorize the crown to suspend the writ for a limited time, and to imprison suspected persons, without giving any reasons for so doing. "An experiment," says Blackstone, "which ought only to be tried, and which we believe has never been tried, but in cases of extreme emergency; and in these the nation parts with a portion of its liberty for awhile, in order to preserve the whole forever." With us the case is different. The written constitution is the supreme law of the land; and, if governmental omnipotence resides anywhere, it resides there. No act of either the executive, the legislative, or the judicial branches of the government, conflicting with the provisions of that instrument, is valid. But that instrument nowhere, in express terms, confers upon the citizen the right to the writ of habeas corpus. It guarantees to him many civil rights, which are specifically enumerated; but the right to this writ is not one of them. It impliedly concedes that the privilege of the writ exists as a common-law right, when it provides that "the privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it." But it does not prohibit the president from suspending it: it merely provides that it shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it. For aught that appears in the constitution, the right to exercise the discretionary power of suspension is vested in the president; and this inference is much strengthened by the fact, that the great lawyers who framed that instrument were all of them learned in the common law, and in all the statutes of the British parliament. Themselves born and educated as British subjects, and familiar with every struggle ever made for freedom, and every triumph for liberty ever achieved by the people of England over kingly usurpation, they inherited the natural jealousy of Englishmen of executive encroachments; and, had they intended to deprive the president of the power of suspending this writ in cases of great public emergency, as they well knew was the case with respect to the power of the crown, and to vest the power of suspension solely with the congress, they would have so provided in the constitution. It is fair, then, to conclude that the power vests

in the president; and, in the exercise of that power, as the chief civil magistrate, he may, in his discretion, when the safety of the republic requires it, suspend the writ generally over the whole country, or in a particular department, or in respect of a particular person. This view is strengthened by the late act of congress (March 3, 1863), which expressly provides that the president may, during this rebellion, "Whenever, in his judgment, the public safety may require it, suspend the privilege of the writ of habeas corpus, in any case, throughout the United States, or any part thereof." And thus the question as to which branch of the government is intrusted with the power of suspension seems to be settled by congress in favor of the president. If, then, the power of suspension is vested in the president, he may exercise that power, in a great crisis like the present, by any appropriate agent he may select for that purpose; and if, as is now the case, the civil authority vested in the marshals, as conservators of the public peace, is insufficient to sustain the government, and enforce the execution of the laws, he may, as he has done, command the aid of the military arm of the nation.

[The able argument of my learned colleague has relieved me from the necessity of discussing at great length the various questions which arise in this case, and I shall, therefore, confine myself to the discussion of such points as, in my judgment, most intimately relate to the subject.

[Upon the original application, the learned counsel for the relator claimed that the case came within the purview of the act of congress relating to the writ of habeas corpus, approved March 3, 1863; that the allowance of the writ was a matter of strict right on the part of the applicant; and that on the return of the writ, with the production of the body of the applicant, the cause of caption and detention could then be inquired into. But such is not the practice of this court. At the October term, 1862, the court held, on the application for a writ of habeas corpus made on behalf of one Bethuel W. Rupert [unreported], then held as a prisoner under an order of the secretary of war, that the writ was not allowable as of course, but that the court would decide upon the hearing of the application, and grant or withhold the writ in its discretion. That practice is still unchanged, and it must be regarded as the law of this court. It is not a new rule of practice, but has been the rule of practice of other courts, and I will briefly refer to some of the cases. In 1759, a motion, based upon affidavit, was made before the court of king's bench, for a habeas corpus, to be directed to one Rigby, keeper of the town jail of Liverpool, to bring up the body of one Barnard Schiever, a subject of a neutral power, who had been taken on board of an enemy's ship, but forced, as it was alleged, into the enemy's service. His counsel urged that it would be very hard upon this man to be kept in prison until exchanged by cartel, and then sent back to France, where he would be forced into their service again. But the court, Lord Mansfield presiding, thought this man, upon his own showing, clearly a prisoner of war, and lawfully detained as such, and denied the motion. 2 Burrows, 765. Again: In the Case of Hobhouse, 3 Barn. & Ald. 420, the court, Abbott, C. J., and Bayley, Holroyd, and Best, Justices, were unanimous in establishing the rule of practice that the writ of habeas corpus, at common law, although a writ of right, is not grantable of course, but only on motion in term time, stating a probable cause for the application, and verified by affidavit. I also refer to 2 W. Bl. 1324, and to 2 Chit. 207. In the Case of Husted, before the supreme court of New York, an application was made for a habeas corpus, on the ground that he was detained in custody by a captain in the army of the United States, who claimed him as a soldier, enlisted under the authority of the United States. But the court denied the application on the ground that, if the facts stated were returned on the habeas corpus, it would be conclusive against his discharge. 1 Johns. Cas. 136. So, in the Case of Yates, who had been committed by the court of chancery for a contempt, a motion, grounded on sundry affidavits, was made for the allowance of a habeas corpus as of course. But Mr. Chief Justice Kent said that, as this was a matter of importance, the court would take until the next day to consider whether it was proper to grant the motion, and another motion to let the applicant to bail was refused. 4 Johns 318. In the recent Case of Sims, the fugitive slave, which came up before the supreme court of Massachusetts, Chief Justice Shaw held that, before a writ of habeas corpus is granted, sufficient probable cause must be shown; but when it appears, upon the party's own showing, that there is no sufficient ground, prima facie, for his discharge, the court will not issue the writ. 7 Cush. 285. In the supreme court of the United States, it is the settled practice to hear argument, either on the motion for the allowance of the writ, or upon the return of a rule to show cause why the writ should not issue. In the Case of Kearney, 7 Wheat. [20 U. S.] 38, who sought release from a commitment for a contempt, the court heard the parties on the motion, and Mr. Justice Story, delivering the opinion, denied the writ. In the Case of Watkins, 3 Pet. [28 U. S.] 193, who was imprisoned by the condemnation of the circuit court of the United States for the District of Columbia, the court, Mr. Chief Justice Marshall presiding, on the motion of the applicant for the allowance of a writ, and counsel not agreeing as to the time of hearing the motion, awarded a rule to show cause why the writ should not issue, and assigned the next motion day as the time for hearing the argument. It was accordingly heard, on the

return of the rule, and the motion for the writ was denied. A similar practice has been pursued in other cases. Com. v. Robinson, 1 Serg. & R. 353; Ex parte Campbell, 20 Ala. 89; Hurd, Hab. Corp. 222; Ex parte Bushnell, 8 Ohio St. 599. The practice pursued by the court in this case, in requiring notice of the motion to be served on General Burnside, is substantially the same as that pursued by Mr. Chief Justice Marshall in Watkins's Case [supra]. The allowance of the writ rests within the discretion of the court or judge before whom the application is made. It does not address itself to the whim or caprice of the court or judge, nor does it involve the exercise of an arbitrary discretion; but it is addressed to the sound judicial discretion of the court,—a discretion illuminated by the lights of judicial precedence and authority, of judicial wisdom, experience, and observation, and by a judicial review of all the facts and circumstances of the particular case. Discretion (says Lord Coke, 2 Inst. 56) is to discern between right and wrong; and, therefore, whoever hath power to act at discretion is bound by the rule of reason and law. It is the right, then, nay, it is the duty, of the court to hear argument upon the motion, so that the whole merits of the application may be ascertained, and a wise discretion exercised.

[The first legislation of congress upon the subject of habeas corpus was the act of September 24, 1789, which conferred upon the courts of the United States, and the respective justices and judges of those courts, the power to grant the writ agreeably to the principles and usages of law; but the power to award the writ ad subjiciendum, and to inquire into the cause of commitment, did not extend to prisoners in jail, unless where they were in custody under or by color of the authority of the United States. Afterward, and when, by reason of the state legislation of South Carolina, officers of the United States, charged with executing the laws of the United States, were imprisoned, by state authority, for the alleged offense against state sovereignty, of obeying the laws of the United States in preference to the laws of the state of South Carolina, the act of March 2, 1833 [4 Stat. 634], commonly called the "Force Bill," was enacted, whereby the jurisdiction of the federal courts and judges was extended, to grant writs of habeas corpus in all cases of prisoners in jail, who had been committed for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof. Thus the legislation stood until 1842, when an apprehended difficulty with England superinduced the passage of the act of August 29, 1842 [5 Stat. 539]. The court well remembers the case of People v. McLeod, 25 Wend. 483. In 1837, he, a British subject, was one of a military expedition sent by the Canadian provincial authorities to destroy an American vessel, the steamboat Caroline, then lying at the port of Schlosser, in American waters, and laden with stores and supplies for the rebels congregated at Navy Island. The boat was destroyed, and an American citizen, standing on the shore, was killed. Afterward, McLeod came to New York, and boasted that he participated in that outrage. He was arrested and indicted for murder. A writ of habeas corpus was applied for and obtained in his behalf, from the supreme court; but the court, Cowen, J., presiding, refused his discharge on the ground that such a case as his was not provided for by law. The queen of Great Britain avowed the act of McLeod, and demanded his release, which demand, after much controversy, was acquiesced in by Mr. Webster, then secretary of state. That act extended the jurisdiction of the justices and judges of the United States to the granting of writs of habeas corpus in all cases of a prisoner or prisoners in jail or confinement, when he or they, being subjects of a foreign state and domiciled therein, shall be in custody under any authority or law of the United States, or any one of them, on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed, under the commission, or order, or sanction, of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.

[The only remaining legislation on this subject is the act of March 3, 1863. This act had its birth in consequence of the present rebellion, and its provisions will become inoperative when the insurrection shall have been suppressed. It is evidently intended, so far as may be consistent with the public safety, to provide for a speedy trial of all persons who may be summarily arrested by or under the authority of the president, and to prescribe a limit to the imprisonment consequent upon such arrests. Its object is twofold: By sections 1, 2, and 3, it authorizes the president, whenever, in his judgment, the public safety may require it, to suspend the privilege of the writ of habeas corpus during the present rebellion; and it exempts all officers, civil and military, from liability, in answer to any writ of habeas corpus, to return with it the body of any person retained by the authority of the president, and suspends all proceedings under the writ before the court or judge issuing it, so long as said suspension shall remain in force and said rebellion continue. It also provides that persons held as state prisoners by order or authority of the president or of the secretaries of state and of war, may, in certain cases, be discharged or let to bail upon the terms provided by the act. By sections 4, 5, 6, and 7, it provides that any order of the president, or under his authority, made at any time during the existence of said rebellion, shall be a defense in all courts in any action, civil or criminal, pending or to be commenced, "for any search, seizure, arrest,

or imprisonment made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of congress;" and it further provides for the removal from the state courts to the federal courts of all suits and prosecutions which have been or shall be commenced against any officer, civil or military or against any person for any arrest or imprisonment made, or other trespasses or wrongs done, or any act omitted to be done at any time during the present rebellion, by virtue or under color of any authority derived from, or exercised by or under the president of the United States, or any act of congress. If the first three sections of the act referred to are prospective in their operations, then it is clear that inasmuch as no proclamation suspending the writ of habeas corpus has been issued by the president since the passage of the act, the application of Mr. Vallandigham does not come within any of its provisions. On the other hand, if those sections be retrospective, as well as prospective in their operation, and his case falls within the act, then he is expressly excluded from the privilege of the writ, and if it should issue to Major General Burnside, he will be bound to make the return provided for by the act, and this proceeding would be suspended so long as the rebellion shall continue. It is evident that the last four sections of the act are intended to embrace all cases of arrest under the authority of the president, past as well as future; but as these are solely remedial in their nature, and have no bearing on the motion now before the court, it is unnecessary to discuss them further than to suggest that, if it shall become the duty of the secretary of war to report to the judge of this court the name of Mr. Vallandigham as a state prisoner, held under his authority, and the next grand jury should terminate its session without finding an indictment against him, it would then become his right to apply to the judge for an order that he may be brought before him, that his case may be examined into, and that he may be discharged or let to bail, according to the circumstances of the case.

[In my judgment, however, the application now presented falls solely within the provisions of the act of September 24, 1789. He is in custody "under or by color of the authority of the United States," and, if he be entitled to any relief, it must be under the act last named. By the creation of the department of the Ohio, the president invested Major General Burnside, the commander thereof, with all the powers necessary to perform his whole duty. That department comprises the states of Kentucky, Ohio, Indiana, Illinois, and Michigan, of which, as stated by General Burnside, one state is at this moment invaded, and three others have been threatened by the enemy. It is a period of domestic war, and all the energies, powers, and resources of the nation are necessarily called into exercise for the maintenance of the constitution and laws of the country, for the restoration of peace, and for the preservation of the liberties of the whole people. The civil arm of the government has proved powerless to effect this object, and it has been necessary for the president to call forth the army and navy, in order that he may, as his official oath requires him to do, "preserve, protect, and defend the constitution of the United States." To that end, it became necessary to subdivide the country into military departments, in order that his great duty of preserving, protecting, and defending the constitution might be faithfully and effectively performed. Of no other officer under the constitution is such an oath required, and it is manifest that in requiring that oath of the chief executive authority, and thus reposing in his hands alone that great and solemn trust, it was intended, by the framers of the constitution, that he should possess, and in his discretion exercise, all the powers necessary to enable him to execute the trust, and to transmit to his successors, through all coming time, a great national unity, to all intents and purposes the same, unabridged and unimpaired, as it had been transmitted to him by his predecessors. All the wealth and all the military and naval power of the nation were at his service to enable him to perform that duty, and it was expressly provided by congress, by the act of February 28, 1795 [1 Stat. 424], that "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary force of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the president of the United States to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed." The president is the sole and exclusive and final judge whether the exigency contemplated by the constitution and by the act of congress has arisen, and this has been the construction put upon this act by the supreme court of the United States in the case of Martin v. Mott, 12 Wheat. [25 U. S.] 19. In this case Mott, a private militiaman, was called into service in the war of 1812, by the governor of New York, upon a requisition of the president of the United States, but did not go out. In 1814, Mott was summoned before a court-martial, and tried for the offense of neglecting the call of the governor, was convicted and sentenced to pay a fine, or, in case of nonpayment, to imprisonment for twelve months. The sentence of the court was approved by the president, and Martin, a deputy marshal, collected the fine. Mott sued Martin for so doing, and the case, having passed through the state courts of New York, was finally decided by the court of errors in favor of Mott, and Martin then obtained his writ of error to the supreme court of the United States, where the judgment of the court of

errors was reversed. Mr. Chief Justice Marshall who delivered the opinion of the court, after affirming the constitutionality of that act of congress, expressly says of the president: "He is, necessarily, constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts." On the breaking out of this rebellion he did so act. In his proclamation of April 15, 1861 [12 Stat. 1258], he says: "Whereas, the laws of the United States have been, for some time past, and now are opposed, and the execution thereof obstructed, in the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law; now, therefore, I, Abraham Lincoln, president of the United States, in virtue of the power in me vested by the constitution and the laws, have thought fit to call forth, and hereby do call forth, the militia of the several states of the Union, to the aggregate number of seventy-five thousand, in order to suppress said combinations, and to cause the laws to be duly executed. The details for this object will be immediately communicated to the state authorities through the war department. I appeal to all loyal citizens to favor, facilitate, and aid this effort to maintain the honor, the integrity, and the existence of our National Union, and the perpetuity of popular government; and to redress wrongs already long enough endured. I deem it proper to say that the first service assigned to the forces hereby called forth will, probably, be to repossess the forts, places, and property which have been seized from the Union; and in every event, the utmost care will be observed, consistently with the objects aforesaid, to avoid any devastation, any destruction of, or interference with, property, or any disturbance of peaceful citizens in any part of the country." The proclamation closes with a command to the persons so combining to disperse within twenty days, and with an order to convene the congress on the fourth day of the following July. The congress convened accordingly, and, in order to sustain the president in the performance of his great duty, provided for an increase of the regular army and of the navy, and also placed at his disposal an additional force of five hundred thousand volunteers. Thus the war for the preservation of the National Union was fully inaugurated, and the president as the civil executive, and as commander in chief of the army and navy, was fully clothed with all the necessary, legal, and physical power to accomplish the object of his proclamation.

[The creation of the department of the Ohio, and the appointment of a major general to command it, were part of the necessary means employed, in the discretion of the president, to accomplish the end in view; and the official acts of the major general, performed under the direct authority of the president, must be regarded as the acts of the president himself. In the case of Martin v. Mott, just referred to, the chief justice says: "If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provision of the law; and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot, therefore, be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the president, or for any right in subordinate officers to review his decision, and, in effect, defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of those facts; and, in the present case, we are all of opinion that such is the true construction of the act of 1795." This doctrine of the chief justice is the same recognized in the law of nature as applied to the law of nations. Vattel [Law Nat.] says (bk. 3, c. 2, § 19): "Every military officer, from the ensign to the general, enjoys the rights and authority assigned him by the sovereign; and the will of the sovereign, in this respect, is known by his express declarations, contained either in the commissions he confers, or in the military code, or is, by fair deduction, inferred from the nature of the functions assigned to each officer: for every man who is intrusted with an employment is presumed to be invested with all the powers necessary to enable him to fill his station with propriety, and successfully discharge the functions of his office." It would be a very difficult task, if, indeed, I could succeed in doing it, to enumerate all the duties which General Burnside is called upon to perform by reason of the command thus conferred upon him. Charged with the care of an extensive department, comprising five states, one of which is already invaded by the enemy, and three others have been threatened; controlling a large army now in the field; obliged to issue requisitions for food, clothing, medicines, and all other munitions and habiliments of war; liable to have his plans made known and thwarted by spies communicating with the enemy, and the power of his army weakened by the falsehoods published and circulated within his lines by rebel emissaries and rebel sympathizers seeking to sow seeds of distrust and disaffection in the minds of his soldiers, it became necessary to establish a rigorous police system throughout his department, and in so doing he promulgated "general order No. 38." This order is intended to embrace as well those in civil life who may offend against its provisions by declaring sympathy

for the enemy in words or speeches, and discouraging the soldiers now on duty, and those who may be hereafter called upon to perform military service, as those who, by carrying secret mails, and recruiting soldiers for the enemy, commit overt acts of treason by giving aid and comfort to the rebels. It was not necessary to issue such an order to his soldiers, for they are all honestly engaged in performing their high duties in the field; and the rules and articles of war, with which they are familiar, provide for the punishment of all persons in the military service for all offenses committed by them. But the civilian, not being strictly under military control, need not, unless he chooses, subject himself to any of the penalties provided for by the order. In the case of Mr. Vallandigham, he saw proper, at a public meeting held in Ohio, and in a public speech, to express his sympathies with the rebels in arms against their country, to declare disloyal sentiments and opinions, and, so far as he could, to weaken the power of the government in its efforts to suppress the Rebellion. For this offense, in open violation of that general order which he then referred to and denounced, he was arrested, brought before a military commission, tried and convicted. He now seeks relief from that sentence, whatever it may be, and asserting, by his counsel, the great privilege of the writ of habeas corpus, demands of this court his discharge. The violation of this order by him was not the result of accident; it was deliberately, and, for aught I can see, purposely violated, in order either to defy the military power of the president, or to bring about a conflict between the military and the civil power of the government. It may be that he desired to show to the people that liberty of speech meant a license to say whatsoever he pleased, without regard to times, persons, or circumstances. It is claimed for him, by his learned counsel, that he is guilty of nothing but the use of words; that the utterance of words is not treason; and that an overt act must be shown to have been committed to constitute the crime of treason. But may not words be actionable? Is not the utterance of words often held to be a misdemeanor? Words of slander are actionable; words which provoke a breach of the peace are punishable; words used to entice a soldier to desert are indictable; so are words used in resisting an officer attempting to serve legal process. General Burnside saw that, to a considerable degree, his earnest efforts to perform the trust reposed in him in his department were seriously impeded, not only by the presence of spies, recruiting officers, and writers of letters, and the carrying of secret mails to the rebels, but by the promulgation of disloyal sentiments and opinions, and the expression of sympathy for the rebels within his lines. He saw that the expression of such sentiments and opinions had a tendency to bring the constitutional government of the country into contempt, and consequently weaken his authority and abridge his usefulness, and to that extent sustain and encourage the enemy and protract the war. He had no alternative but either to act as he did, or to abandon his department. He needed no written law to direct him in his course, for the law of self-preservation, which is the law of nature, is higher than any written law, or written constitution. Clothed as he was with power commensurate with the great duties he was called upon to perform in this extraordinary exigency of the nation, whatsoever in the conduct of any person seriously impeded him in the performance of that duty, it was his right, nay, it was his high duty, to remove. The nature and extent of his power, as a military commander, is very forcibly stated by Mr. Adams, in his speech in congress, delivered in 1842. He says: "I lay this down as the law of nations. I say that military authority takes, for the time, the place of all municipal institutions, and slavery among the rest; and that, under that state of things, so far from its being true that the states where slavery exists have the exclusive management of the subject, not only the president of the United States, but the commander of the army, has power to order the universal emancipation of the slaves." This being true in regard to the institution of slavery, which exists by force of positive law, it must be held to be the law in respect of all other institutions which, during the great public emergency which has been forced upon the country, conflict with or impair the power of the government in its military operations. A similar principle was afterward promulgated by that distinguished political leader and sincere patriot, Senator Dickinson. He said: "There is a power upon which the constitution stands, that lies beneath the constitution and rises above the constitution, and is in and under the constitution: it is the great law of self-preservation,—for communities, nations, and states, as well as individuals. It is older than this government. It is as old as civilization. It had no rise in the constitution. It arises in the very necessity of the existence of civil government." The natural right to acquire and possess property, to pursue or not pursue a particular vocation, to bear or not to bear arms, to speak and write freely our sentiments and opinions on all subjects, must give way whenever the exercise of those rights by the individual endangers the public safety, and conflicts with the paramount right of national self-preservation. The nation can well afford to suspend the enjoyment by the individual of these rights, for a season, in order that, by preserving its own existence, it may secure them unabridged to the whole people forever.

[It has been asserted in argument that there is no war in Ohio; that the law martial does not exist here, and that martial law is no law at all. But is not Ohio at war? If our state, with its two and a half millions of free-

men, is not one of the United States, then Ohio is not at war; but, if otherwise, and the silver light of Ohio's star still radiates from the azure field of the national flag, then Ohio is at war, and has contributed, and will ever contribute, her full proportion of men, money, and munitions of war towards sustaining the existence of the nation of which it forms a part. It is true that the foot of no hostile foe in arms has ever trodden our soil, or invaded our peaceful homes; but thousands of those homes have already yielded their fathers and sons to the service of their country, many of whom are gone never to return; and it will be but a poor solace to the bereaved wives and mothers of the slain to say to them, "Your husbands and sons have fallen in battle, while fighting to uphold the constitution and laws of their country; but Ohio is not at war." Ohio is at war because the United States are at war; and, as a part of a military department of the United States, the citizens of the state of Ohio are liable to the operation of the laws of war, as administered ex necessitate rei, by courts-martial or military commissions. These courts, and the rules by which they are governed, have their origin in high antiquity. The ancient court of chivalry was the fountain of martial law, and, in some form or other, courts-martial have always been recognized in England. Formerly, martial law was exercised at the discretion of the crown, and too frequently it was made subservient to bad purposes, and hence it very justly became obnoxious to the people; and not only the propriety, but the legality, of its being executed in times of peace, has been absolutely denied. Hence it is laid down by Lord Coke (3 Inst. 52) "that if a lieutenant or other, that hath commission of martial law, doth. in time of peace, hang or otherwise execute any man by color of martial law, this is murder, for it is against Magna Charta." Hence, also, Lord Hale, in his History of the Common Law, declares martial law to be, in reality, no law, "but something indulged rather than allowed as law: that the necessity of order and discipline is the only thing which can give it countenance, and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land; and if a court-martial put a man to death, in time of peace, the officers are guilty of murder." But it is now well settled in England that courts-martial are courts of special and limited jurisdiction, and are bound by the same rules and principles of evidence as the courts of common law, and their decisions have often been examined and reviewed on habeas corpus by the courts of the common law. Rex v. Suddis, 1 East, 306; Crosby's Case, 3 Wils. 199; Barnes' Case, 2 Rolle, 157. So, also, in the United States, proceedings of courts-martial have frequently been reviewed by the civil courts, as well, collaterally, upon writs of habeas corpus, as directly upon writs of error. I refer to a few of the cases: Vanderheyden v. Young, 11 Johns. 150; Houston v. Moore, 5 Wheat. [18 U. S.] 1; Martin v. Mott, 12 Wheat. [25 U. S.] 19. It is true that martial law has not been proclaimed in Ohio; but the formal proclamation of martial law is not necessary in order to give efficiency to the public official orders of the major general commanding the department, or to confer jurisdiction upon the military courts and commissions organized by him for the purpose of trying offenders against said orders. The power of the major general to exercise the functions of his office, and the duty of the citizen to refrain from interfering with the exercise of those functions in time of war, exist without any proclamation of martial law. The power of the one, and the duty of the other, arise from the situation in which the country is placed by the civil war now waged against the constitution; and the power of the president, and of the officers whom he has selected to execute that power, is a power which, to use the language of Senator Dickinson, is a power upon which the constitution stands, that lies beneath the constitution, and rises above the constitution, and is in and under the constitution. It is the supreme law of national self-preservation. It is the exercise of that right conferred by the Creator upon man, the assertion of which in an individual no one will dispute, but which exists with more potency with many men, united in a political society, and constituting a great nation. "Since, then," says Vattel, "a nation is obliged to preserve itself, it has a right to everything necessary for its preservation. For the law of nature gives us a right to everything without which we cannot fulfill our obligations; otherwise it would oblige us to do impossibilities, or, rather, would contradict itself in prescribing us a duty, and at the same time debarring us of the only means of fulfilling it." This is the right which has been denominated by Grotius as the internal law of nations, and it applies to nations as well as to individuals. Vattel also says: "As men are subject to the laws of nature,—and as their union in civil society cannot have exempted them from the obligation to observe those laws, since by that union they do not cease to be men,—the entire nation, whose common will is but the result of the united wills of the citizen, remains subject to the laws of nature, and is bound to respect them in all her proceedings. And since right arises from obligation, as we have just observed, the nation possesses also the same right which nature has conferred upon men in order to enable them to perform their duties." [Vatt. Law Nat. LVI.]

[The eloquent advocate of Mr. Vallandigham, controverting the assertion of General Burnside, that "there is no fear of the people losing their liberties," has expressed the fear that our liberties cannot survive a patient submission to arbitrary power. Certainly not,

when, in a time of profound peace, when all the civil machinery of the government is everywhere in perfect and harmonious operation, unchecked and undisturbed by the discordant actions of armed rebellion and of civil war, then a tame and continued submission to the encroachments of any arbitrary power must inevitably lead to the overthrow of the liberties of the people, and to the establishment of a despotism. But the case is entirely different in a time of war, and of such a war, the like of which neither this nor any other country has ever witnessed. Now no temporary sacrifice ought to be too great, in order to preserve the unity of the nation; but when the blessings of peace shall return, and the national life shall be no longer threatened, all the power of the country will be devoted to the suppression of every attempt, let it come from whatsoever quarter it may, to invade the liberty of any, even the meanest, citizen.

[I now leave this important question with the court, feeling confident that the discretionary power which has been invested in your honor will be wisely exercised. In the investigation of the questions which have arisen in this case, this court will consider, not only the allegations of the relator as set forth in his application, but will take judicial notice of the state of the country, torn and distracted by this wicked rebellion. And the court will also notice judicially all the efforts of the executive, and of those acting under his authority, which are made for the suppression of the rebellion, and the preservation and the perpetuation of constitutional liberty; and I doubt not your honor will endeavor not only not to derogate from executive authority by bringing about a conflict between one branch of the government and another, but, by co-operating as far as possible with the other departments, seek to secure unity of action in all the departments, and a speedy restoration of our country to its former dignity, grandeur, and power, as a great and a united nation. I feel sure, also, that there is no judge now on the bench of the courts of the United States whose patriotic heart does not fill with indignation at the wrongs inflicted on our country by the armed traitors now levying war upon the constitution and laws, and by those unarmed, but quite as dangerous, enemies, who sympathize with and encourage domestic treason. I therefore commit this case to the court, with the firm belief that, by your decision, the hands of the federal executive and of the army and navy will be sustained and strengthened in this great struggle; that the hopes of the patriot in the perpetuity of union will be encouraged; that the attempts of rebel sympathizers to stimulate the rebellion and dishearten our army will be discouraged and frustrated; and that all disloyal citizens, as well those who indirectly, as those who directly, furnish aid, comfort, and encouragement to the enemy, will find that a sure and speedy punishment awaits them at the hands of the military authorities, from whose action they can hope to find no shelter in the technical forms and rules of the courts of the civil law. I trust that the time may soon arrive when the din of arms shall cease, and that our beloved country, purified by the severe trial through which she is passing, shall be once more restored to the delightful avocations of peace, and again stand forth among the nations of the earth, a great, united, and free people, purged of every element of despotism, opening wide her portals for the reception of the oppressed of every nation and of every clime, and exhibiting to the admiration of civilization throughout the world, through all coming time, the example of a pure, a just, a free and united republic.] [8]

LEAVITT, District Judge. This case is before the court on the petition of Clement L. Vallandigham, a citizen of Ohio, alleging that he was unlawfully arrested, at his home in Dayton, in this state, on the night of the 5th of May, instant, by a detachment of soldiers of the army of the United States, acting under the orders of Ambrose E. Burnside, a major general in the army of the United States, and brought, against his will, to the city of Cincinnati, where he has been subjected to a trial before a military commission, and is still detained in custody, and restrained of his liberty. The petitioner also avers that he is not in the land or naval service of the United States, and has not been called into active service in the militia of any state, and that his arrest, detention, and trial, as set forth in his petition, are illegal, and in violation of the constitution of the United States. The prayer is that a writ of habeas corpus may issue, requiring General Burnside to produce the body of the petitioner before this court with the cause of his caption and detention. Accompanying the petition is a statement of the charges and specifications on which he alleges he was tried before the military commission. For the purposes of this decision it is not necessary to notice these charges specially, but it may be stated in brief that they impute to the prisoner the utterance of sundry disloyal opinions and statements in a public speech, at the town of Mt. Vernon, in the state of Ohio, on the 1st of May, instant, with the knowledge "that they did aid and comfort and encourage those in arms against the government, and could but induce, in his hearers, a distrust in their own government, and sympathy for those in arms against it, and a disposition to resist the laws of the land." The petitioner does not state what the judgment of the military commission is, nor is the court informed whether he has been condemned or acquitted on the charges exhibited against him.

[8] From pamphlet report by Rickey & Carroll, Cincinnati, Ohio, 1863.

It is proper to remark here, that, on the presentation of the petition, the court stated, to the counsel for Mr. Vallandigham, that, according to the usages of the court, as well as of other courts of high authority, the writ was not grantable of course, and would only be allowed on a sufficient showing that it ought to issue. The court is entirely satisfied of the correctness of the course thus indicated. The subject was fully examined by the learned Justice Swayne when present, the presiding judge of this court, on a petition for habeas corpus, presented at the last October term; a case to which further reference will be made. I shall now only note the authorities on this point, which seem to be entirely conclusive. In the case of Ex parte Watkins, 3 Pet. [28 U. S.] 193, which was an application to the supreme court for a writ of habeas corpus, Chief Justice Marshall entertained no doubt as to the power of the court to issue the writ, and stated that the only question was, whether it was a case in which the power ought to be exercised. He says, in reference to that case, "the cause of imprisonment is shown as fully by the petitioner as could appear on the return of the writ, consequently, the writ ought not to be awarded, if the court is satisfied the prisoner would be remanded to prison." The same principle is clearly and ably stated by Chief Justice Shaw in the case of Ex parte Sims, (before the supreme court of Massachusetts), 7 Cush. 285. See, also, Hurd, Hab. Corp. 223, et seq. I have no doubt of the power of this court to issue the writ applied for. It is clearly conferred by the 14th section of the judiciary act of 1789 [1 Stat. 81]; but the ruling of this court in the case just referred to, and the authorities just cited, justify the refusal of the writ, if satisfied the petitioner would not be discharged upon a hearing after its return. The court therefore directed General Burnside to be notified of the pendency of the petition to the end that he might appear by counsel or otherwise, to oppose the granting of the writ. That distinguished general has accordingly presented a respectful communication to the court, stating, generally and argumentatively, the reasons of the arrest of Mr. Vallandigham, and has also authorized able counsel to represent him in resistance of the application for the writ. And the case has been argued at great length, and with great ability, on the motion for its allowance.

It is proper to remark, further, that when the petition was presented, the court made a distinct reference to the decision of this court in the Case of Rupert [unreported], at October term, 1862, before noticed, as an authoritative precedent of its action on this application. On full reflection, I do not see how it is possible for me, sitting alone, in the circuit court, to ignore the decision, made upon full consideration by Justice Swayne, with the concurrence of myself, and which, as referable to all cases involving the same principle, must be regarded as the law of this court until reversed by a higher court. The Case of Rupert was substantially the same as that of the present petitioner. He set out in his petition what he alleged to be an unlawful arrest by the order of a military officer, on a charge imputing to him acts of disloyalty to the government, and sympathy with the Rebellion against it, and an unlawful detention and imprisonment as the result of such order. The application, however, in the Case of Rupert, differed from the one now before the court, in this: that affidavits were exhibited tending to disprove the charge of disloyal conduct imputed to him; and also in this: that there was no pretense or showing by Rupert that there had been any investigation or trial by any court of the charges against him. The petition in this case is addressed to the judges of the circuit court, and not to a single judge of that court. It occurs, from the absence of Mr. Justice Swayne, that the district judge is now holding the circuit court, as he is authorized to do by law. But, thus sitting, would it not be in violation of all settled rules of judicial practice, as well as of courtesy, for the district judge to reverse a decision of the circuit court, made when both judges were on the bench? It is well known that the district judge, though authorized to sit with the circuit judge in the circuit court, does not occupy the same official position, and that the latter judge, when present, is, ex officio, the presiding judge. It is obvious that confusion and uncertainty, which would greatly impair the respect due to the adjudication of the circuit courts of the United States, would result from the assumption of such an exercise of power by the district judge. It would not only be disrespectful to the superior judge, but would evince in the district judge an utter want of appreciation of his true official connection with the circuit court. Now, in passing upon the application of Rupert, Mr. Justice Swayne, in an opinion of some length, though not written, distinctly held that this court would not grant the writ of habeas corpus, where it appeared that the detention or imprisonment was under military authority. It is true, that Rupert was a man in humble position, unknown beyond the narrow circle in which he moved, while the present petitioner has a widespread fame as a prominent politician and statesman. But no one will insist that there should be any difference in the principles applicable to the two cases. If any distinction were allowable, it would be against him of admitted intelligence and distinguished talents.

I might, with entire confidence, place the grounds of action I propose in the present case upon the decision of the learned judge in that just referred to. Even if I entertained doubts of the soundness of his views, I see no principle upon which I could be justified

in treating the decision as void of authority. But the counsel of Mr. Vallandigham was not restricted in the argument of his motion to this point, but was allowed the widest latitude in the discussion of the principles involved. It seemed due to him that the court should hear what could be urged against the legality of the arrest, and in favor of the interposition of the court in behalf of the petitioner. And I have been greatly interested in the forcible argument which has been submitted, though unable to concur with the speaker in all his conclusions. If it were my desire to do so, I have not now the physical strength to notice or discuss at length the grounds on which the learned counsel has attempted to prove the illegality of General Burnside's order for the arrest of Mr. Vallandigham, and the duty of the court to grant the writ applied for. The basis of the whole argument rests on the assumption that Mr. Vallandigham, not being in the military or naval service of the government, and not, therefore, subject to the rules and articles of war, was not liable to arrest under or by military power. And the various provisions of the constitution, intended to guard the citizen against unlawful arrests and imprisonments, have been cited and urged upon the attention of the court as having a direct bearing on the point. It is hardly necessary to quote these excellent guarantees of the rights and liberties of an American citizen, as they are familiar to every reader of the constitution. And it may be conceded that if, by a just construction of the constitutional powers of the government, in the solemn emergency now existing, they are applicable to and must control the question of the legality of the arrest of the petitioner, it cannot be sustained, for the obvious reason that no warrant was issued "upon probable cause, supported by oath or affirmation," as is required in ordinary arrests for alleged crimes. But are there not other considerations of a controlling character, applicable to the question? Is not the court imperatively bound to regard the present state of the country, and, in the light which it throws upon the subject, to decide upon the expediency of interfering with the exercise of the military power as invoked in the pending application? The court cannot shut its eyes to the grave fact that war exists, involving the most imminent public danger, and threatening the subversion and destruction of the constitution itself. In my judgment, when the life of the republic is imperiled, he mistakes his duty and obligation as a patriot who is not willing to concede to the constitution such a capacity of adaptation to circumstances as may be necessary to meet a great emergency, and save the nation from hopeless ruin. Self-preservation is a paramount law, which a nation, as well as an individual, may find it necessary to invoke. Nothing is hazarded in saying that the great and far-seeing men who framed the constitution of the United States, supposed they were laying the foundation of our national government on an immovable basis. They did not contemplate the existence of the state of things with which the nation is now unhappily confronted, the heavy pressure of which is felt by every true patriot. They did not recognize the right of secession by one state, or any number of states, for the obvious reason that it would have been in direct conflict with the purpose in view in the adoption of the constitution, and an incorporation of an element in the frame of the government which would inevitably result in its destruction. In their glowing visions of futurity there was no foreshadowing of a period when the people of a large geographical section would be guilty of the madness and the crime of arraying themselves in rebellion against a government under whose mild and benignant sway there was so much of hope and promise for the coming ages. We need not be surprised therefore, that, in the organic law which they gave us, they made no specific provision for such a lamentable occurrence. They did, however, distinctly contemplate the possibility of foreign war, and vested in congress the power to declare its existence, and "to raise and support armies," and "provide and maintain a navy." They also made provision for the suppression of insurrection and rebellion. They were aware that the grant of these powers implied all other powers necessary to give them full effect. They also declared that the president of the United States "shall be commander-in-chief of the army and navy and of the militia of the several states when called into actual service," and they placed upon him the solemn obligation "to take care that the laws be faithfully executed." In reference to a local rebellion, in which the laws of the Union were obstructed, the act of the 28th of February, 1795, was passed, providing, in substance, that whenever, in any state, the civil authorities of the Union were unable to enforce the laws, the president shall be empowered to call out such military force as might be necessary for the emergency. Fortunately for the country this law was in force when several states of the Union repudiated their allegiance to the national government, and placed themselves in armed rebellion against it. It was sufficiently comprehensive in its terms to meet such an occurrence, although it was not a case within the contemplation of congress when the law was enacted. It was under this statute that the president issued his proclamation of the 15th of April, 1861. From that time the country has been in a state of war, the history and progress of which are familiar to all. More than two years have elapsed, during which the treasure of the nation has been lavishly contributed, and blood has freely flowed, and this formidable rebellion is not yet subdued. The energies of the loyal people of the Union are to be put to

further trials, and, in all probability, the enemy is yet to be encountered on many a bloody field.

It is not to be disguised, then, that our country is in imminent peril and that the crisis demands of every American citizen a hearty support of all proper means for the restoration of the Union and the return of an honorable peace. Those placed by the people at the head of the government, it may well be presumed, are earnestly and sincerely devoted to its preservation and perpetuity. The president may not be the man of our choice, and the measures of his administration may not be such as all can fully approve. But these are minor considerations, and can absolve no man from the paramount obligation of lending his aid for the salvation of his country. All should feel that no evil they can be called on to endure, as the result of war, is comparable with the subversion of our chosen government, and the horrors which must follow from such a catastrophe.

I have referred thus briefly to the present crisis of the country as having a bearing on the question before the court. It is clearly not a time when any one connected with the judicial department of the government should allow himself, except from the most stringent obligations of duty, to embarrass or thwart the executive in his efforts to deliver the country from the dangers which press so heavily upon it. Now, the question which I am called upon to decide is, whether General Burnside, as an agent of the executive department of the government, has transgressed his authority in ordering the arrest of Mr. Vallandigham. If the theory of his counsel is sustainable, that there can be no legal arrest except by warrant, based on an affidavit of probable cause, the conclusion would be clear that the arrest was illegal. But I do not think I am bound to regard the inquiry as occupying this narrow base. General Burnside, by the order of the president, has been designated and appointed to take the military supervision of the department of the Ohio, composed of the states of Kentucky, Ohio, Indiana, Illinois, and Michigan. The precise extent of his authority, in this responsible position, is not known to the court. It may, however, be properly assumed, as a fair presumption, that the president has clothed him with all the powers necessary to the efficient discharge of his duties, in the station to which he has been called. He is the representative and agent of the president, within the limits of his department. In time of war, the president is not above the constitution, but derives his power expressly from the provision of that instrument, declaring that he shall be commander in chief of the army and navy. The constitution does not specify the powers he may rightfully exercise in this character, nor are they defined by legislation. No one denies, however, that the president, in this character, is invested with very high powers, which it is well known have been called into exercise on various occasions during the present rebellion. A memorable instance is seen in the emancipation proclamation, issued by the president as commander in chief, and which he justifies as a military necessity. It is perhaps not easy to define what acts are properly within this designation, but they must undoubtedly be limited to such as are necessary to the protection and preservation of the government and the constitution, which the president has sworn to support and defend. And in deciding what he may rightfully do under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion, and is only amenable for an abuse of his authority by impeachment, prosecuted according to the requirements of the constitution. The occasion which justifies the exercise of this power exists only from the necessity of the case; and when the necessity exists, there is a clear justification of the act.

If this view of the power of the president is correct, it undoubtedly implies the right to arrest persons who, by their mischievous acts of disloyalty, impede or endanger the military operations of the government. And, if the necessity exists, I see no reason why the power does not attach to the officer or general in command of a military department. The only reason why the appointment is made is that the president cannot discharge the duties in person. He, therefore, constitutes an agent to represent him, clothed with the necessary power for the efficient supervision of the military interests of the government throughout the department, and it is not necessary that martial law should be proclaimed or exist, to enable the general in command to perform the duties assigned him. Martial law is well defined by an able jurist to be "the will of a military commander, operating without any restraint, save his judgment, upon the lives, upon the persons, upon the entire social and individual condition of all over whom this law extends." It cannot be claimed that this law was in operation in General Burnside's department when Mr. Vallandigham was arrested. Nor is it necessary that it should have been in force to justify the arrest. The power vested by virtue of the authority conferred by the appointment of the president. Under that appointment, General Burnside assumed command of this department. That he was a man eminently fitted for the position, there is no room for a doubt. He had achieved, during his brief military career, a national reputation as a wise, discreet, patriotic, and brave general. He not only enjoyed the confidence and respect of the president and secretary of war, but of the whole country. He has nobly laid his party preferences and predilections upon the altar of his country, and consecrated his life to her service. It was

known that the widely-extended department, with the military supervision of which he was charged, was one of great importance, and demanded great vigilance and ability in the administration of his military concerns. Kentucky was a border state, in which there was a large element of disaffection toward the national government, and sympathy with those in rebellion against it. Formidable invasions have been attempted, and are now threatened. Four of the states have a river border, and are in perpetual danger of invasion. The enforcement of the late conscription law was foreseen as a positive necessity. In Ohio, Indiana, and Illinois, a class of mischievous politicians had succeeded in poisoning the minds of a portion of the community with the rankest feelings of disloyalty. Artful men, disguising their latent treason under hollow pretentions of devotion to the Union, were striving to disseminate their pestilent heresies among the masses of the people. The evil was one of alarming magnitude, and threatened seriously to impede the military operations of the government, and greatly to protract the suppression of the rebellion. General Burnside was not slow to perceive the dangerous consequences of these disloyal efforts, and resolved, if possible, to suppress them. In the exercise of his discretion, he issued the order—No. 38—which has been brought to the notice of the court. I shall not comment on that order or say anything in vindication of its expediency. I refer to it only because General Burnside, in his manly and patriotic communication to the court, has stated fully his motives and reasons for issuing it; and also, that it was for its supposed violation that he ordered the arrest of Mr. Vallandigham. He has done this under his responsibility as the commanding general of this department, and in accordance with what he supposed to be the power vested in him by the appointment of the president. It was virtually the act of the executive department under the power vested in the president by the constitution; and I am unable to perceive on what principle a judicial tribunal can be invoked to annul or reverse it. In the judgment of the commanding general, the emergency required it, and whether he acted wisely or discreetly is not properly a subject for judicial review.

It is worthy of remark here that this arrest was not made by General Burnside under any claim or pretension that he had authority to dispose of or punish the party arrested, according to his own will, without trial and proof of the facts alleged as the ground for the arrest, but with a view to an investigation by a military court, or commission. Such an investigation has taken place, the result of which has not been made known to this court. Whether the military commission for the trial of the charges against Mr. Vallandigham was legally constituted, and had jurisdiction of the case, is not a question before this court. There is clearly no authority in this court, on the pending motion, to revise or reverse the proceedings of the military commission, if they were before the court. The sole question is whether the arrest was legal; and, as before remarked, its legality depended on the necessity which existed for making it; and of that necessity, for the reason stated, this court cannot judicially determine. General Burnside is unquestionably amenable to the executive department for his conduct. If he has acted arbitrarily and upon insufficient reasons, it is within the power, and would be the duty of the president, not only to annul his acts, but to visit him with decisive marks of his disapprobation. To the president, as commander in chief of the army, he must answer for his official conduct. But, under our constitution, which studiously seeks to keep the executive, legislative, and judicial departments of the government from all interference and conflict with each other, it would be an unwarrantable exercise of the judicial power to decide that a co-ordinate branch of the government, acting under its high responsibilities, had violated the constitution, in its letter or its spirit, by authorizing the arrest in question. Especially in these troublous times, when the national life is in peril, and when union and harmony among the different branches of the government are so imperatively demanded, such interference would find no excuse or vindication. Each department of the government must, to some extent, act on a presumption that a co-ordinate branch knows its powers and duties, and will not transcend them. If the doctrine is to obtain, that every one charged with, and guilty of, acts of mischievous disloyalty, not within the scope of the criminal laws of the land, in custody under the military authority, is to be set free by courts or judges on habeas corpus, and that there is no power by which he may be temporarily placed where he cannot perpetrate mischief, it requires no argument to prove that the most alarming conflicts must follow, and the action of the government be most seriously impaired. I dare not, in my judicial position, assume the fearful responsibility implied in the sanction of such a doctrine.

And here, without subjecting myself to the charge of trenching upon the domain of political discussion, I may be indulged in the remark that there is too much of the pestilential leaven of disloyalty in the community. There is a class of men in the loyal states who seem to have no just appreciation of the deep criminality of those who are in arms, avowedly for the overthrow of the government, and the establishment of a Southern Confederacy. They have not, I fear, risen to any right estimate of their duties and obligations, as American citizens, to a government which has strewn its blessings with a profuse hand, and is felt only in the benefits it bestows. I may venture the assertion that the

page of history will be searched in vain for an example of a rebellion so wholly destitute of excuse or vindication, and so dark with crime, as that which our bleeding country is now called upon to confront, and for the suppression of which all her energies are demanded. Its cause is to be found in the unhallowed ambition of political aspirants and agitators, who boldly avow as their aim, not the establishment of a government for the better security of human rights, but one in which all political power is to be concentrated in an odious and despotic oligarchy. It is, indeed, consolatory to know that in most sections of the North those who sympathize with the rebellion are not so numerous or formidable as the apprehension of some would seem to indicate. It may be assumed, I trust, that in most of the Northern states reliable and unswerving patriotism is the rule, and disloyalty and treason the exception. But there should be no division of sentiment upon this momentous question. Men should know, and lay the truth to heart, that there is a course of conduct not involving overt treason, or any offence, technically defined by statute, and not, therefore, subject to punishment as such, which, nevertheless, implies moral guilt and a gross offence against their country. Those who live under the protection and enjoy the blessings of our benignant government must learn that they cannot stab its vitals with impunity. If they cherish hatred and hostility to it, and desire its subversion, let them withdraw from its jurisdiction, and seek the fellowship and protection of those with whom they are in sympathy. If they remain with us, while they are not of us, they must be subject to such a course of dealing as the great law of self-preservation prescribes and will enforce. And let them not complain, if the stringent doctrine of military necessity should find them to be the legitimate subjects of its action. I have no fears that the recognition of this doctrine will lead to an arbitrary invasion of the personal security or personal liberty of the citizen. It is rare, indeed, that a charge of disloyalty will be made upon insufficient grounds. But, if there should be an occasional mistake, such an occurrence is not to be put in competition with the preservation of the life of the nation. And I confess I am but little moved by the eloquent appeals of those who, while they indignantly denounce violations of personal liberty, look with no horror upon a despotism as unmitigated as the world has ever witnessed.

But I cannot pursue this subject further. I have been compelled by circumstances to present my views in the briefest way. I am aware there are points made by the learned counsel representing Mr. Vallandigham, to which I have not adverted. I have had neither time nor strength for a more elaborate consideration of the questions involved in this application. For the reasons which I have attempted to set forth, I am led clearly to the conclusion that I cannot judicially pronounce the order of General Burnside for the arrest of Mr. Vallandigham as a nullity, and must, therefore, hold that no sufficient ground has been exhibited for granting the writ applied for. In reaching this result I have not found it necessary to refer to the authorities which have been cited, and which are not controverted, for the obvious reason that they do not apply to the theory of this case, as understood and affirmed by the court. And I may properly add here that I am fortified in my conclusion by the fact just brought to my notice, that the legislature of Ohio, at its late session, has passed two statutes, in which the validity and legality of arrests in this state under military authority are distinctly sanctioned. This is a clear indication of the opinion of that body that the rights and liberties of the people are not put in jeopardy by the exercise of the power in question, and is, moreover, a concession that the present state of the country requires and justifies its exercise. It is an intimation that the people of our patriotic state will sanction such a construction of the constitution as, without a clear violation of its letter, will adapt it to the existing emergency.

There is one other consideration to which I may, perhaps, properly refer, not as a reason for refusing the writ applied for, but for the purpose of saying that, if granted, there is no probability that it would be available in relieving Mr. Vallandigham from his present position. It is, at least, morally certain it would not be obeyed. And I confess I am somewhat reluctant to authorize a process, knowing it would not be respected, and that the court is powerless to enforce obedience. Yet, if satisfied there were sufficient grounds for the allowance of the writ, the consideration to which I have adverted would not be conclusive against it. For these reasons I am constrained to refuse the writ.

NOTE 1 [from pamphlet report by Rickey & Carroll, Cincinnati, Ohio, 1863]. The findings and sentence of the military commission which were in the hands of General Burnside at the time of the habeas corpus proceedings were as follows:

Finding and Sentence.

"The commission, after mature deliberation on the evidence adduced, and the statement of the accused, find the accused, Clement L. Vallandigham, a citizen of the state of Ohio, as follows: Of the specification (except the words, 'that propositions by which the Northern states could be won back, and the South guaranteed their rights under the constitution, had been rejected the day before the battle of Fredericksburg, by Lincoln and his minions,' meaning thereby the president of the United States, and those under him in authority, and the words, 'asserting that he firmly believed, as he asserted six months ago, that the men in power are attempting to establish a despotism in this country, more cruel and more oppressive than ever existed before'), guilty. And as to these words, not guilty. Of the charge, guilty. And the commission do, therefore, sentence him, the said Clement L. Vallandigham, a citizen of the state of Ohio, to be placed in close confinement in some fortress of the United States, to be desig-

nated by the commanding officer of this department, there to be kept during the continuance of the war.

"II. The proceedings, findings and sentence in the foregoing case are approved and confirmed, and it is directed that the place of confinement of the prisoner, Clement L. Vallandigham, in accordance with said sentence, be Fort Warren, Boston Harbor.

"By command of Major General Burnside.

"Lewis Richmond,

"Asst. Adjutant General.

"Official: W. P. Anderson,

"Assist. Adjutant General."

The sentence of the military commission as above set forth was never executed. The disposition made of the prisoner will appear by the following order issued by the president of the United States, which was fully carried out according to its terms.

Order of the President.

"U. S. Military Telegraph. (Cipher) May 19, 1863. (By telegraph from Washington, 9.40 p. m., 1863.) To Major-General Burnside, Commanding department of the Ohio—Sir: The president directs that, without delay, you send C. L. Vallandigham, under secure guard, to the headquarters of General Rosecrans, to be put by him beyond our military lines, and that in case of his return within our lines he be arrested and kept in close custody for the term specified in his sentence.

"By order of the president.

"Ed. M. Canby,

"Brig. Gen., and A. A. G.

"Please acknowledge receipt of this, and time when received, by request of

"Brig. Gen. Canby."

[NOTE 2. The counsel for Mr. Vallandigham sought to have the proceedings of the military commission reviewed by the supreme court of the United States, and, for that purpose, filed a petition in that court for a writ of certiorari to be directed to the judge advocate general of the army, to send up the proceedings of that commission. The application was argued on January 22, 1864, and was denied, in accordance with an opinion delivered February 15, 1864, by Mr. Justice Wayne, who held that a military commission is not a court, within the meaning of the fourteenth section of the judiciary act of 1789, and that the supreme court had no jurisdiction to issue the writ of certiorari in such a case. See 1 Wall. (68 U. S.) 243.]

Case No. 16,817.

Ex parte VALLANDINGHAM.

[See Case No. 16,816.]

VALLE (WICKHAM v.). See Case No. 17,613.

Case No. 16,818.

VALLEJO v. UNITED STATES.

[Hoff. Dec. 66.]

District Court, N. D. California. 1862.

MEXICAN LAND GRANT—CONDITION.

[Construction of grant as being conditional upon the erection of a mill on the land granted.]

[Claim by José de Jesus Vallejo for 1,000 varas, known as the "Vallejo Mill Grant," and granted to him December 30, 1840, by Manuel Jimeno. Claim filed March 2, 1852, and rejected by the commission October 18, 1853.]

HOFFMAN, District Judge. Claim for 1,000 varas of land near Santa Clara. The expediente shows that on the 22d October, 1840, Vallejo petitioned for 1,000 varas of land near Santa Clara for building a water mill, and for cultivation. On the 30th December, 1840, Manuel Jimeno, gobernador interino, made his decree of concession, and a borrador of the final document issued to the party is attached to the expediente. The grant itself, dated December 30, 1840, is produced by the claimants. The genuineness of these documents is not disputed. It is not alleged that the grant was approved by the departmental assembly, or that judicial possession was given of the land. The claim was rejected by the board. The only additional testimony taken in this court is that of Gonzales. This witness states that in 1842 or 1843 Vallejo put some cattle upon the land. It is not pretended that he ever occupied, cultivated, or built a house or fences upon it until long after the conquest of the country. In his petition to the governor, Vallejo states that he has not found it convenient to locate his water mill on the site for which he had previously applied, but rather on that of which he annexes a sketch, in order that, after an examination of its situation, his excellency may be pleased to grant him the use of the machine before mentioned. And, in order to furnish the necessary motive power for the mill, he solicits the use of the arroyos arising in sierra towards the southeast, so that, uniting them by means of a dam, he may turn them towards the indicated object. And he further solicits one thousand varas of land for sowing, as the dotted figure on the sketch shows. The grant recites that: "Whereas Don José de J. Vallejo has solicited a grant of one thousand varas of land, with the object of cultivating it and establishing thereon a flour mill by means of the use of the water flowing from the small lake contiguous to the said land, together with the waters of three brooks to the east of said land, I have thought proper to grant him the said one thousand varas of land, together with the use of said waters, on the following conditions: * * * 3. He may use the waters flowing from the small lake, and those of three brooks on the east of the land, without preventing any benefit which said waters may now be affording, and until the time when the government may desire to render them useful for the wants of any new settlement or village, or for private individuals, who may pretend to settle on ranchos to provide for their support and that of their families, they being always obliged to let the waters flow towards the land of the present grantee."

It is evident, from the terms of these documents, that the sole purpose for which the

land was solicited and granted was the erection of a mill. The 1,000 varas are asked with the avowed object of using them as sowing lands, while the waters of the laguna and the creeks were to furnish motive power. It is apparent that Vallejo has not even attempted to comply with the conditions, or to render any part of the consideration on which the grant was issued. The evidence of Gonzales is vague and unsatisfactory, and at best merely amounts to a statement that, in 1842 or 1843, some cattle belonging to Vallejo were upon the land.

This testimony would, under the ruling of the supreme court in U. S. v. Teschemacher, 22 How. [63 U. S.] 402, 403, be wholly insufficient, even if the grant had been made under the usual conditions merely of occupation and settlement. But in this case the erection of a mill was evidently the main condition of the grant. The undertaking of Vallejo was voluntary, and was the inducement held out by him to obtain the grant. He has never even attempted a compliance with any part of his contract, and, under the circumstances, must be held to have abandoned and forfeited his claim. U. S. v. Buck, 15 Rel. 222; Noes' Case, 23 How. [64 U. S.] 315, 316; Fuente's Case, 2 How. [43 U. S.] 460. That Vallejo, in fact, relinquished all idea of availing himself of Jimeno's concession might also be presumed from the circumstance that he subsequently obtained a grant for a much larger and more valuable rancho, to the cultivation and improvement of which he, doubtless, devoted his entire attention. The decision of the board must be affirmed.

Case No. 16,819.

VALLEJO v. UNITED STATES.

[Hoff. Land Cas. 174.] [1]

District Court, N. D. California. Dec. Term, 1856.[2]

MEXICAN LAND GRANTS.

The objection that the land claimed was not segregated from the public domain, removed by further testimony taken in this court.

Claim for three leagues of land in Sonoma county, rejected by the board, and appealed by the claimant.

B. S. Brooks, for appellant.
William Blanding, U. S. Atty.

HOFFMAN, District Judge. The claimant in this case has produced the original grant by Gov. Micheltorena to Miguel Alvarado, dated Nov. 23d, 1844. This grant was approved by the departmental assembly on the eighteenth of February, 1845. The genuineness of the grant is fully proved, and the occupation of and the cultivation of a portion of the land established by testimony. The claim was rejected by the board for the reason that the tract granted was not segregated from the public domain. The land is described in the grant as known by the name of Yulupa, and bounded by the ranchos of Petaluma, Cotate, Santa Rosa and Los Guilicos. Jasper O'Farrell, who was a government surveyor in 1847 and 1848, and as such surveyed several ranchos in the vicinity, states that he knows the latter well, and that the rancho Yulupa is situated between them; that it is near the town of Sonoma, and can easily be segregated from the adjoining ranchos. Julio Carillo testifies that he has known the lands of Yulupa since 1838; that it lies between the ranchos of "Petaluma," "Cotate," "Santa Rosa" and "Guilicos"; that it contains about three leagues and is well known. The witness further states that Alvarado built a house on the land, and occupied it with cattle and horses in 1843 or 1844. The evidence of these and other witnesses whose testimony has been taken in this court on appeal, sufficiently, in my opinion, establishes the identity of the land granted to Alvarado, and removes the only objection urged to a confirmation of the claim. A decree of confirmation must therefore be entered.

[On appeal by the United States to the supreme court, the decree of confirmation was reversed, and the case remanded for farther evidence. 22 How. (63 U. S.) 416.]

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Reversed in 22 How. (63 U. S.) 416.]

VALLEJO (UNITED STATES v.). See Cases Nos. 16,605 and 16,606.

Case No. 16,820.

VALLETTE v. WHITEWATER VALLEY CANAL CO.

[4 McLean, 192; [1] 5 West. Law J. 80.]

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

EQUITY JURISDICTION—ENFORCEMENT OF LIENS—CORPORATIONS—PARTIES—CONTRACTS.

1. To enforce an equitable lien is the appropriate jurisdiction of a court of equity.

2. The circuit court takes jurisdiction for or against a corporation, from the place where its business is done

3. And this sufficiently appears from the face of the act of incorporation.

4. The citizenship of persons who may or may not afterward apply to be made parties, need not be alleged in the bill.

5. The rights of persons, not made parties, can not be affected directly by the proceeding in a suit; but a question which is raised between parties, may affect them, as the holders of certain paper.

6. A complainant may consent to the postponement of his lien in whole or in part, on conditions beneficial to all the parties concerned.

7. But the court can not change a contract, under any exigency.

[Henry Vallette filed his bill to enforce a lien upon the Whitewater Valley Canal, and applied for a preliminary injunction to re-

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

strain the officers of the company from doing certain acts prejudicial to his lien, and also for a receiver.] [2]

Fox & Chase, for complainant.
Newman & Walker, for defendants.

McLEAN, Circuit Justice. This is an application for an injunction and the appointment of a receiver. The bill alleges that on the 20th day of January, 1842, the legislature of Indiana passed "An act to incorporate the Whitewater Valley Canal Company," with power to make contracts, sue and be sued, and do all things necessary to effectuate the objects of the association. And in the same act, the state transferred to the association all its rights to the line of the canal from the Ohio river to the National road, at Cambridge, and all the expenditures by the state hereon, on condition that after the lapse of fifteen years, and after the completion of the canal by the company, the state should have the right to resume the canal, with the privileges granted, "upon paying to said company the full amount of their expenditure upon the same." Power is given to the corporation to borrow money, and when necessary, to increase the stock of the company, to erect mills and other hydraulic works, to fix the rate of tolls, etc. After the organization of the company, by the election of its officers, they created a loan for the benefit of the corporation, of one hundred and twenty-five thousand dollars, and for part thereof, issued bonds for the payment of one thousand dollars each, one hundred and twelve of which bonds bearing date 1st of January, 1845, were issued and delivered to the complainant, payable to him or bearer. On these bonds, interest at the rate of seven per cent. was payable semi-annually, at the city of New York, until the payment of the principal sum, which was payable in ten years, being part of the first and only loan of one hundred and twenty-five thousand dollars; and the faith of the company and their effects, both real and personal, were inevitably pledged; and said bonds were to have a preference over all debts that might thereafter be created by the company. And in default of said payments it was agreed that the holders of the bonds might enter immediately into the receipt of the tolls and water rents, and the incomes of said company, by applying to the circuit or district court of the United States, or any court of justice, to appoint a receiver of the incomes of said company, and apply the proceeds to the payment of the interest on said bonds, etc. And it was agreed, that should the interest have to be collected by legal process, there should be adjudged to the holder ten per cent. as liquidated damages. The company also executed to the complainant four other bonds of similar character and amount, except as to their date and time of payment. Two of these bonds are now due, and the other two will be due in July next. That there is now due the sum of five thousand seven hundred and fifty dollars for interest, and also one thousand dollars on the obligation which became due in July, 1847, which it seems the defendant refuses to pay. And the complainant states that the corporation has, within a few months, contracted other debts, and has, in violation of law, caused about seventy thousand dollars in bonds to be prepared to be issued, and has issued about twenty thousand dollars of the same, and threatens to issue the balance thereof for the purpose of being used as a circulating medium, and as a substitute for bank notes, in the form of promissory notes, by which said company promises to pay, two years after date, to —— or bearer five dollars, (and other notes from that sum to twenty dollars,) for value received, with interest at the rate of six per cent. per annum; and which notes on their face are agreed to be received by said company, at all times, for tolls and water rents, etc. And the complainant avers, that the corporation has lands and personal property, debts due, and cash on hand to a large amount. That the corporation owes, as he has been informed, over two hundred thousand dollars. That if the said notes be received in payment of tolls and water rents, the sum due to the complainant as aforesaid, can not be paid; and he prays that the defendant may be enjoined from selling or disposing of any of the real or personal estate of the company, and from issuing or circulating any promissory notes of the character before described. Also from receiving them for the tolls and water rents due and to become due. In its answer the corporation admits, the organization of the company, the issuing of the bonds and the sum due to the complainant as alleged by him. It states that by a great rise of water in White river, an extensive injury was done to the canal, to repair which ninety thousand dollars were required. That these injuries, if not speedily repaired, would have been ruinous to the canal. That, failing to raise funds to make the repairs in any other manner, the plan of issuing the promissory notes complained of was adopted. These notes, the defendants insist, are not in violation of law.

Several objections were made to the jurisdiction of the court:

1. That there is a remedy at law. This is an equitable mortgage, and is a peculiar subject of equity. The objects of the complainant are clearly not attainable at law. He may recover a judgment against the corporation, but its tolls and water rents can not be reached in that form. And it appears, from the face of the contract, these were looked to by the parties as a means of payment. This remedy is incorporated into the contract, and it is a part of it. On the tolls and water rents, therefore, the plaintiff has a lien preferable to all others now shown,

[2] [From 5 West. Law J. 80.]

which may be enforced in a court of equity, but can not be in a court of law. And this is the main object of the bill.

2. It is also insisted that it does not sufficiently appear that the place where the corporation does its business, is within the state of Indiana. To this it must be answered, that the place where the functions of this corporation are discharged, must, necessarily, be within the state of Indiana. It can exercise no extra-territorial power on this subject. But from the face of the charter, it is seen that the work to be accomplished is within the limits of the state.

3. It is further objected, that the complainant was for himself and others interested, and that it does not appear who those persons are, and that some or all of them, may be citizens of Indiana, who could not come in as co-plaintiffs. If this supposition be true, it would be a sufficient objection to their being made plaintiffs. They are not now plaintiffs, and this objection may be considered when they shall apply to be made so.

4. Again, it is insisted that the rights of the holders of the promissory notes alleged to be illegal are involved, and that they should be made parties. So far as the question of illegality is concerned, it is not material that they should be made parties. Whether these notes be in violation of law, is distinctly presented by the prayer of the bill, that the corporation should be enjoined from issuing any further notes of similar character, which they are about doing, and which, it is alleged, they have no power to do. As well might it be objected, when a defense is made involving the legality of a promissory note, that the rights of others holding similar notes would be affected. If these notes, now in circulation, are to be treated as valid, and the question is made, whether the payment of them out of the tolls and water rents, as pledged upon their face, the objection that the holders are not made parties, is not without force. In this aspect, the question is one of preference, and that point is not raised in the bill; and it is supposed could not be, unless the holders of the paper were given.

5. The state of Indiana is not a necessary party. Its interest is contingent, depending upon the exercise of its own discretion. And this proceeding can in no respect affect the exercise of that discretion.

The lien of the plaintiff is the first one, as appears from the bonds, and it was expressly agreed that it should be preferred to all others. But, of necessity, there was an implied understanding that the ordinary expenses of the company should be paid. Until this was done, there could be no tolls or water rents to pay out. But this expenditure is limited to ordinary repairs and other expenses, incident to the business of the company. The directors could give no lien, to the prejudice of the plaintiff, beyond this. The work was subject to casualties like other and similar works, but no provision was made for extraordinary expenditures. When these became necessary, as under the circumstances stated in the answer, the directors should meet them, if possible, by the use of other means than those which were mortgaged to the plaintiff. They had lands, debts due for stock and otherwise, and they had power to increase the stock of the company. If these should not be available, after a full trial, and a pledge of the receipts for tolls and water rents was the only means to raise the money to make the repairs, within the power of the directors, it was a subject rather of compromise between them and the complainant, than of legal discretion on their part. The lien may have been given to the complainant injudiciously, but it was given under an emergency as strong, and indeed stronger, than that which now exists. The means afforded by the plaintiff enabled the company to accomplish the enterprise. The lien given to him induced him to part with his money, and no change of circumstances in the affairs of the company can authorize a postponement of the lien. The interest of the parties in this case is identical. Unless the canal can be repaired, the expenditures of the company will be lost, and the work in a short time become of little or no value. And in this event the claim of the plaintiff must fall and become as worthless as the stock of the company. It would seem, therefore, in reason and policy, that the future receipts of the company should be used to make the repairs now being made, so far as may be done with a proper regard to the interest of the plaintiff. And he voluntarily proposes to postpone his lien for ninety days, provided the receipts of tolls and water rents, during the ninety days, shall be applied to the completion of the repairs. And after the expiration of the ninety days, he consents to receive one-fourth of the receipts for toll and water rents. Beyond the ordinary repairs of the canal and the expenses of the company, it can create no demand which shall directly or indirectly postpone the lien of the complainant. The faith of the company is not only pledged for the priority of his lien, but its entire property, and especially the receipts for tolls and water rents. The tolls and water rents are not only pledged equitably, but they are set apart as the means of payment. This being the contract, the company can not change it, nor can the court do so. Courts of equity do not make contracts, but enforce them. As the complainant, however, has consented to the postponement of his lien, as above stated, that all the means of the company may be applied to the repairs now being made, all difficulty on this point is obviated. The sale of the lands of the company for its stock, lessens so much of the property mortgaged to the plaintiff; the lien extended equally to the stock and the land, though the stock was held by individuals; the exchange of the land, therefore, for stock, did not add to the amount of stock, but reduced the subject of the lien

to the amount of land sold. This the plaintiff may object to, as it lessens his security. The promissory notes of small denominations, printed on bank paper, and containing a promise to pay, with interest, a certain sum, and receivable for tolls and water rents, signed by the president and secretary of the company, being evidently intended for circulation, are clearly within the act of Indiana of the 20th January, 1841.

Upon the whole, I think the complainant is entitled to the prayer of his bill, to enjoin the corporation from issuing notes of the denomination above stated, and from receiving such notes already issued in payment of tolls, water rents, or other dues; also from selling any of the real estate now held by the corporation for its stock. And after the canal from Cambridge to the Ohio river shall have been in operation from this time, three months, the receipts having been faithfully applied to the completion of the necessary repairs, the company is required to set apart one-fourth of the receipts for the payment of the plaintiff's demand; and that the same shall be paid to the plaintiff, or deposited in the Lafayette Bank of Cincinnati, subject to the order of the court. And it is further ordered, that the corporation shall, by its proper officer or officers, make a report to the next circuit court of the United States, to be held in the state of Indiana, stating the receipts and expenditures of the company from the time this injunction is allowed up to that term, and that another report of the same character be made at the succeeding term of said court, if the plaintiff's demand shall not be discharged before that time. A receiver will now be appointed. And I take occasion here to remark, that I have no doubt the company has acted, under the exigencies in which it was placed, with a sincere desire to advance the general interests of the association and the public.

[The case was ultimately taken to the supreme court, where the final decree of this court was affirmed. 21 How. (62 U. S.) 414.]

VALLEY BANK (MERCHANTS' NAT. BANK v.). See Case No. 9,447.

Case No. 16,821.

VALLEY NAT. BANK v. MYERS.

[Case reported under above title in 17 N. B. R. 257, is the same as Case No. 5,549.]

VALLEY NAT. BANK v. PAPIN. See Case No. 12,239.

Case No. 16,822.

VALLIERE et al. v. UNITED STATES.

[Hempst. 335.] [1]

District Court, D. Arkansas. June 22, 1847.

SPANISH LAND GRANT.

The heirs [Francois Vallieré and others] of Don Joseph Vallieré, formerly captain in the 6th regiment of the Spanish army serving in Louisiana, claimed title to a large tract of land situated partly in the state of Arkansas and partly in Missouri, on the following facts and documents:

1. The register of the land-office at New Orleans certifies that among the Spanish records under his custody, and forming part of the archives of his office, is a book bearing this title: No. 4, subdivided into volumes or sections, under the title of a "Register de los Primeros Decretos de concession de tierra;" which book exhibits at volume 6, page 31, an entry in Spanish, of which the following is a translation: "11th June, 1793. To Captain Don Joseph Vallieré, in the district of Arkansas, a tract of land situated on the White river, extending from the rivers Norte Grande and Cibolos to the source of the said White river, ten leagues in depth."

2. The surveyor-general of Louisiana certifies that amongst the records of the surveyor-general's office under his charge, in bundle N, No. 37, he finds a plat of survey and procès verbal, in the Spanish language, of which the following is a translation: "Don Carlos Trudeau, Royal and Private Surveyor of the Province of Louisiana. I certify having measured in favor and in presence of Don Joseph Vallieré, captain of the stationary regiment of Louisiana, a portion of land situated in the jurisdiction of Arkansas, on the north and south banks of Rio Blanco, Rio Cibolos, on the west or superior limit, by the fountainhead or origin of the most western branch of the said Rio Blanco, and by vacant lands of his majesty, separated from said vacant lands by a line beginning at the same fountainhead of the north-western branch of Rio Blanco, running south-west ten leagues in depth, on the north by lands of his majesty, separated from these by a drawn line beginning at the Rio Norte Grande, commencing at a point distant ten leagues in a direct line from its mouth or confluence with the said Rio Blanco, running in a course nearly west until it meets the fountainhead or origin of the most western branch of the Rio Blanco, and on the south side by vacant lands of his majesty, separated from these by a line drawn apart, beginning at a point where ends the south-west limit, ten leagues from the fountainhead or origin of the most western branch of the Rio Blanco, running on a parallel line with the said Rio Blanco, descending ten leagues in depth, until it meets Rio Cibolos, at the distance of ten leagues in a direct line from Rio Blanco. All of which is fully demonstrated in the figurative plan which precedes, in which is marked the dimensions, courses, limits, trees, and posts, serving as artificial or natural boundaries. The line and limits have been made at the request of the grantee, and in compliance with the order from the governor-general, El Baron de Carondelet. 18th June, 1793. I certify to all which precedes, in order that it may be verified. I deliver the present with

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

the figurative plan 24th October, 1793. (Signed) Don Carlos Trudeau, Surveyor-General."

3. That in the regular record books kept in New Orleans by the Spanish authorities before 1803, but removed by them to Cuba, where the same, as it is said, now are, is recorded a grant of the foregoing land, in the Spanish language, of which the following is a translation: "Don Francisco Baron de Carondelet, &c., &c. For the benefit of the public, and for the greater encouragement of agriculture and industry of the country, I have judged it expedient to take steps for surveying and granting the royal lands in this province. Therefore, I grant to Don Joseph Vallieré, captain of the regiment stationed in Louisiana, a portion of land in the jurisdiction of Arkansas, situated on both banks of the Rio Blanco, ten leagues on both banks, beginning, &c. (describing it as in the above procès verbal, and then proceeds) which will be better seen on the figurative plan made by my order by the surveyor-general, Don Carlos Trudeau, of this province, the 24th October last (it being impossible for the royal surveyor to make an actual survey at the time). And, in virtue of my order of June of the current year, by which I made him a grant, and ordered the surveyor-general to put him in possession according to the usual form, in consequence of the power which has been conferred on me by the king, whom God preserve, I grant in his royal name to the said Don Joseph Vallieré, captain of the regiment of infantry of Louisiana, the said portion described above, in order that he and his legitimate successors may dispose of it as property belonging to him. Done in New Orleans, 22d December, 1793. (Signed) El Baron de Carondelet."

Don Joseph Vallieré died in 1799. Whether he ever took possession of the land, or any part of it, or made any settlement thereon, does not appear; but as it was in the heart of the Indian country, and they hostile, it is probable no settlement of any consequence was made under the grant. No claim of title was presented by his heirs to the commissioners appointed by the act of congress of March 2, 1805 [2 Stat. 324], or the subsequent laws on the subject of French and Spanish grants in the province of Louisiana; nor is the grant mentioned in any of the reports made by any of these commissioners to the treasury department; nor does it appear to have been set up or brought to the notice of any tribunal, or to the notice of the government in any way until now. The first time it appears to have been brought to notice in any form was, that in 1844 a pamphlet was published in New York by "Jared W. Bell, printer, corner of Ann and Nassau streets," containing copies of what purported to be the original title papers and translations, as above set forth, and legal opinions by Daniel Webster, Rufus Choate, A. P. Upshur, David B. Ogden, Thomas Addis Emmett, James Kent, J. Blunt, John Sergeant, and B. F. Butler, pronouncing the claim valid and the title complete. But the fact that a claim of such magnitude, and thus apparently formal and regular as to muniments of title, should be allowed to sleep more than half a century, is a strong circumstance against its validity, and, on the familiar principle of lapse of time, ought to be almost conclusive against it.

The United States, by S. H. Hempstead, Dist. Atty., answered the petition, denying its allegations, and the validity of the claim, and demanded strict proof thereof. On the 22d of June, 1847, the petition was dismissed for want of prosecution, and a motion to reinstate it, made subsequently, was overruled.

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

S. H. Hempstead, Dist. Atty., for the United States.

Case No. 16,823.

In re VALLIQUETTE.

[4 N. B. R. 307 (Quarto, 92).] [1]

District Court, S. D. New York. Dec., 1870.

ACTS OF BANKRUPTCY—INVOLUNTARY PETITION—SALE OF STOCK OF GOODS.

Where a stock of goods was sold to a bona fide purchaser, and where there is no evidence that the vendor was insolvent at the time of the sale; but it appearing on the trial that the purchaser had previously tried to buy the stock, and that the vendor had refused, but finally sold out because he wished to change his business, *held*, that an adjudication would not be made on an involuntary petition, setting up the sale of the stock as the only act of bankruptcy.

The petition contained three allegations of acts of bankruptcy: The first being that Valliquette, being a merchant, had "fraudulently stopped payment of his debts" within six months. The second, that being insolvent, he had made a sale of his stock of goods to a creditor with intent to give him a preference. And third, that he had made a sale of his stock of goods with intent to defraud his creditors. Valliquette filed an answer to the petition, denying the commission of any of the acts of bankruptcy alleged in the petition, and demanded a jury trial.

The trial came on to be heard before HALL, District Judge, and a jury at the November term of the district court, and the petitioners, to sustain this case, called Reynolds, the person who bought Valliquette out, and he testified that some two weeks before the sale he had applied to Valliquette to buy him out, and Valliquette refused to sell; that two weeks later Valliquette sent him word that he had concluded to go into some other business and would sell out. Reynolds was not then a creditor, but finding that Valliquette was owing several parties debts not due, he applied to these creditors, with Valliquette's consent, and arranged that such creditors should take his notes instead of Valliquette's, and give him time.

[1] [Reprinted by permission.]

An inventory was then taken by a disinterested party, and a bill of sale given Reynolds by Valliquette, and Reynolds then took up one thousand two hundred and seventy dollars of Valliquette's outstanding indebtedness, and paid him one hundred dollars in cash for the stock, which was its full value.

There was no evidence offered that Valliquette was insolvent at the time of this transaction, and no evidence of intent to defraud or to give Reynolds a preference other than the inference, if any, which could be drawn from the transaction.

Counsel for Valliquette asked the court to render a verdict for the respondent.

Counsel for the petitioners claimed that inasmuch as it was admitted that Valliquette had not paid the debt due the petitioners (which was an account), he had fraudulently stopped payment within the meaning of the amendment of 1870 [16 Stat. 173]; and that the fraudulent stoppage mentioned in the amendment was not confined to commercial paper, but applied to the non-payment of any debt.

The court adjourned over night and examined the question, and in the morning charged the jury that the position assumed by the petitioners' counsel was untenable, and directed a verdict in favor of the respondent.

William Russell, for petitioners.
George Gorham, for respondent.

Case No. 16,824.

Ex parte VAN AERNAM.

[3 Blatchf. 160.] [1]

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

EXTRADITION—COMMITMENT BY COMMISSIONER—HABEAS CORPUS—AUTHORITY OF COURT.

1. On a habeas corpus, sued out by a prisoner who is held under a warrant of commitment issued by a United States commissioner, ordering him to be detained and given up to the British authorities, as a fugitive from justice from Canada, under the treaty of Washington of August 9, 1842 (8 Stat. 572, 576), this court cannot review the merits of the decision made by the commissioner, either on the facts or the law.

[Cited in Ex parte Lange, 18 Wall. (85 U. S.) 205; Re Henrich, Case No. 6,369; Re Macdonnell, Id. 8,772; Re Stupp, Id. 13,563; Re Morris, 40 Fed. 825.]

2. If the commissioner had no jurisdiction of the case, or if there was no legal evidence before him tending to prove the accusation, or if the mandate of the president for the arrest of the prisoner was issued without warrant of law, the court will discharge him. But it will not inquire whether the commissioner erred in deciding that the offence charged was committed by the prisoner or was an offence within the treaty.

3. The courts of the United States have no authority, on a habeas corpus, to inquire into the merits of a decision made by a committing magistrate, and to determine that he erred in his construction of the law or the evidence. It will only inquire whether the prisoner stood charged before the magistrate with a criminal offence subjecting him to imprisonment, and whether the magistrate possessed competent authority to inquire into and adjudge upon that complaint.

This was a writ of habeas corpus, returnable to this court, commanding the marshal to produce the body of Daniel W. Van Aernam. The prisoner was brought into court on the writ, and the marshal filed his return, setting forth that Van Aernam was held by him under a warrant of commitment issued by a United States commissioner (George W. Morton), which ordered the prisoner to be detained and given up to a person authorized to receive him on behalf of the authorities of Canada, as a fugitive from justice, whose extradition had been demanded and adjudged under the provisions of the treaty between the United States and Great Britain of August 9, 1842 (8 Stat. 572, 576), commonly called the "Treaty of Washington."

Theodore Romeyn, for prisoner.
Charles Edwards, for British authorities.

BETTS, District Judge. The prisoner was committed for uttering and publishing in Canada a certain forged order or bank draft, purporting to be drawn by the cashier of the Hamilton Exchange Bank, at Hamilton, Madison county, New York, on the cashier of the Troy City Bank, at Troy, New York, for $5,000, payable to the order of the prisoner.

The facts which appeared before the commissioner, on which the prisoner was arrested and detained, are agreed to on both sides. The draft in question was false and fabricated. The prisoner was a party concerned in fabricating it. He was a resident of the state of New York at the time he took the draft into Canada. He there passed it as genuine, and received $5,000 cash for it, and returned, with the money, to this state. He was regularly charged before a magistrate in Canada with the crime of uttering and publishing a forged draft, knowing it to be forged, with intent to defraud the party from whom he obtained the money. No exception is taken to the regularity of any of the subsequent proceedings by the British authorities and within the United States, to reclaim the prisoner and take him back into Canada for trial upon that accusation, according to the provisions of the treaty of 1842 between the United States and Great Britain.

The objection raised, under the habeas corpus, to the extradition of the prisoner is, that the false making of the draft was not a forgery, but a fraud only, or the creation of a false token, and that the uttering, or publishing of the instrument is not one of the crimes named in the treaty, for which the prisoner can lawfully be arrested in this state, and be delivered over to the British authorities. Under this proposition, various points have been debated by counsel—whether the criminality of the prisoner's act was to be

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

determined by the laws of New York or by those of Canada—or whether, in order to authorize his arrest and extradition, forgery within the laws of both governments must be proved to have been committed. In the same connection, various collateral questions deserving of notice have been discussed. But the paramount consideration is—What are the character and extent of the authority of the court over these questions, under a writ of habeas corpus?

In my opinion, this court cannot sit in review on the merits of the decision made by the commissioner, either on the facts or the law. If the commissioner had no legal jurisdiction over the case, or if the mandate of the president under which the prisoner is more immediately confined, was issued without warrant of law, it is the duty of the court to discharge him. It is not disputed that the commissioner was empowered to inquire whether the crime of which the prisoner was accused had been committed by him, nor is it disputed that legal evidence was laid before him tending to prove the accusation, nor is it disputed that the commissioner, on the facts so placed before him, found that the prisoner had committed the offence. The exception to his action is, that he misjudged in point of law, and that the crime was not established by the evidence. If so, this, manifestly, was an error in judgment on the part of the commissioner, but it does not show that he had no jurisdiction. And, if the case were now before the court on writ of error or appeal, the decision of the commissioner would be a legitimate subject for its investigation. But, whatever the local law of the state may be, the courts of the United States have, in my judgment, no authority, under a writ of habeas corpus, to inquire into the merits of a decision made by a committing magistrate, and to determine that he erred in his construction of the law or the evidence. Under the criminal jurisprudence of the United States, that power belongs to a court or a jury when afterwards required to act on the accusation. Grand juries constantly dismiss accusations against prisoners, when examining the proofs on which they were committed by magistrates. Courts overrule the law as declared by magistrates when authorizing the arrest of parties, and also their construction of facts, although affirmed by the presentments of grand juries. Yet such considerations never entitle a prisoner to have his case tried under a habeas corpus, and to receive a discharge, if a judge thinks that there was not enough made out against him on the accusation to warrant his commitment.

Neither the constitution nor the statutes of the United States prescribe or define the qualities of the writ of habeas corpus ad subjiciendum, or the powers of the court or magistrate thereon, on its return. It was a common law process in use at the time of the American Revolution, (though largely varied in its incidents, if not also in its effects, by statutory provisions at home), and was brought by our ancestors with them when they emigrated to America, and became a part of our domestic jurisprudence, in its common law attributes, so far as it was applicable to the situation of the emigrants, and not repugnant to the local and political circumstances in which they were placed. Livingston v. Jefferson, [Case No. 8,411]; 1 Story, Const. pp. 132, 133, §§ 148, 149. The general proposition is, however, to be understood with many restrictions. 1 Story, Const. 133.

The main changes made by parliament in the common law writ consisted in provisions for its prompt enforcement, and did not purport to vary its intrinsic powers. The writ, in the form in which it was used in England at the time of our Revolution, had been incorporated into the positive law of this state, and of several other states, at the time of the adoption of the constitution of the United States, and of the passage of the judiciary act of 1789 (1 Stat. 81, § 14), which recognized the writ, and imparted to the courts of the United States power to use it; and was substantially in force in this and other colonies, anterior to their formation into independent states, in the same form in which it was employed in England. 2 Kent, Comm. 26–33, and notes.

It is not important to consider how far such long usage, or the course of local legislation, may be admissible evidence conducing to show that the writ of habeas corpus, in the form then existing, was contemplated as the process adopted by the constitution or the act of 1789, because, neither the English nor the American statutory enactments had at that time varied, in any important features, the writ as known to the common law. Fitzh. Nat. Brev. 250; Cowell, Law Dict. (1727), "Habeas Corpus"; 3 Bl. Comm. 131; Bac. Abr. "Habeas Corpus," B, 10. The legislation in the state of New York, and in other states, since 1818, may have introduced changes, which may give to the writ employed in the courts of such states, all the scope and efficiency attached to the common law writ, when accompanied, as attendant upon its return, by a certiorari or writ of error, or when heard and executed, on its return, by a court having supervision over the whole proceedings before the tribunal which ordered the commitment sought to be relieved from. Such subsequent state laws cannot, proprio vigore, affect the process or proceedings of the courts of the United States. They are obligatory only so far as they are adopted by congress. Beers v. Haughton, 9 Pet. [34 U. S.] 329; Keary v. Farmers' & Merchants' Bank of Memphis, 16 Pet. [41 U. S.] 89.

In my view of the subject, this court, on the return before it of a writ of habeas corpus, has no further power than to ascertain and determine whether the prisoner stands charged with a criminal offence subjecting him to imprisonment; and whether the com-

missioner possessed competent authority to inquire into and adjudge upon that complaint. I find affirmatively, in this case, on both those inquiries, and therefore decide that I have no authority, under this writ, to review the justness of the decision of the commissioner. The president, therefore, had due authority for the warrant issued by him for the extradition of the prisoner.

The court, if acting as the committing magistrate in this instance, might have doubted whether the law, properly interpreted, would support a charge of forgery for the fabrication of the draft in question, and might have declined to commit the prisoner on the charge; but it possesses no authority to re-judge that point, on this writ. The farthest the court could go, under this writ of habeas corpus, after ascertaining that there was legal proof before the magistrate tending to support the accusation, would be to bail the prisoner, if this particular case were bailable; and the judges in Canada may, in their discretion, grant the same relief.

It cannot affect the opinion of the court under this writ, that the accusation may not be supported on a trial. It is only to determine whether the prisoner is confined in conformity to the law of the land. His innocence is presumed, in law, notwithstanding his imprisonment and his indictment; and it would be a most unsafe guide, for a judge, on a habeas corpus, to be governed by any regard to the question of the guilt or innocence of the accused. Most clearly, such a consideration cannot control the liability of a fugitive from justice to be returned to the place where he committed the alleged crime. He is sent back for the purpose of enabling the tribunal of the country in which the supposed offence was committed, to determine, on a public trial, whether he is guilty of it. The instance of Heilbronn, recently delivered in this state to the English authorities, and acquitted on his trial, after his return, affords no argument for restraining the extradition power. He was returned, not to insure his conviction, but to subject him to trial for an alleged crime. The grand inquest found cause for the accusation, because, after his extradition, he was indicted for forgery. But, on the traverse of the indictment and a full hearing of the case, the court decided that the law did not authorize his conviction. That is the proper forum for the consideration and determination of that question; and not before a judge on habeas corpus, any more than before the committing magistrate. The opposite principle would arrogate to a judge at chambers the functions and duties of a court on solemn trial.

If the papers before me showed that the prisoner was committed by a state magistrate in this state, and was also indicted by a grand jury for the offence charged against him on this application, namely, for uttering a bank draft of exactly the same character, and also for forging the paper, I would not, under the common law acceptation of the functions of the writ of habeas corpus, be authorized to examine the merits of his commitment, and discharge him, upon my opinion that the charge could not be supported on the trial. If this court were well convinced that an indictment could not in the present case be maintained in Canada, or if it were satisfied that one would not be preferred, that consideration would not justify the discharge of the prisoner by habeas corpus. Clearly, it would not, if he were under arrest for a violation of the laws of the United States. And there would seem to be hardly a ground for question, that the treaty compact rests upon the principle, that with regard to the enumerated class of offences, each of the contracting parties is, within its own dominions, to execute its own laws in respect to the offender, and to determine, under those laws, the guilt or innocence of the accused. In this case, the result would be the same, therefore, whether the law of the state of New York, or the law of England, is to supply the definition of the offence. The committing magistrate has adjudged that there was satisfactory proof of the commission of the crime charged; and this court, on the facts admitted, sees that there was probable cause, on the legal evidence before the magistrate, for the decision he made.

An order must accordingly be entered discharging the writ of habeas corpus allowed in this case.

Case No. 16,825.

VAN AMRINGE v. PEABODY et al.

[1 Mason, 440.] [1]

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

FACTORS AND BROKERS—PLEDGE OF GOODS—TROVER BY PRINCIPAL.

A factor cannot pledge the goods of his principal for his own debts; and if he does, the principal may, after a demand and refusal, maintain trover for them against the pawnee.

[Cited in Michigan State Bank v. Gardner, 15 Gray, 370; School Dist. No. 6 in Dresden v. Aetna Ins. Co., 62 Me. 337; Agnew v. Johnson, 22 Pa. St. 475.]

Trover for 1700 bushels of corn and four pipes of brandy. Plea, the general issue. The plaintiff [George O. Van Amringe] who resides in Philadelphia, in the course of the last spring consigned the goods in question, among others, to Messrs. Damon & Co. of Boston for sale. Messrs. Damon & Co. previous to the 11th of June last were indebted to the defendants [Jacob Peabody and others], who are auctioneers in Boston, in the sum of 1100 dollars, for which they had deposited with the defendants, as collateral security, a note signed by Messrs. Brent and Chapin, and being desirous of getting that note for the purpose of discounting it in the market to relieve them from embarrassments,

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

under which they were laboring, they offered on that day to deposit with the defendants 1400 bushels of the plaintiff's corn in lieu of the note, which offer the defendants accepted, and the corn was delivered accordingly. On the 17th of the same June, Messrs. Damon & Co., being in distress for more money, applied to the defendants for an advance of $1000 on a deposit of the four pipes of brandy belonging to the plaintiff, to which the defendants agreed, and the brandy was delivered accordingly; and one of the partners of the firm of Damon & Co. signed a receipt, acknowledging the advance of $1000 on the brandy, as deposited for sale. On the 16th of July following, the price of brandy having declined, the defendants requested additional security for the debts due to them, and Messrs. Damon & Co. accordingly deposited with them 300 bushels more of the plaintiff's corn. At the time of the advance of the goods, Messrs. Damon & Co. verbally agreed to allow the defendants one per cent. per month upon that advance, and two and a half per cent. commissions for every sixty days the goods should remain. But as the parties did not at that time contemplate, that the goods would remain deposited longer than sixty days, it was supposed, that one commission only would grow due. But on the 16th of July, when the new security was taken, the verbal agreement was reduced to writing, and signed by Messrs. Damon & Co.; and in that they expressly stipulated to allow one per cent. per month, and two and a half per cent. commission as above stated. The defendants at the time of these several transactions, knew that Messrs. Damon & Co. were commission merchants, and that the goods deposited with them were consigned to Damon & Co. for sale. The plaintiff, at the time of his consignment of the brandy to Messrs Damon & Co., limited them to the sale price of three dollars and twenty-five cents; and they had no authority from the plaintiff to sell the goods at auction, or to procure any advances on them on the plaintiff's account; they had no authority to act as general agents of the plaintiff, but acted as consignees under his orders. The defendants sold the corn at private sale, with the consent of Messrs. Damon & Co., early in September; and the four pipes of brandy at public auction, at various times, before the middle of the same month, and received the whole amount of the proceeds of both sales. Messrs. Damon & Co. failed about the 11th of September; and the plaintiff made a demand of the corn and brandy of the defendants about the 28th of the same month.

A. Peabody, for defendants, contended, that the real transaction between the defendants and Messrs. Damon & Co., was a purchase of the corn and brandy; and that the goods were never, in fact, deposited as a pledge or as collateral security for the debt due to the defendants. That Messrs. Damon & Co. were to be considered as the general agents, and not as limited agents of the plaintiff; and that the advance on the goods must be deemed to have been made on the plaintiff's account. That when the agent sells the goods of his principal, the buyer may deduct any debt due to him at the time of the sale, which the agent agrees to deduct; and for this he cited Scott v. Surman, Willes, 400.

Mr. Hubbard, for plaintiff, on the contrary contended, that the facts in the case conclusively established, that this was a case of a pledge, and not a sale, of the goods to the defendants. That nothing was better established, than that a factor cannot legally pledge the goods of his principal for his own debts. That Messrs. Damon & Co. were not the general agents of the plaintiff; that they were mere factors in respect to these consignments, and bound to obey the orders of their principal. That the advance on the goods was never authorized by the plaintiff, nor the sale at public auction. That the agreement to allow one per cent. per month, and two and a half per cent. commissions, was grossly illegal; and it was impossible, that the plaintiff could be bound by the illegal acts of his consignees.

STORY, Circuit Justice. It is extremely difficult to find any foundation in the facts of this cause, on which to raise an argument, that the goods were sold, and not pledged, to the defendants. The whole current of the evidence is decidedly the other way. Then, as to the law, it is quite too late to doubt the doctrine, that a factor has no authority to pledge the goods of his principal for his own debts. If he does pledge them, the principal is entitled to recover them from the person in whose hands they are pledged. Here the goods have been sold, and the proceeds received by the defendants; and, in point of law, the sale was a tortious conversion, for which the defendants are responsible in this form of action. There are other difficulties in the way of the defendants which seem almost insurmountable. Messrs. Damon & Co. were not, in any correct sense, the general agents of the plaintiff; they were merely limited agents or factors, as to these particular consignments. They had no authority from their principal to pledge the goods, or to sell them at auction, or to procure advances on them, or to enter into any illegal or usurious contract on his account. Their whole proceedings, therefore, were unauthorized; and the defendants well knew, that they were acting, not for themselves, but as factors. Certainly, under such circumstances, the defendants cannot resist the plaintiff's claim for a full indemnification for the loss he sustained by their acts.

Verdict for the plaintiff for $2,299.35.

VAN ANTWERP (GOODYEAR DENTAL VULCANITE v.). See Case No. 5,600.

Case No. 16,826.

VAN ANTWERP v. HULBURD et al.

[7 Blatchf. 426; [1] Thomp. Nat. Bankr. Cas. 208.]

Circuit Court, N. D. New York. June, 1870.

FEDERAL COURTS—EQUITY JURISDICTION—INTERFERENCE WITH GOVERNMENT OFFICERS—SUBMISSION TO JURISDICTION.

1. This court has no jurisdiction to entertain a suit in equity, brought by a private person, to interfere with or control the administration of the duties of the comptroller of the currency and of the treasurer of the United States, in respect to bonds deposited with the treasurer, to secure the redemption of the circulating notes of a national bank, under the act of June 3, 1864 (13 Stat. 99). Per Woodruff, Circuit Judge.

2. No such jurisdiction is conferred by that act. Per Woodruff, Circuit Judge.

3. The provisions of the 56th and 57th sections of that act, explained. Per Woodruff, Circuit Judge.

4. A plea to the jurisdiction of this court, alleging facts which show a want of jurisdiction, is not a submission to the jurisdiction. Per Woodruff, Circuit Judge.

[Cited in Thayer v. Wales, Case No. 13,872; Romaine v. Union Ins. Co., 28 Fed. 636; Bland v. Fleeman, 29 Fed. 672.]

In equity. The defendants in this suit were Hiland R. Hulburd, comptroller of the currency of the United States, Francis E. Spinner, treasurer of the United States, and Lewis Kingsley, receiver of the National Bank of Unadilla. The suit was brought to compel the comptroller of the currency and the treasurer to discover what disposition had been made of the bonds of the United States, to the amount of $111,200, which the National Bank of Unadilla had, prior to the 8th of June, 1867, deposited with the said treasurer for the purpose of procuring circulating notes, in pursuance of the act of congress, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864 (13 Stat. 99), and the acts amendatory thereof, and how many of such bonds had been sold, and the time and times when so sold, and where, and the amounts realized therefrom, and the disposition made of the proceeds, and how many of said bonds, if any, remained unsold, and how many of said circulating notes had been redeemed, and how many were still outstanding, and what had been done with respect to the interest accruing upon said bonds on the 1st of November, 1867, on the 1st of May, 1868, and on the 1st of November, 1868, and how much of the proceeds of the said bonds and interest still remained in the treasury of the United States, and what disposition the said defendants intended to make of any surplus bonds and the interest thereon, or the surplus proceeds thereof, after the redemption of all the circulating notes of the said bank, or adequate provision had been made therefor. The bill further sought a decree, adjudging, that neither the comptroller nor the treasurer of the United States had any further official duty or authority, in respect to the said bonds and the interest thereon, than to apply or employ them, or the proceeds thereof, to the redemption of the circulating notes of the said bank, and that they, nor either of them, had any legal right or authority to retain any surplus bonds or proceeds, after the said circulating notes were redeemed, or their redemption provided for, in the legal currency of the United States, or to do otherwise than to pay the same over to the plaintiff [John H. Van Antwerp], as the assignee of all of the interest of the said bank therein; and further adjudging, that the plaintiff, as such assignee, upon depositing in the treasury of the United States, in legal currency, a sum which, with what was now there deposited as the proceeds of bonds sold and interest collected, would be sufficient to redeem, at par, all the circulating notes of the said bank, would be entitled to receive from the said comptroller or the said treasurer all of the bonds remaining unsold, or, if all had been sold, then that he would be entitled to any surplus arising from the proceeds of sale, and interest accrued, after the redemption of all of the said circulating notes, or adequate provision had been made therefor; and, that the said comptroller, or the treasurer of the United States, might be decreed to deliver the said surplus bonds and interest to the plaintiff. No discovery was sought from the defendant Kingsley; but it was further prayed, that it might be decreed that Hulburd, as comptroller of the currency, had no legal right or authority to appoint a receiver of the said bank, or of any of its assets or property, and that the pretended appointment of the defendant Kingsley, as such receiver, was null and void. The bill also sought an injunction, restraining the defendant Hulburd, as comptroller of the currency, and the defendant Spinner, as treasurer of the United States, from disposing of any of said bonds, or the proceeds thereof, or interest thereon, remaining after the said circulating notes had been redeemed, or their redemption provided for, in any other manner than to deliver or pay the same to the plaintiff, as his property, by virtue of the assignment to him by the said bank, and restraining Kingsley, as such receiver, from receiving, or in any way interfering with, any of said bonds or the proceeds thereof.

The material facts upon which the discovery and relief were sought were, that the said bank received from the comptroller of the currency circulating notes, to the amount of $100,000; that the plaintiff loaned to the bank $60,000 of the said $111,200 of bonds of the United States, to enable the bank to receive the said amount of circulating notes; that, on or about the 8th of June, 1867, the

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

said bank, by vote of two-thirds of its capital stock, determined to go into liquidation, as a national bank, and duly notified the comptroller of the currency, of such determination, and notices thereof were, at or about that date, published, pursuant to the said act of congress, and all lawful proceedings were taken to put its affairs into liquidation; that, from that time, it ceased to exist or transact business as a national bank; that, since that time, it had done all things required by the said act to be done, to enable it to go into liguidation, as a national bank, and close its affairs, as such; that, on the 8th of June, 1867, the said bank, in consideration of the aforesaid loan, to secure the return of the bonds to the plaintiff, and to secure the redemption of its circulating notes at the New York State National Bank at Albany, (its legally appointed agency,) and in consideration of $3,000, in due form of law assigned to the plaintiff all its right, title and interest in the bonds so deposited with the defendant Spinner, as treasurer of the United States; that the plaintiff thereupon assumed the obligation to redeem all of the said circulating notes, which obligation he had, ever since, been ready to perform, upon the receipt of the said bonds, and was still ready to perform and discharge, so far as he could be permitted so to do, or as was practicable, by reason of the official action of the comptroller of the currency and of the treasurer of the United States, afterwards alleged in the bill; that notice of such assignment was given to the said Hulburd and Spinner, and the plaintiff offered to the said Hulburd to redeem all of the said circulating notes, upon receiving said bonds, or, that if the said Hulburd, as comptroller of the currency, would hand over to the plaintiff the said bonds, the plaintiff would pay over to the treasurer of the United States, or to the proper department of the government, in the legal tender notes of the United States, an amount equal to the then outstanding circuating notes of the said bank, to wit, $100,000; that the said Hulburd refused to deliver to plaintiff the said bonds on his making such deposit, or to recognize the plaintiff's right to the said bonds, in any form or under any circumstances whatever, and had continued to act in disregard and in defiance of such right; that the said circulating notes had, so far as presented, been redeemed at the said New York State National Bank, by or for the plaintiff; that, four days after the said bank had determined to go into liquidation, and on the 12th of June, 1867, it being then in process of liquidation, it was organized as a state bank, and continued to exist and do business as a state bank, until its assets and property were taken by the defendant Kingsley, claiming to have been appointed receiver of the said National Bank of Unadilla, by the defendant Hulburd, as comptroller of the currency; that, in August, 1867, the defendant Hulburd, as such comptroller, assumed to appoint the defendant Kingsley such receiver; that Kingsley accepted the appointment, and in that capacity had taken possession of all the assets and property, in any way or form, pertaining to the said bank, both as a national and state bank, and claimed, in his capacity as such receiver, an interest, adverse to the plaintiff, in the said bonds, so deposited with the treasurer of the United States, and assigned to the plaintiff; that, when the said receiver was appointed, neither the said National Bank of Unadilla, nor its agent for redemption, had refused or neglected to redeem any of its circulating notes according to law, and no act had been done or omitted which authorized the comptroller to appoint a receiver for the purpose of winding up its affairs; that Hulburd, as comptroller, and Spinner, as treasurer, had no interest in, or official duty to perform in respect to, the said bonds and interest and the proceeds thereof, except to apply so much as should be necessary to the redemption of the said circulating notes, and to deliver and pay the balance, which the plaintiff averred to be his property, to him; that the said bonds were of greater amount, at their par value, than such circulating notes, by $11,200, and interest to the amount of $3,336 in gold had accrued thereon, on the 1st of November, 1867, and other interest had accrued thereon May 1st, 1868, and November 1st, 1868, and they had, during all the times aforesaid, a market value of eight per cent. above their par value; that the plaintiff, on the 8th of August, 1867, offered to the said Spinner the taxes payable on the said circulating notes, conditioned upon the delivery of the bonds to the plaintiff, on his depositing legal tender notes, equal in amount to the said circulating notes then outstanding, and that he was still willing and thereby offered to pay such taxes on that condition; that, after notice of the plaintiff's rights, and after the offer to pay into the treasury of the United States $100,000 in legal tender notes, for the redemption of such circulating notes, the said Hulburd, as comptroller of the currency, gave public notice that he would redeem such circulating notes at the treasury department in the city of Washington, and had sold, at various times, the bonds aforesaid, to the amount of from $70,000 to $80,000, at a premium of about six per cent., and the proceeds had been paid into the treasury of the United States, subject to his direction and control, for the redemption of such circulating notes, and some of such notes had been redeemed; that the said Hulburd, as comptroller of the currency, refused to recognize the rights of the plaintiff, and intended to retain the remaining bonds, or sell them, and, after the redemption of all the said circulating notes, pay any surplus to the general creditors of the said National Bank of Unadilla, or to the defendant Kingsley, as the pretended receiver thereof; that,

in September, 1868, the plaintiff again offered to redeem the said circulating notes, in pursuance of his agreement to do so, but the said Hulburd declined to recognize the plaintiff's rights or obligations, and intended himself to redeem such notes with the said bonds or their proceeds, and to dispose of the surplus (over $20,000) in defiance and disregard of the rights of the plaintiff. The comptroller of the currency and the treasurer of the United States interposed a plea to the jurisdiction of the court over them, or either of them, averring that they were, at the time of the service of the writ of subpœna in the suit, inhabitants of the city of Washington, in the District of Columbia, and not within the jurisdiction of this court, and that such writ of subpœna was served upon them at such city of Washington.

John H. Reynolds, for plaintiff.

William Dorsheimer, Dist. Atty., and Edwin W. Stoughton, for defendants.

Before WOODRUFF, Circuit Judge, and HALL, District Judge.

WOODRUFF, Circuit Judge. The discovery and relief sought by the bill of complaint include an inquiry into, and a direct interference with, the administration of the duties of the comptroller of the currency, and of the treasurer of the United States, in respect of bonds deposited with such treasurer, under the act of June 3d, 1864, to provide a national currency (13 Stat. 99), to secure the redemption of the circulating notes of a national bank. The bill assumes that this court has jurisdiction and authority to call those officers of the government to account for their official acts; to require them to state what, in their official capacity, they intend further to do; to restrain them by injunction from doing what is unjust or inequitable towards the plaintiff; and, by decree, to compel them to exercise their functions, in respect to such bonds, according to the law, as interpreted by the court, and to render justice and equity to the plaintiff.

The action is not brought against them as individuals, to restrain or redress a wrong, which, as private persons, they are doing or threaten to do, to the private rights of the plaintiff; and, if it were, their residence at Washington would forbid any attempt to give this court jurisdiction, by the service of process of subpœna, unless they should be found and served within this district. The act of congress relating to both the circuit and district courts is quite explicit, that no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. Act Sept. 24, 1789, § 11 (1 Stat. 78, 79).

It is not claimed that this court has, by virtue of the statutes creating the court, any jurisdiction of the officers of the executive departments at Washington, to review or control their official acts, or to prescribe rules for the administration of their offices, on allegations that, in such administration, they have violated, or are about to violate, the private rights of an individual, even though such public officers should be found in this district and be here served with process. I say nothing of private wrongs, committed without color of official authority, or even with such color, if outside of the jurisdiction of such officers; but it would be a most extraordinary claim, that the secretary of state of the United States, or the treasurer of the United States, is liable to be sued in any district or districts of the United States where he may at any time, or from time to time, be found, by any individual who conceives himself aggrieved by his official acts, or who alleges a title to be paid moneys which have been paid into the treasury of the United States, or to receive other property held by the last-named officer, as such treasurer. The power of the circuit court in the District of Columbia, and, incidentally, the question whether the circuit courts of the United States, severally, had power to issue writs of mandamus to compel an officer of the United States to perform a ministerial act, were fully discussed in Kendall v. U. S., 12 Pet. [37 U. S.] 524, and the cases there cited affirm, that even that power has not been conferred on the circuit courts within the states. See Marbury v. Madison, 1 Cranch [5 U. S.] 127; McIntire v. Wood, 7 Cranch [11 U. S.] 504; M'Clung v. Silliman, 6 Wheat. [19 U. S.] 598; Reeside v. Walker, 11 How. [52 U. S.] 272; U. S. v. Guthrie, 17 How. [58 U. S.] 284; U. S. v. Commissioner, 5 Wall. [72 U. S.] 563.

The present suit proceeds in this court as a court of equity, against the defendant Hulburd, as comptroller of the currency, and against the defendant Spinner, as treasurer of the United States. It arraigns their acts in that capacity, and seeks to control their official acts in the future. It being conceded that they are inhabitants of the city of Washington, and the statute plainly forbidding that a civil suit should be brought against them in this district by the service upon them in Washington of a subpœna to answer, the jurisdiction of this court over them is claimed to be conferred, and, as an incident, the right to summon them to appear here, by the special provisions of the act to provide a national currency, before referred to, and the acts amending the same.

Deferring, for the present, the inquiry whether the proper mode of raising the question is by the plea which has been interposed on behalf of the comptroller of the currency and the treasurer, I deem it proper to examine, first, the claim that the act, called, for convenience, the national currency act, confers the power and jurisdiction contended for.

The sections of the act which are relied upon as conferring jurisdiction are the fifty-sixth and fifty-seventh.

The fifty-sixth section provides, that all suits and proceedings arising out of the provisions of the act, in which the United States, or its officers or agents, shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury. Obviously, this section neither expressly, nor by implication, affects the jurisdiction of any court. It assumes, it is true, that suits may be brought and proceedings instituted which have their foundation in the provisions of the act, and that the United States, or its officers or agents, may be parties to such suits, and declares, and only declares, that such suits and proceedings shall be conducted by the district attorney. If this section is not solely applicable to actions and proceedings instituted by or in the name of the United States, or its officers or agents, and may, by a liberal construction, be held to impose upon the district attorney the duty of conducting the defence of suits and proceedings to which third parties may see fit to make the United States, or its officers or agents, parties defendant, still, this language cannot be held to authorize the institution of such suits, or to give jurisdiction to a court not having, independently of this section, authority to entertain them. The most obvious meaning, intent and effect of this section are, to impose upon the district attorneys the duty of conducting suits and proceedings which may be necessary to carry into full effect the provisions of the act, whether such suits are brought in the name of the United States or of the comptroller of the currency, or in the name of, or by, the receiver of a banking association, and in whatever court such suits may be prosecuted. In general, the language employed, that such suits and proceedings "shall be conducted," imports prosecution, either civil or criminal, and not defence; and, in the other provisions of the act, there are numerous cases contemplated, to which such use of the language applies. But, as already, in substance, said, this section, whether it is confined to the prosecution, or includes also the defence, in nowise purports to indicate when, where, or for what purpose such suits or proceedings may be instituted, or to give them any legality or efficiency. Such legality and efficiency must be determined by other provisions of law. This section can no more be said to enlarge the jurisdiction of the circuit court of the United States, either as to person or subject matter, than it can to confer upon a state court a jurisdiction not possessed before the enactment.

How far is the plaintiff's position aided by the fifty-seventh section? That section enacts, that suits, actions, and proceedings against any association under the act, may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. It is not, and plainly it cannot be, claimed, that this affirmative enactment has any application to a suit against the comptroller of the currency or the treasurer of the United States. Its terms are explicit, and the only suits, actions, or proceedings mentioned, are those against an association.

But there is a proviso to the fifty-seventh section, which, it is claimed, warrants the present suit. That proviso is in these terms: "Provided, however, that all proceedings to enjoin the comptroller under this act, shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located." It is argued that, because the present suit is brought to obtain an injunction, and appertains to the alleged rights of the plaintiff to bonds deposited in pursuance of the act, therefore, this proviso declares that this suit shall be brought in this or some other federal court, and, by necessary implication, gives this court jurisdiction to summon the comptroller, if not also the treasurer of the United States, to appear therein and answer. This is a violent construction, I think, to the language of a proviso which is in the form of limitation, not of affirmative authorization, and has, I think, no such meaning.

What are the proceedings which may be had to enjoin the comptroller "under this act?" No section provides for or refers to such a suit as the present. The eighth section declares, that the association itself shall have power to sue and may be sued, complain and defend in any court of law and equity, as fully as natural persons. Under this section, if the association should prosecute a suit of any nature against any defendants whomsoever in any court, all the conditions of jurisdiction over the person of the defendant, and of the subject matter, must be satisfied. The forty-sixth section relieves the association from the consequences of a refusal to redeem circulating notes, and of the protest of such notes, when the payment of such notes has been restrained by order of a "court of competent jurisdiction." This, of course, declares nothing in respect to the nature or extent of the jurisdiction of any court. So, of that part of section fifty which makes the adjudication of a court of competent jurisdiction competent proof of claims against an association; and, also, of section fifty-eight, which authorizes the recovery by the association of the penalty for mutilating its bills; and, also, of the sections which declare counterfeiting the bills, or engraving plates for forging, a felony, or punishable by fine or imprisonment. Section fifty-three gives the circuit, district and territorial courts of the United States jurisdiction of a suit brought by the comptroller of the currency to obtain a

judgment declaring a forfeiture of the franchises, &c., of an association, for a violation of the provisions of the act.

Section fifty, however, provides a case in which the comptroller of the currency may be enjoined, and prescribes the mode in which he may be called upon to show cause why he should not be enjoined. By that section, the comptroller, on becoming satisfied that any association has refused to pay its circulating notes, and is in default, is authorized to appoint a receiver to take possession of the books, records and property of the association, collect the debts, &c., of the association, and sell its real and personal estate, and pay over all money made or realized, to the treasurer of the United States, subject to the order of the comptroller of the currency. But the proviso to the section declares, that, if such association shall deny its default, it may apply to the nearest circuit, district, or territorial court of the United States, to enjoin further proceedings, and that such court, after citing the comptroller of the currency to show cause why further proceedings should not be enjoined, and after a decision or finding that such association is not in such default, shall make an order enjoining such comptroller, and any receiver he may have appointed. This proviso contemplates a proceeding (not necessarily a formal suit or action, but a proceeding summary in form) instituted by the association, to continue its own existence, preserve its property, and avoid an ex parte receivership, ordered by the comptroller to have effect and operate upon the association and its property in the very place where it is located. Such receiver might be appointed upon erroneous information or mistaken evidence, and considerations of convenience required that the association should have speedy and convenient means within its own district, and where the proofs must necessarily be, of rectifying a mistake and disproving the allegations upon which such ex parte action of the comptroller had proceeded. The proviso to the 57th section had one further object, which, I have no doubt, was its chief purpose, namely, to exclude any possible attempt to procure an injunction in any state court, to restrain the comptroller in the discharge of his duty to appoint a receiver to close up the affairs of a bank that had become insolvent or failed to comply with the provisions of the act. It was intended that, in that matter, state courts should have no jurisdiction.

I find no other circumstances in which proceedings to enjoin the comptroller under the act, are authorized by it. It is unnecessary, for the purposes of this case, to say, and I do not say, that no case can arise in any court in which, under the general principles of law and equity, the legality and effect of the acts of the comptroller of the currency, or of the treasurer of the United States, may not be subjected to adjudication, nor that no case can exist in any court in which an injunction to stay the action of either of them may be obtained. What I mean to say is, that such a case is not provided for in the act in question, save as above stated and commented upon; and the court must seek its jurisdictional power over the subject matter, and over the persons of the defendants, in some source other than the act referred to.

The conclusion necessarily follows, that the plaintiff is not, by the act of congress relied upon, warranted in prosecuting an action in this court, as assignee of the bonds deposited with the treasurer of the United States pursuant to the provisions of that act, to call such treasurer and the comptroller of the currency to an account for their acts in their official character in relation thereto, and that this court has no jurisdiction to summon them, by writ of subpœna, to answer to the present bill of complaint.

It is, however, insisted, that the comptroller and treasurer have, by their plea, submitted to the jurisdiction, and that their plea to the jurisdiction should, therefore, be overruled. If the only ground of objection to the jurisdiction of the court were the service of the subpœna out of the district, the consideration of the plaintiff's claim in this respect would be material. It is a familiar rule, often recognized in the federal courts, that a party may waive his privilege, if he be relieved from liability to be sued in a particular court, and he may even waive the service of any process; and, by pleading or answering to the merits, he does submit to the jurisdiction. This, however, assumes that the court has jurisdiction of the controversy between the parties. But it is equally clear, that exemption from liability to be sued in a particular court, and the objection that the process of the court is served out of the jurisdiction, are the proper subjects of a plea in abatement. I think the court might, in the present case, have granted a motion to set aside the proceeding as to the comptroller and treasurer on that sole ground; but the defendants were not bound to abide the result of a mere motion. It was a matter which could be made to appear of record, and in a form which would make it subject to review. Such pleas at law and in equity are warranted on common law grounds, and in courts of general jurisdiction, as in England; and the treatises and dicta cited to us do not deny this, but establish the contrary. Much more clearly is this true in a court whose jurisdiction is derived from statutes, in which the jurisdiction of the subject matter and of persons, and the limitation of the modes of acquiring jurisdiction, are prescribed, and in terms prohibitory of any other. This will appear well recognized in decisions in the federal courts, some of which will be presently referred to.

I am, therefore, clear, that, independently of the broader question which I have above discussed, if this case is to be disposed of on the plea that the process herein was served

in the District of Columbia, and not in this jurisdiction, and upon defendants who were then inhabitants of that District, and not within this jurisdiction, the matter of the plea is sufficient to defeat the action. A party is not, by merely pleading to the jurisdiction, and alleging the facts which, if true, show want of jurisdiction, to be deemed to submit to the jurisdiction or waive its defect. So simple a proposition needs no authority. Every case, which countenances such a plea, affirms it. In Halsey v. Hurd [Case No. 5,966], it was held, that a plea in abatement for want of service of process was not a waiver of process; and that the plea might be abandoned, and a motion to quash the writ for defective service of process might be substituted.

If there be any embarrassment to a decision based solely upon the plea in this case, it arises not from the matter of the plea, or the fact that the objection is raised by plea, but from the form of the plea, or the manner in which the plea is interposed. The elementary rule on that subject found in text writers, enforced by the courts in England, and countenanced, to some extent, at least, in the practice of the federal courts, is, that pleas which are in abatement, and grounded upon personal privilege, or relief from liability to be sued in a particular court, must be put in in propria persona, and the appointment of an attorney, solicitor or agent, by whom the plea is put in, is, per se, an appearance, an admission that the court has jurisdiction, and a submission thereto. See Teese v. Phelps [Case No. 13,819]; Teasdale v. The Rambler [Id. 13,815]; plea in Dred Scott v. Sandford, 19 How. [60 U. S.] 393. The rule is, in a high degree, technical, and it is not necessary, in the view that I have taken of the whole case, to affirm or enforce it here.

It was stated on the argument, that the present plea was at the instance of the court, made a substitute for a motion to quash the proceeding or set aside the service of process on these defendants, in order that the matter might appear of record. My learned associate, before whom the motion was made, confirms this, and counsel insisted, on the argument, that they ought, if purely technical objections arise, to be at liberty to withdraw the plea and proceed upon their motion, without being prejudiced by having pleaded; and my associate, who is familiar with what occurred in regard to the motion, thinks that should be permitted. Upon what precise reason does not appear, but the defendant in Halsey v. Hurd, above cited, was permitted to abandon his plea and move to quash the writ for defective service. If, therefore, I were of opinion that the plea put in by the solicitor was, in its present form, to be deemed a submission to the jurisdiction, I should acquiesce in the views expressed by my associate on the argument. But, entertaining the opinion which I do, that we have no jurisdiction between these parties to grant the relief sought, I deem it unnecessary to pursue the inquiry last above referred to any further. If I am right in my views, we cannot pronounce judgment between these parties upon the facts alleged in this bill of complaint; and, therefore, whether the particular plea before us is formal or informal whether the matter were before us on motion or otherwise, it is our duty to dismiss the bill as to these defendants.

The general principle, that waiver of the objection by the parties does not give jurisdiction of the cause or matter in controversy between them, would, probably, not be denied. But it has been acted upon so often in the federal courts, and in cases in which the subject of a plea to the jurisdiction in equity, as well as at law, is adverted to, that some may be profitably cited. In Capron v. Van Noorden, 2 Cranch [6 U. S.] 126, it was held, that, on writ of error, a plaintiff might assign for error the want of jurisdiction in the court in which he himself brought the suit, and so take advantage of his own error in not showing his title to sue in that court. In Jackson v. Ashton, 8 Pet. [33 U. S.] 148, in equity, the court directed the dismissal of the bill because it did not affirmatively appear that the circuit court had jurisdiction, though it did not appear negatively that it had not. This was done by the court of its own motion. The counsel were anxious to have the case heard and decided on the merits, but Chief Justice Marshall stated the opinion of the court to be that the bill must be dismissed. In Rhode Island v. Massachusetts, 12 Pet. [37 U. S.] 657, also in equity, the distinction above adverted to between cases in which a party may and must plead to the jurisdiction, is stated. It is there said: "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them. * * * An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which the defendant is brought into it, is waived by appearance and pleading to issue; but, when the objection goes to the powers of the court over the parties, or the subject matter, the defendant need not, for he cannot, give the plaintiff a better writ or bill." It is also there said, that the supreme court is one of limited powers and must be confined to cases and parties over which the constitution and laws have authorized it to act, and that any proceeding without the limits prescribed is coram non judice, and its action is a nullity; and, in that case, the distinction between the courts of England and the federal courts, in particulars important to this subject, is pointed out. See, also, Toland v. Sprague, 12 Pet. [37 U. S.] 300; Voorhees v. Bank of United States, 10 Pet. [35 U. S.] 449, 473, 474. In Smith v. Kernochen, 7 How. [48 U. S.] 198, the right and

duty to plead in abatement a personal privilege or want of jurisdiction of the person, is held. The power and duty of the court to recognize their want of jurisdiction, is concisely stated in Tyler v. Hand, 7 How. [48 U. S.] 573, citing Dockminique v. Davenant, 1 Salk. 220. If the matter or ground of objection to the jurisdiction be extrinsic, the defendant must plead it; if intrinsic, the court will act upon it on motion or notice it of themselves. In Cutler v. Rae, 7 How. [48 U. S.] 729, a libel in admiralty was prosecuted in the district court of Massachusetts, the proofs were taken, a hearing was had and a decree was rendered for the libellants, which was affirmed in the circuit court. Chief Justice Taney, in the supreme court, discusses the question of the jurisdiction of the district court. He says: "It is true the counsel for the appellant has waived all objection on that score;" but, "if the proceedings show a case which the district court was not authorized to try, it is the duty of this court to take notice of the want of jurisdiction, without waiting for an objection from either party;" and the decree was reversed on that distinct ground. In the case of Dred Scott v. Sandford, 19 How. [60 U. S.] 393, this subject is discussed by nearly all of the judges. There, a plea in abatement had been decided in favor of the plaintiff below, and it was insisted that he could not allege error in that decision. But it was held that the court could give no judgment for the plaintiff or for the defendant in a case in which it had not jurisdiction, no matter whether there were a plea in abatement or not. See pages 402, 456, 458, 472 to 474, and numerous cases cited. Judge Curtis (page 567) says: "The course of the court is, where no motion is made by either party, on its own motion to reverse such a judgment for want of jurisdiction, not only in cases where it is shown, negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even where it does not appear affirmatively that it does exist. It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted." See Piquignot v. Pennsylvania R. Co., 16 How. [57 U. S.] 104. For the same principles, see, also, Striker v. Mott, 6 Wend. 465; Henry v. Cuyler, 17 Johns. 469, 471; Davis v. Packard, 6 Wend. 327; Jordan v. Dennis, 7 Metc. (Mass.) 590, in state courts.

If, therefore, I am right in my opinion that this court has no jurisdiction to hear and determine, between this plaintiff and the comptroller of the currency and the treasurer of the United States, the matters alleged in the bill of complaint, we can and must so hold, whether the particular plea put in by the defendants is good or not. The bill, as to those defendants, should be dismissed.

[For further proceedings, see Case No. 16,827.]

Case No. 16,827.

VAN ANTWERP v. HULBURD et al.

[8 Blatchf. 282; [1] 1 Thomp. Nat. Bank Cas. 219.]

Circuit Court, N. D. New York. March 21, 1871.

FEDERAL COURTS—EQUITY JURISDICTION—NATIONAL BANKS—BONDS FOR REDEMPTION OF CIRCULATION — ASSIGNMENT — PARTIES — CITIZENSHIP.

1. V., a citizen of New York, claimed title, by assignment from a national bank, to the United States bonds deposited by it with the treasurer of the United States as security for the redemption of its circulating notes, under the general banking act of June 3, 1864 (13 Stat. 99), and the acts amendatory thereof. He filed a bill in this court, setting forth that the treasurer of the United States and the comptroller of the currency refused to recognize his rights to the bonds, or their proceeds, and that the said comptroller had appointed one K., a citizen of New York, receiver of the bank, and intended to sell the bonds and pay the surplus of their proceeds, after redeeming the circulating notes of the bank, to the general creditors of the bank, or to K., as such receiver, and that K. claimed, as such receiver, an interest adverse to the plaintiff, in such bonds. The bill made the treasurer, and the comptroller, and K., defendants, and prayed for a decree establishing the plaintiff's title, and requiring the treasurer and the comptroller to deliver to the plaintiff the surplus of the bonds, after redeeming the circulating notes of the bank, and decreeing the appointment of K. as receiver to be null and void. K. interposed a general demurrer to the bill, for want of equity: *Held*, that the demurrer must be allowed.

2. (Per Woodruff, J.): The plaintiff could not question the validity of the appointment of K. in respect to other property than the bonds.

3. As the court could not grant the relief asked in respect to the treasurer and the comptroller, it could not, on the facts in the bill, grant the relief asked as against K.

4. The proceeds of the bonds could not, under the act, ever come into the possession of K., and, therefore, K. had no concern in the subject matter of the suit.

5. The averment in the bill, that the complainant was informed and believed, that K., as receiver, claimed an interest adverse to the plaintiff, in the bonds, was not sufficient to sustain the bill, as against the demurrer.

6. (Per Hall, J.): The residuary interest of the bank in the bonds was a part of the assets of the bank, to which K., as receiver, was, under the act, entitled, if the plaintiff had no title to such residuary interest, and therefore the bill showed a question of property between the plaintiff and K., as receiver, in respect to such residuary interest.

7. The demurrer should be overruled, if the court had jurisdiction of the suit, as between the plaintiff and K.

8. As the plaintiff and K. were alleged to be citizens of the same state, this court had no jurisdiction of the suit.

In equity.

John H. Reynolds, for plaintiff.

Edwin W. Stoughton and William Dorsheimer, Dist. Atty., for defendant Kingsley.

Before WOODRUFF, Circuit Judge, and HALL, District Judge.

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

WOODRUFF, Circuit Judge. The object of the present suit is to establish the title of the complainant [John H. Van Antwerp] to the United States bonds which were deposited with the treasurer of the United States by the National Unadilla Bank, under the act of congress entitled "An act to provide a national currency, secured by a pledge of United States bonds," &c., approved June 3d, 1864, (13 Stat. 99,) and the acts amendatory thereof, for the purpose of securing circulating notes. The complainant alleges, that the bank determined to go into liquidation and close its affairs as a national bank, and, upon considerations stated, assigned to him all the right, title, and interest of the bank in or to such bonds, and that he agreed to redeem the circulating notes; that the comptroller of the currency and the treasurer of the United States refuse to recognise his rights, have sold some of the bonds, have given notice of the redemption of such circulating notes, and have redeemed a portion thereof; that, although the complainant has offered to deposit legal tender notes to the amount of such circulating notes, provided the bonds are returned to him, the officers mentioned refuse to deliver the bonds, or the proceeds thereof, to him; that, shortly after such assignment to the complainant, the comptroller of the currency, acting under the said act of congress, but without any legal ground therefor, the said bank not having done or omitted any act which warranted the same, assumed to appoint the defendant [Lewis] Kingsley receiver, and he accepted such appointment, and has taken possession of the assets and property of the bank; that the comptroller of the currency has wrongfully sold some of the bonds, and the proceeds have been paid into the treasury of the United States, and he, in defiance of the complainant's rights, threatens to dispose of the residue, and, as the complainant is informed and believes, intends to retain the proceeds, and, after the redemption of all the circulating notes, to pay any surplus thence arising to the general creditors of the National Unadilla Bank, or to the said Kingsley, as the pretended receiver thereof; and that, as the complainant is informed and believes, the said Kingsley claims, in his capacity of receiver, an interest adverse to the complainant in the bonds so deposited with the treasurer for the redemption of the said circulating notes, and afterwards assigned to the complainant. The bill, upon these facts and others, which it is unnecessary here to recite, bearing upon the administration of the defendants [Hiland R.] Hulburd and [Francis E.] Spinner in respect to the bonds, calls upon the latter to account for their administration, and to disclose what they have done, and what they intend to do, and asks a decree establishing the complainant's title, and that, after the redemption of the said circulating notes, or adequate provision made therefor, the officers last named be decreed to deliver the surplus of the bonds, and interest accrued or accruing thereon, to the complainant; and that it be decreed that the pretended appointment of Kingsley is null and void, with a prayer, also, for an injunction. To the bill of complaint the defendant Kingsley demurs generally, for that the complainant is not entitled to the relief prayed by the bill against the defendant.

The complainant shows no interest in the National Unadilla Bank, or its property or assets, of any description, except such title and interest in the bonds which that bank deposited with the treasurer of the United States, to procure circulating notes, as he alleges he acquired by the assignment of those bonds to him by the bank. In so far as the receivership of the defendant Kingsley extends to any other property than those bonds, the complainant has no right to assail the appointment of such receiver as illegal or irregular. Whether the appointment is valid or void does not concern him. The sole object of the action is to assert the rights acquired by the assignment of those bonds to the complainant, and control the administration thereof. If, therefore, it appears, upon the bill of complaint, that this court has no jurisdiction of the officers of the government in whose possession and control the bonds, or the proceeds thereof, now are, and cannot, as to them, grant the relief which the complainant seeks, there would seem no ground for sustaining the suit as against the demurrant, unless he has done, or is about to do, some act which prevents or hinders the prosecution of the complainant's title before the government officers, or which prevents a recognition of those rights by them.

Upon a consideration of the subject growing out of the argument upon the bill of complaint and the plea interposed by the comptroller of the currency and the treasurer of the United States, I have discussed the question at some length, Van Antwerp v. Hulburd [Case No. 16,826], and have come to the conclusion, that this court, in this action, and upon the admitted facts, has no jurisdiction as against those officers, to grant the relief sought, and that, as to them, the bill must be dismissed. So far as the views there expressed are material to the right of the complainant to maintain the action at all, it is sufficient to refer to the opinion. But, in my judgment, the making of the defendant Kingsley a party to the suit was erroneous, upon grounds independent of the question there considered.

The defendant Kingsley has no custody, possession, or control of the bonds in question, and, under no administration thereof, under the act of congress, can they, or any proceeds thereof, ever come to his possession, custody, or control. He has no title nor interest in the bonds, or their proceeds, legal, equitable, or official, nor has he any duty to perform in respect thereto. His authority and his duty are founded upon section 50 of the act, which, with sections 31 and 34, declares the case in which the comptroller of the currency may appoint a receiver. The character, powers, and

duties pertaining to such receivership are distinctly defined in section 50. He shall, under the direction of the comptroller, "take possession of the books, records, and assets, of every description, of such association, collect all debts, dues, and claims belonging to such association, and, upon the order of a court of record, of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, sell all the real and personal property of such association, on such terms as the court shall direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the twelfth section of this act; and such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller of the currency, and also make report to the comptroller of the currency of all his acts and proceedings." This is the beginning, scope, and end of his duty and functions. It is the comptroller who is to advertise for claims against the bank, and divide the money, (after redeeming the circulating notes,) to and among the creditors of the bank. Whatever power to sue may be implied as necessary to the performance of the duties of the receiver, and even if such receivership be held to involve the vesting in him, pro hac vice, the legal title to the property and the debts, dues, and claims which he is to collect or sell and convert into money, the receivership is limited, by the object of its creation, and the duties which it involves. For the full accomplishment of the object, and the due discharge of those duties, it may be conceded he has all necessary title, authority, and power. But he cannot touch one of the bonds deposited with the treasurer, or a dollar of the proceeds thereof. They are committed to a different and a higher administration. All that he collects he is to pay to the treasurer. The bonds, and all proceeds thereof, are already there. Practically, the receiver is the mere agent of the comptroller, to bring the residue of the assets into the United States treasury. True, the language of the section is, that he shall take possession of the books, records, and assets, of every description, of such association. But this was not intended to displace the custody of the bonds held by the treasurer, or the authority of the comptroller of the currency over such bonds. The administration of such bonds, and the mode and manner of their appropriation to the purposes for which they are held, are fully prescribed in other sections of the act, and these are to be had in view in the construction of the language last cited. The bonds, and the interest accrued thereon, and the proceeds thereof, are already, by the other express enactments, in the hands of the treasurer; and it is absurd to say, that the title thereto, or some interest therein, was vested in the receiver, for the purpose of paying them over to the treasurer. The bonds, if sold, are to be sold by the comptroller of the currency. The receiver has no office or duty to perform in respect thereto, and has no administration of the proceeds, when the comptroller has made the sale and paid them over to the treasurer. In short, the receiver has no concern in the subject matter of this suit. He has no power to do anything, and it is not alleged that he has done, or has attempted to do, anything, which impairs, in any manner, the alleged rights of the complainants, or hinders or prevents his obtaining the recognition of his rights, or any redress to which he is entitled, if those rights are not respected.

But, the complainant has inserted in his bill the statement, that he is informed and believes, that the demurrant claims, in his capacity as such receiver, an interest, adverse to him, in the bonds so deposited with the treasurer; and, inasmuch as a demurrer admits the facts stated, it is claimed that the fact and the admission thereof are sufficient ground for making the receiver a party defendant, and for requiring him to answer the bill. I am, of course, aware, that it is the common practice in the state of New York, in actions for the foreclosure of mortgages, and, perhaps, some others, to assign as a reason for making some defendants parties, that they claim some interest, as mortgagees, judgment creditors, or otherwise, in the premises. But this is a part of a plan devised to save the expense of setting out their interest in detail, and is accompanied by provisions for giving them notice that no formal claim is made against them, and, on the one hand, relieving them from the necessity of answering, when, in fact, no interest adverse to the complainant exists, and from liability for costs; and, on the other, saving the plaintiff from the effect of a disclaimer. This practice has no bearing upon the present question.

It is not true, when the bill of complaint shows affirmatively, on its face, that the defendant has no interest in the matter, has neither a legal nor an equitable interest in the subject of the controversy, has no apparent documentary or other means of asserting a title or interest, not even color for a claim, when he has nothing which can be affected by the decision the court is required to make touching the rights of the complainant, or, in short where, upon the facts stated, it is clear that he stands wholly indifferent and unaffected, that the complainant may make him a party, and compel him to answer, by merely stating that he is informed and believes that he claims an interest. This is not enough to set the power of a court of equity in motion. This does not show that a resort to a court of equity is necessary to protect the complainant against such claim, or that he is in any danger by reason thereof. In the present case, it not only is not shown that such claim is not an idle, harmless pretence, but the bill states a case in which the court is bound to say, as matter of law, it is utterly groundless, if not frivolous, and the complainant states no fact which warrants an appeal

to a court of equity to protect him. It is not suggested, in the bill, that this alleged claim is used, or has been used, in any manner, to the complainant's prejudice, or that it is, in any way, an obstacle to his obtaining possession of his bonds, or their proceeds, from the officers of the government. No facts are stated bringing this alleged claim within any analogy to suits to settle doubtful or conflicting claims, or to remove a cloud upon title, or to suits quia timet. A bill of interpleader resting upon such a naked allegation would not be entertained for a moment. The case, in this respect, stands upon the assumption, that a complainant may bring into his controversy with one who holds and claims to hold the subject matter in dispute, any defendant of whom he can say, that he is informed and believes, that such defendant claims an interest therein, and this, although, as matter of law, in the case made, no such interest, legal or equitable, exists, and no fact is stated showing that such person is doing anything whatever in hostility to, or to the prejudice of, the complainant's right. When to this is added, that, upon grounds more fully stated in reference to the other defendants who have pleaded to the bill, we have no jurisdiction to grant any relief to the complainant, against the only defendants who are shown to have any possession or control over the subject of the controversy, the conclusion is inevitable, that the demurrer of this defendant must be sustained.

HALL, District Judge The bill in this case sets forth the organization of the National Unadilla Bank, under the general banking act of the United States; the subsequent deposit by the bank, with the treasurer of the United States, of $111,200, in United States registered bonds, as security for circulating notes to be issued under the authority of that act; the receipt by the bank, from the comptroller of the currency, of $100,000, in circulating notes; and that such bonds were held exclusively for the redemption of such circulating notes. It also states, that, afterwards, and on the 8th of June, 1867, the said bank, by a vote of its directors and shareholders owning at least two-thirds of its capital stock, determined to go into liquidation as a national bank, and notified the comptroller of the currency thereof; that all lawful proceedings were had and taken in due form to put all its affairs in liquidation; that, on the last mentioned day, the bank assigned to the complainant all its interest in the bonds so deposited; that the complainant agreed to redeem all such circulating notes, and has always been ready to do so; that the treasurer of the United States and the comptroller of the currency were immediately notified of such assignment and its conditions; that the complainant offered to deposit with the proper officer $100,000 of the legal tender-notes of the United States, to secure such circulating notes, on receiving the bonds so deposited, and such offer was refused; that, afterwards, and in August, 1867, the defendant Hulburd, the comptroller of the currency, without any legal right or authority whatever, (the non-existence of any fact or condition of things upon which such legal right or authority could be based being expressly alleged by the bill,) assumed to appoint the defendant Kingsley as a receiver of the assets of said National Unadilla Bank; that the comptroller of the currency has wrongfully sold some of the said bonds, and has paid the proceeds into the treasury of the United States, and intends to sell the remaining bonds and retain all the proceeds thereof, and, after the redemption of the circulating notes of the bank, to pay any surplus thence arising to the general creditors of the bank, or to the defendant Kingsley, as the pretended receiver thereof; that Kingsley thereafter took possession of all the assets of the bank, as such receiver; and that the complainant is informed and believes that the said Kingsley, in his capacity as such receiver, claims an interest in said bonds so deposited, adverse to the complainant. It is expressly averred, that the National Unadilla Bank had ceased to exist, as a national bank, and had not failed to redeem its notes, and had committed no act authorizing the comptroller of the currency to appoint a receiver, and that he and the treasurer had no official duty to perform in respect to such securities, except to hold them as security for the redemption of the circulating notes of such national bank, or dispose of them for the payment and redemption of such notes in the manner provided for in said general banking act, and that such securities had a market value of about eight per cent. over their par value. To this bill the defendant Kingsley demurred, and alleged that the bill shows that the plaintiff is not entitled to the relief prayed.

The bill contains sundry other allegations, but it is unnecessary to state its allegations more fully, as the ground upon which the validity of the demurrer was based is well set forth in the opinion of my learned brother, (to whose conclusion in this respect I am unable to assent,) in the statements, that the defendant Kingsley has no custody, possession, or control of the bonds in question, and that, under no administration thereof, under the act of congress, can they, or any proceeds thereof, ever come to his possession, custody, or control; and that he has no title or interest in the bonds, or their proceeds, legal, equitable or official, or any duty to perform in respect thereto.

In one sense, and upon the allegations of the plaintiff's bill, it is certainly true, that the defendant Kingsley has no interest in the bonds deposited by the bank; but its truth, in that sense, furnishes no ground for the demurrer. It is true, because, upon the allegations of the bill, the plaintiff's right to the bonds, or their proceeds, after the payment

of the $100,000, of the circulating notes of the bank, is perfect, and necessarily excludes all right of any representative of the bank; but it is not in that sense that the statements of my learned brother are intended to be understood. It is quite certain, from other portions of his opinion, that he bases such statements upon the conclusion, that the defendant Kingsley would have had no right to the possession, custody, or control of such bonds, or any portion of their proceeds, after the full redemption of all the circulating notes of the bank, even if there had been no assignment of the interest of the bank in the bonds so deposited. It is true, that there is some language in his opinion which might indicate that this was not the sole ground upon which the statements referred to are based; but such language must be considered in connection with the general law of pleading, and it is not likely that it was intended to be based upon the fact, that the bill showed, that the defendant Kingsley had no interest in the subject-matter of the suit, inasmuch as it showed that the plaintiff's title to the residue of the bonds, or their proceeds, after the circulating notes of the bank were redeemed, was perfect and unquestionable, as against the bank and its representative. On that ground, many, if not most, bills, would be demurrable; for, it is, ordinarily, the very object and purpose of a bill in equity, to show that the defendant against whom relief is sought has no paramount or other right to the subject of the controversy, and that the plaintiff's right to relief is unquestionable. Surely, this is no ground for a demurrer to a bill which shows an interest in the defendant if the plaintiff's claims are not sustained, and also shows, by direct and express averment, that such defendant claims a right adverse to that asserted by the plaintiff.

In this view of the case, it is proper to consider the provisions of the general banking act under which such securities were deposited, and also the provisions of the same act under which the comptroller of the currency assumed to appoint the defendant Kingsley as such receiver.

These bonds were deposited by the bank with the treasurer of the United States, under the 16th, 26th, and other sections of the general banking act of June 3, 1864 (13 Stat. 99); and, under the 26th section, they were to be held exclusively for the purpose of securing the circulating notes of the bank. By the 16th section, the bank is authorized to return its circulating notes to the comptroller and take up the securities deposited therefor, in the proportions and to the extent described; and, by the 26th section, the bank is entitled to a power of attorney to receive and appropriate to its own use the interest on these securities, until it shall have failed to redeem its circulating notes. These and other provisions of the act show conclusively that the bank, before its assignment to the plaintiff, had the equitable, if not the legal, interest, in these securities, subject only to the power and right of the proper officers of the government to dispose of them, or so much of them as might be necessary, in the manner prescribed by the act, for the redemption of the circulating notes of the bank; and this residuary interest the bank might, in the ordinary course of its business, before the appointment of any receiver, assign for a proper consideration. This residuary interest, if not assigned by the bank before the appointment of a receiver, is necessarily a part of the assets of the bank; and the 50th section of the act, under the provisions of which the defendant Kingsley acts as receiver, after authorizing the appointment of a receiver, under certain circumstances, provides, that he "shall take possession of the books, records, and assets of every description, of such association," (bank,) "collect all debts, dues, and claims belonging to such association," &c. The same section also provides, that the receiver shall pay the moneys made or realized by him out of the assets of the bank, "to the treasurer of the United States, subject to the order of the comptroller of the currency," and that the comptroller, (after paying preferred claims, &c.,) "shall make a ratable dividend of the money so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." There is nowhere in the act any other provision for the division or disposition of the moneys arising out of the residuary interest of the bank in bonds pledged as security for its circulating notes; and it is only of the moneys paid over by the receiver, under this 50th section, that the comptroller is authorized to make a dividend. There is no provision in the act authorizing the comptroller or treasurer to dispose of the residue or surplus proceeds of such bonds in payment of the debts of the bank, or otherwise, and, therefore, until the moneys arising therefrom are legally transferred from the treasurer to the receiver, they are in the possession of the treasurer, as the officer of the United States, as the holder of a pledge for the bank; and the comptroller has no power to make any distribution thereof, in payment of the general debts of the bank, until they have passed into the hands of the receiver and have been by him paid over to the treasurer, subject to the order of the comptroller of the currency. The residuary interest of the bank in the securities thus pledged is a part of the assets of the bank, the same as though such securities had been pledged to a private person, as collateral security for the payment of an ordinary commercial debt; and a properly appointed receiver, as the representative of the bank, has the right to demand and receive the property so pledged, as an asset of the bank, in the one case the same as in the other.

It seems very clear, then, that, upon the

case made by the bill, the right to this residuary interest is in the plaintiff; and that, if the plaintiff's right under the assignment set forth is not established, no one but the defendant Kingsley, as such receiver, (if he has been legally appointed and become vested with the right of the bank,) has a right to the same. There is, therefore, a question of property between these parties, upon the claim made by the defendant, as expressly charged in the bill; and the demurrer, consequently, admits, that the defendant, as such receiver, claims an interest in such securities adverse to the plaintiff. These adverse claims to this residuary interest may, therefore, be properly litigated, in this suit, between the plaintiff and Kingsley, as the only party who appears to claim a legal pecuniary interest adverse to the plaintiff's alleged right, and as the only party who can now have a legal standing in court to represent that interest and litigate the claims of the plaintiff, if the receiver was properly appointed. It does not appear that any one but the defendant Kingsley asserts any claim to such residuary interest in the subject in controversy, as against the plaintiff, and he claims, as such receiver, and as the representative or legal assignee or successor of the bank, for the purpose of paying the same to the general creditors of the bank; and, as a decree in this case would determine the question of right as between these two parties, the demurrer should, in my judgment, be overruled, in case this court has jurisdiction of this suit, as between the plaintiff and the defendant Kingsley.

I do not remember that this question of jurisdiction was raised upon the hearing, and my minutes of the argument do not show that it was discussed by the counsel, or that any act of congress conferring jurisdiction in such a case as this, when the plaintiff and defendant are alleged to be citizens and residents of the same state, was cited. And I am not aware that any such act is in force. For that reason, I concur in the conclusion that the demurrer must be allowed.

VAN ARMAN (GILBERT v.). See Case No. 5,414.

Case No. 16,828.

In re VAN AUKEN et al.

[14 N. B. R. 425.] [1]

District Court, W. D. Michigan. June 13, 1876.[2]

BANKRUPTCY—VALIDITY OF COMPOSITION—VOLUNTARY PETITION.

1. Where a composition is made before adjudication, the mere fact that the debtor retains the possession of his assets is no ground for refusing to ratify it.

[Cited in Ex parte Hamlin, Case No. 5,993; Re Wilson, Id. 17,781.]

2. The omission of the court in a voluntary case to adjudicate the debtor a bankrupt does not defeat a composition made before such adjudication.

3. A provision that the debtor may retain his assets does not defeat a composition, for it is surplusage, and, on the application of a creditor, a warrant may be issued, notwithstanding the terms of the provision.

[Cited in Re Cavan, Case No. 2,528; Re Shaw, 9 Fed. 498.]

4. Creditors who are fully secured need not be reckoned in computing the proportion who must join in composition.

WITHEY, District Judge. May 21st, 1876, [Aaron] Van Auken and [James] Crane filed a voluntary petition, with schedule and inventory, to obtain the benefit of the bankrupt act [of 1867 (14 Stat. 517)]. At the same time they filed a petition asking for composition proceedings. There was no order of adjudication, for the reason that the court was not asked to act upon the petition in that behalf; but there was an order for a meeting of creditors. That meeting was held before Register Burns, of Kalamazoo, and he has certified to the court the proposition made by the debtors, the resolution passed accepting the proposition, and that the resolution was passed by the requisite number and value of creditors, and confirmed by the signatures thereto of debtors, and by two-thirds in number and one-half in value of all creditors proving their debts. Upon notice to creditors we are now to inquire whether the resolution has been passed in the manner required by the composition section. Creditors have appeared, and oppose the recording of the resolution and proceedings had in this case: First. Because the debtors are to remain in possession of their assets, by the terms of the proposition and resolution, with power to dispose of their property before payment of the compromise amount. Second. Because the debtors have never surrendered their assets, nor has there been an adjudication. Third. Because the resolution was not confirmed by the signatures of half in value and two-thirds in number of all creditors in this, that secured creditors have not joined.

The practice of this court, in involuntary cases, has been to permit and approve of composition proceedings, while the assets were in the hands of the debtor, where there has been no adjudication. The composition section expressly permits a composition before as well as after adjudication. The court in bankruptcy does not, without special cause shown to exist, therefore, deprive debtors of the possession of their assets until after adjudication, nor does the law contemplate it or make any provision for doing so. When, therefore, congress saw fit to permit a composition before adjudication, and made no provision what should be done with the debtor's property, pending day of payment given by the creditors, the matter was left in the sound judgment of the court, when the resolution is presented to it, to determine whether,

[1] [Reprinted by permission.]

[2] [Affirmed by circuit court; case unreported.]

on the whole case as presented, the composition offered to and accepted by the creditors is for the best interest of all concerned, subject of course to the express provisions of the section. In such a case, where the compromise amount was money down, there would be no occasion to inquire what security the creditors would have. Where notes are given on time, indorsed or signed by responsible third persons whom the creditors signify their acceptance of and satisfaction with, this court has said it was satisfied, and has uniformly left the assets in the hands of the debtors without any restriction as to their disposition. We have believed this would best enable the debtors to provide means with which to pay in money according to the terms of the compromise.

But it is said the debtors may squander the assets and not pay. We say then they will not be discharged from their debts, and will not be entitled to a discharge. The creditors will have the notes and may enforce their payment, or, upon any failure to pay, as the composition provides shall be done, may have the bankruptcy proceedings renewed and proceeded with, when the debtors may be made to account for their assets; and, if they have been guilty of a fraudulent disposition of any part of their assets since filing their petition in bankruptcy, it would debar them a discharge from their debts. We think, when the law authorizes a composition before and without adjudication, it contemplates that it shall be done without the appointment of an assignee or a trustee, and without, therefore, requiring the debtor to surrender his assets. The court is to see that the composition is in all respects judicious, and reasonably safe to all creditors, and, when satisfied it is best for the interest of all concerned, the mere fact that the debtors retain their assets is not an objection.

The question is, whether the court regards the creditors safe under the terms of the composition. I think they are in this case, and the law suffers the court at any time, if payment as per composition is not made, to have a surrender of assets.

The views expressed amount to a denial of the first objection, and indicate that there is no difference whether the proceeding is in a voluntary or an involuntary case, as to debtors retaining possession of the assets and composition before adjudication.

On the second objection, no surrender of assets and no adjudication. In a voluntary case the petition declares willingness to surrender all the debtor's estate, and schedules the same. The filing of the petition is by section 5014 declared to be an act of bankruptcy, and it is made the duty of the court to adjudge them bankrupts. It seems there was an omission to adjudicate the debtors bankrupts on their own petition at the time it was filed. As it was the duty of the court to have done so, and, our attention being called to the omission, it is now our duty so to do, and accordingly the court directs an order of adjudication to be entered. This we regard as correct. But, notwithstanding the adjudication was not made when petition was filed, the proceeding in bankruptcy was pending from the time the petition to be adjudicated was filed. This is expressly declared by section 4991 of the act. Now, as the proceedings in bankruptcy were pending when the composition proceedings were started, which, according to the composition section, may be at any time when the bankruptcy proceedings are pending, and before as well as after adjudication, the omission of the court to decree the debtors bankrupt, and issue a warrant of seizure, ought not to defeat the composition, and we hold does not. We have now adjudicated the debtors bankrupt, and can issue a warrant of seizure. The law requires this to be done, but we think we have power to stay all further proceedings in the bankruptcy case proper, and permit the composition to be carried out, inasmuch as the composition has been so far perfected, thus leaving the case substantially where an involuntary case would be if a composition was had therein before adjudication. The fact that the proposition for composition stipulates for the debtors retaining their assets is not regarded as fatal to the composition. We regard it as no part of the proposition authorized by the statute, and is purely surplusage. It binds no one, neither the creditors nor the court. On application of any creditor a warrant of seizure may issue, notwithstanding the terms of the proposition as to retention by the debtors of their assets.

The third objection is not well taken, as we hold that secured creditors are not to participate in the composition. If any creditor has a debt partially secured, he may prove the debt in excess of the security, to be allowed by the court; so says the composition section. There is no such proof in this case.

Let an order be entered staying all further proceedings in the bankruptcy case, except as to the composition, until the further order of the court. We have signed the necessary order, reciting our findings as drafted, with such modifications as the case requires, and the order will indicate our conclusions. If there are doubtful questions in this case, they are open for supervision by the circuit judge, and we shall be glad to have them reviewed and settled.

We do not regard it obligatory on us to appoint a trustee to take possession of a debtor's assets in every case, because another district court in bankruptcy has seen fit, in a proper case, to take that course. We should appoint a trustee in a proper case, but it does not follow that it should be done in this case. The law nowhere requires it, and we do not believe it would be error to appoint or refuse to appoint a trustee. That is largely a question of a prudential character.

The above opinion was affirmed by the Hon. H. H. Emmons, circuit judge, July 27th, 1876, after an oral argument on both sides. [Case unreported.]

Case No. 16,829.

VAN AVERY v. PHOENIX INS. CO.

[5 Biss. 193.] [1]

Circuit Court, N. D. Illinois. Nov., 1870.

PLEADING AT LAW—PLEAS.

Where the declaration is special, stating facts and circumstances, a plea setting up the same matter is bad; they can be given in evidence under the general issue.

[This was a suit by Thomas Van Avery against the Phœnix Insurance Company of Hartford, Conn., upon a policy of insurance. Heard on demurrer to the pleas.]

O. B. Sansum, for plaintiff.

Miller & Van Arman, for defendant.

BLODGETT, District Judge. In this case a demurrer is interposed to the special pleas of the defendant. The first plea is in substance, that the suit has not been brought within one year from the time the loss occurred, upon the policy of insurance. The second plea is in substance that the loss occurred while the steamer was engaged in saving a stranded vessel off a reef, whereby it is claimed that she vitiated her policy and that the insurers are not liable.

The pleader who drew the declaration has averred the specific manner in which the loss occurred, that she was relieving a stranded vessel, and that it was in pursuance of an immemorial custom among persons engaged in the navigation of these waters that such relief should be rendered.

I am inclined to think that both these pleas, in view of the averments of the declaration, are nothing more than what can be given in evidence under the general issue. I do not think that the second plea, the last plea in reference to showing the manner in which the loss occurred, is anything more than a reiteration of the matter in the declaration. The question as to whether it does present a defense is one to be decided when the evidence is taken as to whether such a custom exists. I think that the defense under the first plea can be given under the general issue. It is a mere question of fact to be determined on the trial.

Demurrer to special pleas sustained.

VAN BERGEN v. STUART. See Case No. 11,041.

Case No. 16,830.

VAN BOKELEN v. BROOKLYN CITY R. CO.

[5 Blatchf. 379.] [2]

Circuit Court, E. D. New York. Dec. 31, 1866.

FEDERAL COURTS—FOLLOWING STATE DECISIONS—MUNICIPAL CORPORATIONS — RAILROAD IN STREET—RIGHTS OF ABUTTING OWNERS.

1. Where a court of the United States is called on to construe the laws of a state, in a litigation between parties before it, it is its duty to follow the decisions of the courts of the state as to such construction.

[Cited in Patapsco Guano Co. v. Morrison, Case No. 10,792.]

2. It is held by the court of appeals of New York, that the use of land in a public street for the purposes of an ordinary railroad, is a new burden, which cannot be imposed without previous compensation to the owner of the fee of such land.

3. It having been held by the supreme court of New York, at general term, that the use of land in a city street for the purpose of an ordinary horse railroad is no new burden, but simply a new mode of enjoying the public easement, and, consequently, that no further compensation can be demanded by the owner of such land, and it having also been held by a judge of the same court, in an action brought to prevent the laying of a railroad track, that there existed lawful authority, under the statutes of New York, to lay such track, this court followed such decisions, on a motion for a provisional injunction to restrain the laying of such track.

This was an application [by Libertus Van Bokelen] for a provisional injunction, to restrain the defendants from laying a railroad track in Greene avenue, in the city of Brooklyn.

BENEDICT, District Judge. This is a similar motion to that in the case of Osborne v. Brooklyn City R. Co. [Case No. 10,597]. In that case the injunction was denied, upon the ground that, under the decisions in the courts of the state of New York, consequential damage to an abutting lot by reason of laying a railroad track in a street, does not entitle the lot owner to compensation, and that no damage other than such consequential damage, and different from that sustained by the community, was made to appear. The present case is distinguished from the former one by the fact, that it is conceded, in this case, that the plaintiff is the owner in fee of the portion of the avenue in front of his lots, and that the defendants are about laying their track upon his land. The case, then, raises the question, whether the proposed use of the plaintiff's land for a horse railroad, to be operated by the defendants under their charter, will be a new burden, not included in the public easement, and for which the owner must be first compensated by a new assessment; and, also, the question, whether the statutes of the state of New York, and the consent of the common council, furnish any authority for the proposed entry upon the plaintiff's land.

In considering these questions, it is to be noticed, at the outset, that they are questions which do not depend, for their solution, upon a construction of the constitution or laws of the United States. This court is called on to adjudicate the matter in use between the parties solely by reason of the citizenship of the plaintiff, and not because the subject-matter brings it within the jurisdiction of the national courts, under the federal constitution. Called on thus, by a citizen of another state, to administer the laws of the state of

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

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

New York, it becomes the duty of this court to look to the determinations of the courts of this state, and, if possible, to follow them, as declaring the law applicable upon the present occasion, to the end that a conflict of decisions between the national and state courts, to settle which no competent tribunal exists, may be avoided. Looking, therefore, to the decisions of the courts of New York upon the subject-matter in question, we find, that the court of appeals have held, that the use of land in a public street for the purposes of an ordinary railroad, is a new burden, which cannot be imposed without previous compensation to the owner of the fee, (Davis v. Mayor, 14 N. Y. 506;) and that the supreme court, sitting at general term, in this judicial district of the state, (Brooklyn Cent. & J. R. Co. v. Brooklyn City R. Co., 33 Barb. 420,) have laid down a distinction between the case of a steam railroad, which was the one in question in Davis v. Mayor, and the case of a horse railroad such as is proposed by the defendants, and has held, that the use of a city street for the purpose of an ordinary horse railroad is no new burden, but simply a new mode of enjoying the public easement, and, consequently, that no further compensation can be demanded by the owner of the land. The main question in this case, in the precise form in which it is here presented, has, therefore, been passed on by the supreme court of the state, at general term, in a decision which has not been disputed by any other general term, or hitherto questioned in the court of appeals.

So, too, as regards the effect of the various statutes of the state, to authorize the defendants to operate their road in any street of the city, upon the consent of the common council, without the necessity of procuring the consent of a majority of the property owners on the street—that question has been submitted to the supreme court of the state, in an action brought to prevent the laying of this very track, and it has been held, by an able judge, that the statutes of the state, in connection with the consent of the common council, furnish legislative authority to lay down the track proposed.

Now, although it be true, that the decisions of the state tribunals are not to be considered as of binding authority in the national courts, and late cases can be found where the national courts have refused to follow very solemn determinations of the same question by the state courts, (Chicago City v. Robbins, 2 Black [67 U. S.] 418; Gelpcke v. City of Dubuque, 1 Wall. [68 U. S.] 176,) I feel bound to give effect to these express adjudications of the state tribunals, certainly upon a motion like the present one, in regard to the precise case in hand. To do otherwise, would, in this case, work injustice to the defendants, for, in a view of the decisions of the local courts, in actions to which they were parties, they may fairly claim to have gone on under the express permission of those courts, in constructing their new line through Gates avenue to Bedford avenue, and in tearing up the street and partly laying their rails through Greene avenue. Under these decisions, their track in Gates avenue has been laid, which will be useless so long as the track in Greene avenue is unfinished. They have bought the material, and have laid down the ties over a considerable portion of the extent of Greene avenue, and this property is liable to loss and depreciation while thus lying in the street. Moreover, in addition to the loss and inconvenience which a stoppage of the work in its present half-finished state will cause to the defendants, serious inconvenience to the public would also result from the injunction, if now granted, inasmuch as Greene avenue must, in that case, remain in some places impassable until the final termination of the present controversy. On the other hand, no serious detriment to the plaintiff is likely to result from the completion of the track. The presence of the track in its unfinished condition would cause as much substantial injury to him, during the pendency of the action, as will the completed track. The completion of the track pending the litigation will not prevent him from obtaining perfect relief under the final decree, in case such decree be in his favor, while the interest which he seeks to protect is that of an owner of land already dedicated to the public.

Taking into consideration, therefore, the aspect of the questions of law involved in the case, under the decisions of the courts of the state, the unfinished condition of the work, the condition of the street, the nature of the plaintiff's interest in the street, and the injury likely to result to him from permitting the work to proceed pending the litigation, I feel bound to say that the case does not seem to me to be one which would warrant the interposition of this court, as prayed for on this motion. The motion must, therefore, be denied, and the plaintiff be left to bring his action to a final hearing, if he be so advised, before which time it is not improbable that the doubts thrown upon the law of the case by the apparently conflicting opinions of the courts, may be dispelled by a determination of the court of appeals, before which it is stated the main question in the case is now pending.

Case No. 16,831.

VAN BOKKELEN et al. v. COOK et al.

[5 Sawy. 587; 9 Reporter, 502.] [1]

Circuit Court, D. Nevada. Sept. 4, 1879.

EQUITY JURISDICTION—ADMINISTRATION—FOREIGN ASSETS—ASSIGNMENT—CITIZENSHIP—PARTIES—STATUTE OF LIMITATIONS.

1. A bill may be filed on the equity side of the circuit court against an administrator to

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 9 Reporter, 502, contains only a partial report.]

recover assets which he has fraudulently withheld, and a final settlement of such administrator's accounts by a probate court will be no bar to the suit.

[Cited in Klemp v. Winter, 23 Kan. 495.]

2. If assets in a foreign jurisdiction come into the possession of an administrator by a voluntary delivery to him, he may be required to account for them in the home jurisdiction.

[Cited in Re Ortiz's Estate, 86 Cal. 315, 24 Pac. 1035.]

3. Since the act of March 3, 1875 [18 Stat. 470], an assignee of a chose in action, not founded on contract, may sue without showing that the citizenship of his assignor was such as would have given the circuit court jurisdiction had such assignor sued.

4. Persons against whom no relief is prayed, and whose interests can not be injuriously affected by the suit, need not be joined as parties.

[Cited in Lytle Creek Water Co. v. Perdew (Cal.) 4 Pac. 432.]

5. In cases of fraud the cause of action does not accrue until the discovery of the fraud, and where the allegations of the bill do not show the time of discovery, a demurrer will not lie upon the ground that the fraud is shown to have been committed more than the statute period before the bringing of the suit. It is not necessary to state in the bill the facts which take the case out of the statute.

6. As to the constitutionality and proper construction of that portion of the act of March 3, 1875, which confers original jurisdiction upon the circuit courts of all suits "in which there shall be a controversy between citizens of different states."

7. In a suit by one or more heirs to recover assets, another heir and distributee is a proper party, but is not indispensable whenever the court can proceed and do justice to the parties before it without injury to the absent person.

[Cited in the Debris Case, 16 Fed. 35.]

[This was a bill in equity by Deborah Van Bokkelen and others against Daniel Cook and C. Derby.] On demurrer to the bill.

McAllisters & Bergin and H. K. Mitchell, for complainants.

S. M. Wilson and W. S. Wood, for defendants.

Before FIELD, Circuit Justice, SAWYER, Circuit Judge, and HILLYER, District Judge.

HILLYER, District Judge. This is a suit on the equity side of this court, in which the complainants, heirs of one Jacob L. Van Bokkelen, seek to compel the defendants to account for certain mining stock alleged to have been fraudulently disposed of by them. Both defendants are sued in their personal capacity, but the bill charges the fraudulent acts to have been done while the defendant Daniel Cook was administrator of the estate of said Jacob L. Van Bokkelen, the defendant Derby acting in concert and collusion with him.

The defendants demur to the bill on several grounds, which will be briefly considered.

1. Jurisdiction of the subject-matter of the suit is denied to this court. It is alleged in the bill that the defendant Cook was administrator of the estate of said Jacob L. Van Bokkelen; that, as such, he filed his final account in the district court of Storey county, Nevada, a court having probate powers; that his account was settled and he finally discharged before this suit was begun.

The question thus raised is, whether this court has jurisdiction to call an administrator to account who has, in the course of his trust, defrauded the estate, notwithstanding the probate court which appointed him may have passed a decree finally settling his accounts and discharging him. That the court has this jurisdiction we think can be satisfactorily shown. The frauds charged in this bill are not shown to have been investigated or passed upon by the probate court, but to have been concealed from that court; and it would indeed be against conscience, and a subversion of justice, if an administrator, while confessing a fraudulent management of the assets of the estate under his care, could successfully plead in bar of a suit like this, by the defrauded heirs, the final settlement of his account by the probate court.

If we allow to that settlement the same conclusiveness ordinary judgments have, yet it would, as between the administrator and the heirs, be voidable like other judgments for fraud. This is no direct proceeding to vacate the decree of final settlement, but a suit brought for the purpose of charging the defendants personally for a fraudulent appropriation to their own use of a portion of the estate of the deceased, Van Bokkelen.

We have been referred to many cases sustaining, but none denying, to a court of equity jurisdiction of such a case.

If an executor be called to account for misconduct, he cannot improve his situation by a fraudulent settlement with the probate court, showing a full administration of the estate, when in reality a large portion of it, not received by the distributees, remained in his hands. Speed's Ex'rs v. Nelson's Ex'rs, 8 B. Mon. 499. So one distributee may exhibit a bill in the circuit court to obtain her share of an estate, charging the administrator with gross misconduct, with making false settlements with the probate court, with keeping back a true inventory of the property in his hands, and with using the money of the estate for his private gain, such bill having for its object relief against these fraudulent proceedings, and the compelling a true account of administration. Payne v. Hook, 7 Wall. [74 U. S.] 425.

It appeared from the bill in that case that the administrator had not yet made his final settlement, and that the administration was still in progress, but the court held that the bill stated a case for equitable relief, "according to the received principles of equity," and that the complainant was not bound to resort to the probate court to correct the errors and frauds in the accounts of the administrator.

The present bill charges the defendant, Cook, with making a fraudulent inventory,

causing a fraudulent assessment, sale and purchase of the stock, in collusion with Derby, rendering a false account of the stock to the court; and with managing and controlling the stock as his and Derby's own, thereby making large profits; and seeks to compel the administrator and his confederate to account for the stock, and the profits made by its management. This bill, like that in Payne v. Hook, we think states a case for equitable relief, "according to received principles of equity." Courts of equity have from early times exercised a concurrent jurisdiction with courts of law, in matters of the administration of assets. A reading of the statements in the bill, will make it apparent that the frauds in this case cannot be adequately redressed at law. There must be an account taken of the stock and of the profits made by the various operations stated in the bill, and this can only be efficiently done in equity. The fraud is itself a ground of equity jurisdiction. There is in addition, the jurisdiction which exists in courts of equity to enforce constructive trusts, and to all these "mixed considerations" the jurisdiction is properly referable. Story, Eq. Jur. § 534.

2. It is claimed that, because the corporation was a California corporation, the stock had its actual situs in that state, was never assets in the hands of the administrator in Nevada, and that he could not, therefore, have committed any devastavit or fraud upon it.

The shares of mining stock being personal property, they are regarded in law as having no situs, or a movable one which is always the domicile of the owner. The deceased, Jacob L. Van Bokkelen, being domiciled, at the time of his death, in Nevada, the title of his administrator to all his personal property is perfect, whether found in California or elsewhere; and, while the administrator could not have sued in California and recovered possession of this property without there taking out auxiliary letters of administration, if it came into his possession by a voluntary delivery, it came lawfully, and he may be required to account for it as assets in this jurisdiction. Wilkins v. Ellett, 9 Wall. [76 U. S.] 740. In accordance with this view it is held to be the duty of an administrator to place on his inventory all the property of his intestate, and he should include goods situated in another state. Estate of Butler, 38 N. Y. 389.

The title of the administrator to the whole, wherever situated, is good, and although his letters do not confer upon him any authority to sue in another jurisdiction, if he make an assignment his assignee may sue there without taking out letters. Harper v. Butler, 2 Pet. [27 U. S.] 239. The foundation of the rule that an administrator cannot sue in a foreign jurisdiction is a regard for the creditors and distributees residing there. The disability is confined to the person, and does not extend to the subject-matter. Peterson v. Bank, 32 N. Y. 46. In this case it does not appear that there are any creditors or distributees in California, from whence the assets in question come, and there appears to be no shadow of ground upon which the administrator Cook can stand to deny his liability to account here for the property received by him in California.

3. The bill shows an assignment by two of the heirs to one of the complainants, but does not show the citizenship of the assignors, and the objection is made that the bill must show that the citizenship of the assignors was such as would have given the court jurisdiction, had they sued. Section 629 of the Revised Statutes is cited in support of this objection. Since the adoption of that section, however, the act of March 3, 1875 (18 Stat. 470), has been passed, which materially changes the former law in respect to the matters upon which this objection is based.

Section one of that act contains the following clause: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless the suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law-merchant and bills of exchange." By the former law, section 629, all choses in action, whether founded on contract or tort, except foreign bills of exchange, were embraced. Now, as the extract just given shows, an assignee can prosecute an action founded on a tort without regard to the citizenship of the assignor. This suit is not founded on contract, and consequently the jurisdiction depends upon the citizenship of the party on the record, whether he be assignee or original owner of the claim on which suit is founded.

4. It appears, from the face of the bill, that a portion of the stock which is alleged to have been the property of Jacob L. Van Bokkelen, and to have been fraudulently assessed and sold, stood on the books of the company in the names of W. H. Watson, A. J. Grant and Sol. Simpson, and that the defendant Cook well knew that this stock was the property of said J. L. Van Bokkelen. The defendants claim that this shows that Watson, Grant and Simpson are necessary parties to this suit, because the legal title to the stock was in them, and a conversion of that very stock is alleged. It is not seen how this shows these persons to be necessary parties. No transfer of the stock is sought, nor can any interest they may have in it be affected by the decree in this suit. The contest in respect to the right to the stock is between the complainants and the defendants, Cook and Derby. According to the face of the bill, Watson, Grant and Simpson have no real interest to be affected by the decree. No decree is asked and none can be made against either of them. Their presence, then, is wholly unnecessary.

5. It is claimed that, as appears from the bill, the act of inducing the assessment and sale of the stock and the purchase and issuing of new certificates all occurred in California five years before the filing of the bill, and therefore any cause of action which might have existed is barred by the statute of limitations. The statute of Nevada bars an action for relief on the ground of fraud in three years from the discovery of the fraud. Upon an obligation or liability incurred out of the state, the bar is two years, nothing being said about discovery in case of fraud. It is unnecessary to determine at this time whether this cause of action arose in California, or whether it is such an obligation or liability as the law contemplates. The bill does not show on its face at what time the fraud was discovered. It is alleged that the decree of final discharge was made March 6, 1876, and that the complainants had no knowledge of the frauds until "long after the decree of final discharge."

The bill was filed February 4, 1879. It is not necessary to state in a bill the facts which take the case out of the statute. Mandeville v. Wilson, 5 Cranch [9 U. S.] 15. Independent of the statute of Nevada, the cause of action in this suit on the general principles of equity jurisprudence, did not "accrue" until the discovery of the fraud. Bailey v. Glover, 21 Wall. [88 U. S.] 342. It can not, therefore, be said that the bill shows on its face that the suit is barred, whether we apply the three or the two years' limitation.

6. The only remaining question relates to the joinder of Mary E. Von Kleuze, and the failure to join Minnie Van Bokkelen as a party. The allegation of the bill as to the citizenship of Mary E. Von Kleuze, is that she is a citizen of the United States, at present residing in the kingdom of Bavaria. Minnie Van Bokkelen is an heir, and entitled to share in the distribution of the estate. The bill should have mentioned the state in which Mary Von Kleuze last resided. Her citizenship of that state continues, notwithstanding her present residence in Bavaria. But if we assume that she is a citizen of the same state as that of some of the defendants, which is the most favorable position for the defendants, the objection to her joinder then involves a decision upon the constitutionality and proper construction of that portion of the act of congress of March 3, 1875, which confers original jurisdiction upon the circuit courts of all suits "in which there shall be a controversy between citizens of different states."

Upon a suggestion of the presiding justice, that a case involving the precise question is now before the supreme court of the United States, set down for argument at the ensuing October term, this point was not discussed upon the argument before us. The question being a jurisdictional one, can be raised at any time hereafter, should the supreme court decide against the jurisdiction. We therefore overrule the demurrer on this point, without expressing any opinion upon it at this time. In regard to the non-joinder of Minnie Van Bokkelen, there is this to be said. She appears from the bill to be an heir and distributee. She is therefore a proper party, but upon the authority of Payne v. Hook, 7 Wall. [74 U. S.] 425, she is not an indispensable party. If, as was said in that case, the court is able to proceed to a decree, and do justice to the parties before it without injury to absent persons, it will do so. The real object of the present suit is the collection of assets of the estate of the deceased Van Bokkelen, alleged to have been wrongfully appropriated by the defendants to their use. The suit can proceed for this purpose, without any injury to the rights of absent heirs. If assets are recovered, all entitled to share in them may be allowed to come in for that purpose, or their rights can be fully protected by the decree. This disposes of all the objections.

The demurrer is overruled, with costs, and the defendants are required to answer the bill on or before the next rule day.

Case No. 16,832.

VAN BRUNT v. CORBIN et al.

[14 Blatchf. 496.] [1]

Circuit Court, E. D. New York. June 13, 1878.[2]

REMOVAL OF CAUSES—CITIZENSHIP.

A suit in which the plaintiff is a citizen of New York, and three of the defendants are citizens of New York, and one defendant is a citizen of Ohio, and one defendant is a citizen of Indiana, and none of the parties are nominal parties, cannot be removed into this court, under the act of March 3, 1875 (18 Stat. 470).

[Cited in Boyd v. Gill, 19 Fed. 147.]

[This was an action of ejectment by Catherine Van Brunt against Austin Corbin and others. Heard on a motion to remand to the state court.]

Andrew G. Cropsey, for plaintiff.

Alfred C. Chapin, for defendants.

BENEDICT, District Judge. This is a motion to remand this cause to the state court, whence it has been removed by filing a petition and bond, by virtue of the provisions of the act of March 3, 1875 (18 Stat. 470). The suit is an action of ejectment. The plaintiff is a citizen of the state of New York. Of the five defendants, three are citizens of the state of New York, one is a citizen of the state of Ohio, and the other is a citizen of the state of Indiana. None of the parties are nominal parties. All of the defendants joined in the petition for removal, and the whole suit is sought to be transferred to this court.

The right to retain this cause in this court is sought to be upheld upon the authority of

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

[2] [Affirmed in 105 U. S. 576.]

a decision made by Mr. Justice Bradley, in Girardey v. Moore [Case No. 5,462], where it was determined by that eminent judge, that, under the act of March 3d, 1875, the right of removing a cause from the state court to the circuit court of the United States, exists in all cases where there are substantial parties, citizens of different states, on opposite sides of the cause, although there are parties on opposite sides who are citizens of the same state. I am prevented from adopting this view of the statute, by a decision of the circuit judge of this circuit, in Petterson v. Chapman [Case No. 11,042], where it was held, that, to authorize a removal under the act of March 3d, 1875, each individual plaintiff must have a different state citizenship from that of each individual defendant. This decision now furnishes the law for this circuit, and, in accordance with such authority, it must be held, in this case, that, inasmuch as here there is but one controversy, to which all the parties in the suit are substantial parties, and where some of the defendants are citizens of the same state with the plaintiff, the suit is not one in which there is a controversy between citizens of different states, within the meaning of the act of March 3d, 1875.

This conclusion renders it unnecessary to consider the other grounds of objection to the proceedings. The motion to remand is granted.

[Subsequently a writ of error was sued out from the supreme court, where the order to remand was affirmed. 105 U. S. 576.]

Case No. 16,833.

In re VAN BUREN.

[19 N. B. R. 149.] [1]

District Court, S. D. New York. April 23, 1879.

BANKRUPTCY PROCEEDINGS — ACTION AGAINST DEBTOR—STAY—CLAIMS PROVABLE.

[1. A claim to have a judgment in favor of the claimant against the bankrupt set aside on account of fraud, whereby it was rendered for a smaller sum than was really due, and to recover what is still due under the contract on which the judgment was rendered, is a debt provable under the bankrupt law.]

[2. If a final judgment is not recovered against the bankrupt before the filing of the petition in bankruptcy, the proceedings in the action will be stayed if the claim on which the action is based is provable, whether dischargeable or not.]

Alvin Burt, for bankrupts.
Wm. W. Badger, for creditors.

CHOATE, District Judge. This is a motion to stay proceedings in an action against the bankrupts after judgment and after the issue, but before the service, of an execution against the person. The judgment was recovered since the filing of the petition in bankruptcy in an action commenced long prior thereto. On behalf of the creditors it is claimed that the service of the execution cannot be stayed in a case where the debt is not dischargeable, being one, as is alleged, created by the fraud of the bankrupts, and that in this case the debt was not dischargeable. The uniform ruling in this court has been, however, that if final judgment has not been recovered before the filing of the petition in bankruptcy, proceedings at any stage of the action, before or after judgment, will be stayed if the claim is provable, whether dischargeable or not, and that under sections 5106, 5107, and 5117 of the Revised Statutes, while a party who has been arrested before a stay is applied for will not be released if the debt is not dischargeable, yet the only test upon an application for a stay of proceedings under section 5106 is whether the debt is provable. And in practice a stay is constantly granted after judgment. See In re Rosenberg [Case No. 12,054]; In re Schwartz [Id. 12,502]. Indeed, in a very late case on this subject, which is cited and relied on by the learned counsel for the creditors (In re Alsberg [Id. 261]), the rule is thus stated by Judge Bradford, and apparently approved by Mr. Justice Story: "The result of the authorities is that when a debt is provable, all actions against the debtor pending proceedings in bankruptcy shall be stayed, including arrests, with the exception that if the bankrupt has been arrested on a debt not dischargeable he shall not be released from the arrest by the bankrupt court." To the same effect seems to be the decision of the supreme court of Louisiana in Keeting v. Arthur, 27 La. Ann. 570. The only question, therefore, is whether the debt is provable. While claims for unliquidated damages for purely personal torts have been excluded from proof, great liberality of construction has been shown in interpreting the word "debts" in the bankrupt law of 1867 (Rev. St. § 5067 [14 Stat. 517]). It has been held that a claim of the United States for the value of goods forfeited by violation of the revenue laws is provable. In re Vetterlein [Case No. 16,929]. Claims for conversion of personal property are clearly provable, and are referred to as such in section 5067. Cole v. Roach, 10 N. B. R. 288. In Re Schwartz [supra], Judge Johnston says: "Where a claim originated in a contract, although fraudulently induced, and is prosecuted in an action sounding in tort, it continues to constitute a provable debt, even though the fraud must be proved to entitle the plaintiff to a recovery." It is evident that the form of action provided by law for the recovery of the claim is not decisive, and has very little bearing on the question. Nor does the recovery of a judgment so merge the original cause of action as to preclude the bankrupt court from inquiring into its real character.

In the present case the plaintiffs in the

[1] [Reprinted by permission.]

action had a contract with the bankrupts, under which there became due to the plaintiffs a large sum of money as their share of the proceeds of certain goods. The bankrupts were under obligations to pay over this certain part of the proceeds on its receipt by them. Instead of doing so, they made false entries in their books, and, by conspiring with other parties, produced false and fictitious contracts with these other parties, and when sued for an accounting under the contract they procured the recovery against themselves of a judgment for a grossly insufficient amount by the use of these false books, fictitious contracts, and perjury upon the trial, and the fraud was not discovered until after the judgment was entered and satisfied of record. The plaintiffs then brought this action for the fraud, conspiracy, and deceit, whereby, without fault on their part, they had been deprived of a judgment for the true amount due, and they claimed damages in the amount in which the recovery on the former action fell short of the true amount due. The court of appeals has decided, and their decision is of course conclusive, that the plaintiffs could recover in that form of action. But it is equally true that it is consistent with their opinion—indeed, it is distinctly affirmed therein—that the plaintiffs had another remedy on the same facts, which was by an equitable suit to have the former judgment set aside, and then to recover the same amount upon a new and correct accounting. It may be that by recovering a judgment in their present action, the first of which is the perpetration of a fraud whereby they were precluded by the former judgment from recovering what was due to them under the contract, they have now cut themselves off from this equitable remedy; but the question is whether at the filing of the petition in bankruptcy the plaintiffs had a provable claim, and I cannot doubt that if they had then presented their claim to this court, as a claim to have the former judgment set aside for the fraud and to recover what was still due under the contract, their claim would have been adjusted under the order of this court and admitted to proof. It would have been regarded as a claim in its essential character growing out of a contract, and a "debt" provable under section 5067. Any other disposition of their claim, if there had been assets to divide, would have justly seemed very oppressive to them. The fact that there are no assets does not, of course, alter the case, though it may have made it more for the interest of the plaintiffs to pursue other remedies; nor does what has happened since the filing of the petition,—the recovery of the same damages in an action sounding in tort,—in my opinion, on the decided cases, so alter the nature of the debt that they are precluded from proving it. The plaintiffs have in fact, since the judgment, proved their debt, which shows that they themselves, or their legal advisers, regard the claim as a provable one. In this, I think, they are right. Stay continued.

[For a hearing on the question of the bankrupts' discharge, see 2 Fed. 643.]

VAN BUREN v. The E. M. McCHESNEY. See Cases Nos. 4,463 and 4,464.

Case No. 16,834.

VAN CAMPBUSH v. CRAWFORD.

[The case reported under above title in 6 Alb. Law J. 358, note, and 4 Leg. Op. 453, is the same as Case No. 2,224.]

Case No. 16,835.

In re VAN CAMPEN.

[2 Ben. 419; [1] 1 Am. Law T. Rep. U. S. Cts. 67; 1 Thomp. Nat. Bank Cas. 185.]

District Court, S. D. New York. May, 1868.

HABEAS CORPUS AND CERTIORARI—BANKING ACT — EMBEZZLEMENT — MAKING FALSE ENTRIES—EVIDENCE.

1. Where a party was charged, before a United States commissioner, with embezzlement of the funds of a national bank, and with having made false entries in its books, and, an examination having been had, was held for trial, and the proceedings were brought before the court for review, by habeas corpus and certiorari: *Held*, that the court, on such review, will examine the evidence before the commissioner, and will do what he ought to have done.

[Cited in U. S. v. Brawner, 7 Fed. 87.]

2. Evidence showing probable cause to believe that the accused is guilty, is sufficient to warrant his being committed for trial.

3. Evidence of the actual existence of a certain national bank, and of acts done by the accused as president thereof, is sufficient evidence, on such an examination, of the legal incorporation of the bank, and of the connection of the accused with it.

4. The making of false entries by a clerk in the bank, by direction of the accused, constitutes the accused a principal in the offence of making false entries.

[Cited in U. S. v. Fish, 24 Fed. 594.]

5. An intent to defraud the bank is to be inferred from the fact of embezzlement.

6. Where the president of a national bank, charged, as trustee, with the administration of the funds of the bank in his hands, converts them to his own use, he embezzles and abstracts them, within the fifty-fifth section of the act of June 3, 1864 (13 Stat. 116), and the acts amendatory thereof, unless he shows authority for so doing.

[This was an application by Samuel R. Van Campen for a writ of habeas corpus.]

B. K. Phelps, Asst. U. S. Dist. Atty.

C. A. Seward and J. L. Ward, for prisoner.

BLATCHFORD, District Judge. The prisoner was arrested in this district, on a war-

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

rant issued by the marshal of this district, on the 30th of April, 1868, by Commissioner Betts, a commissioner of the circuit court for this district, on a complaint made on oath before him, charging the prisoner with having, at Elmira, in the Northern district of New York, at various times specified in the warrant, during the year 1867, and while president of the First National Bank of Elmira, "an association and body corporate, created and organized under and by virtue of the act of congress, entitled 'An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof,' approved February 25th, 1863, and the acts amendatory thereof," embezzled, abstracted, and willfully misapplied moneys, funds, and credits of the association, to the amount of $36,000, the property of the association, and a certain draft for $7,000, the property of the association, and, with intent to defraud the association, and to deceive the officers and agents appointed to examine its affairs, and especially the bank examiner of the United States, made divers false entries in the books of the association, and in its reports and statements, which false entries are set forth particularly in the complaint. The prisoner was brought before the commissioner, and an examination of witnesses on the part of the United States, in support of the charge, took place on the 8th and 11th of May. The prisoner appeared by counsel, who cross-examined the witnesses on the part of the United States; but no witnesses were examined, or testimony put in, on the part of the prisoner. On the 12th of May, after the case had been summed up before the commissioner, by the counsel on both sides, he committed the prisoner to the custody of the marshal for this district, for trial in the Northern district of New York. At this stage of the proceedings, a petition was presented to this court by the prisoner, praying for a writ of habeas corpus to the marshal, and a writ of certiorari to the commissioner, in order that a review might be had, by this court, of the ground on which the prisoner was committed. The writs were issued on the 12th of May, and under them the prisoner has been brought before this court, and the proceedings and evidence before the commissioner have been returned to this court, and the case has been fully argued on an application by the prisoner to be discharged from custody.

The particular offences in regard to which testimony was taken before the commissioner, are made such by the fifty-fifth section of the act of June 3, 1864 (13 Stat. 116). That section provides, that "every president, director, cashier, teller, clerk, or agent of any association, who shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the association, * * * or shall make any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment, not less than five, nor more than ten years."

It is settled, by authoritative decisions, that this court, in reviewing, on habeas corpus and certiorari, the action of a committing magistrate, who acts under the laws of the United States, will examine the evidence on which the commitment was grounded, and will do that which the magistrate ought to have done. Ex parte Bollman, 4 Cranch [8 U. S.] 75, 114; In re Martin [Case No. 9,151].

I have examined the testimony put in before the commissioner in this case, and am entirely satisfied that there is sufficient evidence to hold the prisoner for trial, as having been guilty of embezzlement, and of making false entries, within the provisions of the statute cited. In Ex parte Bollman, 4 Cranch [8 U. S.] 75, 125, Chief Justice Marshall says, that the inquiry, in a case like this, being one which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial; and, in that case, as well as in the case of Burr's Trial [Case No. 14,693], he cites, with approbation, the remark of Blackstone, that if, upon such an inquiry, it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him; otherwise, he must either be committed to prison, or give bail. Chief Justice Marshall adds [Case No. 14,692a], that the foundation of the proceeding must be a probable cause to believe there is guilt, and that this probable cause can only be done away in the manner stated by Blackstone. This probable cause (Ex parte Bollman, 4 Cranch [8 U. S.] 75, 130) must be proved by testimony in itself legal, and which, though, from the nature of the case, it must be ex parte, ought, in most other respects, to be such as a court and jury might hear. In this case, there is probable cause shown, on legal testimony, to believe the prisoner guilty of embezzlement, and of making false entries, within the statute, and this probable cause has not been done away with in any manner.

It is objected that no evidence was given, before the commissioner, of the existence of the bank, or of the prisoner's official connection therewith. The record does not show that any such objection was taken before the commissioner. If it had been, the presumption, from the evidence, is, that the defect could have been supplied by proper official papers. The evidence against the prisoner is of such a character, that, even if this objection could prevail, I should not be at liberty to discharge the prisoner, but would

be obliged to hold him, to give an opportunity to the prosecution to supply the proof wanting. But I think there is sufficient prima facie proof on both points. Two witnesses testified, without objection from the prisoner, to the existence de facto of an institution called the First National Bank of Elmira, and to the fact that the prisoner acted as president of it until October, 1867, when he resigned. There is also a great deal of testimony as to acts done by the prisoner as president, and directions given by him in that capacity. This is enough on an inquiry of this nature. It is sufficient, not only on the charge of embezzlement, but also on the charge of making false entries, with intent to defraud the bank. People v. Caryl, 12 Wend. 547; People v. Davis, 21 Wend. 309, 313; People v. Peabody, 25 Wend. 472; Johnson v. People, 4 Denio, 364, 368; Dennis v. People, 1 Parker, Cr. R. 469; People v. Chadwick, 2 Parker, Cr. R. 163.

In regard to the charge of making false entries, it is objected, that the prisoner did not personally make the false entries, but that they were made by a clerk in the bank, by the direction of the prisoner. This is sufficient to make the prisoner a principal in the offence, and to constitute a making of the entries by him. U. S. v. Wilson [Case No. 16,730].

An intent to defraud the bank is to be inferred from the fact of the embezzlement, and an intent to deceive its officers from the circumstances in evidence attending the false entries.

The indebtedness of the prisoner to the bank is claimed to be merely an overdraft, and not criminal. This is not so. Where a president of a bank, charged, as a trustee, with the administration of the funds of the bank in his hands, converts them to his own use, he embezzles and abstracts them, within the statute referred to, unless he shows authority for so doing. There is sufficient evidence that the prisoner, while acting as president of the bank, converted to his own use over $30,000 of the moneys of the bank, and he shows no warrant for so doing.

The writ of habeas corpus is discharged, and a warrant will issue to the marshal, under section thirty-three of the act of September 24, 1789 (1 Stat. 91), for the removal of the prisoner to the Northern district of New York.

Case No. 16,836.

VANCE v. CAMPBELL.

PATENTS—UTILITY—ESTOPPEL BY USE.

The use by a defendant of the plaintiff's invention, or something substantially like it, estops him denying the utility of such invention. The use of the thing patented implies that the party thought it of some utility.

[Cited in Law's Pat. Dig. 281, to the point stated above. Nowhere more fully reported; opinion not now accessible.]

Case No. 16,837.

VANCE v. CAMPBELL et al.

[1 Fish. Pat. Cas. 483.] [1]

Circuit Court, S. D. Ohio. May, 1859.[2]

PATENTS—UTILITY — ESTOPPEL — INTERPRETATION OF CLAIMS.

1. Every patent is granted on the hypothesis that there is some utility. It is, however, competent for a defendant to rebut this presumption by evidence, and if he make it appear that the invention is utterly worthless it is a good defense.

2. It is very well settled that the court will not be very rigid as to the degree of utility, nor inquire into the quantum of value. If the invention be useful in any degree, and not absolutely worthless, the patent will be sustained.

[Cited in Gibbs v. Hoefner, 19 Fed. 324.]

[Cited in Johnson v. McCabe, 37 Ind. 538.]

3. If the defendant has used the patented improvement, or something substantially like it, he is estopped from denying its utility, for his use of the thing patented would imply that he thought it useful.

[Cited in Cook v. Ernest, Case No. 3,155.]

4. Whether a given element is or is not claimed as a material part of the patentee's invention, is a question for the court.

5. The words "as herein described," and "as herein set forth," refer to the specification, and may, in their proper construction, embrace elements of a combination not specifically named in the claim.

This was an action on the case, tried before Judge Leavitt and a jury [against John Campbell, William Ellison, and David I. Woodrow], to recover damages for the infringement of letters patent "for an improvement in cooking stoves," granted to plaintiff, February 6, 1849.

The specification was as follows: "To all whom these presents shall come, be it known, that I, Elisha Vance, of Wilmington, in the county of Clinton, and state of Ohio, have invented certain new and useful improvements in cooking stoves, of which the following is a full, clear and exact description; reference being had to the annexed drawings of the same, making part of this specification, in which figure 1 is a perspective view of a Premium cooking stove, having my improvements applied thereto, the bottom, one end, and part of the front being shown; figure 2 is a vertical section taken through the line X X of figure 1; and figure 3 is an elevation of the back end of the stove, the back plate being removed to expose the diving-pipe, and show the arrangement of the flues. The same letters indicate the same parts in all the figures. In the accompanying drawings of a 'Premium cook-stove,' A is the fire-box; B the oven; C the ash-box; which, together with the external plates of the stove, may be formed and arranged in the usual or in any convenient and improved manner. In all stoves heretofore constructed upon this plan, it has been found very difficult to make

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

[2] [Reversed in 1 Black (66 U. S.) 427.]

the bottom and back plates of the oven sufficiently hot, and equally difficult to prevent the front and top from becoming too much heated; but while the Premium stove is admitted to be liable to this very serious objection, it is at the same time acknowledged to be, in other respects, the very best stove in use. For this difficulty, in baking in these stoves, I have devised an effectual remedy, which consists in a particular arrangement of the flues for the purpose of equalizing the draught above and below the oven, and in placing a cold air-chamber, D, between the oven B and the flue E, which prevents the front of the oven from becoming unduly heated. To insure a free circulation of air in the chamber D, I insert a pipe d into its bottom, which admits a continual current of cold air, and makes apertures 'd' in the upper part of its ends, which admit of a constant escape of rarified air. To heat the oven equally on all its sides, it must be uniformly enveloped with the heated products of combustion; to this end, the flue is divided at the front of the oven into two branches, one passing above, the other below the oven, and which reunite near the middle of the back flue where they enter the pipe i, which is made to descend to that point; but the placing of the pipe i, with its lower end in this position, although necessary to divide the heat equally between the top and bottom of the oven, is not alone sufficient, because of the tendency of the current to take the shortest and most direct path to the place of exit; and without the plate A, at the front of the cold air-chamber, with a low fire, most of the heat would pass beneath the oven; and with the fire-box full of fuel, most of the heat would pass over the oven, which, under these differing circumstances, would present opposite extremes of irregularity in the diffusion of heat. To prevent such irregularities, therefore, I place the plate A, as seen in figure 2, so that it will form a flue in front of the cold air chamber (whose mouth is at the same distance from the flue above the oven, that the lower end of the pipe i is above the flue below the oven), and these flues being at all times unobstructed, their action is uniform, and the heat is equally distributed under all circumstances on the several sides of the oven. The arrows indicate the course of the upper branch of the current of heat, and the arrow u that of the lower branch. By this arrangement of the flues, and the exit-pipe i, the heat is not only at all times uniformly distributed over the oven, but it is also directed so as to bring it at the best advantage into contact with such culinary vessels as may be placed on the stove, and containing water or other substances which it is required to boil, so that the dampers are in no case required, as the stove is at all times adjusted and in perfect order to perform any culinary operation for which it is adapted, an advantage which all can appreciate who are acquainted with the difficulty of instructing those persons who are in general more immediately intrusted with the management of cooking stoves, in the proper use and adjustment of dampers. Having thus described the construction and arrangement of my improved Premium stove, what I claim therein as new, and desire to secure by letters patent, is the combination of the diving-pipe i, with the flues F, arranged as herein described, for the purpose of evenly distributing and equalizing the heat on the four sides of the oven, without using or requiring dampers, as herein set forth. In testimony whereof, I have hereunto set my hand in presence of two subscribing witnesses. Elisha Vance."

So much only of the charge as relates to the construction of the patent, and the question of utility, is here reported.

G. M. Lee and S. S. Fisher, for plaintiff.
T. D. Lincoln, for defendants.

LEAVITT, District Judge (charging jury): The novelty or originality of this invention is not controverted, but it is insisted by the defendants that there is such an entire absence of utility in the improvement as to affect the validity of the patent itself. The statute undoubtedly makes utility essential to the validity of a patent, and whether it exists in a particular case, is to be decided by the jury upon the evidence, subject to the decision of the court upon the law. It is very familiar law that the patent itself affords prima facie evidence of utility. The patentee is obliged to accompany his application with his oath to the usefulness of his invention, and every patent granted is based upon the hypothesis that there is some utility. Still it is competent for the defendant to rebut this presumption by evidence, and if he make it appear that the invention is utterly worthless, it is a good defense. In regard to this matter, however, it is very well settled that the courts will not be very rigid as to the degree of utility. It will not inquire into the precise quantum of value; but, if the invention be useful in any degree, and not absolutely worthless, the patent will be sustained. In this case, there has been a great deal of conflicting testimony. The plaintiff proves, by several men that have used it, that the stove works well; while others testify that it is a good stove and in demand. On the other hand, some who have used it, pronounce it of no value; while others again, who have been examined on this point, express an opinion, derived from actual knowledge of its operation, or from theoretical observation, that, in their judgment, this improvement adds nothing to the value of the old "Premium Stove." It is left with the jury to apply this testimony in accordance with the law; it is for you to judge of the credibility of the witnesses, and the weight of their testimony, upon this point; but I may also remark that if you find that the defendants have used this improvement, or

something substantially like it, they are estopped from denying the utility of the plaintiff's invention; for, in that case, the use of the thing patented would imply that the party thought it of some utility.

* * * * * *

Upon the question of infringement, if the front plate is claimed in the specification as a material part of the plaintiff's combination, and if it be material and necessary to the action of the plaintiff's stove, and the defendants have not used it, or something which is an equivalent for it, there is no infringement. Whether it is claimed as material in the specification, is a question for the court. The patent is for an improvement on a stove before known, called the "Premium Stove." It would seem to be the object of the invention to produce an equal distribution of heat, without the aid of a damper, and in any stage of the fire. After describing various changes and appliances to effect these objects, and among them the "diving-pipe," the patentee proceeds to say: "This (the diving-pipe) is not alone sufficient, because of the tendency of the current to take the shortest and most direct path to the place of exit; and without the plate 'a' at the front of the cold air-chamber, with a low fire, most of the heat would pass beneath the oven; while with a fire-box full of fuel, most of the heat would pass over the oven," etc. "To prevent such irregularities, therefore, I place the plate 'a' so that it will form a flue in front of the cold air-chamber," etc. It would seem, from these extracts, and from the whole specification, that the plaintiff has fully described the front plate, and that he regarded it as an important agent for the production of the effect at which he aimed. It is true that in the "summing-up," the front plate is not specifically designated. He there claims, as his invention, "the combination of the diving-pipe i, with the flues F, arranged as herein described, for the purpose of evenly distributing and equalizing the heat on the four sides of the oven, without using or requiring dampers, as herein set forth." But in giving a construction to a patent, it is the duty of the court to look to the whole specification, to the body of the patent. And, in the "summing-up" itself, the patentee refers to the arrangement "as herein described," and "as herein set forth," embracing most clearly, as I think, by these phrases, the front plate. I am obliged to say, therefore, that, in my opinion, he claims it as a material element of his combination.

[On a writ of error from the supreme court the judgment was reversed, and a venire de novo ordered. 1 Black (66 U. S.) 427.]

VANCE (SUYDAM v.). See Case No. 13,657.

VANCE, The A. D. See Case No. 92.

VANCLEVE (STEVENS v.). See Case No. 13,412.

Case No. 16,838.

The VANCOUVER.

[2 Sawy. 381; [1] 18 Int. Rev. Rec. 103.]

District Court, D. Oregon. April 15, 1873.

COLLISION BETWEEN STEAMERS—ENGINEER, NOT LICENSED—GUY ACROSS A RIVER—BOATS PASSING EACH OTHER.

1. Although at the time of a collision the engineer on the injured boat is not licensed, this circumstance will not prevent a recovery of damages for the injury, where the evidence shows that the want of a licensed engineer did not contribute to the collision.

2. A wire cable laid across the Wallamet river as a guy on which to run a ferry boat, is not an unlawful obstruction to navigation, unless it actually prevents or renders hazardous the navigation of the river by others.

[Cited in The Swan, 19 Fed. 457; Ladd v. Foster, 31 Fed. 834; Albina Ferry Co. v. The Imperial, 38 Fed. 617.]

3. When vessels are approaching each other in what the pilot rules call "the first situation," the boat that is crossing the bow of the other is entitled to keep its course, and the other should port its helm and pass astern.

In admiralty.

E. C. Bronaugh and John Catlin, for libellant.

J. F. Caples and Julius Moreland, for claimant.

DEADY, District Judge. This is a cause of collision. The libel was filed January 11, 1873. The following facts are admitted by the pleadings or proven by the evidence:

On January 6, 1873, the libellant, Joseph Knott, was the owner of a side-wheel steam ferry-boat, called the Portland, which was then, and a long time before, plying to and fro across the Wallamet river, between the foot of Stark street, in the city of Portland, and L street, in East Portland, a distance of about 1,200 feet. The hull of the Portland is ninety-five feet in length, and the aprons attached to each end are about twelve or fifteen feet long. She was steered or guided by a steel wire cable or guy four inches in circumference, laid across the bed of the river, and passing through a sheaf at each end of the boat, a few feet back of the aprons.

The Vancouver is a stern wheel steamboat about one hundred and twenty feet long, which at and before the time of the collision, was making daily trips between Portland and Vancouver. About five o'clock in the afternoon of January 6, the Vancouver left her berth, about one hundred and fifty feet above the west landing of the ferry-boat, for Vancouver, having on board a party of excursionists. There was a four knot current in the river, and the wind was high and down stream. In leaving her wharf, the Vancouver usually backed down across the route of the ferry-boat, and then turned her bow

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

down stream, but on this occasion she went ahead about four hundred feet.

When the Vancouver gave the whistle to cast off from her wharf, the Portland was about two hundred feet from her east landing, crossing to the west with passengers; and her pilot, assuming that the Vancouver would back down in front of her, stopped her, but the Vancouver going up stream, the Portland resumed her voyage, and when about six hundred feet from the east shore, gave one whistle as a signal to pass to the right. The Vancouver, which at this time was swinging round into the stream about four hundred feet above and two hundred feet west of the ferry-boat, answered the signal promptly with one whistle. By the time she got fairly turned around and pointed down stream, she was five hundred feet from the west shore, and making eight or ten miles an hour. When within two hundred and fifty feet of the ferry-boat, and when the bow of the latter had crossed her jack-staff, she gave two whistles to signal that she would pass to the left, in front of the ferry-boat, and starboarded her helm so as to point her bow quartering toward the west shore.

To this signal the ferry-boat promptly responded with one whistle, thus indicating her intention to pass to the starboard, according to her original purpose, but seeing that the Vancouver was apparently coming down on them, the pilot immediately gave the signals to stop and back, which were obeyed. The pilot of the Vancouver, when within one hundred feet of the ferry boat, seeing that he could not pass clear, gave the signals to stop and back, which were obeyed, but in a few seconds thereafter the collision occurred by the Vancouver striking the Portland obliquely ten or twelve feet back of the forward apron, crushing in her guards, and cutting or breaking the wire cable at the point where it came in contact with the cut-water of the former. The collision and resistance of the wire checked the forward motion of the Vancouver when she backed out and passed on, to the right, without stopping. The Portland floated down stream without a guide, until she was brought under control by means of a steering oar, when she steamed back to the east shore—being unable to make the west one on account of the breaking of the apron chain, which let the apron down into the water, and rendered it impossible to propel the boat in that direction.

Upon this trip the engineer on the ferry-boat was not a licensed one, but the proof is satisfactory, that he obeyed all the signals promptly, and that this circumstance in no way contributed to the collision. Both boats were under the charge of licensed pilots.

The evidence is conflicting, as to whether either of the boats was backing at the moment of the collision. It is probable that both of them had shut off steam, and that the Vancouver had commenced to back her wheel so as to check her speed, but not to stop her way. The pilot of the Vancouver testifies that when he gave the signal to stop and back, she was only about one hundred feet from the Portland. At that time she was making eleven feet to the second. From the time of giving those signals, nine seconds would take her across the course of the ferry-boat, while the latter was approaching the point of collision at a speed of six feet to the second.

Under the circumstances, it does not appear probable that the collision could have been prevented when the pilot of the Vancouver gave the signals to stop and back, because at the rate she was then going, with the wind and current as they were, she could not stop her way in one hundred feet—something less than her own length. This being so, it is necessary to go back and ascertain by whose fault these boats were brought into this dangerous proximity and condition.

When the Vancouver blew the two whistles, the boats were in what the pilot rules call the "first situation." The ferry-boat was crossing the bows of the Vancouver at right angles, to port, and was therefore entitled to keep on her way, while for the same reason it was the duty of the latter to port her helm, and pass astern of the former. There is no doubt but that if this rule had been obeyed by the Vancouver the collision would not have happened. Prima facie, therefore, she is in fault, and should suffer the loss sustained by the collision.

It may be said that if the ferry-boat had stopped and backed, when the Vancouver gave the two whistles, that the latter could have passed to the left without collision. But the Vancouver had no right to give this signal. It was her duty to pass to the right, particularly after having signaled her intention so to do. Of course it was the duty of the ferry-boat whether first in fault or not, to avoid a collision if possible. But allowance must be made for the circumstances in which she was placed by the prior misconduct of the Vancouver.

She could only move back and forth upon one line, and her deck was but two or three feet above the water. The Vancouver, a double-deck boat, at a distance of two hundred and fifty feet, while going at the rate of eight or nine miles an hour, down stream, suddenly changes her course, and signals her intention to cross the bow of the ferry-boat. It is very doubtful if the way of the boat could then have been checked soon enough to have prevented the collision. But if it now appeared probable that the collision might have been avoided, by immediately stopping and backing the ferry-boat, it must be remembered that the persons in charge with the passengers were in great danger of their lives by this sudden and wrongful change of direction by the Vancouver. From the deck of the ferry-boat it appeared as if the Vancouver would run the former down in an instant.

There was no time for reflection or precaution. For acts done under such circumstances the law does not hold parties, who are otherwise innocent, responsible. In City of Paris, 9 Wall. [76 U. S.] 638, Mr. Justice Swayne, in considering a similar case, says: "The acts complained of were done in the excitement of the moment and in extremis. Whether they were wise, it is not material to inquire. If unwise, they were errors and not faults. In such case the law in its wisdom gives absolution."

The claimant, however, impliedly admitting that under ordinary circumstances the Vancouver ought to have passed astern of the ferry-boat, alleges in its answer that it was prevented from so doing by reason of the wire cable of the latter being stretched level with the water from the boat to the east shore until it reached the middle of the river. The evidence does not sustain the allegation; on the contrary, the weight of it is decidedly against it.

The river deepens quickly from the west shore, so that at one hundred feet from such shore it is about eighty feet deep; from thence it shoals gradually to the east shore, and within one hundred feet thereof is about ten feet deep. The rope weighs something over four tons, and lies on the bottom of the river, and is taken up and passed astern as the ferry boat moves back and forth. In crossing, in time of high water and strong wind, there is an unusual pressure upon the boat down stream. This makes it describe a line slightly curved down stream, and to this extent the cable is tightened and drawn near the surface of the water. Under these circumstances the claimant gave some evidence tending to prove that if the Vancouver crossed the wire when near the surface her rudder might catch on it, and become unshipped.

But the evidence shows that the Vancouver, which drew about two feet of water, could cross the wake of the ferry-boat within fifty feet of it with perfect safety, when the latter was three hundred feet from shore. In my judgment it is not possible for the ferry-boat, under any lateral pressure which it can sustain, to lift this cable and hold it taut upon the surface of the water at a distance of one half or even one fourth of the way from either shore. In company with counsel, I crossed the river on the boat when the water and wind were both strong and the cable sank out of sight in one hundred and fifty or two hundred feet from either shore. The evidence shows that steamboats have often crossed the wake of the ferry-boat within forty feet, and that no accident has ever happened to any boat on account of the wire.

But even if it were true that it was unsafe for the Vancouver to cross the cable in the wake of the ferry-boat, when the former gave the signal to pass to the left, she was not justified in attempting to cross the bow of the ferry-boat. She was free and could move in any direction, while the ferry-boat could only move back and forth in a straight line. She should have stopped, gone aside or turned back if necessary—indeed, she should have crossed the wire and risked her rudder rather than a collision and the destruction of both boats and the lives of the people on board.

The claimant also insists that the cable of the ferry-boat is an obstruction to navigation, and unlawful, and therefore the libellants cannot recover. Upon this point, evidence was produced by both parties. The great preponderance of it goes to show that the cable is not an obstruction, in any sense that would make it unlawful. In some sense, or degree, every vessel that is launched upon the river is an obstruction to its navigation. The portion of the surface of the river occupied by it cannot be occupied by another at the same time, and the result is that neither can have the unrestricted or unobstructed use of the river without collision with the other. But such an obstruction is not an unlawful one. What is an unlawful obstruction must always depend upon the circumstances of the particular case. The Wallamet river is a public highway, free and open to be navigated by any kind of vessel for any purpose, not specially prohibited by law. So long as any such vessel, however guided or propelled, does not actually prevent or render hazardous the navigation of the river by others, I suppose it cannot be considered an obstruction to navigation in the ordinary sense of the term.

1 Pars. Shipp. & Adm. 547, cites Potter v. Pettis, to show that a vessel may lawfully obstruct the navigation of a stream by extending a warp across the entire channel, provided it be lowered on the approach of another vessel, so as to permit it to pass in the usual channel.

But upon this point it is not necessary to speak absolutely. In my judgment it is immaterial whether this cable is or was an unlawful obstruction to the navigation of the river or not. If it is, proceedings may be had by any one who is aggrieved by it, to abate it as a nuisance. Granting that it was an unlawful obstruction to the free navigation of the river, the Vancouver was not, therefore, justified in wilfully running down the ferry-boat, or placing herself in such a position with reference to her as to render a collision unavoidable. The Vancouver knew of the existence and condition of the cable when she left her wharf on the day of the collision. She was then offered two thirds of the channel on the west side on which to back down across the line of the cable as usual. For some reason she declined the offer, and steamed up the river as if she was going to Oregon City on an excursion. Upon this the ferry-boat went ahead, as she had a right to do, and as she saw the Vancouver turning down stream, signaled to her to pass to the right. Under these circumstances, it was the

duty of the Vancouver to have slowed her engine so as to give time for observation and deliberation, if there was any probability of danger in crossing the cable astern of the ferry-boat, as is alleged by the claimant. If the strain upon the cable on account of the force of the current and the wind was likely to bring the cable to the surface, it was not a new thing under the circumstances, and the pilot of the Vancouver must have been familiar with the occurrence. In any event, the Vancouver should have passed astern of the ferry-boat, as there is little doubt she might have done with perfect safety, or else kept away until the ferry-boat had moved so far west as to make it certain, in the judgment of the pilot, that the cable had sunk astern of her.

On the whole, it appears that the pilot of the Vancouver not only erred in attempting to pass to the left of the ferry-boat, but that he did so under circumstances that evince an almost wanton disregard of the safety of the latter and her passengers and crew. Being alone in fault, the Vancouver must compensate the libellant for the injury done to his boat and wire.

The libel alleges that the libellant has sustained damages to the amount of $2,000, but the proof does not support the allegation.

The wire cost originally, in San Francisco, $1,060, and had been in use from October, 1872. After the collision it was taken up, spliced, and put down again, and has been in use ever since. Forty feet of its length was consumed in making the splice. At the splice it is probably as strong as anywhere, but it is rough, and will wear the sheaf faster on that account. The evidence upon the injury to the wire is meager and vague. Levi Knott, the son of the libellant, states that it is of no value for that ferry—for what reason he does not say, except the additional friction on the sheaf from the splice, and that it is now too short for very high water. Foster, the pilot on the ferry-boat, thinks it is damaged $500. This is all the evidence on the subject, except the view of the court. I find the libellant has sustained damage by the collision as follows:

Injury to the guard and apron of the ferry-boat, $100; wages of an extra hand half a month, while the boat was run with a steering-oar, $25; loss of one third of usual receipts during same period, $162; cost of taking up and splicing wire cable, $150; loss of forty feet of cable used in making splice, $40; general depreciation in value of whole cable from decrease of length, and being spliced, $450—total, $827. These figures being made upon coin estimates, and the decree being made in currency, I add twelve per cent. to this amount, making in all $926.24, for which a decree will be entered for the libellant.

VANDERBILT (McKIBBIN v.). See Case No. 8,860.

Case No. 16,839.

VANDERBILT et al. v. REYNOLDS et al.

The NORTH STAR.

[16 Blatchf. 80; 7 Reporter, 523.] [1]

Circuit Court, S. D. New York. March 14, 1879.[2]

COSTS—ADMIRALTY APPEALS—COLLISION.

1. Cross libels were filed in the district court, in admiralty, for a collision, one being a suit in personam and the other a suit in rem. In the first suit the district court decreed damages and costs against the respondent. In the second suit, that court dismissed the libel, with costs. The respondent in the first suit appealed, and the libellant in the second suit appealed. This court, on the appeals, apportioned the damages sustained by the respective parties. One of the vessels was totally lost by the collision. The aggregate costs of both parties in this court and in the district court were divided by this court equally between the parties.

[Cited in The Osseo, Case No. 10,608; The Pennsylvania, 15 Fed. 817; The Hercules, 20 Fed. 206.]

2. The rule as to interest on damages and costs, stated.

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

[These were two libels for collision. The first was a libel in rem by William H. Reynolds and others, owners of the Ella Warley, against the steamship North Star, of which William H. Vanderbilt and others, executors of Cornelius Vanderbilt, were claimants. The second was a libel in personam by the said claimants against the said Reynolds and others.]

Robert D. Benedict, for the Ella Warley.

Augustus C. Brown, for the North Star.

BLATCHFORD, Circuit Judge. In the first case, the district court decreed against the respondents, November 10th, 1866, $27,747.82 damages and $276.76 costs. In the second case, the district court dismissed the libel, May 17th, 1864, with $420.96 costs. In the libel in the first case the claim was $100,000. In the libel in the second case, the claim was "at least" $75,000, "with interest." [Cases unreported.] The respondents in the first case appealed from the whole of said decree therein, on the ground that the libel therein ought to have been dismissed. The libellants in the second case appealed from the whole of said decree therein, on the ground that they were entitled to recover their damages. This court made a decree in each case, on said appeal therein, reversing the decree therein, and ordering that the damages sustained by the respective parties by the collision be apportioned. [See Case No. 10,330.] The damages sustained by the libellants in the second suit were not ascertained in the district court. This court or-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 7 Reporter, 523, contains only a partial report.]

[2] [Affirmed in 106 U. S. 22, 1 Sup. Ct. 41.]

dered a reference in the second suit, to ascertain such damages, and reserved the question of costs in each suit. [See Case No. 10,331.] The $27,747.82, above mentioned, was made up thus:

Repairs to the North Star, the vessel of the libellants in the first suit	$ 5,141	43
Interest thereon for 4 years, to March 13th, 1866, the date of the commissioner's report in that suit, in the district court	1,083	90
	$6,225	33
Deterioration in the value of the North Star	6,000	00
Demurrage, 17 days, at $900 per day	15,300	00
	$27,525	33
The district court, on the exception by the respondents in the first suit to the item of $6,000 for deterioration, reduced it to $5,000, thus deducting	1,000	00
	$26,525	33
Interest on $26,525.33 from March 13th, 1866 (the date of the commissioner's report), to November 10th, 1866 (the date of the decree)	1,222	49
	$27,747	82

The Ella Warley, the vessel of the respondents in the first suit and the libellants in the second suit, was, with her outfit and stores, totally lost by the collision, on the 9th of February, 1863. This court has fixed her value, at the time she was lost, at $40,000, and the value of her outfit and stores lost, at that time, at $7,675.90.

The costs of the several parties, other than as above specified, have been taxed as follows: Costs of the respondents in the first suit, in the district court, $58.40, and in this court, $31.50; costs of the libellants in the second suit, in the district court, $496.44, and in this court, $1,129.83; costs of the libellants in the first suit, in this court, $577.12; costs of the claimants in the second suit, in this court, $123.85.

The counsel for the owners of the North Star asks that the costs of all parties, in both courts, be apportioned, as well as the damages. The counsel for the owners of the Ella Warley asks that they recover their costs of the district court and of this court.

The North Star recovered in the district court, as damages, as follows: Repairs, $5,141.43; deterioration, $5,000; demurrage, $15,300; total, $25,441.43. In this court it has recovered only one-half of that sum, which reduction has been effected by the appeal of the respondents in the first suit. In the district court the Ella Warley recovered nothing. In this court it has recovered the one-half of $47,675.90. which recovery has been effected by the appeal of the libellants in the second suit. Throwing out interest, the North Star recovers $12,720.72, and the Ella Warley recovers $23,837.95, leaving a balance of recovery in favor of the Ella Warley, of $11,117.23.

In Hay v. Le Neve, 2 Shaw, 395, in 1824, both vessels were held in fault, one only suing, and the house of lords awarded to the vessel suing one-half of her damage, and ordered that each party bear his own costs. The court referred to a case before Sir James Marriott, in 1789, where it was found that both ships were to blame, but one the most, and the loss was apportioned, and it was ordered that the costs of both parties be brought together and divided and borne equally by the parties; and remarked, that "it would, perhaps, be more equitable to say they should each pay their own expenses." In the cases of The Monarch, 1 W. Rob. Adm. 21; The Oratava, 5 Month. Law Mag., Notes of Cases, 45; and The De Cock, Id. 303,—all in 1839,—Dr. Lushington, on the authority of Hay v. Le Neve, ordered that each party should pay his own costs, the damages being apportioned. In The Washington, 5 Jur. 1067, in 1841, where both vessels were held to blame, in cross actions, Dr. Lushington is reported as saying: "I decree the damages, costs and expenses of both parties to be thrown together, and to be equally divided, according to the precedent of Hay v. Le Neve, in the house of lords." But this report must be incorrect. In the case of Vaux v. Sheffer, S Moore, P. C. 75, in 1852, there being cross suits, Dr. Lushington had held one vessel only in fault. She appealed. The privy council held both vessels in fault, and divided the damages, and said: "There will be no costs." In The James, Swab. 55, in 1856, one party only suing, Dr. Lushington found both vessels in fault, and pronounced for one-half of the damage proceeded for, "but made no order as to costs." The claimants of the vessel sued appealed, and the privy council reversed the decree below, and held that the suit could not be maintained, but allowed no costs of the appeal. In The Dumfries, Swab. 125, in 1856, the owners of a vessel totally lost by a collision sued the Dumfries, which was injured also. Dr. Lushington condemned the Dumfries. She appealed. The privy council held the Dumfries not to be in fault and the other vessel wholly to blame, and reversed the decree, and said: "But, as one vessel was wholly lost, and the other sustained much injury, and as the case is attended with many difficulties, they are of opinion that no costs ought to be allowed, either in this court or the court below." In the Fyenoord, Swab. 374, in 1858, one vessel suing, Dr. Lushington held the vessel sued wholly in fault. She appealed. The privy council held both vessels in fault, and divided the damage, and said: "The appellants to have their costs of appeal." In The Hibernia, 5 Ir. Jur. (N. S.) 366, in 1860, in the Irish court of admiralty, one vessel suing, the court held both vessels in fault, and divided the damage, "each party paying his own costs." In Maddox v. Fisher [The Independence], 1 Lush. 270, and 14 Moore, P. C. 103, in 1861, there being cross suits, Dr. Lushington held one

vessel solely to blame and she appealed. The privy council held both vessels in fault, and ordered the damages to be divided, and said: "The costs below must be disposed of according to the rule of the admiralty in such cases. There will be no costs on either side, of this appeal." In The Saxonia, 1 Lush. 410, in 1862, there being cross suits, between the Eclipse and the Saxonia, Dr. Lushington held both vessels to blame, and ordered the damages in each case to be divided, "each party to pay his own costs." The owners of the Saxonia appealed in both suits, and the owners of the Eclipse "adhered in each action to the appeal." Adherence by a respondent to an appeal by the other party, is an appeal by the respondent from the same decree, or a part of it, by filing a declaration of adhesion, stating from what part of the decree he desires to appeal. Williams & B. Adm. Jur. 315, Append. 190. The privy council held both vessels to blame, and dismissed both appeals, "each party paying his own costs." In The Agra, L. R. 1 P. C. 501, in 1867, there were cross suits. Dr. Lushington held the Agra wholly in fault, and condemned her in damages and costs. She appealed. The privy council held both vessels to blame, and divided the damages equally (one of the vessels having foundered), and said: "Each party will bear his own costs, both here and in the court below." In The Corinna, 35 Law T. R. (N. S.) 781, in 1876, the admiralty court held the Corinna alone to blame. She appealed. The court of appeal found both vessels to blame and ordered the damages to be divided. The appellant applied for costs, contending, that, notwithstanding the rule of the privy council in such a case, he, being a successful appellant, should have costs. The court followed the case of The Agra, and said: "In these cases, the rule of the privy council will be retained. Though the plaintiff has partially succeeded in his appeal, he is not found to be free from blame for the collision. Each party will bear his own costs, both here and in the court below."

The English rule, applied to the present case, would require, therefore, that each party should bear his own costs, both in this court and in the court below. In this country, the rule has not been uniform. In The Rival [Case No. 11,867], in 1846, in the district court for Massachusetts, both vessels were held to blame, and the damages were equally divided, but all the costs were imposed on the vessel which was held to be most in fault. But, in Lenox v. Winisimmet Co. [Id. 8,248], the same court, in 1848, holding both vessels in fault, divided the aggregate damages equally, and decreed that each party pay one-half of the costs. In The Bay State [Id. 1,148], in 1848, in the district court for this district, one vessel suing, both vessels were held in fault, and the libellants were awarded one-half of their damages, and no costs were allowed to either party against the other. In The Catharine v. Dickinson, 17 How. [58 U. S.] 170, in 1854, the supreme court, for the first time, decided, that the proper rule of damages, where both vessels were in fault, was to divide the loss, but nothing was said about costs. In The Nautilus [Case No. 10,058], in 1854, the district court for Maine, finding both vessels in fault, divided the whole damage to both between them by moieties, and ordered that each party pay his own costs. In Lucas v. The Thomas Swann [Id. 8,588], in 1854, the district court for Ohio found both vessels in fault, and divided the loss, and ordered that the costs "be paid equally." In Foster v. The Miranda [Id. 4,977], in 1854, the district court for Illinois held both vessels in fault, and divided the aggregate damage equally between both parties, and ordered that each party pay his own costs, although one recovered $150. In the St. Charles, 19 How. [60 U. S.] 109, in 1856, the district court had held one vessel wholly in fault, and the circuit court had held the other vessel wholly in fault and dismissed the libel. The libellants appealed to the supreme court, and that court found both vessels in fault, and apportioned the loss, and gave to the appellants their costs of appeal in the supreme court. In Chamberlain v. Ward, 21 How. [62 U. S.] 548, in 1858, there being cross-libels, the district court for the Southern district of Ohio had found one vessel wholly in fault. She appealed to the circuit court. That court held that each party must pay one-half of the damages occasioned by the collision, and of the costs in both courts. Both parties appealed to the supreme court, which held that the case was one of mutual fault, and affirmed the decree of the circuit court, without costs in the supreme court to either party. In The Marcia Tribou [Case No. 9,062], in 1858, in the district court for Massachusetts, both vessels were held in fault, and the damages and costs were ordered to be borne by each in equal proportions. In the same court, in O'Neil v. Sears [Id. 10,530], the same ruling was applied. In The Bedford [Id. 1,216], in this court, in 1863, one party alone suing, the district court had decreed for the libellants. The claimants appealed. This court held both vessels in fault, and ordered the libellants' damages to be divided, and allowed no costs to either party in the court below, but allowed the appellants their costs in this court. In The Austin [Id. 663], in 1868, in the district court for this district, one vessel alone suing, and having been injured, and both vessels being found in fault, the damages were apportioned, and costs were given to the libellants. In the Baltic [Id. 824] and The Paterson [Id. 10,795], both cases in 1869, the same court, under the same circumstances, made the same ruling. In Lane v. The Denike [Id. 8,045], in 1868, there being cross suits, the district court for Massachusetts had held one vessel wholly in fault and awarded full damages and costs to the other. On appeal, the circuit court held both vessels in fault

and divided the damages and costs. In The Maria Martin, 12 Wall. [79 U. S.] 31, in 1870, the district court for Wisconsin had dismissed the libel. On an appeal by the libellants to the circuit court, that court had held both vessels in fault and made a decree that each should pay one-half of the damages and its own costs. The libellants appealed to the supreme court and the claimants did not. That court held that the libellants' vessel was in fault, and affirmed the entire decree of the circuit court. In The Favorita [Case No. 4,694], in 1870, in the district court for the Eastern district of New York, the court said: "The case is one of mutual fault, and, although I entertain no doubt as to the propriety, in a proper case, of mitigating the effect of the rule of equal division of loss, in cases of mutual fault, by awarding full costs to either party, I do not consider that the present case calls for any deviation from the practice, which is to refuse costs to both parties, when both are equally in fault." The practice referred to was evidently based on the English rule. In The Empire State [Id. 4,474], in 1870, in the district court for the Northern district of Illinois, both vessels were held in fault and the damages were divided, and each party was ordered to pay his own costs. In The Mary Patten [Id. 9,223], in 1872, in the district court for Massachusetts, the question is considered by Judge Lowell. There were cross-libels, and, of course, injury to both vessels, and both were held in fault. Judge Lowell remarks, that the question, "whether the costs, like the damages, should be added together and divided, or each should bear his own, seems to be one of doubt." He refers to the case of The Rival [supra], and says that "no question was made of the correctness of that decision, nor that the court has full legal discretion over the whole matter of costs, to adapt its decrees to the equities of each case;" that there were no facts to take the case before him out of the ordinary rule, if there were one "applicable to an equality of fault;" and that it was "very difficult to find any rule from the decisions, in no one of which is there any argument or reason given at the bar or by the court." He then refers to the case of Hay v. Le Neve [supra], as one in which the costs were divided, as well as the damages. I do not so understand that case, as to the costs. He then says, that, in the Massachusetts district, it has been the practice to divide the costs. He then refers to the cases of The Nautilus, The Miranda, The Bedford, and The Favorita [supra], as cases in which costs were refused to both parties. He then adds: "There is one aspect of the question which does not appear to have received sufficient attention. If the loss is all suffered by one vessel, and her owner brings his libel, he will recover half his damages; and there is no reason why he should not, in general, recover his full costs. It is the ordinary case of a prevailing party recovering less than he asks for; and, if there has been no tender or offer of amends, and no equity peculiar to the individual case, it is according to the sound and reasonable law of all courts, that he should recover costs. It would take a very long and uniform course of practice to establish any other rule in collision cases; and, although some of the decisions above cited were of that character, the point appears to have been overlooked. In examining some late authorities, since the above paragraph was written, I am happy to see that the recent practice in New York conforms to what I have suggested as the true rule, and gives costs to the libellant, if he alone has been injured and recovers half his loss." He cites, to this effect, the cases of The Austin, The Baltic, and The Paterson [supra]. He adds: "Returning to the case of injury on both sides, and of cross-libels to recover them, and no very substantial difference of fault or other equity, there appears to be authority for dividing the costs and for refusing them to both parties. The former practice, which has always been ours, seems to me quite consistent with the theory which divides the damages; and I shall adhere to it until the direct authority of an appellate court, or a very decided preponderance of general practice, shall be against it." In The Sapphire, 18 Wall. [85 U. S.] 51, in 1873, the Euryale had sued the Sapphire, in the district court for California, for a collision, claiming $15,000 damages. There was no cross-libel, nor did the Sapphire set up, in the answer, that she had been damaged. The Euryale had a decree in the district court for $15,000 damages. The circuit court affirmed it. On appeal by the Sapphire, the supreme court held that both parties were in fault, and that the damages ought to be equally divided between them, and directed that a decree should be entered "in conformity with this opinion." The circuit court thereupon entered a decree in favor of the Euryale for $7,500, and for her costs in the district and circuit courts, less the costs of the appeal by the Sapphire to the supreme court. The Sapphire appealed again to the supreme court, alleging, as errors, that no damage to the Sapphire was taken into consideration, and that costs in the court below were allowed to the Euryale. For the Sapphire it was contended, that, in collision cases, where both parties were in fault, each should pay his own costs. The supreme court held that the only damages which could be divided in that particular case were those sustained by the Euryale. As to the costs, the court say: "The appellants further complain, that it was erroneous to allow the libellant his costs in the district and circuit courts, deducting therefrom the costs allowed them by this court—i. e., the costs of the reversal of the former decree. We do not perceive, however, in this, any such error as requires our interposition. Costs in admiralty are entirely under the control of the court. They are, sometimes,

from equitable considerations, denied to the party who recovers his demand, and they are sometimes given to a libellant who fails to recover anything, when he was misled to commence the suit by the act of the other party. Doubtless, they generally follow the decree, but circumstances of equity, of hardship, of oppression, or of negligence, induce the court to depart from that rule in a great variety of cases. In the present case, the costs allowed to the libellant were incurred by him in his effort to recover what has been proved to be a just demand, and a denial of them, under the circumstances of the case, would, we think, be inequitable." In The City of Hartford [Case No. 2,750], in 1874, in the district court for this district, one vessel alone was injured and brought suit. Both vessels were held in fault and the damages were apportioned, the libellants recovering one-half of the damages they had sustained. The libellants asked for the costs of the cause. The court said: "In this district the practice has been to allow costs, in a case of this kind, to the party who recovered, even though the amount he recovered was diminished by the application of the doctrine of apportionment because of mutual fault." Considering that practice to be sustained by the decision of the supreme court in The Sapphire [supra], the court gave to the libellants a decree for their costs. In The America, 92 U. S. 432, in 1875, the owners of the Fairfield, sunk and totally lost by a collision with the America, had sued the latter in the district court for this district. That court dismissed the libel. On appeal by the libellants, the circuit court reversed the decree, and awarded to the libellants $17,723.75, with the costs of both courts. The claimants appealed to the supreme court, and that court held both vessels in fault, and "that the damages and the costs in both of the courts below should be equally apportioned between the two vessels, as prescribed by the desions of this court," citing The Catharine, 17 How. [58 U. S.] 170; The St. Charles, 19 How. [60 U. S.] 109; and The Maria Martin, 12 Wall. [79 U. S.] 31. The decision is stated thus: "Decree reversed, with costs in this court, and the cause remanded, with directions to apportion the damages and the costs in both courts below equally between the respective vessels, in conformity with the opinion of the court."

The counsel for the owners of the North Star asks this court to follow the ruling in the case of The America [supra]. There is no allusion in the opinion of the court in The America to the decision in The Sapphire. In each case only one vessel sued, and there was no allegation of damage to the other vessel, and the supreme court, on an appeal by the vessel sued, reversed the decree of the circuit court, and reduced the libellants' damages by one-half, because both vessels were held in fault. Yet, in the earlier case, the court held that it would be inequitable not to give to the libellants their costs of the district and circuit courts, and, in the latter case, it apportioned the costs in both of those courts equally between the two vessels. In none of the cases cited by the supreme court in The America, did it apportion the costs of the courts below equally between the parties. In The Catharine and The St. Charles [supra], nothing was said about the costs below, and, in The Maria Martin, the decree of the circuit court, that each should pay his own costs, was affirmed. In Chamberlain v. Ward [supra], the circuit court divided the damages and the costs of the district and circuit courts, and that decree was affirmed by the supreme court. In Chamberlain v. Ward, in Lane v. The Denike, and in The Mary Patten, there were cross-libels, as in this case, and the costs were divided, as well as the damages. There is no case of cross-libels, which I have been able to find, in this country, where both vessels have been found in fault, and the costs in the courts inferior to the supreme court have not been divided. In the following cases, the costs of the lower courts, as well as the damages, have been divided, where only one party sued and both were held in fault, viz.: Lenox v. Winisimmet Co., Lucas v. The Thomas Swann, The Marcia Tribou, O'Neil v. Sears, and The America [supra]. In the following cases, where only one party sued, and the damages were divided, each party was left to pay his own costs of the lower courts, viz.: The Bay State, The Nautilus, The Miranda, The Bedford, The Maria Martin, The Favorita, and The Empire State [supra]. In the following cases, where only one party sued, and the damages were divided, the libellant recovering had his costs of the lower courts, viz.: The Austin, The Baltic, The Paterson, The Sapphire, and The City of Hartford [supra]. In The Rival, the damages, one vessel suing, were divided, and the costs were imposed on the vessel most in fault.

In view of the cases in this country, I think that the better rule is, that in a case like the present, of cross-libels and mutual fault, the aggregate costs of both parties in this court and in the district court must be divided equally between the parties. Whether The America is to be regarded as overruling The Sapphire, in a case like The Sapphire, is a question not involved in this case.

In regard to the damages sustained by the owners of the North Star, interest is not to be added on the $27,747.82, from the time of the decree of the district court, but the item of $5,141.43 is to be taken, and interest paid on it from the time it was paid for repairs. The $5,000 deterioration is to be taken, and interest is to be allowed on it from the date of the commissioners' report, March 13th, 1866. The demurrage, $15,300, is to be taken, and interest is to be allowed on it from the latter date. The interest on the money paid for repairs, may be at the rate of 7 per cent. per annum, and the other

interest must be at the rate of 6 per cent. per annum. There can be no interest on the costs, either of the district court or of this court. Deems v. Albany & Canal Line [Case No. 3,736]. Let a decree be drawn in conformity with the foregoing decision.

[Both parties appealed to the supreme court, where the decree was affirmed. 106 U. S. 22, 1 Sup. Ct. 41.]

VANDERBILT v. REYNOLDS. See Case No. 10,331.

VANDERBILT, The C. See Case No. 3,524.

VANDERBILT, The CORNELIUS C. See Case No. 3,235.

Case No. 16,840.

In re VANDERHOEF et al.[1]

District Court, S. D. New York. Sept. 6, 1878.

BANKRUPTCY—EXAMINATION BY CREDITORS.

[Where creditors conducting an examination of the debtor in an apparently earnest opposition suddenly cease, without apparent cause, it is proper for the register to allow another creditor to continue the examination.]

In bankruptcy. In the matter of Nathaniel S. W. Vanderhoef and John P. Beatty.

M. H. Regensburger, for petitioner.

CHOATE, District Judge. So far as the register ruled that he had no right or power to allow the examination requested on behalf of Mr. Von Bauer, I think he was in error. The creditors should be allowed a full and fair examination, but if the register is satisfied that the examination is merely a device for delay, or it is clearly needlessly protracted, he may, in his discretion, check it, or limit the time when it shall be closed. I see no objection to one creditor's proceeding with an examination commenced by another, if that examination is incomplete, or leaves matters that may aid the creditors in voting on the composition uninvestigated; and at any time before the meeting is closed it is competent for the register to allow any creditor to carry on such an examination, whether he applied at the first session, or later, provided that the register shall be satisfied that the delay in applying for making the examination is explained. The fact that other creditors were conducting an examination in an apparently earnest opposition to the composition, and that their opposition and examination of the debtor suddenly ceased, without apparent cause, would, in my judgment, be in itself a good reason for allowing another creditor to continue the examination thus left incomplete. The register must exercise his own discretion, giving all the creditors a fair chance fully to discover the state of the debtor's affairs, yet preventing unreasonable delay and mere obstruction of the proceedings.

[For prior proceedings, see Case 16,841.]

[1] [Published from the records in the clerk's office. The case is also reported in 18 Alb. Law J. 220.]

Case No. 16,841.

In re VANDERHOEF et al.

[18 N. B. R. 543.][1]

District Court, S. D. New York. Aug. 29, 1878.

BANKRUPTCY—DEFECTIVE PETITION—AMENDMENT.

A petition by one partner against his copartner omitted to state the residence of such copartner. *Held*, that the omission might be supplied by amendment.

[In re Nathaniel S. W. Vanderhoef and John P. Beatty. Petition in bankruptcy.]

W. B. Hornblower, for the motion.

B. F. Forster, contra.

CHOATE, District Judge. This is a petition by one partner against his copartner. The petitioner is described as "of the city, county, and state of New York." The petition alleges that the petitioner and his copartner Beatty "have been for the last four months copartners, carrying on business in the city of New York." There is no averment as to the residence of Beatty. Beatty appeared upon the return day of the order to show cause, and proceedings have been instituted for a composition. At the first meeting in composition certain creditors appeared and had noted on the record their objections to the jurisdiction of the court that it is not averred that the debtors reside in the United States, and that the debts exceeding three hundred dollars, which it is averred that the debtors owe, are debts provable in bankruptcy. The debtors now join in a motion that the petitioner be allowed to amend his petition in the particulars complained of. It is insisted on the part of the opposing creditors that the court, not having got jurisdiction of the case by reason of the want of proper averments in the petition, showing jurisdiction, the amendment cannot be allowed. But the authorities are clear that if the facts are such as sustain the jurisdiction, such necessary averments may be supplied by amendment. Jackson v. Ashton, 10 Pet. [35 U. S.] 480. The question whether the averment as to the debts is defective is not passed upon. Motion granted.

[See Case No. 16,840.

[1] [Reprinted by permission.]

Case No. 16,842.

VANDERHOOF v. CITY BANK OF ST. PAUL.

[1 Dill. 476;[1] 5 N. B. R. 270; 3 Leg. Gaz. 268; 3 Chi. Leg. News, 338, 355.]

Circuit Court, D. Minnesota. June Term, 1871.

BANKRUPTCY—SUFFERING PROPERTY TO BE TAKEN ON LEGAL PROCESS.

1. The requisite intent on the part of an insolvent debtor to give, and of a creditor to secure, a preference which is illegal under the bankrupt act [of 1867 (14 Stat. 517)], may be inferred from circumstances.

[Cited in Warren v. Tenth Nat. Bank, Case No. 17,202.]

2. Where the creditor knew the debtor to be insolvent in the legal sense; that he had committed an act of bankruptcy; that he had no property but his stock in trade; that the debtor was unable to pay or meet his debt, though urged to do so, and when sued by such creditor for a large sum gave no notice of the suit to the other creditors, and did not defend it nor otherwise make any effort to prevent the judgment and the levy and sale of goods thereunder; and where the effect of sustaining the judgment and levy would be to allow that creditor to make his whole debt and leave the other creditors nothing: *Held*, that the levy of the execution did not under such circumstances give a valid lien on the goods as against the assignee in bankruptcy. Per Dillon, Circuit Judge. Nelson, District Judge, contra.

This is a bill in equity, filed in this court by the assignee in bankruptcy of the firm of Vanderhoof Bros., against the City Bank of St. Paul. The object of the suit is to determine which of the parties has the better right to the stock of goods of the bankrupts, or the proceeds thereof. The assignee claims these goods, or their value, as assets of the bankrupts. The bank, on the other hand, maintains that it secured a valid lien thereon by virtue of the judgment and execution hereinafter mentioned. The bill attacks the judgment and execution as being obtained in violation of the bankrupt act. The pleadings and proofs show the following state of facts: About the 20th day of July, 1869, Vanderhoof Bros. purchased of Mrs. Marvin a small retail boot and shoe store in the city of St. Paul, for the sum of $2,000, and gave their notes therefor; one for $1,000, due in six months from the said 20th day of July; one for $500, due in eight months, and the other for $500, due in one year. Vanderhoof Bros. commenced business with a capital not exceeding $600 or $800. Before the purchase of the stock was made the City Bank of St. Paul, through Mr. Upham, the cashier, at Vanderhoof's request, agreed to discount said note for $1,000, and afterwards did so, and it is one of the notes on which the bank subsequently recovered judgment as hereinafter stated. On the 22d day of January, 1870, the bank commenced suit against Vanderhoof Bros. in the state court, on a note dated December 24, 1869, for $209, due January 15, 1870; on a note for $350, dated November 2, 1869, payable to the bank, and due January 1, 1870 (indorsed January 19, 1870, $100); a note for $600, dated November 20, 1869, payable to the bank, and due January 19, 1870; and, also, on the abovementioned note given to Mrs. Marvin for $1,000, which matured January 20, 1870. On the 26th day of February, 1870, judgment, by default, was taken on these notes in favor of the bank and against Vanderhoof Bros. for $2,130, and on the same day an execution was issued and placed into the hands of the sheriff, and immediately afterwards levied upon the whole stock in trade of the debtors, and the same was subsequently (March 25, 1870) sold, yielding the sum of $2,385.71, which is now in the hands of the clerk of the United States district court. The sale by the sheriff was first enjoined by the United States district court, but the judge thereof, on a showing that such a sale was expedient, allowed it to be made on condition that the proceeds should be deposited therein. On the 11th day of March, 1870 (after the levy and before the sale under the execution), a petition in bankruptcy was filed in the United States district court against Vanderhoof Bros., and they were (March 24) adjudicated bankrupts, and the complainant appointed the assignee. The stock in trade levied on and sold constituted all the property of the bankrupts. In addition to the above facts, D. W. Vanderhoof, as a witness for the plaintiff, testified that they transacted all their business with the City Bank, of which Mr. Upham was the cashier and active business man; that they kept their bank account there; that in December, 1869, Mr. Upham called upon them at their store for a statement of their business affairs and condition; he took it down on an envelope; it was taken from their books, and showed their debts and accounts falling due from October, 1869, to March, 1870; it showed their debts, excluding what they owed the bank, to be $3,500, and including the debt to the bank, $5,600, and that their assets at cost price exceeded their liabilities. The witness also stated that in October, 1869, an inventory was taken which showed $6,500 stock, and it had not decreased $1,000 when statement was made; that the assets remained about the same until the levy, and were then of the value of $5,500, but cost more than that. He says: "We did not pay the notes to the City Bank because we did not have the money. I told the officers of the bank so—that we did not have the money. They urged payment, and I told them we were doing the best we could to collect money and to sell goods to pay them. I told them this about every time a note became due, and when renewal notes were given, and in January, 1870. I told them we had plenty of goods to pay

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

all our debts if they would not crowd us." * * * "It was through my influence that Mr. Upham advanced the $1,000 to Mrs. Marvin, of whom we bought." * * * "I had no conversation with Mr. Upham about the suit. After it was brought he told me that on Mr. Reed coming into the bank he disliked the account, and had forced him (Upham) to do what he had done. I told Upham I had done the best I could about making payments." Mr. Johnson, a resident creditor, testified that after the levy he asked Vanderhoof "why he allowed the City Bank to take judgment without letting him know that suit had been commenced;" to which he replied, "because he felt under obligations to Mr. Upham." This statement, Mr. Vanderhoof, being called as a witness by the bank, denies. Mr. Mason, a creditor, testified that he asked Upham about the judgment, and said he knew exactly how the firm stood, how much they owed, and where and when it would become due, mentioning a large Chicago debt of $2,100, and that they could not pay it, and that Vanderhoof had promised him that if they got into trouble he would make their claim good, and that he had this understanding with him. Mr. Upham, as a witness for the bank, testified that he had some conversation with Mr. Mason about the affairs of Vanderhoof Bros., but denied that he had ever made the statement to which Mr. Mason testified, or any statement of the kind, or that he had ever had any such understanding with Vanderhoof. He stated that suit was brought because Mr. Reed had purchased a controlling interest in the bank, was the vice-president, and insisted that the claim should be collected. He testified that the statement made to him by Vanderhoof was such a one as the bank requires of all their customers, whose affairs they do not know all about. It showed, as near as he could remember, that the assets exceeded liabilities by about $1,500, and he says he considered them solvent, and so reported to Reed, the vice-president, who nevertheless insisted that the debt should be collected, and that this was the reason suit was brought, and that he so stated to Mr. Vanderhoof.

Rogers & Rogers and C. K. Davis, for the assignee.

Newell & Brill, for the bank.

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

DILLON, Circuit Judge. There can be no reasonable doubt that in January, 1870, when the bank commenced suit, Vanderhoof Bros. were insolvent. They had no assets except their stock in trade. Not to mention other debts, they owed the bank over $2,100. They had no money with which to pay, and no means with which to raise money except their stock of merchandise, which at cost price did not more than equal the amount of their liabilities, and which, when sold by the sheriff, did not bring more than about one-third of what they owed. Plainly, they were insolvent. They were urged to pay, and only failed to pay because they could not; and this was the reason they declared to the bank. Surely a mercantile firm, having no property but their stock in trade, who, when pressed for a debt admitted to be just, give as a reason that they are unable to pay it, and suffer judgment to be rendered against them, is insolvent within any accepted or sound definition of that term, as used in the bankrupt act, and this, although the stock in trade may, at cost price or cash value, could it be sold for what it is worth, equal or exceed the trader's liabilities. The notes held by the bank and on which its suit was brought were commercial paper, and one of them was, at the time suit was commenced, more than fourteen days past due, and was not paid simply because the bankrupts were unable to pay it. This was of itself an act of bankruptcy, and proof of insolvency. Shawhan v. Wherrett, 7 How. [48 U. S.] 644; Smith v. Buchanan [Case No. 13,016]. And of all these facts the bank had notice.

I lay out of consideration as not sustained by the evidence the allegation of the bill that the Messrs. Vanderhoof procured the judgment to be rendered; nor is it shown that there was any collusion between them and the officers of the bank with reference to the suit which the bank commenced. Undoubtedly the debtors would have preferred that suit should not have been brought; but payment being demanded which they were unable to make, and having no defence to the notes, and feeling friendly to the bank, and under obligations to it, they suffered judgment to go against them, knowing, of course, that they could not meet it, and that their stock was liable to be, and probably would be, as it was, seized to pay it. Now under these circumstances, has the bank a right to hold the preference which it has sought to gain by its judgment and execution? If so the bankrupt act, known to have been framed to supersede the system of preferences, and to place all unsecured creditors of an insolvent upon the same footing, is signally defective. If the debtors had turned out their goods to the bank in payment of these notes, clearly the bank could not, with its knowledge of their condition, have held them against the assignee. Section 35. The act dissolved all attachments made within four months of its taking effect; and it is planted full of provisions intended to secure equality, and to prevent preferences. The bankrupts did not, before judgment, give notice to their other creditors in the same city or elsewhere that the bank had sued them. The motive of the bank in bringing suit was to secure their debt, and a knowledge of the condition of the debtors prompted the suit. The bank knew facts which, in law, showed their debtors to be in-

solvent and that they had committed an act of bankruptcy in not paying one of the notes in suit when urged to do it.

As the debtors did not defend the action, nor give notice to other creditors that it had been brought, nor go into bankruptcy, and were insolvent, I have no difficulty in holding that they suffered judgment to go against them, and property to be seized on execution, with an intent to defeat the act.

Of these facts the bank was cognizant, and the requisite intent on the part of debtors to give, and on the part of the bank to obtain, an illegal preference may and should be inferred from the circumstances. These circumstances are the known insolvency (in the legal sense) of the debtors, the fact that they had committed an act of bankruptcy; that they had no property but their stock in trade; that being pressed to pay, they were unable to do so; that they gave no notice of the suit, and did not defend it, or go into bankruptcy, nor otherwise make any effort to prevent the judgment, levy, or sale; and that the effect of sustaining the execution proceedings would be to allow one unsecured creditor to make his whole debt, and leave the other creditors nothing. To sustain the right of the bank to the benefit of its judgment and levy, would subvert the bankrupt act, and if such a claim were maintainable, the bankrupt act would be speedily repealed, so as to allow all creditors to strive for preferences.

A decree should, in my opinion, be entered, establishing the right of the assignee to the money produced by the sale of the goods, and ordering the defendant to pay the costs of this suit.

The testimony shows that the property brought a good price, and I do not think we should charge the defendant with the difference between what the property sold for, and its supposed market value at the time it was seized.

It is proper to add that Judge NELSON is of opinion that the requisite intent to defeat the bankrupt act cannot be inferred from the circumstances above mentioned, and hence that the bank secured a valid lien on the stock by the judgment and levy.

NELSON, District Judge. I cannot assent to the conclusion of the circuit judge in this case. I agree that Vanderhoof Bros., being merchants, had committed an act of bankruptcy, in not resuming payment of their commercial paper within a period of fourteen days after suspension, and were thus legally insolvent at the time the suit was commenced against them by the bank. I also agree, that when urged by the bank to pay, they told the cashier "that they had no money to pay their debts with, but their property was ample to meet all their liabilities."

The bank, with knowledge of this condition of the debtors' affairs, commenced suit upon several notes held by them against the debtors, obtained a judgment by default, and the sheriff made a levy by virtue of an execution issued before the bankruptcy proceedings were instituted. The question is now presented: Did the debtors, by remaining passive while all these proceedings were progressing, from the time of the service of the summons down to the final levy under the execution, suffer their property to be seized by legal process, with intent to give preference to the bank, or with intent to delay and defeat the bankrupt act, and did the bank have reasonable cause to believe that a fraud on the act was intended?

The intent to prefer is a necessary ingredient of the charge made in the bill of complaint, and must be proved. There is no direct evidence to establish any consent by the debtors to the commencement of a suit against them, nor of collusion between them and the bank. They said nothing in their interview with the cashier at the time when informed by him, that the directors had determined to enforce the collections of the notes by a suit which would show any intention to give a preference.

"Johnson," a creditor of the debtors, swears that one of them told him that he did not inform any of his other creditors of the proceedings instituted by the bank, because "he felt under obligations to the cashier." This testimony is met by the debtor with an emphatic denial that he ever made any such statement; so that I am satisfied that the debtor said nothing which could fix any illegal intent upon him. The complainants' counsel invokes the familiar principle that every person is presumed to intend the natural consequences of his acts, and contends that the result of all the proceedings instituted by the bank, and the conduct of the debtors enabled the former to obtain a preference, and therefore we must presume that the latter intended it.

I cannot give my assent to the application of this rule to the facts as they exist in the case. The debtors had no defence to the notes sued upon; the liability was incurred for a valuable consideration. The cashier knew all of the circumstances under which a large portion of the indebtedness had been created, and the judgment was obtained, not only without any act on the part of the debtors, but in spite of them. Any defence that the debtors might interpose would have been sham, and merely delayed the final judgment. The law of this state would not justify any such conduct on the part of the debtors, and no honest debtor would seek to delay a recovery of a just debt by interposing a sham defence. Upon this state of the case how can the judgment obtained by due course of law, establish an intent to prefer the judgment creditor?

It is said by counsel that the debtors should have defeated the action of the bank by voluntarily filing their petition in bankruptcy. I can find nothing in the law compelling an insolvent debtor to thus put himself into

bankruptcy. Various reasons satisfactory to himself and in accordance with good faith, may influence him and prevent him from doing this. He may not wish to acknowledge, by so doing, that he is hopelessly ruined in his business; or he may think that he will still be enabled, with his property on hand, to arrange with his creditors by obtaining additional time within which to pay his indebtedness. Entertaining these views, I cannot believe that in this case, when the debtors have sworn that they did not intend to give a preference, such intent can be fairly inferred because they did not seek the bankrupt court.

If the judgment obtained under these circumstances does not substantiate the charge of an intent to prefer, did the further proceedings taken by the sheriff, to wit: a levy by virtue of an execution, establish the charge that the debtors suffered their property to be seized by legal process with intent to give a preference? The laws of this state provide that a judgment is a lien on real estate as soon as docketed, and points out the steps necessary to be taken to make it a lien on personal property. The law directed the sheriff in the discharge of his duties, and the lien became perfect upon the property in controversy here, without any participation of the debtors in the matter. The lien having been thus obtained, before bankruptcy proceedings were instituted, in my opinion, is protected by the act. If it is not to be recognized as valid, but is to be regarded as obtained in violation of the act, and a fraud upon it, congress must say so, or the supreme court so decide.

The Circuit Judge being of the opinion that the assignee should recover, a certificate of division was ordered, on questions stated: [1. Whether or not an intent on the part of said debtors, Vanderhoof Brothers, to suffer their property to be taken on legal process, to wit: the said execution, with intent to give a preference to said bank, or with intent thereby to defeat or delay the operation of the bankrupt act, can be inferred from the foregoing facts. 2. Whether, under the said facts, the said bank, in obtaining said judgment, and making the said levy, had reasonable cause to believe that a fraud on the bankrupt act was intended? 3. Whether, under said facts, the bank obtained, by the levy of its execution, a valid lien on the said goods as against the assignee in bankruptcy?] [2]

[The case was accordingly taken to the supreme court upon a certificate of division in opinion. The first two questions under discussion were decided in the negative, the third in the affirmative. 17 Wall. (84 U. S.) 473.]

As to proof of fraudulent preference, see Giddings v. Dodd [Case No. 5,405]; Linkman v. Wilcox [Id. 8,374]; Rison v. Knapp [Id. 11,861]; Martin v. Toof [Id. 9,167]; Wright v. Filley [Id. 18,077].

[2] [From 5 N. B. R. 270.]

Case No. 16,843.

VANDERSLICE v. The SUPERIOR.

[2 Am. Law J. (N. S.) 347; 4 Pa. Law J. Rep. 388; 13 Law Rep. 399.]

District Court, E. D. Pennsylvania. Feb., 1850.

TOWAGE—EXTENT OF TUG'S LIABILITY—NOTICE OF RESTRICTIONS.

1. Considerations stated by Kane, District Judge, for holding a steam tug to the rigid accountability of a common carrier, in opposition to the case in 3 Hill, 9.

[Cited in Nelson v. The Goliah, Case No. 10,106; Brawley v. The Jim Watson, Id. 1,817; The Thomas Kiley, Id. 13,925.]

[Cited in Wright v. Gaff, 6 Ind. 422.]

2. The captain of a steam tug is the pilot of the voyage, and is the best judge of the sufficiency of the canal boat taken in tow, to resist the weather, and of the adequacy of her crew to do what may be required for her protection, and cannot limit his responsibility by a notice, given at the time of commencing the voyage, that it must be at the risk of the canal boat.

3. The steam tug, notwithstanding such notice, is bound for the exercise of all that skill and care which the circumstances of the case demand.

In admiralty.

KANE, District Judge. The steamer Superior was customarily employed by the Philadelphia and Havre de Grace Steam Towboat Company in towing vessels for hire between Philadelphia and the Delaware outlet of the Chesapeake and Delaware Canal. On the 15th of March, 1846, Captain Metz, her commander, was applied to by the libellant, to tow his canal boat, the Judge Roger, then laden with a valuable cargo, down the river. Captain Metz objected, alleging that the state of the weather was such as to make the trip a hazardous one; but being pressed by the libellant and several other masters of canal boats which were in waiting, he finally consented to take them, saying at the same time that "the weather was unfit to go down the river that day, and that if they must and would go down, they must do so on their own responsibility," or "at their own risk." Three of the canal boats were thereupon attached to the sides of the steamer; but one of them meeting with an accident immediately after, two only proceeded. Of these, one was very soon cast off at the request of her captain; thus leaving only the boat of the libellant, who persisted in his purpose to go on. They had not however made much progress before it was deemed prudent to detach the Judge Roger from the side of the steamer, and to tow her astern. In doing so, the canal boat got into the trough of the sea, and rolled so heavily as to lose some casks of merchandize, that made part of her deck load; and it was then agreed that she should be run in upon the mud flats on the Pennsylvania side above the pier at the Greenwich Point house, where it was thought she might take the shore safely. It was ebb-tide, and the wind was blowing hard from the Jersey shore. The

manœuvre of casting off the canal boat was executed badly on one side or the other, and she struck against the pier with so much violence as to damage her greatly. She succeeded, however, in anchoring a short distance below; when the steamer, returning either for the purpose of rendering assistance, or of receiving the towline which had been left fast to the canal boat, came into collision with her so forcibly as to break several of her own paddle wheels, and further to injure the canal boat in a greater or less degree. After this the steamer again took her in tow conducting her in a nearly sinking state towards the Jersey shore; and having almost reached it, she again cast her off, and directed her course for Philadelphia. But the depth of the water and the adverse wind and probably also the condition of the canal boat prevented the libellant from beaching his boat by means of poles, and she in consequence drifted out into the stream. The steamer returned upon observing this; but again coming into collision with her broke into her stern and completed her wreck. The boat sank, her hatches came off, part of her cargo drifted out, and nearly if not quite all of the remainder was damaged. I believe that there is no dispute upon the facts which I have recapitulated. The discrepancies in the testimony relate to the sea-worthiness of the canal boat at the time of leaving Philadelphia, and the degree of skill and care displayed by the steamer in the subsequent incidents.

The libellant claims indemnity for the damage done to his boat and her cargo by these repeated collisions. He considers the steamer as in the occupation of a common carrier, and liable for all losses which have not been occasioned by the act of God, or of public enemies; and he denies that the limitation by the captain of his responsibility, by the notice to the libellant, if admissible at all, can be so extended as to exempt him from liability under the circumstances presented by the evidence. For he says in the second place, that the loss was directly occasioned by a want of that ordinary skill and care on the part of the steamer which are engaged by every carrier of goods for hire. The claimants, the towboat company, deny that they are common carriers; and assert that being ordinary bailees, bound as such by force of the ordinary contract only to the exercise of ordinary care and skill, their special disclaimer of responsibility, impliedly acceded to by the libellant at the time of contract, must be construed as exempting them from liability for everything except just that measure of skill and care which would be exacted by the circumstances of a voyage which involved no special or extraordinary hazards. They affirm that they did exercise this measure of skill and care; that the collision of the canal boat against the pier was occasioned by her being insufficiently manned; and that, as to the two subsequent collisions, they must be referred to the state of the weather, and were, moreover, in their consequences of no importance, since the first collision had reduced the canal boat to a state of wreck.

The first question thus presented is: Whether steam tugs, whose regular and constant business it is to tow boats for hire, are to be regarded as common carriers, when the owner or master of the boat towed remains on board of it. Chancellor Kent, in his Commentaries (vol. 2, 599), includes them in this class of bailees, but cites no authority for the position. On the other hand, Judge Story excludes them from it (Bailments, § 496), referring in the margin to the case of Alexander v. Greene, 3 Hill, 9. I confess that, after reading that case over carefully, the reasoning of the court does not appear to me conclusive, and that I am much more impressed by the argument of the counsel for the unsuccessful party. It has been suggested, that such steam tugs should perhaps hold a place between common carriers and ordinary bailees for the carriage of goods; not liable in general for loss by fire or robbery, since the owner or his immediate agent has to a certain extent the continued supervision of his property, but to be otherwise held to the highest degree of accountability, since the vessel towed is for the time under their control—quite as much so as the baggage of a passenger in a stage coach. But, if they are not to form a distinct new category, I should be strongly inclined to the opinion that they must be treated as common carriers. Their occupation is essentially a public one—they hold themselves out to the world as ready to serve all who will employ them, and they have whatever of advantage any common carrier can derive from such a public announcement. They have the custody and direction of the vessel to be transported: it is generally fastened to the steamer in such a manner as not to be safely detached while the two are in motion, unless by the act of those on board the steamer; and if detached while on the way, the boat is without any power of providing for her safety. The hands on board the boat, moreover, receive their orders from the steamer's captain—and in fact the two move on together under the sole impulse and guidance of the steamer. The vast interests, which are daily confided to such steam tugs, the hazards to which our internal commerce may be subjected by a want of the highest degree of skill and care on the part of those who command them, and the difficulty of drawing the line in a court of justice between the consequences of mismanagement and those of mere stress of weather, or, where these come together, as they often do, of assigning to each its appropriate share of influence;—these considerations urge us very strongly to hold the steam tug to the rigid accountability of a common carrier. But I do not think it necessary to decide the question. Though the law of

Pennsylvania under which this contract was made, seems to be settled by the supreme court of the state, however reluctantly, that a common carrier may restrict his common law liability by special contract; yet the extent to which such a limitation may go is itself limited very strictly. It has never been contended, that the limitations can be so enlarged as to relieve him from the exercise of all ordinary skill, diligence and care. The utmost, for which he has ever been allowed to stipulate, is that his liability should be subject to the same rules as that of an ordinary bailee for hire. What then was the liability of the steamer, considered as an ordinary bailee, who, at the time of contracting, had given to the master of the canal boat the special notice which is in proof? Independent of that notice the engagement was for the exercise of adequate skill, and of reasonable care and prudence in towing the boat to her destination,—skill and prudence, both adapted to the circumstances, hazardous or otherwise. Did the notice vary this engagement?

In the case of Alexander v. Greene, already referred to, it was decided that an engagement to tow a boat "at the risk of the master and owners thereof" relieved the steam tug from all liabilities arising from a want of ordinary care and skill; and it has been contended here with great force, that the notice by Captain Metz that if the canal boat determined to go, it must be on her own responsibility or at her own risk, should have an equally broad effect. I acknowledge that I cannot distinguish the two forms of expression, so as to give them a difference of import. But I have not been able to satisfy myself, that the notice in either case should have the effect contended for. I cannot conceive of a contract for transportation, which shall be so limited, as to exonerate the carrier, when the property entrusted to him is destroyed by his negligence or want of skill. Such a contract would have no meritorious consideration: its terms involve no engagement at all: it means nothing, but that the carrier will not fraudulently or wilfully destroy the property; and to this every man, whether carrier or not, is bound by the law of the land, in reference to the property of every other man, without any contract whatever. In my judgment a saving of this sort would be repugnant to the spirit and purpose, as well as the body of the contract; and, were such an interpretation claimed for the notice in this case, I could not regard it otherwise than as void. Such I may remark, seems to be the opinion also of the accomplished editor of the American Leading Cases, in his comments on this decision. But the claimants here do not assert this doctrine without qualification. They admit themselves bound for the reasonable skill and diligence which would be adequate to an ordinary risk; and only ask exemption from employing that higher skill and diligence which the particular emergency in this case called for. Still I cannot accede to the legal policy which would sustain even such a limitation. It could never have a practical interpretation. What is its import? Does it mean that if in consequence of the storm the captain of the steamer shall become too much absorbed in anxiety for his own safety to think of any thing else, this shall be enough to discharge him and his steamer from liability? Does it mean that he may cast off his tow to the mercy of the elements, so soon as he becomes sensible that his own risk is increased by keeping it attached? His own safety, and the safety of his tow would no doubt have been more complete, if neither had left the wharf at Philadelphia; now, what increase of peril, beyond that of encountering the elements at all, shall be deemed the casus fœderis, which is to excuse his negligence or want of skill in meeting it! And how are we to subdivide and distribute the indicia of nautical skill and prudence, so as to mete out to the vessel under tow its just portion of them in the varying contingencies of such a voyage!—asserting for it all that would be needed in favorable weather, but denying its right to any more?—distinguishing circumstances into ordinary and peculiar, that differ only by inappreciable degrees, as the height of a wave, or the force with which the wind blows, and referring the injury which is complained of to one or the other class of causes; thus ascertaining whether the peril was within the contract or its limitation?

How shall we decide in reference to a particular case of peril or difficulty, that it called for extraordinary energies, but that the energies that combated it were merely ordinary! It involves no hardship to the master or proprietor of a steamer, whose daily occupation is the navigation of the river, to assume that he is acquainted with its hazards, and fitted to decide whether the state of the wind and tide will allow him to carry down his train of canal boats in safety. He is the pilot of the voyage: he is the best judge even of the sufficiency of the canal boat to resist the weather, and of the adequacy of her crew to do what may be required for her protection. It is in evidence that when the water is smooth, and the tow boats are attached in consequence to the steamer's guards, the hands of the tow boats have nothing to do,—that boats have occasionally been towed in safety without any person on board,—at other times, when the boat is towed astern, a man is required to steer her, and a boy or another man to give occasional assistance. Sometimes a still larger crew may be required by circumstances. Again, the form, dimensions, and lading of the tow boat have their influence. A decked boat with a light cargo is perfectly safe in weather which would swamp an open boat, heavily laden. Now, when a boat offers herself for towage, it is the proper office of the master of the steam-tug to determine upon all these points, and to refuse

to take her if she is either too imperfect in her structure and arrangements, too heavily burthened, or too lightly manned to meet the apparent hazards of the particular voyage. He would have this right, whether regarded as a common carrier or as an ordinary bailee; and I see no objection to requiring that he shall exercise it. I am inclined, therefore, to decide that the limitation of the claimants' liability, which has been contended for, does not exist; and that the steam-tug, notwithstanding the notice, was bound for the exercise of all that skill and care which the circumstances of the case called for.

Did Captain Metz exercise this degree of skill and care? I have examined all the evidence in the case very fully and cautiously. There is in it just about the usual conflict of recollections that belongs to controversies of this sort. Men who are parties in a scuffle, or on board different ships that come into collision, never agree as to where the blame lies. Even lookers on very seldom unite in detailing occurrences of an exciting character. Especially is this true as to times, distances, and even as to the order in which incidents have followed each other. It is often in consequence the most puzzling duty of a judge, to determine from the conflicting evidence of honest and intelligent witnesses, what the truth is which they all profess to detail. In such a case he is fortunate if he can get hold of some fact independent of memory—some land mark that cannot have been subjected to change. I think we have something of this sort in a part of the evidence here. It is found in the position and course of the canal boat at the moment of striking the wharf, as determined by the part on which she received the first injury. She struck on her starboard bow: her head, therefore, was that moment inclined outwards to the river, and off from the flats. She struck, moreover, with great violence; so as not only to break in her bow, but to indent or displace the wharf-log against which she struck. I do not see how these two circumstances can be explained, unless by the supposition that at the moment of striking she was obeying a powerful impulse derived from the steamer. Now it is agreed on all hands, that the steamer and the canal boat were on the Jersey or weather side of the river, where it was determined that the boat should be cast off; that the steamer immediately directed her course towards the Pennsylvania shore, and reaching this side of the channel, passed immediately below the powder wharf, 562 feet above the place of the first accident, still steering towards the flats. Then inclining down stream in the cove between the powder wharf and the wharf at the Ferry, where the water was smooth, she skirted along the flats; the canal boat in the meantime steering towards the Pennsylvania shore. Arriving near the lower or Ferry wharf, the steamer again headed outwards towards the deep water; and it was about this time, or immediately after, that the canal boat struck the wharf. So far the witnesses concur. The witnesses for the steamer say, that soon after passing the powder wharf she slackened her speed, and at last checked it altogether for the purpose of enabling the canal boat to throw off the bow-rope; and that this would have been effected if the crew of the canal boat had been effective; but that the libellant being at his helm, and no other person on board but a boy who was not strong enough to unhook the rope, the libellant left his helm to assist him, and thus occasioned the accident, though the steamer had in the meantime thrown loose her tow rope. Now, it is plain that this of itself would not have produced the collision. Had the steamer stopped in time, and the tow-rope been fully slackened, the canal boat would not have had sufficient headway to drive her against the wharf so forcibly; and her motion directed inwards by her helmsman, and aided by the wind, would have continued towards the shore, rather than outwards against wind and steerage. The story on the other side denies that the captain of the canal boat ever left his helm, and refers the injury to the continued speed of the steam boat, which kept the tow line taught until the boat was nearly in contact with the wharf, even while the steamer was heading out herself; and thus made it impossible for the boat to obey her helm. This view of the facts, which is borne out moreover by the testimony of those who witnessed the accident from the shore, seems to me to be fully corroborated, and I have already remarked by the force and direction of the boat's impact against the wharf. There are numerous facts disclosed in the depositions which point to the same conclusion. It is not necessary for me to refer to them in detail. I have been particularly struck by the reported difference in the bearing of the two captains:—the one excited, intimidated, losing his presence of mind, hurrying about his vessel, multiplying orders—twice bringing his steam boat into forcible collision with the sinking canal boat which he sought to rescue;—the other calm, resolute, efficient; endeavoring to secure his boat to the wharf by lines after the first accident; anchoring her when that failed; holding on to his chance of deliverance even after the steam boat had become entangled with her afterwards; refusing to quit his post when warned that she was bearing down on him the second time; and even after she had again struck him, and he was driven down in the water to his knees by the last collision, holding on to his vessel till he had made fast to her bow the line by which she was dragged ashore at last after she had sunk. In a question which involves the seamanship and prudence of these two men in the circumstances which led to the first accident, I am justified in referring to their subsequent conduct in the disasters which followed. I am constrained to say that the captain of the steam tug appears to have failed

in the performance of what I suppose to have been his duty. It was not enough that he shut off his steam when approaching the wharf; for this would only check without arresting the motion of his vessel; he was bound, in the exercise of ordinary care, even if the weather had been calm, to see to it that the rope was adequately slackened to allow the canal boat to get ashore; and if he found that from any cause the rope was not at once detached, he was bound to wait till it could be done; or if the wind and his position made it dangerous for him so to stop on his course, he should have retained his hold of her, carrying her out with him into the channel again, and repeating his manœuvre at some lower point on the river. I fully acquit him of all wilful misconduct; but I cannot escape the conclusion, that had he been more self-possessed than he appears to have been; in a word, had he exercised the ordinary skill and prudence which his contract of bailment implied, the first accident never would have occurred. As to the two subsequent collisions, the argument for the claimants admits that they are without legal justification or excuse.

The preliminary questions which were raised upon the pleading, do not seem to me to involve a difficulty. The bailee of goods has such a property in them as will support a suit for damage done to them; and though the party damaged by a collision cannot in any case receive a double satisfaction, I do not see any reason for refusing him permission to include in the initiation of one proceeding his claim of recourse against the ship which has injured him, and against its owners to the extent of their interest in it. The decree will be in rem for the libellant for the amount of his actual loss by reason of the three collisions that have been referred to, with interest, in the nature of damages from the date of the occurrences, and with full costs. And it is referred to the commissioner to ascertain the amount of this decree.

Case No. 16,844.

In re VANDERVELPEN et ux.

[14 Blatchf. 137.] [1]

Circuit Court, S. D. New York. Feb. 20, 1877.

EXTRADITION—TREATY WITH BELGIUM—JURISDICTION OF COMMISSIONER.

1. The extradition treaty between the United States and Belgium (18 Stat. 804) declares that its provisions shall not apply to any crime committed prior to the date of the treaty, except murder and arson. The date of the signing of the treaty was March 19th, 1874. It was not to take effect until 20 days after the day of the date of the exchange of ratifications. They were exchanged April 30th, 1874. *Held*, that a crime committed in Belgium on the 1st of May, 1874, was covered by the treaty.

2. Where an extradition case, under a treaty, is brought before a United States commissioner, it is his judicial duty to judge of the effect of the evidence, and no other judicial officer has any power to review his action thereon.

[Cited in Re Wiegand, Case No. 17,618; Re Wahl, Id. 17,041; Re Fowler, 4 Fed. 317.]

[This was an application by Jean B. H. Vandervelpen and Jeanette Damas, his wife, for a writ of habeas corpus.]

William D. Shipman and Emmet R. Olcott, for relators.

Frederic R. Coudert, for the Belgian government.

JOHNSON, Circuit Judge. These persons being in the custody of the marshal of the Southern district of New York, in extradition proceedings had before Kenneth G. White, a commissioner of the circuit court, specially authorized to entertain such proceedings, upon the warrant and decision of such commissioner against them, have been now brought before me by writ of habeas corpus. The question I am to consider is, whether the restraint and imprisonment of the petitioners is lawful, for it is only from unlawful restraint and imprisonment that parties can be freed by means of the writ of habeas corpus.

The extradition of persons charged with crimes alleged to have been committed, is regulated by the Revised Statutes, (title 66), in conjunction with the particular treaty or convention applicable to the case. Section 5270 covers the whole authority and procedure of the magistrates of this country in these proceedings. It provides as follows: "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the supreme court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record, of general jurisdiction, of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district or territory, with having committed within the jurisdiction of any such foreign government, any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention, and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made." The

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

authority of this law cannot be and is not denied, and it necessarily follows that an imprisonment in pursuance of it is lawful. The treaty for extradition under which these parties have been charged, is between the United States and Belgium. The officer who has acted under the law is one of those upon whom it confers the power of acting. For the purposes of this law, each of the enumerated officers possesses the same authority, so that it is indifferent, for all legal purposes, whether he is the chief justice of the supreme court of the United States, or only a commissioner authorized to act by any of the courts of the United States. Each of them derives his power not from his official station, but from the delegation of power conferred by this act. A complaint under oath was made before this officer, charging these parties, who were found within the limits of a state, with having committed within the jurisdiction of Belgium a criminal offence provided for by that treaty. The offence thus charged was uttering a forged obligation, with intent to defraud, on and after the 1st day of May, 1874. It is provided for by subdivision 5 of article 2 of the treaty. 18 Stat. 804. Article 3 declares, that the provisions of the treaty shall not apply to any crime or offence committed prior to the date of the treaty, except murder and arson. The date of the signing of the treaty is March 19th, 1874. By article 8 it was not to take effect until twenty days after the day of the date of the exchange of ratifications. These were exchanged April 30th, 1874, and the treaty did not take effect until twenty days thereafter. But, when it did take effect, it operated according to its terms. The reference in article 3 was to the date of the treaty, which was either the date of the signing, or the date of the exchange of ratifications, and not the time of its taking effect. The offence charged, therefore, is included, in respect to time as well as to substance, within the provisions of the treaty. The warrant issued by the magistrate, on which the prisoners were arrested, follows the complaint, and directs the apprehension of the persons charged, and that they be brought before the commissioner who issued the warrant, to the end that the evidence of criminality may be heard and considered. The statute and the treaty have thus far been exactly followed by the commissioner, who thereupon became clothed with all the authority that the treaty and the statute confer in this behalf. When it is remembered that the treaty and the statute create the power, and that judicial intervention takes place only because they prescribe it, and that no review, by judicial authority, of the action of the officer who executes the power, is provided by either treaty or statute, no ground is apparent upon which such a review can be claimed. The jurisdiction of the commissioner is complete when the prisoners are brought before him under the statute and treaty, upon a charge provided for by the treaty. He is then to hear and consider the evidence of criminality, in the exercise of his jurisdiction. If, on the hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty, he must certify the same, together with a copy of all the testimony taken before him, to the secretary of state. In this case, a mass of evidence was adduced before the commissioner, authenticated according to the provisions of the act of June 19th, 1876 (19 Stat. 59), and relating to the charges against the prisoners. Of the effect of this evidence, it was the judicial duty of the commissioner to judge, and neither the duty nor the power to review his action thereon has been conferred upon any other judicial officer. If he deems it sufficient, the statute prescribes his further action in the premises. It then rests with the executive authority to determine, in the last resort, what is demanded by justice and the obligations of the treaty. If it appears to the president, upon a review of all the evidence, that the charge is not sustained, and that justice and the obligation of the treaty do not require the surrender of the prisoners, he can refuse it, and they can be set at liberty, either under the provisions of section 5273 of the Revised Statutes, or in any other appropriate manner.

The whole subject involved in this case has received very careful and ample examination, in this circuit, in the case of In re Stupp [Case No. 13,563], where all the previous cases are fully examined by Judge Blatchford. His opinion in that case was concurred in by Judge Woodruff, and their decision established the law in this circuit. I consider it my duty, and my judgment agrees with their views, to apply that decision to this case. I abstain from expressing any opinion upon the effect of the evidence. Having, as I think, no right to make that opinion effectual in case it differed from that of the commissioner, I think it only suitable to withhold it all together. The writs must be discharged, and the prisoners remanded to the custody from which they were taken.

Case No. 16,845.

VANDERWICK v. SUMMERL.

[2 Wash. C. C. 41.] [1]

Circuit Court, D. Pennsylvania. April Term, 1807.

ACCOUNTING IN EQUITY—REFERENCE TO MASTER—EXCEPTIONS TO REPORT.

1. Where money belonging to A and C, arising out of a joint transaction between him and C, has, with the knowledge by B of the interest of A in the same, been placed by the agent of A and C to the credit of B and C, who are partners, and C is indebted to his partner B; B cannot apply the money of A to the credit of C, in satisfaction of his claim upon him.

[Cited in Re Ketchum, 1 Fed. 827.]

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

2. The court observed that where accounts were referred to a master, they would not settle principles previous to taking an account; but they must be brought before them on exceptions.

[Cited in Lull v. Clark, 20 Fed. 455.]

This bill was brought for an account, and amongst other items there was one for the plaintiff's interest in the cargo of a vessel, the Mary Ann, owned and managed by Brown, and shipped on his and the plaintiff's account, before he became a partner with the defendant; but the proceeds of which came to the hands of Brown & Summerl, after their partnership, and with full notice to Summerl of the plaintiff's interest therein. The case, as it appeared from the accounts rendered, from the correspondence, and from parol evidence, was shortly this: Certain commercial transactions had taken place between the complainant, living at St. Domingo, and Israel Brown, a resident of Philadelphia, amongst which was a shipment of flour, made by the latter on the joint account of himself and the complainant, in a vessel belonging to the complainant, to the Island of Martinique; just previous to the capture of that island by the English. Before the vessel sailed with her return cargo, the island was taken, and the vessel and cargo libelled and condemned. From this sentence an appeal was entered, and restitution was awarded by the court of admiralty in England. Brown, not satisfied with simple restitution, laid his claim for damages before the commissioners acting under the British treaty, who awarded a certain sum to be paid by the government on that account. In 1794, the defendant and Brown entered into partnership, and there was strong evidence to induce a belief that the defendant was perfectly acquainted with the interest of the plaintiff in the cargo of the Mary Ann, and consequently that he was entitled to such a proportion of the money and damages, to be paid in England, as his proportion of the cargo. In 1802, and afterwards, the money on account of the Mary Ann was received, and at different times remitted by Kowan, the agent in England; or placed by him to the credit of Summerl & Brown; which sums were placed to the credit of Brown, on the books of Summerl & Brown. Brown afterwards died insolvent.

The single question was, whether in the accounts to be settled between these parties, any part of the proceeds of the cargo of the Mary Ann, ought to be debited to the defendant. It was contended by Mr. Levy, for the defendant, they ought not. Brown was the only receiver of the money. He was largely indebted to the defendant, as appears by the evidence; and if he took the plaintiff's money to pay his individual debts, the plaintiff cannot follow it into the hands of the defendant, but must look to the estate of Brown; or if that be insolvent, as is admitted, it is the complainant's misfortune.

For the plaintiff, it was said, had Brown alone received the money, and with it paid a debt to the defendant, or used it for the joint concern, the money could not be specifically followed, nor could there exist any implied contract between plaintiff and defendant. But the money came to, and was received by Summerl & Brown jointly, the defendant knowing that he was receiving the money of the plaintiff. This created a contract in Summerl & Brown to pay the plaintiff his proportion, from which the defendant is not discharged by the book operation of placing the whole to the credit of Brown, in the books of Summerl & Brown.

THE COURT ordered an account to be settled by the commissioners of the court, with directions to credit the plaintiff with his proportion of all moneys received on account of the cargo of the Mary Ann for restitution, and from the government of England.

VAN DEUSEN (UNION PAPER-COLLAR CO. v.). See Case No. 14,395.

Case No. 16,846.

VANDEVER v. TILGHMAN.

[Crabbe, 66.] [1]

District Court, E. D. Pennsylvania. Jan. 30, 1837.

SEAMEN'S WAGES — CONDEMNATION OF SHIP AS PRIZE — RESTORATION.

1. Where a vessel is captured and condemned, wages are due the seamen up to the date of condemnation.

2. Where a vessel was condemned, by the French government, in 1808, and the representatives of the owner recovered a portion of their claim on that account, under the convention of 4th July, 1831, with France, the fund is liable for wages due the seamen, at the time of condemnation; without deduction for the expenses of recovery, or abatement in the same proportion as the original claim.

This was a suit for wages. It appeared that the libellant [Peter Vandever] shipped, as mate, on board the schooner Hope, owned by Edward Tilghman, Junior, on the 3d November, 1807, for a voyage from Philadelphia to Leghorn and back, at the rate of thirty-five dollars per month; that, on the 18th January, 1808, the schooner, then being off Leghorn, was captured by a French cruiser, sent into Portovenero, in the Gulf of Spezzia, and afterwards taken into Leghorn; that on the 7th September, 1808, the schooner was condemned by the council of prizes at Paris; that, by an arrangement between the captors and the consignees, the schooner sailed from Leghorn on the 4th December, 1809; that, after trading for some time in the Mediterranean, she sailed for a port in Denmark; that she was captured by an English cruiser and sent into London; that the libellant remained on board, doing his duty, till this time; that, while waiting adjudication of her case in London, the

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

libellant made a voyage to the West Indies and back, in another service; that the schooner was condemned by the English court of admiralty; that the libellant worked his passage home, and arrived in Philadelphia on the 4th February, 1812; that on the 16th April, 1812, the libellant commenced suit, by summons, in this court, against Edward Tilghman, Junior, for his wages; that the suit was not proceeded in because of the insolvency of Edward Tilghman, Junior; that Edward Tilghman, Junior, assigned to Edward Tilghman, Senior, among other things, his claim against the French government on account of the seizure and condemnation of the schooner; that Edward Tilghman, Senior, had since died, and that Benjamin Tilghman, the respondent, was his executor; and that, under the convention of the 4th July, 1831, between the United States and France, the respondent had been awarded fifty-eight per cent. on eighteen thousand five hundred and forty-eight dollars, and that he had received thirty-nine and three hundred and seventy one-thousandths ($39\,^{370}/_{1000}$) per cent. on account of this claim.

The libel was filed on the 2d December, 1836; and the libellant stated his claim as follows:

Wages from 3d November, 1807, to 4th December, 1809		$ 875
Deduct credits (specifically enumerated)		99 70
Due on 4th December, 1809		$ 775 30
Add wages from 4th Dec., 1809, to 4th Feb., 1812	$910	
Less, wages earned from London to West Indies, 6 mo. at £4 10 ($20) per month	120	790
Whole amount due on 4th Feb., 1812. And interest from that date.		$1565 30

The respondent denied his liability, and, also, the jurisdiction of the court.

Mr. Bayard, for libellant.

Under Sheppard v. Taylor, 5 Pet. [30 U. S.] 675, all that is left for this court to do, is to decide the amount of the wages due; for that case settled: 1. That this court has jurisdiction. 2. That the sum awarded, by the commissioners, for the vessel and freight, is specifically liable for the wages of the seamen. 3. That the seamen have a lien, for their wages, upon this fund, into whosoever hands it may come. 4. That the seamen are entitled to their wages for the whole voyage for which they shipped. 5. That the seamen are entitled to their whole wages, out of the fund in the hands of the assignee, so far as it goes, after deducting certain charges; and the wages are not to be reduced pro rata according to the award, unless the whole amount of the award falls short of the whole amount of the wages. This last point is supported by Abb. Shipp. pt. 5, c. 2, and 3 Kent, Comm. 187, 188. In consideration of certain admissions made, by the respondent, for purposes of evidence, the libellant only claims for wages from the day of sailing from Philadelphia (3d November, 1807), to the day of sailing from Leghorn (4th December, 1809), and an allowance of three months as a reasonable time to return home, sanctioned by the time occupied by the voyage out (two months sixteen days); by the provisions of the act of 28th February, 1803,—2 Story's Laws, 883 [2 Stat. 203], § 3; by Emerson v. Howland [Case No. 4,441]; and by Pool v. Welsh [Id. 11,269].

Mr. Rawle, for respondent.

The principle of the case of Sheppard v. Taylor, 5 Pet. [30 U. S.] 675, is that the fund is substituted for the vessel, and that seamen have the same rights against the one as against the other. Capture rescinds the contract for wages. Recapture or restoration revives it for the period during which seamen remained with the vessel up to condemnation. If they remain after condemnation, it is a new contract. Abb. Shipp. 459, 463; Oxnard v. Dean, 10 Mass. 143; Wetmore v. Henshaw, 12 Johns. 324, 333; The Saratoga [Case No. 12,355]; Powell v. The Betsey [Id. 11,355].

The libellant was entitled to wages up to condemnation, as follows:

Wages from 3d November, 1807, to 7th Sept., 1808	$354 66
Less, credits (specifically enumerated)	99 70
Amount due on 7th September, 1808	$254 96

But: 1. This should be reduced in the same proportion as the respondent's claim. That is, the libellant should receive fifty-eight per cent. of two hundred and fifty-four dollars and ninety-six cents. 2. He should bear his proportion of the expenses of collection, which are twenty-five per cent. [Sheppard v. Taylor] 5 Pet. [30 U. S.] 716, 717. 3. The respondent having actually received only thirty-nine and three hundred and seventy one-thousandths ($39\,^{370}/_{1000}$) per cent. of the whole claim, the libellant should only receive that proportion of his claim now. These three principles will reduce the amount to be given to the libellant, at present, to seventy-four dollars and fifty-eight cents.

HOPKINSON, District Judge. The libellant is entitled to wages to the time of condemnation, deducting the credits allowed in his claim, but without deduction on account of the expenses of recovery.

Decree for libellant for two hundred and fifty-four dollars and ninety-five cents, and costs.

Case No. 16,846a.

VANDEWATER v. WESTERVELT.

[18 Betts' D. C. MS. 22.]

District Court, S. D. New York. 1851.

COLLISION — VESSEL AT ANCHOR — CONFLICTING EVIDENCE—MUNICIPAL REGULATION—ENFORCEMENT IN ADMIRALTY.

[1. In an action by the owners of a sloop against a steamer, for colliding with her while

weighing anchor with her head pointed in the same direction as the moving steamer, the evidence as to whether there was a sheer by the sloop, which caused the collision, was conflicting. *Held*, that the fact that the collision forced the steamer against a vessel lying 200 yards away, and that the blow upon the steamer was given by the stem of the sloop, and at right angles, justified a finding that such a sheer on the part of the sloop occurred.]

[2. Act New York April 12, 1848, requiring steamboats passing up and down the East river, between the Battery and Blackwell's Island, to be navigated in the center of the river, applies to a tug without any regular landing place, the business of which is to cruise along the docks, and move vessels from one pier to another, or into and out of the harbor.]

[3. The admiralty courts enforce municipal regulations which affect the equipment, position, or management of vessels within particular jurisdictions.]

[4. When a collision between a sloop and a steamer is caused partly through the gross negligence of the former in sheering while weighing anchor, and partly by the failure of the latter to observe a regulation requiring steamers to keep to the center of the river, it is proper to assess one-half the damages against each.]

[This was a libel by Robert J. Vandewater against Jacob R. Westervelt to recover damages caused by a collision.]

BETTS, District Judge. The sloop Novelty, owned by the respondent, was at anchor in the East river, towards the Long Island side, and from one to two hundred yards off from Jackson Ferry, heading up the river. The steam tug Margaret Kemble was running up the river, near the East shore, on her way to Wallabout for a tow. Her course was inside the sloop, there being sufficient space between her and the docks for the tug to pass. The tide was ebb. As the tug approached the sloop the latter was raising her anchor to get under way, and had her mainsail up, and, as the tug was in the act of passing, the sloop took a shear, either from her anchor being tripped, or upon her cable, and ran bow onto the larboard quarter of the tug. Both vessels were injured by the collision. The testimony taken from the two vessels is, as usual, in direct conflict as to the cause of the accident. The witnesses on board the tug testify that all the hands of the sloop were forward, and after she had taken her shear, and was upon the point of colliding with the tug, one ran aft and took the helm, but too late then to bring the sloop back to her true heading, or keep her off the tug. The witnesses for the sloop testify that a man was all the time at her helm, and that the tug, crowding up between her and the docks in order to avoid some impediment there, bore athwart her bows, and ran directly upon the sloop; that her anchor had not been tripped; and that she did not shear or move from her position until struck.

The testimony of the witnesses on both sides is to be received with caution and distrust. It has become almost an axiom in the law of evidence that witnesses so situated will support the correctness of their own conduct in the management of their respective vessels, and are equally prone to defend the vessel to which they are attached. There are some circumstances tending to entitle witnesses on the steamer to higher credit, as to this particular fact, than those of the sloop; but, regarding the direct testimony as in equilibrium, there is a collateral fact which very conclusively shows that the sloop made a movement at the time, and in such manner as to cause the collision. Indeed, her pilot admits she was on a shear. The testimony for the respondent, in concurrence with that for the libellant, shows that the striking of the two vessels pressed the steamer against another vessel lying at the dock,—a fact which could not be expected to happen if the sloop continued at her position two or three hundred yards off, nor could it have happened physically if, as alleged by the witnesses on the sloop, the steamer had not stopped her wheels, and was working them ahead when she struck. It is alike inconsistent with another particular admitted by all the proofs,—that the collision crowded the tug against a schooner at the dock, and that the sloop, according to the evidence of the pilot, was not more than her length from the dock at the time. These probabilities, in cases of conflicting evidence, properly guide the decision of the court. The Mary Stewart, 2 W. Rob. Adm. 244. Besides, the place the blow was received on the tug, and the force and direction of it, demonstrate that it was given by the stem of the sloop, and directly and nearly at right angles, which is wholly inconsistent with the theory that the tug had received such an injury, going up the river the same direction the head of the sloop lay, by the act of crossing her bows.

I hold it clear, therefore, upon the proofs, that the movement of the sloop towards the steamer, when the two were so near together that the steamer could not avoid her, caused the collision. The movement was by a sudden shear on the cable, owing to the negligence of the man at her helm, or the want of a person there, or, which is perhaps more probable, owing to the anchor having broken ground, and the wind from the S. W. driving her stem up the river. In either supposition, the shear and change of direction of the sloop from about N. W. to S. W. would have been easily prevented by her helm, if properly managed, and it was gross negligence of those having charge of her to permit the shear. The fault of the sloop has therefore contributed to the injury received by the steamer, and she would be responsible for all the consequences, if the steamer was clear of blame on her part.

By an act of the legislature of the state of New York passed April 12, 1848 (Sess. Laws, c. 321, p. 450), it is enacted that all steamboats passing up and down the East river, between the Battery, at the southern extremity of the city of New York, and Blackwell's Island, shall be navigated as near

as possible in the centre of the river, except in going into or out of the usual berth or landing place of such steamboat. This statute, it is claimed by the respondent, compelled the tug to head to the middle of the river, and that she, in her own wrong, attempted to force a passage between the sloop and shore, and far out of the middle of the stream. It is argued for the libellant that the act applies only to passenger and freight boats navigating through the East river into and from the Sound, and which have regular berths or landing places at New York. It is proved, to show the tug is not within the scope of the act, that she has no regular berth or landing place, her business being to cruise along the docks, and move vessels from one pier to another, or take them out or bring them into the harbor, and their appropriate landing places. It is further urged that the admiralty courts do not notice merely municipal regulations of the ports, but administer only the principles of the general law.

Neither of these points, in my judgment, is tenable. The act is universal in its terms. It embraces every description of steamboats plying in the locality designated. It does not look to the fact of the boat having a berth or landing place as characterizing her, and thereby bringing her within the scope of the act, but affords her an excuse for being out of the middle of the river, if she is in the act of leaving or making her berth. The construction contended for would exempt all steamboats from New Jersey or Connecticut, or other foreign ports, passing through the East river without making a landing at the city, from the provision of the act,—a mischief within its manifest contemplation, and one needing the application of the remedy not less than when the boat chanced to have a regular berth or landing place at the city wharves.

The admiralty court does not enforce, as a ground of action, regulations which are purely municipal, but where they affect the equipment, position, or management of vessels within particular jurisdictions, the rule established by them is observed and applied in this court equally as in the local courts. Abb. Shipp. 184, note. The supreme court recognize this admiralty rule as a just interpretation of the common-law obligation. Smith v. Coudrey, 1 How. [42 U. S.] 29. Accordingly it is held to be a fault in a vessel anchoring off the piers within a distance less than three hundred yards, or lying at anchor in the harbor at nighttime without exposing a light in the rigging (The North America [Case No. 10,313]), or for one steamer to attempt to pass another, both going the same way, within a less distance than twenty yards (The Rhode Island [Cases Nos. 11,743 and 11,745]). The English admiralty follow the same rule, especially in actions in personam. The Girolamo, 3 Hagg. Adm. 176, 177. In a crowded thoroughfare similar to that of the East river, and lined on both shores with numerous slips and piers, from which vessels are constantly coming out into the stream, the regulation adopted by the statute is of a character to demand the respect and observance of all tribunals,—not less so, certainly, than a code of rules adopted by the Trinity masters in England, which are enforced by the admiralty there (The Gazelle, 1 W. Rob. Adm. 471), a regulation which prohibits a steamer coming into a crowded harbor at high speed, and which our courts cause to be observed. See decision of superior court on this subject. Fitch v. Livingston (April 12, 1852) 11 Am. Law J. (N. S.) 449.

I have no hesitation in declaring that an obligation imposed on steamers by the state law is one which this court should enforce as in consonance with the principles of maritime law, and eminently conducive to the safety of navigation in that most crowded and difficult thoroughfare, and that the tug, on the occasion in question, was acting in violation of the law, and was accordingly wrongfully attempting to run between the sloop and the shore. This fault, if it did not itself produce the accident, contributed to the collision which ensued. It was, no doubt, the duty of those in charge of the sloop to have done all in their power to prevent the collision, although it was seen that the tug was in an unauthorized position. The Blenheim, 2 W. Rob. Adm. 422. And she could have been effectually avoided by a proper attention to her helm. This cause, then, is one in which there has been a want of due diligence on both sides, without wilful neglect or intent to do wrong. The steamer, to gain the benefit of a weaker head tide, ran out of her proper course, near the docks, yet then might have safely passed the sloop, had she remained stationary as she was anchored when the tug neared her, or had she sheared in aid of the tug. The tug having no right by law to be in that position, if she had in that course collided upon the sloop she must have borne the consequences of any injury to the latter. But her being in an improper position did not excuse the sloop in an act of negligence or mismanagement which inflicted an injury upon her. The Hope, 1 W. Rob. Adm. 154. The collision in this case, therefore, resulted from the fault of both parties; and, according to the rule prevailing in this court, the consequences must be equally borne by both. Story, Bailm. § 608a. Reference to a commissioner to ascertain the damage to the two vessels, to be equally divided between them. Each party to bear his own costs. 1 W. Rob. Adm. 26.

Case No. 16,847.

VANDEWATER v. The YANKEE BLADE.

[1 McAll. 9.] [1]

Circuit Court, S. D. California. July Term, 1855.[2]

MARITIME LIENS—JURISDICTION IN REM—CHARTER PARTY—CONSORTSHIP.

1. Maritime liens will not be extended by implication.

2. Where a contract is maritime, if there is no lien annexed to it by law, it cannot be enforced in admiralty by proceedings in rem.

3. An agreement by owners for the future employment of their vessels, resembles more a consortship than a charter-party, and to it no lien is fixed by implication of law.

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

A libel in rem was exhibited in the court below, claiming damages for the violation of an agreement, entered into at New York, on the 24th day of September, 1853, in the following words: "This agreement, made this twenty-fourth day of September, 1853, at the city of New York, between Edward Mills, as agent for the owners of steamship 'Uncle Sam,' and William H. Brown, as agent for the owners of steamship 'America,' witnesseth, that said Mills and Brown hereby agree with each, as agents for the owners of said ships before named, to run the two ships in connection for one voyage, on terms as follows, viz.: Of all moneys received from passengers, and for freight contracted through and between New York and San Francisco, both ways, the 'Uncle Sam' shall receive seventy-five per cent. and the 'America' shall receive twenty-five per cent.; the money to be received here by said E. Mills, and the share of the 'America' to be paid over to William H. Brown, or his order, before the sailing of the ship; and the share due the 'America' of moneys received on the Pacific side, to be paid over to said Brown, or his order, immediately on the arrival of the passengers in New York, by E. Mills, who guarantees, as agent aforesaid, the true and honest returns of all funds received by his agents on the Pacific. It is understood that this trip is to be made by the 'Uncle Sam' leaving San Francisco on or about the 15th October, and the 'America' New York on or about the 20th October next. Each ship is to pay all the expenses of her running and outfits, and to be responsible for her own acts in every respect. Each ship is to retain all the moneys received for local freight or passengers, that is, for such freight and passengers as only pay to the ports the individual ship runs to, without any division with the other ship. No commissions are to be charged anywhere on any receipts for the 'America' by said Mills in division; but the expense of advertising, and the amount paid out for runners at all points are to be borne by each ship in the same proportion as receipts are divided between them. In consideration of all the above, well and truly performed in good faith, Edward Mills, as agent for the steamship 'Yankee Blade,' hereby agrees that when the 'America' arrives at Panama, on her voyage hence to the Pacific Ocean, said ship 'Yankee Blade' shall leave New York at such time as to connect with the 'America,' conveying passengers and freight on the same terms as is hereinbefore agreed, say twenty-five per cent. to the 'Yankee Blade,' and seventy-five per cent. to the 'America;' provided only that said connection shall be made at a time that will not prevent the 'Yankee Blade' from making her connection with the 'Uncle Sam' at her regular time. E. Mills, W. H. Brown."

To the libel exceptions were taken in the court below, which being sustained, the libel was dismissed [case unreported], and an appeal taken to this court.

Janes, Doyle & Barber, for libelant.
Crockett & Page, for claimant.

McALLISTER, Circuit Judge. This case comes before the court on an appeal from the decree of the district court of the United States for the Northern district of California, dismissing the libel upon exceptions taken to it. To the exception taken to the jurisdiction of the court, this inquiry will be limited.

For the past half-century, the extent of the admiralty jurisdiction of the courts of this country has been a fruitful source of controversy; and, though illumined as it has been by the genius of some of our ablest jurists, still remains a vexed question. In 1847, in Waring v. Clarke, 5 How. [46 U. S.] 441, the supreme court decided that in cases where admiralty jurisdiction depends on locality, it extends to all torts committed on the high seas, or within the ebb and flow of the tide as far up a river as the tide ebbs and flows, although the place be infra comitatus. Thus much for the jurisdiction of admiralty over torts. In the same year, in the case of New Jersey Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, that court decided that the courts of the United States had admiralty jurisdiction in personam and in rem over libels founded on contracts of affreightment to be executed on the sea, between the cities of New York and Providence. In 1849, in Cutler v. Rae, 7 How. [48 U. S.] 729, they declined to entertain a like jurisdiction in a cause of contribution, or general average, civil and maritime, and they say, "It is very much to be regretted that the jurisdiction of the courts of admiralty, in this country, is not more clearly defined. It has been repeatedly decided in this country, that its jurisdiction is not restricted to the subjects over which the English courts of admiralty exercised jurisdiction at the time our constitution was adopted." It is not necessary, for the purposes of this case, to enter the

[1] [Reported by Cutler McAllister, Esq.]
[2] [Affirmed in 19 How. (60 U. S.) 82.]

field of extended discussion into which our inquiry into the extent of admiralty jurisdiction over contracts would lead. If that jurisdiction be admitted to the extent contended for by its most zealous advocate, this case cannot come within its reach. Some twenty years after his elaborate exposition of the doctrine in the case of De Lovio v. Boit [Case No. 3,776], Judge Story reasserted it in the case of The Volunteer [Id. 16,991]. The principle enunciated is, to use his own language, "that the admiralty had an original, ancient, and rightful jurisdiction over all maritime contracts strictly so called (that is, such contracts as respect business, trade, and navigation to, on, and over the high seas), which it might exert by a proceeding in rem in all cases where the maritime law establishes a lien or other right in rem; and by a proceeding in personam where no such lien or other right in rem existed." It follows from this, first, that all maritime contracts are within the jurisdiction of the admiralty courts; second, that there are only some of these contracts for the violation of which the admiralty jurisdiction can be exercised in rem; and, third, that those are such contracts to which the maritime law has annexed a lien. Admitting the contract sued on to be a maritime one, the inquiry is whether it belongs to that class of such contracts as have attached to them, by legal implication, a lien.

It is admitted by the proctor for libelant, that there is no case parallel in its details with the present; and this court is asked to extend the principles applicable to charter-parties, and make the lien which the law applies to those instruments, applicable to the case at bar. Before viewing the contract in its supposed analogy to a charter-party, let us consider it per se. It is a contract made by owners of vessels in a home port. This circumstance is worthy of consideration. The question is not whether an instrument known to the maritime law, and to which it has annexed a lien, is to be divested of that lien by the fact that such instrument was made by the owner instead of the master of the ship. The point is, whether there should be an implied lien in a contract, such as the one under consideration, made by the owners in the home port. In the case of The Draco [Id. 4,057], Judge Story, after deciding that a bottomry bond may be made by the owners of a vessel in a home or a foreign port, says, "Whether upon contracts so made in a home port a remedy lies in the admiralty in rem, is quite a different question." When so great an advocate of admiralty jurisdiction doubts, we certainly should pause. Again, in Blaine v. The Carter, 4 Cranch [8 U. S.] 328, 331, the court say, "In the case of a bottomry bond, executed by the owner in his own place of residence, the same reason does not exist for giving an implied admiralty claim upon the bottom (of the ship); for it is in his power to execute an express transfer or mortgage." In view of foregoing reasoning, in relation to a marine instrument, well known to the laws of the sea, in deciding whether there is an implied lien annexed to the contract in dispute, and which is, sui generis, the fact, that there is no necessity for such implication, as it was in the power of the party to make an express hypothecation, is not to be overlooked. To create such lien it has been urged that the present contract is a charter-party, or if not, so analogous to it that the rule applicable to the one should be applied to the other.

A charter-party is the hiring of the whole or a part of a vessel, for the transportation of merchandise or passengers; and if it does not, ex vi termini, convey a proprietary interest, it certainly does pass a claim or interest in the vessel, recognized by the maritime law, the privilege to look upon her as answerable for the goods placed on board. That she is answerable for them, and they to her, is a well-settled and universal rule of law; and the parties, when they enter into the contract, are presumed to do so with knowledge of the lien implied by law from the terms and character of the instrument they make. The present agreement is a personal one, between the owners of vessels, to embark them in a common enterprise and divide the profits in the mode agreed upon; and includes a personal guarantee of one of the owners for a true and honest return of the moneys received by his vessel. If such agreement be a charter-party, then must every agreement between owners, where their vessels are to be used in carrying it out, be so considered; and the law, where no express lien has been created, must imply one. In charter-parties there is a mutuality of lien. The ship is answerable to the goods, and these again to the ship. They are joined together by the act of the law, and cannot be separated, save by the act of the parties, without the discharge of the respective liens. Here is perfect mutuality. The court can perceive none such in this case. The agreement is simply one of association; its object, to make a direct route through from New York to San Francisco, for the transportation of merchandise and passengers, the owners designing to combine the capacity of their two vessels to keep open a direct, uninterrupted communication between the two termini of the contemplated voyage. The court has been unable to find any case decided by the supreme court of the United States which has adjudicated that implied liens are annexed by the maritime law to associations made by owners of different vessels for purposes of trade. The case of Andrews v. Wall, 3 How. [44 U. S.] 568, is the only case which refers to these associations between the owners of vessels. But the question did not directly come before the court. Judge Story, arguendo, did say, "Over maritime contracts the admiralty possesses a clear and established jurisdiction, capable of being enforced in personam as well as in rem." As general as are

the terms here used by Judge Story, this court considers them as simply affirming the admiralty jurisdiction in personam over all maritime contracts. But, as before stated, the question was not directly before the court. Conkling, in his treatise, says of the case of Andrews v. Wall [supra], that it was not an original suit, but an intervention by third persons for their interest against funds in court. Had the enunciation, made by Judge Story, been understood in an unrestricted sense, and deemed the doctrine of the court, whence the expression of regret by the chief justice, four years later, "that it is very much to be regretted that the jurisdiction of the courts of admiralty in this country is not more clearly defined"? If the proposition advanced arguendo by Judge Story had been adopted by the court in its unrestricted sense, no clearer definition was needed. The jurisdiction of the admiralty would extend over all maritime contracts whatever, either by a proceeding in rem or in personam. The only question as to jurisdiction, when the former proceeding was taken, would be whether the res or its proceeds were within the reach of the court. This court knows no adjudication of the supreme court which has carried the doctrine to that extent, and it feels indisposed to adopt it in advance. The instrument sued on was made by the owners of the ships in the home port; there is no express hypothecation; there is no necessity for annexing to it an implied one; it is an instrument unknown to the maritime law; there is nothing in the transaction to raise an inference that the credit was not exclusively personal; and there is no decision of the supreme court affixing an implied lien to such a contract. The agreement, as has been said, is simply an association for the purposes of trade. In relation to an agreement of consortship, Mr. Conkling, in his treatise on Admiralty Jurisdiction, says, "There seem to be sufficient reasons for holding that no mutual liens arise from a contract of consortship, and, therefore, no suit in rem can be maintained for their enforcement." Volume 2 (2d Ed.) p. 517. Benedict states, "that vessels engaged in maritime employment, in which association increases efficiency or security, often agree to make common cause in their enterprise. Such agreements are agreements for consortship. They are maritime contracts, and are within the acknowledged jurisdiction of the admiralty of this country." (Section 298.) But he does not intimate that they are within that class of contracts referred to by Judge Story, in the case of The Volunteer [supra], to which there is annexed a lien by the maritime law, which can be enforced by a proceeding in rem. The analogy between the contract sued on and an agreement for consortship is slight; but it appears to the court stronger than that which exists between the former and a charter-party. In this case, the owners of the ships could, had they so chosen, have created an express lien; the maritime law gives no implied one, and this court declines to construct one.

The exception to the jurisdiction is overruled, and the decree of the court below, dismissing the libel, is affirmed.

Affirmed in Vandewater v. Mills, 19 How. [60 U. S.] 82.

Case No. 16,848.

VANDOVER v. WILMOT.

[10 Ben. 223.] [1]

District Court, S. D. New York. Jan., 1879.

BILL OF LADING—DEMURRAGE—AGENT.

1. V., the master and owner of a canal-boat at Oswego, employed F. & Co. to procure for him a cargo, and F. & Co. arranged with H. R. & Co., the proprietors of an elevator, to give the boat a load of grain for New York. F. & Co. gave V. an order on H. R. & Co. for the grain and he went to the elevator and loaded his boat. F. & Co. then made out a bill of lading in two parts, which were signed by V. and by F. & Co., each keeping one part. It consigned the cargo to W. in New York, and authorized him to detain the boat at the rate of $3.00 a day for thirty days, and thereafter at the rate of $2.00 a day till the 1st of April, and from that time demurrage was to be allowed at the rate of 2½ per cent. per day on the freight. After V. had left with his boat, F. & Co. received from H. R. & Co. blank forms of bills of lading, which differed from the others as to the rate of demurrage after the 1st of April. F. & Co. filled up and signed these bills, naming H. R. & Co. as shippers, and sent them to H. R. & Co. and they forwarded one of them to W., to whom they consigned the grain. W. never received the bill of lading which V. had signed and delivered to F. & Co., because they had sent it to S., to whom they had made the freight and demurrage payable, as security for advances made by them to V. The boat not having been discharged till April 16th, V. filed a libel against W. to recover demurrage from April 1st, according to his bill of lading. The difference between the two bills of lading was accidental: *Held*, that the first bill of lading must be held to be the contract between the parties and that W. should have been put on inquiry as to the contract, from the fact that his bill of lading did not purport to be signed by the master or by any one authorized to bind the boat.

2. V. was entitled to recover the demurrage claimed.

[This was a libel in personam by John N. Vandover against John Wilmot.]

W. R. Beebe, for libelant.

E. T. Wood, for respondent.

CHOATE, District Judge. This is a libel in personam by the master and owner of a canal-boat, against the consignee of the cargo, for demurrage, pursuant to the terms of the bill of lading. The libellant being at Oswego with his boat, employed there the firm of B. C. Frost & Co. to procure for him a cargo of grain, paying them a commission therefor. Frost & Co. made arrangements

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

with Hagamon, Rundell & Co., the proprietors of an elevator in Oswego, to give the libellant's boat a load of grain for New York. They gave the libellant an order on Hagamon, Rundell & Co. for the grain, and he went there and loaded his boat. Frost & Co. then prepared and presented to the libellant a bill of lading in two parts, which were signed by the libellant and by Frost & Co. The libellant retained one and left the other with Frost & Co. This bill of lading named Frost & Co. as the shippers. It made the freight and demurrage payable to one Sargent, in New York, for the security of Frost & Co., who advanced money to the libellant for his expenses in reaching New York. The consignee named was the respondent, Wilmot. Frost & Co. had no interest in the cargo. Hagamon, Rundell & Co., who were the shippers and consignors to the respondent, were acting as agents for the owners of the grain. With this bill of lading, which is the one on which the suit is brought, the libellant proceeded on his voyage to New York. By its terms, the consignee could detain the boat at the rate of three dollars a day for thirty days and thereafter at the rate of two dollars a day till the 1st of April, 1873, and from that time demurrage was to be allowed at the rate of 2½ per cent per day on the freight. Soon after the libellant left with his boat, Frost & Co. received from Hagamon, Rundell & Co. blank forms of bills of lading, differing from that signed by the libellant in respect to the demurrage, giving the privilege of detaining the boat without limit of time, at the rate of two dollars a day after the first thirty days. Frost & Co. filled up and signed this bill of lading in two parts, naming Hagamon, Rundell & Co. as the shippers, and delivered them to Hagamon, Rundell & Co. One of these bills of lading Hagamon, Rundell & Co. forwarded with a letter to the respondent, to whom they consigned the grain. The respondent never received the first bill of lading, that signed by the libellant. The one retained by Frost & Co. had been forwarded by them to Sargent. The boat was detained till the 16th of April, the respondent having no knowledge that the libellant had signed or given a bill of lading differing from that sent to him by Hagamon, Rundell & Co. until about the 1st of April, when he had paid most of the freight and the demurrage up to that time. The suit is to recover the difference in demurrage between the two bills, being about eight dollars a day, from April 1st to April 16th. It appeared by the testimony of Mr. Frost, called as a witness by respondent, that the difference in the two bills was accidental; that there was no express agreement prior to the signing of the first bill of lading between them and the libellant as to demurrage, nor any conversation or understanding between them and Hagamon, Rundell & Co. on the subject; that when the second bill of lading was signed by Frost & Co., they did not observe the difference between the two; that the first bill of lading was in the form usually employed by Hagamon, Rundell & Co. in making their shipments; that the form of the second bill of lading had been sometimes used, but that this clause as to demurrage, so far as it differed from the first bill of lading, had been inadvertently introduced, so far as Hagamon, Rundell & Co. were concerned. It appeared by the testimony of the respondent that he had had prior consignments from Hagamon, Rundell & Co., and received from them bills of lading in the form of the second bill of lading.

It is claimed by the respondent that the first bill of lading, that sued on, is not binding on him; that Frost & Co. were not the shippers; that they were acting in this transaction merely as agents of the libellant; that the only bill of lading, if any, which had any binding force, is the second bill of lading, under which the respondent received the consignment; that the suit cannot be maintained for a quantum meruit, if there was no binding bill of lading, because it is based on an express contract, the first bill of lading. But I think upon the proofs, the first bill of lading entitled the libellant to recover. The libellant knew only Frost & Co. as the parties through whom he received the cargo. They were evidently entrusted by the shippers, Hagamon, Rundell & Co., to make arrangements for the shipment with the master of the boat. They stood more in the position of brokers between the boat and the shippers, than in the position of mere agents of the master. They were his agents for procuring a load, but having found a shipper, they acted for the shipper in making an agreement with the master as to the terms on which it should be transported. Frost testified that it was customary for them in such cases, to give the master a memorandum as to freight, consignee, etc., on which he started on his voyage, and afterwards to make out and forward a formal bill of lading signed by them. Possibly, if the master sailed with such a memorandum and without signing a bill of lading, an authority might be implied from the circumstances for Frost & Co. as his agents, afterwards to sign and forward a bill of lading, but that is not this case. The bill of lading signed by the libellant, was in all respects a formal and complete bill of lading. It fixed the terms of carriage and demurrage. It left nothing which usually forms part of such an instrument to be agreed upon. And the whole matter of agreeing on the terms of the contract had been clearly left by the shippers to Frost & Co., who, with the libellant, signed this bill of lading. It is clear therefore, that Frost & Co. had no authority to alter its terms or to make a new contract without the consent of the libellant, and it was the contract between the libellant and the shippers, Hagamon, Rundell & Co., and it appears by the testimony of Frost, that there was no mis-

take in making it. It was, and the second bill of lading was not, the contract intended by the parties to be made, and in accordance with the form used by Hagamon, Rundell & Co. The fact that Frost & Co. were named in it as shippers, is immaterial. In a sense, they were the shippers, as agents for Hagamon, Rundell & Co. Then, as to the respondent, although he had not in fact seen the true and only bill of lading, and the paper received by him purporting to be such was void, not being signed by the master nor by his authority, yet he received the cargo, and could, on inquiry, have seen the bill of lading. It should have put him on inquiry that the paper he had was not signed by the master, nor by any one who, on its face, appeared to have the master's authority to sign it. If he trusted in an instrument signed by a stranger, with no apparent authority to bind the master or owner of the boat, it was his own fault and the libellant should not suffer therefrom. As he accepted the consignment of the cargo without inquiry as to the terms of the contract between the boat and the consignor, he thereby assented to the terms of that contract, whatever it was, and is bound to pay the freight and demurrage accordingly.

Decree for libellant with costs.

VAN DRESAR (GIBSON v.). See Case No. 5,402.

VAN DYCK (MORGAN v.). See Case No. 9,810.

VANDYKE (JOHNSTON v.). See Case No. 7,426.

Case No. 16,849.

VAN DYKE et al. v. TINKER.

[11 N. B. R. 308.] [1]

District Court, E. D. Michigan. 1874.[2]

BANKRUPTCY—FRAUDULENT PREFERENCE—ACTION BY TRUSTEES—PLEADING—WAIVER—AMENDMENT TO BANKRUPT LAW—NEW TRIAL.

1. In an action by trustees of a bankrupt's estate under section 43 of the bankrupt act [of 1867 (14 Stat. 538)] against a sole defendant for money had and received, with a bill of particulars showing that the money sought to be recovered was money paid by the bankrupt to the defendant as a creditor, in fraud of the act, but disclosing no joint liability of the defendant with others; and the defendant pleaded the general issue, it is too late for the defendant to insist upon the trial that he was such creditor and received the money as a member of a partnership. He could take advantage of such a non-joinder only by plea in abatement.

2. In case of an action brought by trustees of a bankrupt's estate under section 39 of the act, to recover money paid by the bankrupt to a creditor by way of preference, and the bankruptcy proceedings were compulsory or involuntary under said section, and were commenced, and the cause of action arose before December 1, 1873, the amendment of June 22, 1874 (section 12) [18 Stat. 180], requiring proof that the creditor knew that the payment was made to him in fraud of the act instead of that he must have had reasonable cause to believe, as provided in the original act, has no application.

[Cited in Crump v. Chapman, Case No. 3,455; Warren v. Garber, Id. 17,196; Tinker v. Van Dyke, Id. 14,058; Bradbury v. Galloway, Id. 1,764.]

3. When a cause is tried for the defendant by competent counsel, in the absence of counsel originally employed and who had prepared the case for trial on the part of defendant, and also of counsel who had been employed to assist him in the trial, and, first, no postponement of the trial was asked on that account; and, second, it does not appear that the result would have been different if such counsel had been present; and, third, the new testimony proposed is simply cumulative, there is no right to a new trial on the ground of surprise.

On motion by defendant [L. W. Tinker] for a new trial. Plaintiffs [Van Dyke and Brownson] are trustees of the estate of James Neilson, a bankrupt, under section 43 of the bankrupt act. The action was in assumpsit for money had and received, with a bill of particulars specifying the plaintiffs' demand to be for money paid by Neilson to Tinker, a creditor, by way of preference and in fraud of the bankrupt act. The defendant pleaded the general issue, and the case was tried by a jury. The proceedings in bankruptcy were commenced by creditors' petition under section 39 of the act, and they were so commenced; and the particular transactions out of which this action arose were had before the amendments of June 22d, 1874, and before December 1st, 1873. On the trial the defendant offered to prove that the transactions in question were had with him as a member, and on behalf of a copartnership composed of himself and two others, and not in his individual capacity. This proof was excluded as incompetent under the general issue. In the charge to the jury the court, among other things, instructed them that if they found from the evidence that the defendant had reasonable cause to believe that a fraud on the bankrupt act was intended in the payment made to him, it was sufficient in that regard to entitle the plaintiffs to a verdict; and that the amendments of June 22d, 1874, requiring proof of knowledge in lieu of reasonable cause to believe in such cases, had no application to this case. The verdict was for the plaintiffs for the full amount claimed, [case unreported,] and the defendant then moved for a new trial. The grounds of the motion are stated in the opinion of the court.

Alfred Russell and A. B. Maynard, for the motion.

Don. M. Dickinson and Mr. Van Dyke, opposed.

LONGYEAR, District Judge. First. The first ground of motion was "because the court erroneously excluded the evidence offered by defendant to show that Robert H. Edwards

[1] [Reprinted by permission.]

[2] [Affirmed in Case No. 14,058.]

and William H. Edwards and himself constituted the firm of L. W. Tinker & Co., from whom said bankrupt bought said goods." The bill of particulars sufficiently apprised the defendant of the particular grounds of plaintiff's demand, but did not disclose any joint liability; and, if the defendant desired to take advantage of the non-joinder of his copartners, he should have done so by plea in abatement. It was clearly too late on the trial upon the merits. Ballou v. Hill, 25 Mich. 205; Gould, Pl. p. 258, § 114.

Second. The second ground of motion was "because the court erroneously instructed the jury that if the defendant had reasonable cause to believe that a fraud on the act was intended, that the plaintiffs should have a verdict." Sections 35 and 39 of the original act were substantially alike in their provisions concerning the circumstances under which a recovery could be had in cases of preference. In both the right was based, amongst other things, upon the creditors' receiving the preference having had reasonable cause to believe that a fraud on the act was intended. By sections 11 and 12 of the amendatory act of June 22, 1874 (18 Stat. 180), "reasonable cause to believe" is changed to "knowing" and "knew"; and by section 21 of the latter act it is enacted "that all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed." The question therefore is as to the effect of the amendments and repeal upon previously accrued rights, the repeal not being accompanied by any saving or reserving clause as to such rights. As a general rule, where, as in this case, a right is created and exists solely by virtue of a legislative enactment, and such enactment is repealed without any saving or reservation as to rights previously accrued, they fall with the repeal, or at least cannot be afterwards enforced. Here, however, the entire enactment was not repealed, and the objection is not that the right was defeated by the repeal, but that the defendant was not given the advantage of the amendment to make room for which the repeal was made. The solution of the question, therefore, depends upon the ascertainment of the time when the repeal and amendments took effect. And here it must be borne in mind that, inasmuch as the repeal was not for the purpose of doing away with the law entirely, but was for the sole purpose of making room for changes in some of its provisions by way of amendment, the repeal can be given no greater scope and extent in regard to the rights and cases to be affected by it, than the amendments themselves. Hamlin v. Pettibone [Case No. 5,995]. Acts of congress take effect from and including the day of their approval, unless otherwise provided in the act. In the present instance there is no provision as to when the amendment to section 35 in question should take effect; but in regard to the like amendment to section 39 it is expressly provided that "the provisions of this section (section 39 as amended) shall apply to all cases of compulsory or involuntary bankruptcy commenced since the 1st day of December, 1873, as well as to those commenced hereafter." It will be seen, therefore, that the question does not present itself in precisely the same aspect under the two sections. Inasmuch as this case arises out of compulsory or involuntary bankruptcy, the amendment and repeal in question as affecting cases arising under section 39 need alone be considered. The student who is curious to pursue the inquiry beyond that will find the whole matter ably discussed on the one side in Hamlin v. Pettibone [supra], and Brooke v. McCraken [Id. 1,932]; and on the other side by a correspondent of the Central Law Journal (U. S. v. Missouri, K. & T. R. Co. [Id. 15,786]); In re Rogers [Id. 12,003].

As we have already seen, the amendment of section 39 in question was made to apply to all cases commenced since December 1st, 1873. This excludes all cases commenced before that date from the operation of the amendment as effectually as if it had been so expressly enacted. The effect of the repeal, as we have also seen, cannot be extended beyond that of the amendment. Cases commenced before December 1st, 1873, are therefore not within the effect of the repeal. The case under consideration belonged to the latter class, and the charge given was therefore correct. This view of the question is fully sustained by the court in Hamlin v. Pettibone, supra.

Third. The surprise complained of is substantially this: The counsel who had been retained by defendant, and who had prepared the case for trial on his part, was obliged to be and was absent when the trial came on. He had, however, spoken to another counselor to assist him on the trial, but who also was absent. The defendant thereupon procured the services of the counselor who tried the case for him. These circumstances were not called to the attention of the court at the time, nor any postponement asked on their account. Neither is there any complaint that the counsel who tried the case was not entirely competent. What is complained of is simply this, that certain testimony on the part of plaintiffs, tending to show that the defendant had reasonable cause to believe the debtor insolvent at the time of the transactions in question, was a surprise to defendant and his counsel; and that, although defendant was examined as a witness, and gave testimony tending to contradict the same, yet another witness, one of defendant's partners, who was also sworn and examined as a witness for the defendant, was not examined on that point, but who, if he had been, would have corroborated defendant's testimony. The foregoing facts are shown by affidavits. It does not appear, however, that the counsel originally employed, nor the one who was to assist him, had

any better knowledge of the case in that regard than the counsel who tried the cause. In point of fact, the contrary appears by the affidavits.

Inasmuch, therefore, as, first, no postponement was asked on account of the absence of counsel; second, it does not appear that the result would have probably been different if the counsel originally employed or his assistant counsel had been present and taken part in the trial; and, third, the new testimony proposed is simply cumulative, there is no ground for a new trial on the ground of surprise.

There is no doubt hardship to the defendant in this case, as was urged at the hearing of the motion. The same may be said, however, of every case of this kind. In all such cases the creditor simply receives that which is his honest due as between him and his insolvent debtor. But the law, having a regard for equal justice to all, has provided that when a creditor, thus receiving his pay, thereby obtains a preference over others, and under certain specified circumstances, such creditor shall return what he has so received into the common fund, and take his pro rata with the rest. In this case the jury has found that those circumstances existed, and of course the legal effect followed. Insolvency and failure of debtors always results in hardship to creditors; and the hardship to the creditor who, by his vigilance, has obtained a preference over others, in compelling him to return what he has received into the common fund and share it with the rest, is, after all, nothing more than compelling him to share a common hardship with others in like situation with himself.

Motion for new trial denied.

[The judgment was affirmed by circuit court on writ of error. Case No. 14,058.]

VAN DYKE (TINKER v.). See Case No. 14,058.

Case No. 16,850.

VAN EPPS v. WALSH et al.

[1 Woods, 598.] [1]

Circuit Court, S. D. Alabama. Dec. Term, 1870.

CONSTRUCTION OF CONTRACTS—INSURRECTION—OFFICIAL ACTS OF OFFICERS OF INSURGENT STATE—GUARDIAN'S BOND—VALIDITY—INVESTMENT OF WARD'S PROPERTY IN CONFEDERATE BONDS.

1. The obligation of a contract is what the parties intended by it when they entered into it. To ascertain the meaning of a contract, the courts are authorized to consider the circumstances of the parties at the time they made it.

[Cited in The Orient, 16 Fed. 921; Waring v. Louisville & N. R. Co., 19 Fed. 866.]

2. A probate judge in the state of Alabama, whose term of office had not expired at the date of the secession of the state, but who held over and served out his term after the state had joined the Confederate States, and the war of secession had commenced, became a judge of the new insurgent government of Alabama, without any new election or appointment.

3. A bond was given in Alabama by the guardian of a minor after the state had seceded and joined the Confederate States, and after the commencement of hostilities between the United States and the Confederate States, conditioned that the guardian should perform all the duties required of him by law. *Held*, that the "law" referred to in the bond was the law of the insurgent government of Alabama, and that a compliance with that law by the guardian discharged the sureties on the bond.

4. When the insurgent government of the state of Alabama undertook, through its officers and laws, to appoint a guardian for the estate of an infant situate within its territory, its act was as valid and lawful as if done by a government de jure.

5. A guardian who receives assets of his ward incurs an obligation even without bond, to improve the estate and account for and pay it over to his ward, with its increase and profits.

6. He can be relieved of this obligation in one of two ways only; either by its full performance, or by discharge therefrom by a court of competent jurisdiction, authorized to act in the premises.

7. The decrees of the courts of a revolutionary and insurgent government, enforcing laws passed in support of rebellion against the lawful government, and intended to defeat the just rights of its citizens, are void.

8. The legislature of the insurgent state of Alabama, having passed December 5, 1861, an act authorizing guardians to invest the estates of their wards in Confederate bonds, and A., the guardian of B., having so invested the estate of his ward, and having, on a settlement with the probate court, made during the war, received a credit for the Confederate bonds, and at the time of such settlement, his ward being within the Federal lines: *Held*, that the settlement was not binding upon the ward, and the guardian was not entitled to credit for the Confederate bonds.

9. A decree of the court of chancery of the insurgent government of Alabama, made during the war, affecting the rights of a party who was at the time of the decree in the state of New York, is void.

In equity. This cause was submitted for final decree, on the pleadings and evidence.

Robert H. Smith, T. N. McCartney, and M. E. McCartney, for complainant.

John A. Campbell, E. S. Dargan, John T. Taylor, Peter Hamilton, and Wm. Boyles, for defendants.

WOODS, Circuit Judge. On the 16th day of April, 1861, Abram W. Van Epps was appointed by the probate court of Mobile county, Alabama, guardian of Barney H. Van Epps, the complainant, and gave bond in the sum of $50,000, with E. S. Dargan, Charles Walsh and others as sureties, conditioned that if the said Abram W. Van Epps should well and truly perform all the duties which might be by law required of him as guardian, then the obligation should be void. Under this appointment the guardian reported that he had received as assets of the estate of his ward the sum of $15,328.89. On the 10th day of

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

November, 1862, on the application of the sureties on the guardian's bond, Abram W. Van Epps, as guardian, filed an additional bond, in the penalty of $50,000, with E. S. Dargan and Charles Walsh as securities, with the same identical condition as the original bond. On the same day, Van Epps executed a deed of mortgage to Dargan and Walsh on certain real estate in the city of Mobile, in which, after a recital that Dargan and Walsh were sureties on his bond as guardian, the purpose and condition of the mortgage are thus set out: "Now the object of this conveyance is to protect and save harmless my said securities on my said bond, and also to secure the said Barney H. Van Epps in all sums of money I may be found indebted to him on a final settlement of my accounts as such guardian, both of which being done, that is, the full protection of my sureties and the payment of all sums to said Barney H. Van Epps, the minor, this conveyance to be null and void, otherwise to remain in full force." The mortgage further provides, as follows: "If I die before I make a final settlement of my accounts, or, if living, I make such final settlement and am found in arrear and indebted to said Barney H. Van Epps, the minor, then my said sureties or the survivor of them shall have the right to take possession of said premises and hold them for the purposes aforesaid, and to sell the same at public auction, and, from the proceeds, first to pay all the sums I may be indebted to said ward, and the residue to pay over to me or my executors and administrators, if I am not then in life." On the 8th day of March, 1864, Van Epps resigned his guardianship, and his resignation was accepted by the probate court, and on the same day, Wesley W. McGuire was appointed his successor. On the 9th day of March, 1864, Van Epps made a final settlement of his accounts, as guardian, with the probate court of Mobile county, from which it appeared that there was a balance of $15,624.14 as the assets of his ward in his hands. He was directed by the court to pay over to McGuire, his successor, all the assets of his ward, which was done in open court, and the said McGuire acknowledged the receipt thereof. The said sum of $15,624.14 was paid in Confederate treasury notes and bonds. On the 28th day of December, 1868, the complainant having reached full age, cited McGuire, his second guardian, to a final settlement of his accounts. Both parties were present by themselves and counsel, and a settlement was made, and a balance of $45.56 found in the guardian's hands, which was paid to complainant, and the receipt thereof acknowledged by complainant in open court, and complainant discharged McGuire from further liability to account for the same. It further appears that, at a partial settlement of the accounts of McGuire with his said ward, made in said probate court, on the 19th of March, 1868, McGuire reported that he had on hand a balance of $11,758.54, Confederate treasury notes, which were declared to be of no value, and for that reason he was allowed a credit for that amount in his account. The assets received by Abram W. Van Epps of his ward's estate were in gold or its equivalent. The Confederate treasury notes and bonds which Van Epps turned over to his successor were, it is claimed, lost to the estate of the ward. After the final settlement of the accounts of Abram W. Van Epps as guardian, and his discharge by the court on March 9, 1864, Abram W. Van Epps filed a bill in the chancery court of Mobile county against Dargan and Walsh, to compel them to enter satisfaction of said mortgage given to them as aforesaid, which, on the 24th day of February, 1865, the said chancery court decreed to be done, and declared that the mortgage was satisfied and no longer of effect. In obedience to this decree and on the day of its rendition, Dargan and Walsh entered satisfaction on the margin of the record of said mortgage, in which entry they recite that the satisfaction is entered so far as they have power, and that the same was done in obedience to the decree of court. At the time of the final settlement of the accounts of Van Epps, guardian, by the probate court in March, 1864, and of the decree of the chancery court of Mobile county in February, 1865, Van Epps, the ward, was absent from the state of Alabama and was residing in the state of New York.

The object of the bill is to compel Van Epps and his sureties to pay in lawful money the balance found in his hands on March 9, 1864, and which he undertook to discharge by the payment of Confederate notes and bonds; that an account may be taken between said Abram W. Van Epps and complainant, and that payment of any balance found due complainant may be enforced out of said mortgaged premises and the said sureties on the bonds of said Abram W. Van Epps. This claim for relief is based on the allegation that the probate court of Mobile county, which on March 9, 1864, assumed to settle the account of Van Epps as guardian, and to discharge him, and the chancery court which declared said mortgage to be satisfied and directed its release, were not legal courts; that they were without authority to make such settlement, discharge and decree, and that the same are therefore null and void. Dargan and Walsh, the sureties on both the bonds of Van Epps as guardian, Wesley W. McGuire as administrator of John H. Woodcock, Wm. B. Hayden as guardian of Wm. L. Nunnalee, a lunatic, the said Woodcock and Nunnalee being sureties on the first bond of Van Epps, and Harriet McLean and James McLean, her husband, the said Harriet now claiming to hold the legal title to the premises mortgaged by Van Epps, are the defendants and the only defendants to the bill.

The first question which naturally claims

the consideration of the court is, whether the relief asked by the bill against the sureties on the bonds of Van Epps, the guardian, can be granted? It is a doctrine so well settled, that the liability of a surety is strictissimi juris; that he stands upon the letter of his bond; that his obligation is limited by the terms of his bond, as to require no citation of authorities to support it. Another rule of law just as well settled is, that the obligation of a contract is what the parties intended it to mean when they entered into it; what they both understood to be the contract, that is the contract; and to arrive at the understanding of the parties, the courts are authorized to look at the circumstances which surrounded them when they made it.

Keeping these principles in view, let us look at the surroundings of the parties to the bonds of Van Epps. The court knows as historical facts, that on the 11th day of January, 1861, the state of Alabama, represented in convention, passed an ordinance purporting to dissolve its connection with the Federal Union; that the convention proceeded to organize a state government, which denied and repudiated the authority and laws of the United States, and declared itself to be a state in a government called the Confederate States. It established and put in operation a government for the state of Alabama, which denied and refused all connection with the government of the United States. The officers of the new pretended state government were sworn to support, not the constitution of the United States, but the constitution of a government organized in opposition and in hostility to the United States, called the Confederate States. Before the first of April, 1861, this new government of the state of Alabama had driven out the forces of the United States and seized upon the forts and the arsenal of the United States located within its limits, and held hostile possession thereof. The new authorities of the state, prior to the first of April, 1861, had raised, armed, equipped and drilled troops to resist the power of the United States and to maintain the secession of the state from the Federal Union. All departments of the government under the new order of things were conducted in subservience to the authority of said Confederate States and recognized the new government of the state. After the 1st of February, 1861, no officers of the United States exercised or were permitted to exercise any authority as such in the state of Alabama, but were utterly excluded therefrom by the power of the state as so organized, and of the so called Confederate States of America. Before April, 1861, the Confederate States was fully organized and its government in full operation in and over Alabama and other seceding states, and its seat of government was established in Alabama, with a president and congress, cabinet and judiciary elected or appointed according to its constitution. On the 13th of April, 1861, the Confederate States commenced hostilities against the United States, and on the 15th of April, 1861, war was recognized by the president of the United States as commenced and existing between the United States and Confederate States of which Alabama was one. On the 16th day of April, 1861, not a vestige of the authority of the United States or of the government of the state of Alabama as a member of the Federal Union remained in the state. On that day a judge of the Confederate States was holding office in Mobile, the courts of the states were organized under the authority of the new state government, or acknowledged that authority and stood ready to submit to and enforce its laws. The great mass of the people of the state believed that the dissolution of bonds between Alabama and the Federal Union would be perpetual, and that thenceforth, the state would remain a member of the Confederate States, which was to hold the relation to the United States of enemies in war, in peace, friends.

In this condition of affairs the contract of these sureties was made. The obligee of the bond was John H. Hitchcock, probate judge of Mobile county. He had been elected under the old government of Alabama, and his six years' term was about to expire. He held over after the secession of the state, and served out his term. It cannot be successfully maintained that he was not a judge under the new insurgent government of Alabama. The assumption that he was not leads to consequences so absurd as to make it untenable. What then was the contract of these sureties, as understood by themselves and John H. Hitchcock, the acting probate judge? They agreed that their principal should, as guardian, well and truly perform all the duties which were or might be required of him by law. By what law? Not the law of the displaced government of Alabama, for that had in the contemplation of the parties no force. Nor by the law of the United States, for that was repudiated and could not at the time be enforced in the state. The conclusion is irresistible that their contract was based on and referred to the existing order of things and that the law by which the guardian was to be governed was the then existing law, and such other laws as should be put in force during the continuance of the trust. To suppose that they had any other law in view is too unreasonable a proposition to be for a moment entertained. If Alabama and the other Confederate States had succeeded in achieving permanent secession and independence, can there be a doubt that no question would ever have been raised as to what was meant by this contract? The settlement of the guardian in 1864, would never have been challenged, and it would not have been challenged because it would strike the universal sense that the settlement was binding and valid, and the covenants of the

sureties performed. Can it be plausibly argued that because the rebellion and secession proved in 1865 to be a failure, therefore the contract of these sureties made in 1861 and 1862, and which had been fully performed and discharged in 1864 as the parties understood it, was changed, and a different liability raised thereon? We are bound, if the language of the obligation permits, to give such effect to it as the parties, when they made it, intended to give. It is no answer to this, to say that the judge who settled the account of Van Epps in 1864, and discharged him, was not a legal officer. These sureties never agreed that the account should be settled by a lawful probate judge, as that term is now understood. They agreed that the account should be settled under what they understood at the time to be the laws of the state, and by the person who under those laws was performing the duties of probate judge, and whose authority was derived from those laws. These were the laws and these the officers, that without controversy, must have been in their contemplation when the bond was executed. Suppose that the condition of the bond had been that the guardian should settle his trust to the approval and satisfaction of the chamber of commerce of the city of Mobile, and that such settlement had been made, and the condition of the bond according to its terms complied with. These sureties would not be liable on the bond, because the chamber of commerce was not a court, and had no jurisdiction over the subject matter of the settlement, for they had fulfilled precisely what they agreed to do. In either of the cases supposed, namely, the success of the rebellion after the settlement of the guardian with the acting probate judge, or the giving of the bond that the guardian should account with the chamber of commerce, the conditions of the bond being performed according to the intention of the parties, no suit at law could be maintained on the bond. The plea of covenants performed would be a complete bar to such action. But secession failed; the insurgent government of Alabama, more than a year after the final settlement of the guardian's accounts with his ward had been made by the acting probate judge, in accordance with the laws the parties to the bond had in view, was overthrown, and the old government restored. It is now sought by this bill to make a new contract for these sureties; a contract which in all probability never entered their minds when they became sureties, to wit, that having discharged their contract according to the laws in their contemplation when they made it, they are to stand bound until their principal accounts according to the laws of the restored governments, state and national. They stand upon the terms of their bond as contemplated at the time by all parties; they have the right to say that their contract shall not be extended the division of a hair; they say they have performed their covenant according to its true interpretation, and that no action can be maintained upon it, and we think the position is impregnable. There is no equity against a surety. If at law he is released, he is released altogether.

When a court has no power to appoint a guardian, but does appoint him, and he gives bond with sureties, and takes possession of the estate of his ward, it is not competent for any of the obligors in such bond to object to its validity on the ground of want of power in the court to make the appointment. Iredell v. Barbee, 9 Ired. 250. While we recognize this doctrine, and hold the sureties concluded by a bond taken by a court not authorized to take it, still we can not enlarge the liabilities of the bond, change its terms, or extend its meaning beyond the fair intendment of the parties. In Texas v. White, 7 Wall. [74 U. S.] 733, the supreme court uses this language: "It is a historical fact that the government of Texas then in full control of the state, was its only actual government, and certainly if Texas had been a separate state, and not one of the United States, the new government having displaced the regular authority, and having established itself in the customary seats of power and in the exercise of the ordinary functions of administration, would have constituted in the strictest sense of the words a de facto government, and its acts during the period of its existence as such would be effectual and in almost all respects valid. And to some extent this is true of the actual government of Texas, though unlawful and revolutionary as to the United States. It is not necessary to attempt any exact definitions within which the acts of such a state government must be treated as valid or invalid. It may be said perhaps with sufficient accuracy that acts necessary to peace and good order among citizens, such for example as acts sanctioning and protecting marriage and the domestic relations governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts which would be valid when proceeding from a lawful government, must be regarded in general as valid, though proceeding from an actual though unlawful government; and that acts in furtherance and support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must in general be regarded as invalid and void." When, therefore, the actual existing government of Alabama, on the 16th of April, 1861, undertook, by its officers, to appoint a guardian for the estate of an infant situate within its territory, it was doing as parens patriæ, an act as valid and lawful as if done by a government de jure, and pro hac vice, was in effect a lawful government. Neither it nor its officers can be called to account for discharging a lawful duty. If the state as parens

patriæ undertakes the duty of caring for an infant's estate, it alone can be allowed to prescribe how that trust shall be discharged, and can be called to account by no other power or person so long as its acts are not in furtherance and support of rebellion against the rightful government, or intended to defeat the just rights of citizens. On this branch of the case, therefore, I am of opinion that a probate judge of the insurgent government of Alabama might lawfully appoint a guardian for an infant's estate within its territory, and take bond for the faithful discharge of the trust by the guardian; that the bond is valid, and that, to this extent, the acts of such officer or the government under which he acts cannot be called in question. Further, that such bond must be construed, so far as sureties are concerned, according to the laws of the revolutionary government, and according to the understanding of both obligors and obligees at time of its execution.

The result of these views is, that the bonds of Van Epps, as guardian, are valid; that the guardian, having performed his duty according to the laws of the government in force when the bond was executed and the settlement of the guardian made, and as the parties to the bond understood he was to do, the sureties have performed their covenant and are discharged from further liability, and, as to them, the bill must be dismissed. Let it be understood, however, that the sureties are relieved solely upon the ground that they have performed their contract as they understood it, and as the state, as parens patriæ, acting by its officer, understood it at the time it was made. But, while the sureties on the bond are discharged, it does not follow that the guardian is clear of liability. By the reception of the property of his ward, he incurred liabilities independent of any bond, and which would attach to him without bond, and which attach to him independent of his relationship as guardian. This obligation was to improve the estate of his ward and to account for and pay it over to his ward with its increase and profits. He can be relieved from this obligation in one only of two ways, namely, by the full performance of the obligation, or by his discharge therefrom by a court of competent jurisdiction authorized to act in the premises, and whose findings and decrees are valid. When the guardian relies upon the decree of the court of a revolutionary and insurgent government for his discharge, it must appear that its proceedings were not in support of the rebellion against the lawful government, or intended to defeat the just rights of citizens. The act of the revolutionary legislature of Alabama, passed December 5, 1861, authorizing guardians and other trustees to purchase bonds of the Confederate States, or of the state of Alabama, or to receive their notes in payment of any debts due the ward, was an act in furtherance of the rebellion, and therefore void; it gave no authority to guardians to purchase such bonds, and the decree of any probate court allowing a guardian a credit for such notes or bonds, was of effect to defeat the just rights of a citizen, to wit, the ward, and was of no binding force on him, and did not operate to discharge the guardian. The court, in attempting to make such a settlement, was no court, and its decree no decree. The decree of the chancery court of Mobile county, directing Dargan and Walsh to enter satisfaction of the mortgage made to them by Van Epps, the guardian, was also made coram non judice. The main party in interest was the minor Van Epps, who was in the state of New York, and prohibited by the laws of the United States from making any defense. It is not pretended that any actual notice was served, or could be legally served upon him, and, even if served, he could make no defense, and the purpose of the decree against him was to deprive him of the security which his guardian had given him to protect his estate. It was a decree depriving him of his just rights, and, in rendering it, the court was no court, and the decree ineffectual. Cuyler v. Ferrill [Case No. 3,523]; Buchanan v. Rucker, 9 East, 191; Borden v. Fitch, 15 Johns. 121; Newdigate v. Davy, 1 Ld. Raym. 742. We have therefore arrived at these further conclusions, that the payment in confederate notes and bonds, of the balance found due by the probate court of Mobile county from Van Epps as guardian, was not binding on his ward, the complainant, nor was the decree of the chancery court of Mobile county, directing the release of the mortgage given by Van Epps, binding on the ward, so that the ward has a just claim against his guardian for so much of his estate as was converted into confederate notes and bonds, and paid over to McGuire, the second guardian.

It has been repeatedly held by the supreme court of Alabama, that all judgments rendered by the revolutionary state courts of Alabama are void. Ex parte Bibb, 44 Ala. 140; Noble v. Cullom, Id. 554. And in the case of Bibb, the court held that the ordinance of the convention, No. 26, of 1865, dated September 12, 1865, purporting to ratify such judgments, was illegal and void. While unwilling to accept this doctrine in the broad terms laid down by the supreme court of this state, yet I am of opinion, as already expressed, that where the judgments of the courts gave effect to the legislation of the revolutionary legislatures, which was enacted for the purpose of aiding the rebellion or deprived citizens of the United States of their just rights, such judgments and decrees are void, and no subsequent legislation can make them good. The settlement of the probate court in 1864, being void as well as the decree of the chancery court, no direct proceeding is necessary to set them aside or reverse

them. They are nullities so far as they undertake to conclude the rights of complainant against his guardian, and a bill in equity in this court is a proper method for enforcing these rights. The complainant having then a just claim on Van Epps, his guardian, and the release of the mortgage given by him to Dargan and Walsh being void, it remains to consider what, if any, are the rights of complainant under that mortgage. The settlement made by Van Epps, the guardian, with the probate court on March 9, 1864, shows that he had in his hands, of his ward's money, $15,724.14. That is the balance, as struck by the probate judge. The payment of this sum or any part of it in Confederate notes or bonds was no payment. Per Walker, C. J., in Shackleford v. Cunningham, 41 Ala. 205. Now, what is the purpose of the mortgage given by Van Epps to Dargan and Walsh, as expressed in the instrument itself? It is not only to indemnify them, as his sureties, but to secure Barney H. Van Epps in all sums of money he, the guardian, might be found indebted to him on a final settlement of his accounts as guardian, and the mortgage provided, that if the mortgagor died, before final settlement, or if living, made such settlement, and was found indebted, and in arrear to his ward, the mortgagees might sell the mortgaged property and pay such indebtedness. This makes Dargan and Walsh trustees for the benefit of the minor, and as such trustees, they have a mortgage lien for the benefit of complainant on the premises, to secure him in the amount due from his guardian.

If the views we have expressed are correct, McLean and wife cannot be innocent purchasers of the mortgaged property, for the mortgage remains of record without any valid release, and that is constructive notice to them. Before, however, any decree could be made by this court, by which the lien of the complainant could be enforced on the mortgaged premises, Abram W. Van Epps must necessarily be made a party. No such decree could be made which would not directly affect him. Being a nonresident he cannot be made a party. By reason of this deficiency in the jurisdiction of this court, I am unable to see how any relief can be given complainant as against Abram W. Van Epps and the mortgaged property. The bill must, therefore, be dismissed as to Dargan and Walsh and the other sureties on the bonds of Van Epps, and as to McLean and wife and Dargan and Walsh, as trustees under the mortgage, the bill is dismissed without prejudice. Decree accordingly.

VAN FOSSEN (UNITED STATES v.). See Case No. 16,607.

VAN HAGEN (STURGES v.). See Case No. 13,570.

VAN HAVEN, Ex parte. See Case No. 16,858.

Case No. 16,851.

VAN HOOK v. PENDLETON et al.

[1 Blatchf. 187; [1] Fish. Pat. Rep. 120.]

Circuit Court, S. D. New York. Oct. Term, 1846.

PATENTS—PROVISIONAL INJUNCTION—WOODWORTH PLANING MACHINE—EQUITY INFRINGEMENT SUITS—FEIGNED ISSUES.

1. On a motion for a provisional injunction under Woodworth's patent for an "improvement in machines for planing, tonguing, and grooving and dressing boards, &c.," the originality of Woodworth's invention and the validity of the patent will be considered as settled.

2. The Macgregor machine, with a planing wheel having its knives not on a cylinder, but on the face of an obtuse or flattened cone, and in a plane inclined to the axis of the wheel, is an infringement of the Woodworth patent.

3. The case of Woodworth v. Wilson, 4 How. [45 U. S.] 712, cited and examined, and held to decide that the Bicknell machine, which was similar to the Macgregor machine, was an infringement of Woodworth's.

[Cited in Gibson v. Van Dresar, Case No. 5,402.]

4. When a patentee will not be charged with acquiescing in the use of his invention.

[Cited in Green v. French, Case No. 5,757; M'Williams Manuf'g Co. v. Blundell, 11 Fed. 422.]

5. The case of Woodworth v. Wilson, 4 How. [45 U. S.] 712, decided the questions of the originality of Woodworth's invention, and of the validity of his patent of 1828.

6. The case of Wilson v. Rousseau, 4 How. [45 U. S.] 646, decided the sufficiency of the amended specification and the validity of the re-issued patent of 1845, and that the patents of 1828 and 1845 were for the same invention.

7. On the question of the infringement of a patent, raised in a suit in equity, a feigned issue will not be awarded, unless the court have doubts as to the identity of the two machines.

8. Rules as to awarding a feigned issue.

In this case, an application for a provisional injunction was made before Mr. Justice Nelson and Judge Betts. The plaintiff [William Van Hook] was the assignee for the city and county of New-York, for the term ending December 27th, 1849, of letters patent to William Woodworth for an "improvement in machines for planing, tonguing, and grooving and dressing boards, &c.," as re-issued to William W. Woodworth, administrator of William Woodworth, deceased, on the 8th of July, 1845. See Wilson v. Rousseau, 4 How. [45 U. S.] 662 to 668, for the re-issued letters patent and amended specification. The plaintiff's bill was accompanied by affidavits, from which it appeared that the machine used by the defendants [John Pendleton and Jonathan Leach], and which was alleged to be an infringement of the Woodworth patent, was known as a Macgregor machine, and was claimed to be covered by patents issued to James Macgregor, Jr., in 1833 and 1838. On the part of the plaintiff, it was contended, that Woodworth was the original and first inventor of the improvements described and

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

shown in his patent and specification of December 27th, 1828, and in the drawing which accompanied them, and more fully described in the amended specification of July 8th, 1845;[2] and that after the decisions had on the question of originality, in favor of Woodworth, in numerous cases in several circuit courts, and in the case of Woodworth v. Wilson, 4 How. [45 U. S.] 712, in the supreme court, in many of which all the evidence bearing on the question had been introduced, it should not be considered as open for controversy on a motion for a provisional injunction.

In the defendants' machine, the planing wheel had its knives placed, not on a cylinder, but on the face of a very obtuse or flattened cone, and in a plane inclined to the axis or shaft of the wheel. The plaintiff insisted that the planing wheel of Macgregor was not, in its mechanical principles or mode of operation, essentially different from the cylinder of Woodworth; that Macgregor's mode of arranging the knives was pointed out in Woodworth's specification as a modification of his mode; and that the combination of the Macgregor planing wheel with pressure rollers, or some analogous device for the same purpose, embraced the improvements of Woodworth.

The defendants resisted the motion on numerous affidavits made by themselves and others. Their grounds of opposition were that Woodworth was not the original and first inventor of the improvements claimed by him; that the same combination of tools for tonguing and grooving with pressure rollers, had been used as early as 1818 by the society of Shakers, at New-Lebanon, N. Y., as appeared by the affidavit of Amos Bishop; that Malcolm Muir, of Glasgow, Scotland, had invented and put in operation in Great Britain, in 1827, a machine for planing, tonguing and grooving boards, &c., for which a patent had been issued to him, and which embraced the same combination of tools for tonguing and grooving, with pressure rollers, as that described in Woodworth's patent, as appeared by the description of Muir's machine, in the London Journal of Arts and Sciences, second series, vol. 2, p. 68, and in the same work, conjoined series, vol. 1, pp. 49 and 57; that the same combinations of pressure rollers with the planing cylinder, and with the cutters for tonguing and grooving were invented by Uri Emmons, prior to their alleged invention by Woodworth; and that Daniel Dunbar and James Tompkins were the inventors of that for which Woodworth obtained the patent. The defendants also insisted that the re-issued patent of July 8th, 1845, was not for the same invention as the original patent of December 27th, 1828; and that the Macgregor machine used by them, (which they had a right to use by purchase from Macgregor,) did not embrace Woodworth's improvements. Models of the respective machines were introduced, and the defendants read numerous affidavits made by engineers and mechanical experts, to show that the two machines were different in principle and mode of operation. These affidavits were expressed in general terms, and did not to much extent state the particular differences or the reasons on which the opinions of the affiants were founded. The defendants also contended that the planing wheel of Macgregor, from the manner in which the knives were set upon its face, made a different cut on the surface to be planed from the cylinder of Woodworth. It was also urged that the plaintiff's remedy in the case was not by a motion for an injunction, but by proceedings under the 16th section of the act of July 4th, 1836, (5 Stat. 123,) for a repeal of the patent issued to Macgregor; that machines made according to the Macgregor patent had been for some years in operation in Philadelphia and Baltimore and elsewhere, and the defendants had been using their machine for a number of years; that the Macgregor machines had been unmolested, and property had been invested in them to a considerable extent; that the owners of the Woodworth patent must be held to have acquiesced in these infringements, if such they were; and that, especially, had the plaintiff acquiesced in the use by the defendants of their machine, as it was in operation near him and he had known of it for a long time.

Seth P. Staples and George C. Goddard, for plaintiff.

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

BETTS, District Judge, delivered the opinion of the court, stating that NELSON, Circuit Justice, who had been obliged to leave the city, concurred in it fully. After the decisions which have been made on the Woodworth patent in this court, in most of the other circuits, and in the supreme court, in cases in which the originality of the invention, and the validity of the patent in other respects, have been brought in question, and been thoroughly examined, it must be con-

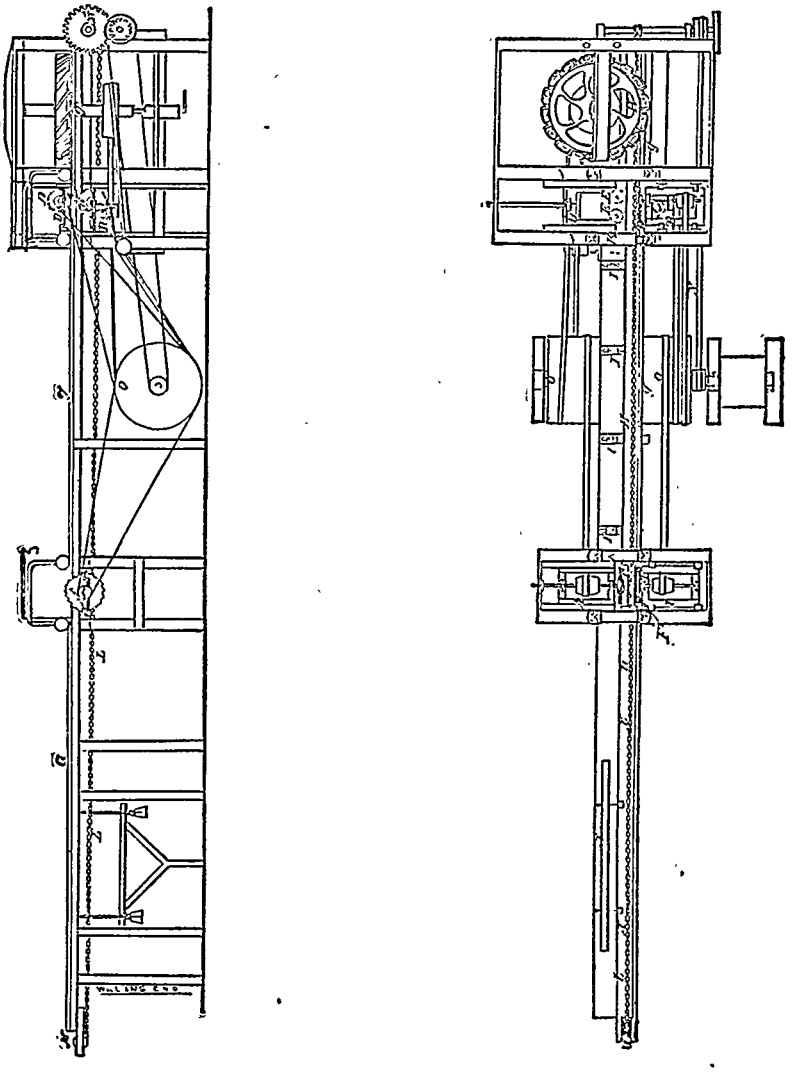
[2] NOTE [from Fish. Pat. Rep. 120]. "The plank or board is to be moved on toward the cutting edges of the cutters or knives, on the planing cylinder, so that its knives or cutters, as they revolve, may meet and cut the plank or board in a direction contrary to that in which it is made to advance; the edges of the cutters are, in this method, prevented from coming first into contact with its surface, and are made to cut upward from the reduced part of the plank toward said surface, by which means their edges are protected from injury by gritty matter, and the board or plank is more evenly and better planed than when moved in the reversed direction. * * *

"B B are the heads of the planing cylinder, and C C the knives or cutters, which extend from one to the other of said heads, to the peripheries of which they may be attached by means of screws. The knives C C, with the faces, forming a planing angle, may be placed in a line with the axis, J, of the cylinder, or they may stand obliquely thereto, as may be preferred." [For drawings of the Woodworth patent above referred to and explanations thereof, see 10 Fed. Cas. 330.]

sidered as settled, for the purposes of this motion, that William Woodworth was the inventor of the improvements described in his patent.

The only question on this motion which presents any difficulty is, whether the machine used by the defendants is an infringement of the Woodworth patent; and upon that point we have carefully examined all the evidence presented in the affidavits submitted on the part of the defendants, and the models exhibited to us. On a slight view of the two machines, their general appearance and form being different, they might be thought to be different in their essential parts; but on a more careful examination and comparison of them, and a consideration of the principles on which they are constructed, we are united in the opinion that the machine used by the defendants, described as a Macgregor machine, is, in its mechanical principles, mode of operation and combinations, substantially the same as that of Woodworth. The planing wheel of Macgregor presents a change of form only, from a cylinder to an obtuse or flattened cone or conically shaped wheel; and the action of the knives or cutters in the Macgregor machine, on the surface to be planed, is not essentially different from the action of Woodworth's cutters, the change appearing to consist only in the knives passing over more of the surface to be planed, and in their cutting for a part of the distance in a measure cross-wise of the board in the process of planing. On a careful consideration of this question, in all the aspects in which it has been presented, we are satisfied that the machine used by the de-

[3] [J. McGregor, Jr. Planing Machine. Patented Aug. 28, 1833.

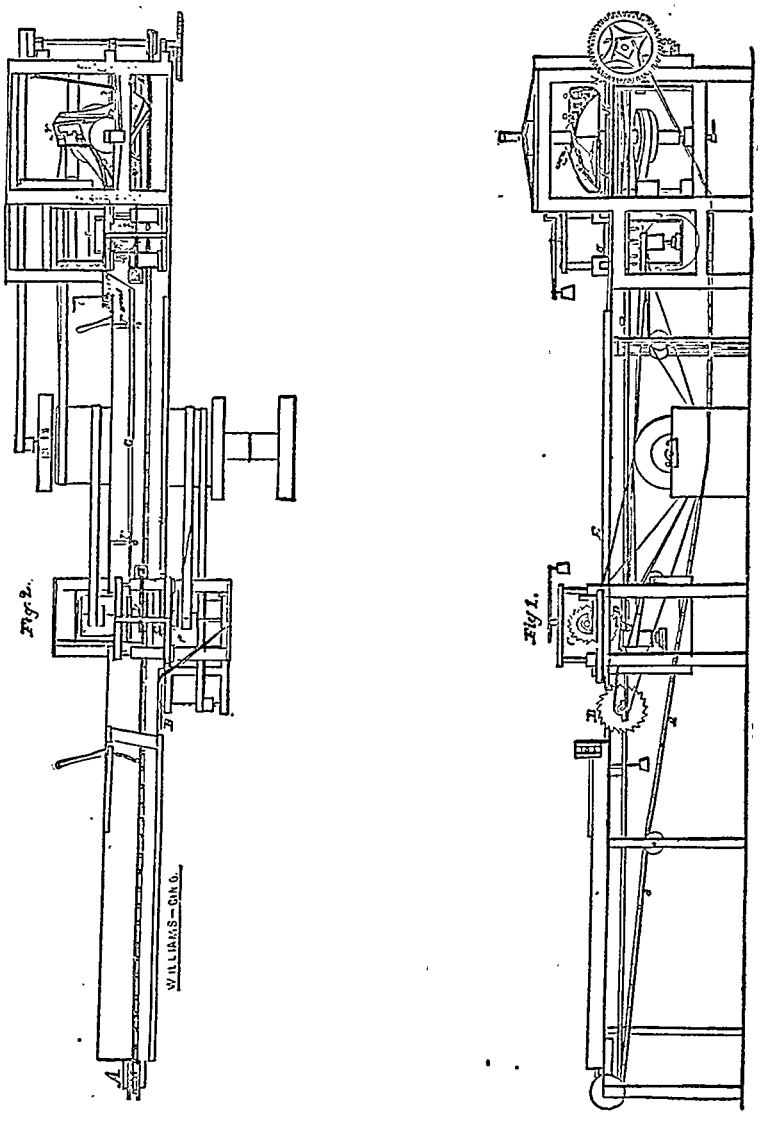


[3] [From Fish. Pat. Rep. 120, from which was also taken the detailed description of this machine, published as note A, at the end of this case.]

fendants is an infringement of the Woodworth patent.

This same point has been contested and decided in cases arising in other circuits. In the case of Woodworth v. Wilson, 4 How. [45 U. S.] 712, carried by appeal to the supreme court from the circuit court for the district of Kentucky, an attachment was applied for in the circuit court, on the ground that a party who had been enjoined from using the Woodworth machine was using the Bicknell machine, and thus violating the injunction. The court in Kentucky, on the evidence produced on the application for an attachment, dissolved the injunction. We have examined the evidence in that case, from which it appears that the Bicknell machine, especially in its planing wheel, was similar to the Macgregor machine, in the points in which it is claimed that the latter is distinguished from the Woodworth machine. The case as presented to the supreme court did not turn upon the question whether the Bicknell machine was an infringement of Woodworth's patent; but that point was so involved in the case that it is not to be supposed that the court would have reversed the decree of the court below, without expressing an opinion that the Bicknell machine might be used without violating the injunction in favor of Woodworth's, if they had so thought. The testimony taken in the court

[4][J. McGregor, Jr. Planing Machine. Patented Jan. 9, 1838.



[4From Fish. Pat. Rep. 120, from which was also taken the detailed description of this machine, published as note B, at the end of this case.]

below, which was much at large, and was by both parties directed to the infringement by the Bicknell machine, was brought before the supreme court. That court reversed the decree below, and reinstated the injunction; the effect of which must have been to entitle the plaintiff in the circuit court to pursue his attachment there against the Bicknell machine. In the absence of a reasoned opinion upon the subject, we accept the decision of the supreme court as importing its judgment that the Bicknell machine was an infringement of Woodworth's patent. A case has also arisen recently before the district judge for the Eastern district of Pennsylvania, on a motion for an injunction, which was granted, against what was there called a Gay machine, which, however, from the description given of it, was, in its construction, like the Macgregor machine. An injunction has also been granted by Chief Justice Taney in Baltimore against a machine which is said to have been a Macgregor machine.

Many affidavits have been presented on the part of the defendants to show that the Woodworth machine and that used by the defendants are wholly unlike; but these affidavits are, for the most part, wanting in any statement of the particulars in which the machines differ, or of the reasons on which the opinions given are founded. We have examined and compared the descriptions and models of the machines, and heard the arguments of counsel, and are thus enabled to form an opinion ourselves, and we think that the two machines combine substantially the same improvements.

It is contended on the part of the defendants that an injunction ought not to be granted, on the ground that the plaintiff has acquiesced in the use of this machine by the defendants; that he has known of its use and has not interfered to prevent it. We do not think this objection can prevail. It does not satisfactorily appear that the plaintiff knew how the defendants' machine was constructed, or how far it infringed upon his; and, if he did know, we do not hold that he forfeited his right to protection by injunction against the infringement, because he did not apply sooner. He brought other suits, one against one of these defendants, to vindicate his rights; and he is not to be charged with acquiescence because he proceeded first against that which was a more palpable and obvious violation of his right, or because he has not brought suit against all the machines which infringe upon it. We order an injunction against the defendants pursuant to the prayer of the bill.

At a subsequent day, the defendants, having put in their answer, moved, before NELSON, Circuit Justice, and BETTS, District Judge, for a feigned issue to try the matter in controversy before a jury. The motion was argued by the same counsel as before. The opinions were given at the close of the argument.

NELSON, Circuit Justice. The defendants are struggling against the judgment of the court, already formed and expressed, on the motion, heretofore granted, for an injunction. Most of the questions in this case were then fully considered and decided. In Woodworth v. Wilson, 4 How. [45 U. S.] 712, which was taken to the supreme court from the district of Kentucky, the question of the originality of the invention was most thoroughly enquired into, as evidence from every quarter of the country was produced, by depositions of experts, and from books of science, and it was notwithstanding held that Woodworth was the first inventor, and that the specification of the patent of 1828, in connection with the drawing, was sufficient, and the patent valid. The questions, both as to the originality of the invention and as to the validity of the patent, were decided on the most full examination and argument. The case of Wilson v. Rousseau, 4 How. [45 U. S.] 646, from the Northern district of New-York, was founded on the amended specification of 1845. All the questions involving the validity of the new patent were raised in that case. It was argued at great length and the specification was held to be sufficient, and the re-issued patent valid. The new specification was but a clearing up of the criticisms which had been made on the old one in the course of the litigation had upon it. The supreme court having passed upon these questions and settled them, after argument, and on full consideration, how can we, on this motion, revise them? There is not a point made now which has not been made before. The questions raised have, on several occasions, in the district of Vermont, and in the Northern district of New-York, been acted upon as settled, and we so regard them. The only question we can consider as open for controversy is that of infringement. To permit litigation to be renewed as to any other, would be to encourage a struggle against the deliberate judgment of the appellate tribunal. To that the parties must submit, until they can again bring the questions into that court. They can, of course, go into proofs in this case and the court will then pass upon them.

Then, as to the question of infringement. If on the hearing on pleadings and proofs we shall entertain doubts as to the identity of the two machines, we will direct the question to be tried by a jury. But it will be as to that point alone, the question of infringement. If we do not entertain doubts on that question, it will be our duty to decide it; for we are not aware of any principle that will justify us in sending the case to a jury, unless we shall be brought to doubt on the question of identity.

In reply to an observation from the defendants' counsel, NELSON, Circuit Justice,

said: The remittitur in Wilson v. Rousseau, 4 How. [45 U. S.] 687, was drawn up by me. The only reason why the answer to the eighth question certified (see pages 670, 688), was drawn in the manner it was, was that the question did not present a principle of law but a matter of fact. But the court had no doubt as to the fact and virtually decided the question. Both patents, that of 1828 and that of 1845, were before us, and we had no doubt they were for the same invention.

BETTS, District Judge. It is not a matter of course to order a feigned issue; but the party applying must lay a foundation for it. This is not the case of a new patent, but of an old one, long in use and established by decisions. And this court must adhere to what has been passed upon by the court above, whether it is contained in the remittitur or not. A feigned issue is not to be granted, unless the opinion of the jury on a question is found to be needed. And after a jury shall have passed upon the question, it will be for the court to say whether the verdict is right; and the court may set it aside. In the position of this case at present, a feigned issue cannot be ordered. Motion denied.

[For a subsequent proceeding, see Case No. 16,852.]

[For other cases involving this patent, see note to Gibson v. Van Dressar, Case No. 5,402.]

NOTE A.[5]

McGregor Planing Machine. Patented August 28, 1833.

Improvement in machine for jointing, tonguing, grooving, and planing plank for flooring and siding for ceiling.

This machine contains jointing saws, also saws for cutting the tongue upon an edge of the boards fed to the machine.

The plank to be planed is carried forward between the saws by a chain.

There are gauges in the machine to guide the plank straight. The gauge which is behind the saw is made sharp at the forward end, and shaves off the edging that is above the tongue.

The gauges on the other side are adjustable so as to suit any width of plank. In front of the jointing-saw is a weight to keep the plank up to the stationary gauge.

5. The jointing is done by two circular saws: the one on the side farthest from the plane shaft is so placed as to cut the edge off in a line with the gauge that lies immediately after it; the one on the other side is placed in a movable carriage, operated by a graduating screw, so that it can be set to any width desired.

6. The tongue of the board is formed by four circular saws, the two placed on the perpendicular shaft have a chuck between them as thick as the intended tongue. This shaft is so placed that the two saws cut horizontally into the edge of the plank as far as the width of the intended tongue. Above and below the plank is a shaft placed horizontally with one saw on each—the one above cuts down to the cut made by the upper horizontal saw, the one below cuts up to the lower cut made by the lower horizontal shaft. These two last-mentioned shafts are so placed that the saws cut into the face of the plank as far from the outer edge as the tongue is designed to project.

7. The groove is formed by three circular saws placed on perpendicular shafts, twining horizontally in the same carriage or frame, which carriage or frame is so constructed that it may be moved back or forward by a regulating screw to suit any width of plank to be dressed. On one of these shafts are put two circular saws, having a chuck between them of such thickness that the saws from outside to outside will be as far apart as the width of the intended groove; the other shaft carries one saw made thicker than the two just mentioned, and so placed that it clears out the timber between the cuts made by the before-mentioned saws.

8. The revolving circular plane is made in the following manner: The shaft is of cast-iron, with a cast-steel step fitted in its lower end, and a cast-steel bearing, about six inches in length, fitted in its upper end to admit the shaft to rise and fall without disturbing the upper box. Eight cast-iron arms project from this shaft; at the extremities of these is a circular cast-iron rim, projecting three-quarters of an inch below the arms; even with the under surface of which rim is a flange, projecting horizontally one and a half inch; the under side of which flange and rim is twined true, forming a smooth surface to pass freely over the plank to be planed. In this flange are sixteen slots, forming throats to admit the inner edges of the plane-irons, at the back part of which slots are projections extending from the top of the rim as far as the outer edge of the flange to which they are cast solid, having the same inclination as the irons. These projections form the back part of the slots as well as the bed-pieces on which the plane-irons rest, and are fastened by screws, bolts, and nuts. Each plane-iron is four inches long and two inches wide; rounded on the outer corner, the front edge passing through the throat being nearly square; this edge, the outer corner and up the outer edge as far as the plank should ever exceed the desired thickness, is made sharp. The foot-shaft of this rotary plane rests in a step, the latter being so made that the rotary plane can be adjusted vertically.

9. The feeding is performed by an endless chain passing over two wheels—one at the end of the frame in which the revolving plane is placed, and the other at the first end of the way. The first-mentioned wheel has cogs on its periphery, working in the links of the chain. On this chain are fastened hooks, which lay hold of the end of the plank on the chain, carrying it forward to the saws and plane.

10. Rollers for holding down the planks.—There are three of these rollers: one placed in front of the jointing and tonguing saws; one between these and the plane; and the other behind the plane—all held down upon the planks by weights and levers to confine the planks on the way.

11. Operation. — The machine being put in motion by steam or water-power, the plank to be dressed is placed on the way in front of the jointing-saws, and carried forward by the motion of the endless chain to these saws, which joint its edge; it is then carried forward to the tonguing and grooving saws, passing under the rollers between the gauges, when it is tongued and grooved in the manner hereinbefore described; the endless chain then carries it forward to the circular revolving-plane, when it is planed smooth by the operation of the plane in the manner also hereinbefore described. The plank is then conducted out of the machine by the continued motion of the endless chain. The jointing may be performed in a separate machine; also the tonguing and grooving. And the planing likewise may be done in a machine distinct from the others, but all operated on the same principle as herein described. Rollers

[5] [From Fish. Pat. Rep. 120.]

may also be fixed before and after the jointing-saws, to keep the plank firmly down upon the way.

Claim.—1. The planing of timber of any size or dimension by the principle of the twining tool and plane-iron united, as before described, or by the twining tool separate from the plane-iron, or so near as to retain the same principle. 2. The application of the sliding-box for the steps of the revolving plane-shaft to turn in, and by which the revolving plane is raised and lowered, to give the desired thickness to the plank, made and applied as before described. 3. The passing the shaft through beyond the face of the revolving circular plane, so as to have a step for the plane to rest on. 4. The application of the gauge under the plane to keep the stuff down while the plane is operating. This may be done by a roller, but I prefer the gauge. 5. The application of the common circular saw to joint, tongue, and groove plank or siding in the manner before described. 6. The mode of forming a tongue on a board, plank or sliding by cutting in the edge of the plank horizontally on each side of the tongue, and then vertically to form the shoulders by circular saws, as hereinbefore described. 7. The mode of forming the groove by making two horizontal cuts in the edge of the plank with two circular saws as far apart and deep as the width and depth of the intended groove, and clearing out the timber between the cuts by a circular saw, revolving horizontally in the manner herein described.

NOTE B.[6]

McGregor Planing Machine. Patented January 9, 1838.

Improvements in the machine for planing, jointing, tonguing, and grooving of boards, for which letters patent of the United States were granted unto me under date of the 28th day of August, 1833. The machine does not vary in its general construction and mode of operation from that above alluded to—that patented August 28, 1833; and it will not, therefore, be necessary to describe it minutely in the present specification, but only to particularize those things which constitute the improvements thereon.

Fig. 1, in the accompanying drawing (28 Fed. Cas. 994), gives a front, and Fig. 2 a top view of the improved machine. In my original machine the board or plank was jointed on both edges by two circular saws, set upon shafts nearly opposite to each other, this jointing having been the first operation performed by the machine, as the board entered it to be jointed, tongued, and grooved.

In the present improved machine, after placing the plank upon the bed of the machine, and conveying it forward by means of the endless chain A A, as formerly, it first comes in contact with the jointing-saw B, which joints one edge of it by rubbing a strip therefrom, which strip is carried off as heretofore. As it advances, the plank next comes into contact with the tonguing-saws C C, which operate upon the jointed edge; whilst the second jointing-saw D, which stands opposite to the tonguing saws C C, joints the opposite edges. This arrangement removes a difficulty experienced in the old machine, in which the plank was jointed at the same time on both edges by two saws, as before noticed, and was subsequently made to encounter the tonguing and grooving-saws acting opposite to each other. It, however, was found impossible to prevent those slight deviations in the apparatus, which would affect the regularity of the tongue and groove, and consequently the matching of the plank. The first improvement which I claim consists in the foregoing new arrangement of the jointing and tonguing saws, namely, in the first jointing of one edge by a circular saw upon the first saw-shaft, and the subsequent jointing whilst the tonguing of the opposite edge first jointed is at the same time effected at a point opposite, or nearly opposite, to the second jointing-saw, as herein described. The plank, as it proceeds forward, is borne up against the gauge-strip E, on the front of the bed, by the movable gauges E E, as formerly; but to carry off the strip cut by the second jointing-saw, is added the guide-strip or gauge G, which is armed with a thin elastic plate of iron at that end of it which is toward the kerf of the saw, into which kerf it enters, and effectually removes the strip out of the way, and prevents its interfering with the grooving-saws H, as it sometimes did under the old arrangement.

The end of the elastic strip of iron is confined onto the frame of this second jointing-saw, so that when the saw is shifted the strip moves with it, and is thus always opposite to the kerf. The second claim to improvement is to the employment of the gauge-strip E in the manner and for the purpose set forth. The grooving-saws I are constructed and operate as in the original machine, and are in like manner supported upon a sliding frame J J, by which they may be adjusted precisely to the width of the stuff to be grooved. The stuff, after being tongued and grooved, passes on between the stationary gauge-strip E and the opposite cheek or strip K K, which makes part of the sliding-frame L L. The strip E having a groove on it which receives the tongue of the plank, and the strip K a tongue which, in like manner, enters the groove of the plank as in the original machine, the plank is thus firmly held between these tongued and grooved strips, whilst it is acted upon by the revolving planes. As the sliding-frame which carries the grooving-saws I, and that carrying the tongued-strip K, require to be brought up simultaneously and equally against the plank which is to be grooved and planed, I have devised a new and improved mode of effecting this object. M M is a shaft which passes under the sliding-frames J J and L L, and has on it four pinions equal in size, which take into four racks—one on the under side of each of the side pieces of the two sliding-frames, and by turning this shaft by means of the wrench o or otherwise, it is manifest that the two sliding-frames will be simultaneously adjusted, as may be desired. This mode of adjustment, as arranged and applied to the planing machine, constitutes the third claim to improvement. In my machine, as originally patented, the cutters by which the planing was effected, consisted of a number of irons—usually sixteen—affixed in slots on the periphery of the revolving horizontal planing wheel, the edges of these cutters being carried so as to operate like gouges in turning, as described in the specification thereof.

The improvement in this part consists in the employment of a smaller number of irons—usually three—of greater width, so as to extend from the periphery of the wheel, or from the ends of arms which may be substituted for a wheel, to the shaft which carries it. The forward arm, or part of the wheel, forming the throat to the iron, not being extended as far out as the part forming the bed-piece to the iron, allows the outer end of the iron to spall off all that is above the desired thickness to be planed off. These wide irons, which are held and adjusted by suitable screws, are shown at N N N, attached to three arms, These irons are not placed in the direction of radii to the wheel, but stand in relation thereto in the manner of skew-irons in rabbet and other planes. These are not curved at their extremities, but have straight-cutting edges; and their distinguishing characteristic is their being so set that they shall cut under the surface of the plank without coming into contact with the fibrous surface left by the saw and the gritty matter always entangled therein. As

[6] [From Fish. Pat. Rep. 120.]

the shaft of the planing wheel is not vertical, but has an inclination toward the plank, the edges of the irons or cutters will first enter that edge of the plank which is toward the shaft, cutting toward the center, and obviating all danger of spalling, and the iron will not begin cutting at the off edge until it is about returning toward the center, and, of course, it can not produce spalling there. I claim as my fourth improvement the particular mode above described, of constructing and arranging the plane-irons, or cutters, so that they shall cut under the surface of the stuff to be planed, they being in all respects made and arranged substantially in the manner set forth.

Case No. 16,852.

VAN HOOK v. PENDLETON et al.

[2 Blatchf. 85;[1] 1 Fish. Pat. Rep. 205.]

Circuit Court, S. D. New York. April 4, 1848.

PRACTICE IN EQUITY—EXAMINATION OF WITNESSES—EXAMINERS—ORAL TESTIMONY—WAIVER—STAY OF PROCEEDINGS—DISCRETION OF COURT—DEPOSITIONS.

1. The principles which govern the practice of the United States courts in equity, considered.

2. The practice as to examining witnesses in suits in equity, considered.

[Cited in U. S. v. Tilden, Case No. 16,520.]

3. The circuit courts of the United States have power to appoint examiners in suits in equity.

4. It is a matter of discretion whether such examiners shall be standing examiners, or be designated as the occasion arises for their services in any cause.

5. Where the plaintiff in a suit in equity proceeded, after the cause was at issue, to take proofs before one of the standing examiners of the court, without his having been specially appointed as examiner or commissioner in the suit, *held*, that the examiner was competent to take the evidence.

6. An oral examination before an examiner, without any agreement between the parties to waive written interrogatories, is irregular.

7. Such agreement ought to be in writing.

8. But, where a party has due notice that such an oral examination is to be taken, or has been taken, and acquiesces in it, he waives his right to require written interrogatories.

9. Where, more than ten months after such an oral examination, and nearly five months after publication, the defendant, who had due notice of the time and place of the examination, moved to set the proofs aside because they were not taken on written interrogatories, *held*, that he was guilty of laches, and that it was too late for him to raise the objection.

10. Under rule 78 of the rules in equity of 1842, it is a matter of discretion with the court whether it will or will not stay the proceedings in a cause to allow a party to cross-examine or take a new deposition of a witness already examined by deposition for the opposite party under section 30 of the act of September 24th, 1789 (1 Stat 88).

[Cited in Steam Stone-Cutter Co. v. Jones, 13 Fed. 581.]

11. The practice in taking depositions under that act, considered.

This was a suit in equity for an account and an injunction for the infringement of letters patent. After the cause was at issue, the plaintiff [William Van Hook] proceeded to take proofs before one of the standing examiners of the court, without his having been specially appointed as examiner in the cause, or as commissioner therein; and the testimony was taken before him upon oral examination and not by written interrogatories. The defendants [John Pendleton and Jonathan Leach] had written notice, previous to the examination, of its time and place, and of the names of the witnesses to be examined. There was no written stipulation between the parties that the testimony should be taken on oral examination. The defendants now moved to set aside the proofs for irregularity. The testimony was taken more than ten months previous to the motion, and the depositions were filed in the clerk's office nearly five months before the motion. The plaintiff also took depositions, under the act of September 24th, 1789 (1 Stat. 88, § 30), of witnesses residing more than one hundred miles from the place of holding the court. Such depositions were taken in different states, and at places remote from each other, and more than one hundred miles from the defendants. Prior to taking them, the plaintiff gave notice to the defendants of the names and places of residence of the witnesses intended to be examined in that way, and also notified them that, if they would designate agents at those places on whom fuller notices could be served, the particular times and places of the several examinations should be communicated to them, as soon as the officers who were to take the depositions should fix such times and places. The defendants refused to designate any agents, and declined taking any part in the proceedings. The plaintiff took the depositions without serving any further notice on the defendants, and without their being present. The defendants now moved for leave to cross-examine the witnesses whose depositions had been so taken, and that the hearing be stayed for that purpose.

[For prior proceedings, see Case No. 16,851.]

Seth P. Staples and George C. Goddard, for plaintiff.

Edwin W. Stoughton, for defendants.

BETTS, District Judge. (1.) Under the first motion now made, it is insisted that the rules in equity adopted by the supreme court in 1842,—1 How. [42 U. S.],—regulate the entire subject of taking testimony in suits in equity, and exclude all modes of taking proof other than such as are prescribed by those rules; that they authorize proofs to be taken by an examiner, only when he is specifically appointed in the cause; and that the parties must proceed by written interrogatories, unless they mutually consent to an oral examination.

It will tend to a clearer view of the subject, to recapitulate briefly the principles govern-

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

ing the practice of the United States courts in equity. The 2d section of the act of September 29th, 1789 (1 Stat. 93), declared, that the forms and "modes of proceedings" in causes of equity jurisdiction should be according to the course of the civil law. "Modes of proceeding," or "processes," comprehend the entire practice applicable to the subject. Wayman v. Southard, 10 Wheat. [23 U. S.] 1; Bank of U. S. v. Halstead, Id. 51. The 2d section of the act of May 8th, 1792 (1 Stat. 276), limited the terms of the direction in the act of 1789, in respect to proceedings in equity, by declaring that they should be conformable "to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law." This act has always been understood to adopt the principles, rules and usages of the court of chancery in England, subject to alterations by the United States courts. Manro v. Almeida, 10 Wheat. [23 U. S.] 473; Hinde v. Vattier, 5 Pet. [30 U. S.] 398; Rule 7 of Supreme Court, Aug., 1791; Rule 33 in Equity, March, 1822; Rule 90 in Equity, March, 1842. The terms of the rule last cited are: "In all cases where the rules prescribed by this court, or by the circuit court, do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England," &c. It is obvious, therefore, that the code of rules adopted by the supreme court was not intended to exclude, by implication, other rules and usages of the circuit courts, but that the operation and effect of that code are limited to the specific regulations which it makes.

Three points of inquiry, therefore, arise: 1. What were the usage and practice of this court in taking proofs in causes in equity, when the rules in equity of March, 1842, were promulgated? 2. What was then the practice in the English chancery? 3. What express regulation is made on the subject by those rules?

The first published rules of this court were promulgated October 27th, 1828. Rule 60 of those rules appointed a master and examiner in chancery in causes depending on the equity side of the court, but no other regulation in respect to chancery practice was adopted. Accordingly, the course of procedure in equity suits was governed by the rules of the supreme court and the English practice. Rule 73, adopted on the 15th of January, 1833, provided, that "if a general commission is not issued pursuant to the 25th rule" in equity "of the supreme court" (of 1822), "within ten days after replication filed, either party may give notice of the examination of witnesses before the standing examiner of this court; and three months from the time of the replication shall be allowed the parties for taking their depositions before the examiner." This rule was incorporated in the revision of 1838 as rule 108. The rules in equity of 1822 of the supreme court upon this head were rules 25, 26 and 28, and they recognize, rather than adopt or direct, three methods of taking proofs: 1. According to the acts of congress. 2. Under a commission. 3. Before a master or examiner appointed in the cause, where the witnesses live within the district. And it may be remarked, in this connection, that the supreme court, by rules 67, 68 and 78 of the rules in equity of 1842 re-adopt in effect the provisions of those prior rules 25, 26 and 28—clearly so, so far as the present point of inquiry in regard to the rule of the circuit court for taking proofs is concerned.

It is manifest that the supreme court did not consider it necessary, in the first instance, to provide or create any of the officers referred to. They instituted neither commissioners, masters nor examiners. Those officers were referred to as adjuncts to the court, and incidental to it in the exercise of its powers, whenever its business should demand their agency.

The mode of proceeding in England was familiar to the profession in this country, and had been of immemorial usage in the English chancery. After issue joined, either party, on filing interrogatories with the clerk in court, could sue out a commission for the examination of witnesses out of London. The commissioners were designated on the nomination of both parties. 1 Har. Prac. 140; 2 Mad. Ch. Prac. 405. The same practice in substance was in force when the supreme court promulgated the rules of 1842 (2 Daniell, Ch. Prac. 1070), and it is manifest that the commission authorized by those rules is the same in general purpose and effect with that granted by the English chancery, except that, upon their face, the rules might import an obligation on parties to take all their proofs under such a commission or under the act of congress. The 28th rule in equity of 1822 restricted the taking of testimony by commission to witnesses residing out of the district, and left it optional with either party to summon his witnesses residing within the district before "the commissioners appointed to take testimony, or before a master or examiner appointed in any cause," &c. Rule 78 in equity, of 1842, is in nearly the same terms.

In this case, the plaintiff examined his witnesses before a standing examiner of the court. Two exceptions are taken to the regularity of this method of proceeding: 1. Because no appointment of an examiner in the cause was made by the court. 2. Because the examination was taken orally and not upon written interrogatories.

1. An examiner is not, in the course of chancery practice, created or appointed at the instance of suitors, any more than a master, register or clerk. He is an official attached to the court, permanently in commission, to execute the functions appropriate to his office. He was originally regarded in England as a clerk of the master of the rolls, delegated by him to take examinations formerly had before

him personally. 2 Daniell, Ch. Prac. 1069. Yet there, as in the United States, he is an officer of the court, created for the purpose of taking proofs, however his appointment may be made. 1 Barb. Ch. Prac. 277. No statutory provision seems to have been made in this state for the appointment of examiners, prior to the constitution of 1821. Const. 1821, art. 4, § 12. Under the constitution of 1777 they were, in practice, commissioned by the governor and council of appointment. Const. 1777, art. 23. The court of chancery had power, under that constitution, to appoint its register and clerks only (article 27), but the legislature recognized examiners as permanent officers of the court, and conferred on them power to administer oaths to witnesses and to take affidavits to be read in court. 1 Kent & R. Laws, 444, § 16; 1 Rev. Laws, p. 491, § 13. However the appointment of examiners may have been first made in England, from the time they became recognized standing officers of the court of chancery, acting in place of the court in taking testimony, they received their appointment from the court. Turner v. Burleigh, 17 Ves. 354. Under the process act of May 8th, 1792 (1 Stat. 275), and the act of August 23d, 1842 (5 Stat. 516), the same power of appointment devolves upon the United States courts, in equity, to be exercised by the circuit courts, pursuant, however, to the directions of the supreme court when given. Under this general authority commissioners are appointed to take testimony. They are named in each cause separately, because it is important to designate them with reference to the residence of witnesses, very generally out of the district; and that this is the reason for authorizing a commission at all, would seem probable from the rule dispensing with it at the election of parties where the witnesses reside in the district. The same power which enables the court to name commissioners, suffices for the appointment of masters and examiners, they being all officers auxiliary to the court in aid of the exercise of its jurisdiction. In regard to masters and examiners no reason exists for limiting their appointment to particular causes, and there is a manifest convenience and propriety in confiding trusts which demand much legal knowledge and experience in chancery proceedings, to standing officers, whose capacity and places of business may be known to the community.

The rules in equity of 1822 left these appointments wholly to the circuit courts, without direction or suggestion on the part of the supreme court. In the rules in equity of 1842, it was thought proper to sanction (rule 82) the appointment by the circuit courts of standing masters, and of masters pro hac vice. But there is no trace in this district of any previous limited appointment of masters. They were undoubtedly made permanent officers, in consonance with the usage of the English chancery; and it is difficult to perceive any reason supporting their appointment in either way, that does not uphold it in both. As the circuit courts could, no doubt, without the aid of rule 82, have appointed masters pro hac vice, at their discretion, when the course of business demanded it, so, with the same object in view, they could have designated standing masters. The power had been so interpreted in this district. Masters have been standing officers of this court since 1822, and examiners since 1828. Previous to the adoption of the rules of 1828, the usage of the circuit court within this district seems to have been, to refer subjects appropriate to a master's office to a standing master of the state chancery, which in effect was equivalent to appointing him a master pro hac vice. Congress, by conforming the powers of the United States' courts in equity to those of the high court of chancery in England, must be supposed to have contemplated the naming of agents to carry out those powers, as well in matters incidental to the business of the courts, as in the course of proceedings in suits.

It is argued that the authority given by rule 78 of 1842, in equity, to take testimony before an examiner, is expressly limited to one appointed in the particular suit. The language of the rule, however, would be satisfied, by designating in a common order, or by mere notification, the officer with whom the interrogatories were to be filed or the examination was to be had. That would be in effect appointing him examiner in the cause, although he should not be commissioned anew. And the course of practice is tantamount to what is called appointing a master or examiner in the cause, for both parties are not required to take their testimony before the same examiner, each being at liberty to designate his own examiner, both for the direct and the cross examination of witnesses. Turner v. Burleigh, 17 Ves. 354; Troup v. Haight, 6 Johns. Ch. 335.

We have no doubt of the authority of this court, under the acts of congress and the rules of the supreme court, to appoint examiners, and it then becomes wholly a matter of discretion, whether they shall be appointed standing examiners or be named as the occasion arises for their services in any cause. We therefore hold, that the examiner employed in this case was competent to take the proofs.

2. The point touching the irregularity of the proceedings in the examiner's office might probably have been conclusive against the plaintiff, if it had been raised in due time. The examination of witnesses was taken on oral interrogatories, conformably to the practice of the state court of chancery. 1 Hoff. Ch. Prac. 462. The English method is different, and no express rule of this court has authorized a dispensation with written interrogatories, in an examination before a commissioner or examiner. The 67th rule in equity of the supreme court, of 1842, provides, that "if the parties shall so agree, the testi-

mony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories." There is great practical convenience in that mode of examination, and, as it is the established practice in the state chancery to take examinations viva voce (2 Rev. St. p. 180, § 83; Ch. Rule 85), the courts of the United States would be disposed to apply the most liberal intendments to uphold examinations of witnesses so taken, without evidence of any written stipulation or consent between the parties to that end. If it be out of the usual course to give effect to a mere verbal agreement between parties or their attorneys, out of court, affecting the cause, yet a waiver of objections to mere matter of form may be implied, and the court may safely hold, that a party who had notice that an examination was to be taken, or had been taken, orally, and acquiesced in it, should be considered to have waived his legal right to require written interrogatories to be filed. The testimony in this case was taken nearly a year ago, on written notice to the defendants of the time and place of taking, and of the names of the witnesses to be examined. Publication was made nearly five months ago.

We do not put our decision upon the ground that the defendants were bound to move for the suppression of the proofs before the depositions were placed on file; although, good faith and liberal practice should have induced them to apprize the plaintiff that they intended to treat the proceedings as irregular. But we hold the defendants to have been guilty of laches in not moving the court, or a judge out of court, to suppress the proofs, immediately on their being filed or published. By rule 1 of the rules in equity of 1842, the circuit court is always open for motions of that character, and probably, under rule 3, and other rules, a judge at chambers can hear such a motion at any time. It is an elementary doctrine in the practice of all courts, that parties shall take advantage of irregularities at the first opportunity after acquiring knowledge of them, or be deemed to have waived all objections to them. Grah. Prac. bk. 3, c. 21; Hinde v. Tubbs, 10 Johns. 486; Rowan v. Lytle, 4 Cow. 91; Brasher's Ex'rs v. Van Cortlandt, 2 Johns. Ch. 247; Skinner v. Dayton, 5 Johns. Ch. 191. Here, there has been a delay since actual publication of nearly five months, a time abundantly sufficient for the plaintiff to have re-examined his witnesses in season for a hearing at this term, if his former proceedings had been held irregular; and a delay of more than ten months since the examination was had. We think the defendants are precluded from now raising this objection.

(2.) The motion by the defendants for leave to cross-examine the witnesses whose depositions were taken under the act of congress, and that the hearing be stayed for that purpose, must also be denied. The defendants had all the notice of the time and place of taking the depositions that was necessary or reasonable. They contend, however, that rule 78 of the rules in equity of 1842 entitled them to refuse, as they did, to designate agents, or to take any part with the plaintiff in the proceedings; and that, as the plaintiff took his depositions without serving on them notice of the time and place of taking, they can now have the cause stayed to enable them to cross-examine the witnesses. But we think rule 78 does not justify the interpretation insisted on, and that, as the defendants intentionally took their stand upon a legal point, they must bear the consequences of its determination against them. The rule in question allows a party the opportunity of an after cross-examination, or of taking a new deposition of the witness, only where "a court or judge shall, under all the circumstances, deem it reasonable." No facts are laid before us showing the necessity or propriety of a further examination of the witnesses. It is not stated that they gave testimony adverse to the defendants, or that there are facts within their knowledge, not stated, which might be important in the cause. We are not furnished with any circumstances to guide our discretion in this respect. On both grounds, the motion must be denied.

We do not intend to intimate that there is any objection to the defendants' proceeding, at their own expense and risk, to take the evidence of the witnesses already examined, or of others. The point is not so presented that we are called upon to decide whether they can now bring in testimony on their part.

[For other cases involving this patent, see note to Gibson v. Van Dressar, Case No. 5,402.]

Case No. 16,853.

VAN HOOK v. SCUDDER et al.

[N. Y. Herald, June 21, 1843.]

Circuit Court, S. D. New York. June 2, 1843.

PATENTS—PLANING, TONGUEING, AND GROOVING MACHINE.

[The Woodworth patent of December 27, 1828, as extended on December 27, 1842, *held* valid and infringed.]

[Cited in Washburn v. Gould, Case No. 17,214; Brooks v. Bicknell, Id. 1,944; Brooks v. Jenkins, Id. 1,953; Wilson v. Rousseau, Id. 17,832.]

This was a case arising upon a bill of complaint praying for an injunction to be issued in behalf of the plaintiff (the proprietor of a planing mill in this city, and an assignee under Woodworth's patent for a planing machine) against the defendants, who also have been engaged in dressing boards, plank, etc., by cylindrical planing machines, at an establishment in —— street. The case came up for argument at the recent April term of the United States court, but inasmuch as the term was nearly elapsed, and the engagements of Chief Justice THOMPSON prevented him from hearing this cause in the city of New York, it was, by consent of counsel, set down

for argument before Justice THOMPSON at chambers, in Poughkeepsie. The case was accordingly submitted on the 2d inst. The plaintiff alleged that he was the owner, by purchase from the patentee, of the exclusive right to construct and use, in the city and county of New York, Woodworth's machine for planing, tongueing, and grooving boards and plank. The defendants were charged with infringing upon the plaintiff's right by using machines built upon the same principle, and having the same mode of operation, as the Woodworth machine. The patent of Woodworth having been proved, and also the extension thereof, evidence was produced on the part of the plaintiff, from a number of machinists, engineers, and mechanics, 1st, that the machines in use at his mill were built according to the specifications contained in the patent granted to Wm. Woodworth Dec. 27th, 1828, and extended on the 27th Dec., 1842; 2d, that the machines employed by the defendants were similar to Woodworth's in all their essential parts, having the same combination, operating in the same manner to produce a like result.

It was maintained on the part of the defendant: 1st. That the patent granted to William Woodworth, under which the complainant claims, was originally invalid, because (1) all the several parts of Woodworth's machine, and the application of those parts, were known in 1799, and were sufficiently described by Samuel Bentham in the Repertory of Arts; because (2) Mr. Emmons invented and put in operation at Syracuse, in the state of New York, a cylindrical planing machine, embracing all the essential combinations and parts of Woodworth's machine, in the year of 1824, 4 years before the date of Woodworth's patent; (3) Woodworth's machine was useless; (4) Woodworth's specification is insufficient and unintelligible, if not contradictory. 2d. If Woodworth's patent was originally valid, the extension was unauthorized by law and void. 3d. The defendants' machinery was not, in principle, combination, or mode of operation, like Woodworth's. 4th. The court will not grant an injunction in a doubtful case, but will leave the parties to try the rights at law.

S. P. Staples, for complainant.
M. G. Harrington, for defendants.

THOMPSON, Circuit Justice. A motion having been made on the part of the complainants for an injunction in this cause, on due notice to the defendants, on reading the bill of complaint and on reading and filing affidavits and papers on the part of the complainants and also on the part of the defendants, and on hearing S. P. Staples, for complainant, and M. G. Harrington, for defendants, it is ordered that the defendants, on the first Monday of each month, commencing on the first Monday of July next, file in the office of the clerk of this court an account or statement in writing of all the work done, or caused to be done, by the said defendants, or either of them, during the previous month, with or upon the planing machines used by said defendants, and for a violation of the patent whereof said bill is filed,—that is to say, of the number of boards, plank, or other material planed or tongued or grooved by said defendants, or either of them,—and that said account or statement be signed and sworn to by the said defendants, or one of them, as a correct and true statement of all the work so done by them. And it is further ordered that the said defendants, on or before the thirteenth day of June inst., execute to the complainant a bond in the penal sum of five thousand dollars, with a condition providing that, if the said defendants shall pay to the complainant such sum of money as may be ordered to be paid to the complainant by the defendants, or either of them, in this suit, and such damages and costs as the complainant in any trial brought or to be brought by the order or direction of the said court for such work, or violation, may recover against the defendants, or either of them, then said obligation shall be void, otherwise to be in full force, which bond is to be executed by the defendants and two sureties residing in said district, and to be affirmed, as to the sufficiency of the sureties, by the district judge, and to be filed with the clerk of this court. And it is further ordered that if such bond shall not be filed on or before the thirteenth day of June instant, or if said account or statement in writing shall not be so filed, then an injunction shall issue, under the seal of this court, directed to the defendants, restraining them pursuant to the prayer of said bill of complaint.

The bond not having been filed by the defendants pursuant to the order of the court, the injunction was accordingly issued on the 14th inst. The following is copied from the records:

"[Injunction.] The president of the United States of America to Ephraim Scudder and John H. Dayton, and to their, and each of their, Counsellors, Attorneys, Solicitors, Servants, Workmen, and Agents, and each and every one of them, Greeting: Whereas, it has been represented to the circuit court of the United States for the Southern district of New York, in equity, on the part of William Van Hook, complainant, that he has lately exhibited his bill of complaint in the said court against you, the said Ephraim Scudder and John H. Dayton, to be relieved touching the matter therein complained of; and whereas, by an order duly made and entered in said cause, an injunction has been ordered to issue against you, the said Ephraim Scudder and John H. Dayton, and the persons before mentioned, and each and every of you, pursuant to the prayer of the said bill of complaint. In consideration thereof, and the particular matter in the said bill set

forth, you, the said Ephraim Scudder and John H. Dayton, your counsellors, attorneys, solicitors, servants, workmen, and agents, and each and every of you, are commanded, under the penalty of ten thousand dollars, to be levied upon your lands, goods, and chattels, that you do absolutely desist and refrain from any further use of the improvement, machinery, and machines in the bill of complaint mentioned, until the further order of the said court. Witness: Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the city of New York, the 14th day of June."

Case No. 16,854.

VAN HOOK v. WOOD.

[4 Betts' C. C. MS. 24.]

Circuit Court, S. D New York. Feb. 22, 1845.

PATENT FOR INVENTION—ACTION FOR INFRINGEMENT—SUFFICIENCY OF DECLARATION.

[1. In an action for the infringement of a patent, the declaration need not aver the fulfillment of the prerequisites to the issue of the patent, but it must contain allegations from which their fulfillment is naturally to be implied.]

[2. An averment that a patent under the seal of the United States, in due form of law, was issued, imports that it possessed all the constituents to its validity exacted by the statute.]

[3. In an action for infringement, the declaration cannot be attacked by general demurrer as not stating a sufficient title in plaintiff, when it avers that the patent was renewed on the application of the administrator of the patentee, and that he assigned his right to the plaintiff, and that the assignment is duly recorded.]

[4. An averment in a declaration that the commissioner renewed and extended a patent by making a certificate of the extension, without averring in terms that it was made on the patent as provided by statute, is sufficient, as against a general demurrer, when followed by an allegation that by virtue thereof the letters patent became of the same force and effect in law as if originally granted for 21 years.]

[5. The allegation that the renewal proceedings were in conformance to law, and that the commissioner did renew and extend the patent, avers, substantially, a valid extension, which it is for plaintiff to prove on the trial.]

[6. An averment that disclaimances were duly and legally executed in writing, and accepted by the commissioner, is sufficient to enable plaintiff to give evidence of their execution as required by statute.]

[7. The plaintiff claiming under an assignment need not set forth a perfect instrument of assignment in order to maintain his action.]

[8. An assignment of a patent, though not recorded, vests title in the assignee until due entry or claim by the party entitled to take advantage of the breach of condition as to recording.

[This was an action by William Van Hook against Thomas W. Wood for infringement of a patent.]

BETTS, District Judge. This case, like Van Hook v. Wood [See Case No. 16,855], is on demurrer to a declaration, and involves some of the same questions considered and disposed of in that case. The declaration avers: That a patent was granted to William Woodworth, December 7, 1828, for a new and useful improvement in the method of planing, tongueing, grooving, and cutting into mouldings, or either, planks, boards, etc. That the letters patent were recorded anew August 26, 1842. On the first of January, 1839, the patentee died, and on the 14th day of February, thereafter, William W. Woodworth took out letters of administration, etc. That on the first day of January, 1840, the plaintiff became, by an assignment in writing, the owner of the exclusive right to the said letters patent within and for the city and county of New York. On the first day of September, 1842, the said administrator applied for an extension of the patent, and on the 16th day of November, 1842, the commissioner of patents did renew and extend the same, by making a certificate of such extension, for the term of seven years from and after the expiration of the patent, etc., which certificate, with that of the board, etc., was duly recorded. On the 19th December, 1842, the administrator assigned to plaintiff the sole and exclusive right to such extension in the city and county of New York for three years after the expiration of the original patent. On the 2d day of January, 1843, the administrator, for himself and all persons claiming under him, disclaimed the circular saws, etc. On the 15th day of September, 1843, the administrator duly assigned to the plaintiff the whole residue of such patent for the city and county of New York, for the residue of the time, etc., which is duly recorded. The declaration charges infringement by the defendant in the city of New York, on the first day of July, 1843, and from that time to the commencement of this suit, etc. The action was commenced at October term, 1844.

The grant of the patent is set forth in the declaration that William Woodworth was the original and first inventor of the said improvement, etc., and, being such inventor, made application to the secretary of state of the United States to obtain letters patent for an exclusive property in the said improvement, and complied with the acts of congress in such case provided, and thereupon letters patent of the United States, in due form of law, were issued to the said William Woodworth, under the seal of the United States, etc. The point most discussed and relied upon under the demurrer is the insufficiency of this method of pleading letters patent, and the case of Cutting v. Myers [Case No. 3,520], decided by Judge Washington, is relied upon as settling the question in favor of the defendant. If that case is to be understood according to its acceptation by the defendant's counsel in respect to the pleading then under judgment, and the exposition of the statute is sound,—that making out the patent by the proper officers does not import its delivery or going into effect as a grant,—this declaration avoids the difficulty upon which that point was ruled. Here it is expressly averred

that letters patent, in due form of law, were issued to William Woodworth under the seal of the United States. The argument of the learned judge in his opinion dwells upon the want of any express allegation of the delivery or issuing of the patent, and that the pleadings only represent inchoate and imperfect steps in the completion of the grant; and it, throughout, goes upon the assumption that if a delivery had been averred a sufficient foundation could have been laid for the implication that all proceedings enjoined by the statute as preliminary to the grant have been properly taken. The doctrine established by that case is not that the declaration must aver the fulfillment of those prerequisites, but only that, if not averred in detail, it must contain allegations from which their fulfillment is naturally to be implied. This principle is stated with great precision and force by the judge,—Cutting v. Myers [supra],—and is enforced with higher authority by the supreme court. Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448. The teste to the patent by the signature of the president, and that it should be made out in the name of the United States and recorded, are, under the act of 1793, vital particulars, without which it could not be delivered by the secretary of state. The legal presumption in respect to the acts of high officers of government is that they are taken in strict conformity to the injunctions of law, and an averment that a patent, under the seal of the United States, in due form of law, was issued, imports that it possessed all the constituents to its validity exacted by the statute. Noe v. Prentice [Case No. 10,284a]. It would be useless tautology to allege seriatim that the various acts pointed out by the statute were performed by the president, secretary, etc.; the whole matter, so far as pleading is concerned, being embodied in the averment that the patent was issued. I lay no stress upon the allegation that the patent was in due form of law, as that is matter of evidence, to be shown at trial. The general issue pleaded by the defendant imposes on the plaintiff the necessity of proving his title by the production of the patent, possessing all legal requisites to the validity, and the parties would stand on the same footing if the declaration had set forth the proceedings in obtaining and executing the grant with all possible fullness of detail. All unnecessary allegations should be discountenanced, as they amplify proceedings, and tend to confuse the points upon which the controversy should turn. Still, I do not accede to the position that in relation to the official acts of public functionaries, performed under specific appointment of law, it is enough to aver they were performed in due form of law, without spreading at large on the pleadings the particular steps taken in executing such duties. Upon authority and principle, I hold the declaration sufficient in this particular.

Three objections taken under the general demurrer, (1) that the extension or renewal of the patent to the administrator was without authority of law and void, or, (2) if operative, that the extension inured to the benefit of the assignees of the original patent right, and (3) the sufficiency of the specification upon its face to uphold the patent, were all considered and disposed of by the court, against the defendant, on his motion to dissolve the injunction issued against him. That decision will be adhered to in the present case.

Further objection raised by the general demurrer is that the declaration does not set forth a sufficient title in the plaintiff. That point, clearly, cannot be maintained on general demurrer, because, if the deduction of title to the plaintiff is defective and faulty in every other particular, yet, the renewal of the patent having vested in the administrator the whole of the extended term, it is sufficiently averred that he, after that, on the 15th of September, 1843, assigned his right in the city and county of New York to the plaintiff, and that the assignment was duly recorded, and that infringements have continued to be committed to the present period. The original patent expired in 1842, and the declaration, on its face, sufficiently gives title in the new term to enable the plaintiff to sustain his action for all violation since that time, and, being good in any substantial part or count, will be held good on general demurrer. The object of the demurrer, however, as indicated by the points taken, is to raise the questions whether the extension of the patent was made in a legal and valid manner, and, if it was, whether the plaintiff has shown title in himself thereto, accompanied by the additional objection that the declaration deduces no valid title to the plaintiff under the original patent. The latter point could be of no importance, except as to violations anterior to December, 1842, unless the assignment of the original patent right was in such terms as to convey also the privilege of any extension or renewal thereof, since, for the purposes of this action, here and in equity, it is decided that a bare assignment takes only the term of the original patent, and does not acquire any interest in its extension. There is nothing in the declaration importing that the plaintiff had conveyed to him, by the assignment under the original patent, anything beyond the interest there subsisting. And, if the deduction of title is imperfect in that respect, it would only limit the plaintiff's recovery to the posterior term, not bar his action; and the exception, accordingly, is not one that will lie on general demurrer.

In respect to the other two points, I think, under a general demurrer, the declaration is sufficient in this behalf. It avers that the administrator made application in writing for the renewal, pursuant to the act of congress, and then and there complied with and performed all the requirements of the said act,

and such proceedings were had thereon that the commissioner on the 16th November, 1842, did renew and extend the patent, by making a certificate of such extension, which, with the certificate of the board appointed to decide on such application, containing their opinion and judgment, was duly recorded, etc. The insufficiency imputed to the statement is the same in substance as before considered in respect to pleading the original grant, and the principles governing that point apply with no less appropriateness to this. It would be supererogatory to set out the proceedings leading to the decision and certificate of the commissioner and the board, and from their consummating the act the law will imply that everything had been previously done which the statute made necessary in order to the extension. The declaration varies in this particular from the form pursued in the other, in not alleging that the certificate of extension was issued or delivered to the administrator. It is averred that the certificates were duly recorded, and profert is made thereof. The declaration, in this, adopts the language of the statute; and the provision of the eighteenth section, authorizing the extension or renewal of patents, does not, as that of the seventh section, require the commissioner to issue the certificate. On the contrary, it declares that "such renewal shall extend for the benefit of assignees and guarantees to the extent of their respective interests in the patent." Had the declaration followed out in full the language of the act, there could have been no doubt of its sufficiency; for then it would have averred everything the act required to render the extension complete, and making the certificate on the patent would have been deemed the same as its issue or delivery to the patentee. But the act requires the commissioner to extend the patent "by making a certificate to that effect on the patent," and this averment in the declaration is that the commissioner did renew and extend the patent by making a certificate of such extension, without averring, in terms, it was made on the patent. Though this is loose pleading, and an exceedingly summary way of setting out a title derived through a statute, yet I am inclined to consider it sufficient under general demurrer for two reasons: First, for that it is alleged that by virtue "whereof" the letters patent became of the same force and effect in law as if originally granted for 21 years, all which was and is in due form of law; and, secondly, because it is matter of evidence, to be made out on the part of the plaintiff, and the rules of pleading do not exact the statement of particulars to be proved in support of the right, when the right is substantially averred. Staples, Pl. 348. An averment that the plaintiff is heir or devisee is good on general demurrer, without showing on the declaration whether he is son or brother of his ancestor, or setting out the will at large. Day v. Chism, 10 Wheat. [23 U. S.] 453. The allegation that the proceedings were taken conformably to law, and that the commissioner did renew and extend the patent, avers substantially a valid extension, which it is incumbent on the plaintiff to prove at the trial. Or the averment, I think, may be held to import that the commissioner performed every act enjoined on him by statute; and, as the patent had long been issued, it was unnecessary to aver, as in the case of the grant itself, the making the certificate on the patent, in order to lay the foundation to imply its delivery to the patentee. The making out and recording a patent, according to the opinion of Judge Washington, does not import its delivery, and is accordingly a defective averment of the grant thereof. But, admitting that case to be a sound interpretation of the act of 1793 [1 Stat. 318], a distinction may be taken in respect to renewals under the act of 1837 [5 Stat. 191]; there being nothing in the latter statute indicating that the commissioner is to do more than make a certificate, and record it on the patent, to perfect the renewal, whereas the former is supposed to demand, also, after all the acts of the officers are fully performed, a delivery or issue of the letters patent to the patentee. Making the certificate becomes here tantamount to such delivery. The act then declares, "which certificate, and also that of said board, are to be recorded in the patent office." The declaration avers such record, and makes profert of it; and as the record, by the terms of the statute, is subsequent and consequent to making the certificate on the patent, and a transcript of it, the averment of such record implies the performance of the previous step by the commissioner, upon the execution of which only could the record exist.

The defendant further seeks, under the general demurrer, to raise the question of the validity of the patent without the disclaimers referred to in the declaration, and the sufficiency of the disclaimers to aid or make it good; and, by special demurrer, he points out defects of form in pleading the disclaimers. It is averred that on the first day of February, 1838, James J. Wilson, the owner of the patent right for the city and county of New York, by an instrument in writing in due form, and duly and legally executed by him, disclaimed all exclusive right to the application and use of circular saws, etc., which disclaimer was delivered to the commissioner of patents, and was by him accepted and duly recorded, and that on the 2d day of January, 1843, the administrator, in the same manner, for himself and for all persons claiming any interest in the said patent, made like disclaimer. The declaration alleges that the patentee died January 1, 1839; that letters patent issued to William W. Wooodworth, on his estate, and "on the first day of January, 1840, the plaintiff became, by an assignment in writing, the owner of the exclusive right to said letters patent within and

for the city and county of New York." Clearly, it is not matter of law, for the court to decide upon the face of the declaration, whether the patent was void for claiming the application and use of circular saws; and in that respect, therefore, the allegation might be regarded merely surplusage, a particular which does not vitiate, whether well or ill pleaded, unless it goes to show that the plaintiff has no cause of action. 1 Chit. 232; Gould, Pl. c. 3, § 170; Com. Dig. "Pleader" (C 4) 28. But, supposing the disclaimers to have become part of the specification, then they are excepted to by special demurrer, because it is not alleged they were attested by one or more witnesses in writing, or that they contained a statement of the extent of the interest of the parties making them. I think the special causes of demurrer assigned in respect to the disclaimers cannot be sustained, because the general averment that they were duly and legally executed in writing, and accepted by the commissioner, is sufficient to enable the plaintiff to give evidence of their being executed conformably to the requisites of the statute, without setting forth any ingredient to their due execution, and that the declaration does particularize, to a common intent, the interest of the parties executing them.

Three other special causes of demurrer are assigned: (1) That it does not appear in the declaration how the plaintiff, on the first of February, 1840, became, by assignment, exclusive owner of the letters patent for the city and county of New York. This objection presupposes that it is incumbent on the plaintiff to set forth a perfect instrument of assignment, in order to maintain his action. I perceive no foundation in principle for this. It is never necessary for assignees in bankruptcy to set forth the commission, assignment, etc. They declare only in the capacity of assignees. 2 Chit. Pl. 91; 3 Durn. & E. [7 Term R.] 779. Where the specialty supplies the cause of action, the assignee, the same as the obligee, will be obliged to set forth particularly the instrument on which the action is founded. 1 Chit. 347. But his title to sue may be alleged generally,—particularly when the assignment to him need not be by deed. Noke v. Awder, Cro. Eliz. 436; Id. 373; 3 Barn. & Ald. 392.

(2) Another ground of special demurrer is that it does not appear on the declaration that Wilson ever parted with, or assigned away, his right to said patent, etc. It is sufficient answer to this objection to say that it does not appear upon the declaration that he had any right after the year 1838, the time when he executed the disclaimer. It is alleged that the patentee died January, 1839, and that the plaintiff acquired full title for the city and county of New York in January, 1840. If Wilson's right terminated with the life of the patentee, or previous to, or by, the assignment to the plaintiff, of 1840, it would be unnecessary to notice when he acquired or when he parted with his right. The court cannot imply that it was a continuing right after 1838, which could impede the acquisition of a perfect title by the plaintiff in 1840. A demurrer is not the mode of pleading by which such matter can be brought up to bar the plaintiff's right. The probable presumption may be that Wilson was the assignor, in 1840, to the plaintiff, and, if so, this objection would be embraced in, and disposed of with, the best special cause of demurrer; and, if he may not, there is no legal incompatibility before the plaintiff acquired title, in 1840.

The last special cause of demurrer strongly relied on is that the plaintiff does not aver that the assignments through which he claims title were recorded. This may have been a prerequisite to the passing of title under the act of 1793, and therefore bad on demurrer. Dobson v. Campbell [Case No. 3,945]; Wyeth v. Stone [Id. 18,107]. But the act of 1836, § 11 [5 Stat. 121], varies essentially the language of that of 1793. The patent is made assignable, without restrictions, by an instrument in writing, and then follows a direction for recording the assignment within three months. See Valentine v. Marshall, Case No. 16,812a. For three months, at least, then, the assignment would operate and convey a perfect title, and the noncompliance with a condition subsequent (if the recording be a condition at all) would, upon the principles of the common law, leave the interest in the grantee until due entry or claim by the party entitled to take advantage of the breach of condition, and this must usually be the party from whom the grant proceeds.

In overruling the demurrer, it is not to be understood that the court fully approves the mode of declaring adopted in this cause. There are various particulars in which the declaration might have been open to exception on special demurrer, and, in stating the title of the plaintiff, it deviates entirely from established forms, without giving, in brevity and perspicuity, any commensurate advantages. The court would in no way encourage the diffuse and prolix methods sometimes in use in declaring on statutory rights, yet that vice might be avoided, still retaining all convenient conciseness, and affording a distinct and explicit view of the right set up, and the manner it is intended to be proved at trial. Some of the exceptions in the case were fundamental, and raised questions proper to be discussed and considered; but others must be regarded as rather hypercritical, and seeking to conform the pleadings to that nicety and technical exactness which once had its vogue, but which has long been discountenanced in this country and England as in no way advancing the rights of parties, or the sound administration of the law. On the whole case, judgment must be rendered for the plaintiff, with costs.

Case No. 16,855.

VAN HOOK v. WOOD.

[4 Betts, C. C. MS. 21.]

Circuit Court, S. D. New York. Oct. 30, 1844.

PATENTS—ESTOPPEL BY COMPROMISE AGREEMENT—PRELIMINARY INJUNCTION—CONFLICTING VERDICTS IN OTHER CIRCUITS—ASSIGNMENTS—RENEWED PATENTS—PLANING MILLS.

[1. An arrangement made by two patentees, by way of compromise to avoid litigation, for the mutual use of their respective patents, should not be construed as an acknowledgment by either of the validity of the other's patent, so as to estop him or his assigns or licensees from denying its validity.]

[2. The federal courts regard a verdict in another circuit, when the validity of the patent was in issue, as prima facie evidence sufficient, if in favor of the patentee, to entitle him to an injunction, and, if against him, to defeat his application.]

[3. Where there were three verdicts in other circuits, two against and one in favor of the patentee, *held*, that the court would grant an injunction on the strength of the latter, it appearing that a new trial was denied after full argument and mature deliberation, whereas in the opposing cases there had yet been no hearing on motion for a new trial, and that there was good ground to suppose that the jurors misapprehended the court's instructions.]

[4. The extent to which assignees of a patent may enjoy a renewed patent is to be determined solely by the stipulations of the assignment.]

[5. Whether complainant will be required, as a condition of obtaining a preliminary injunction in a patent case, to give a bond to indemnify defendant in case the patent is not sustained, is a matter of practice, which each court may regulate at its discretion, conforming to the state procedure, or adopting an independent method for itself.]

[6. The Woodworth patent of November 27, 1828, renewed November 16, 1842, for a planing mill, construed on motion for a preliminary injunction, and *held* valid and infringed.]

[This was a bill by William Van Hook against Thomas W. Wood to enjoin the infringement of a patent. Heard on motion for a preliminary injunction.]

T. P. Staples, for complainant.

Stoughton & Harrington, for defendant.

BETTS, District Judge. The plaintiff, by his bill, claims to be the assignee of the entire interest for the city and county of New York in the patent granted to William Woodworth, December 27, 1828, and in its continuation or renewal, after his decease, to his administrator William W. Woodworth, for seven years, made November 16, 1842.* He charges that he is in possession and use of the patented discovery, and that the defendant, in violation of his right, has set up, and is now using, two machines within the city of New York. Six interrogatories are appended to the bill, and the defendant's answers specifically to them is demanded. The defendant filed his answer, and in it denies, that he has ever at any time been in use of the improvements in the bill described, and also denies that he has constructed, repaired or purchased or brought into use any machine upon the plan of the complainant's, or containing any part of his alleged improvement. Several witnesses, Hammond, Cole and Roach, testify that the defendant is using two machines, which he obtained of Scudder & Dayton, and that they are substantially the same as the complainant's. Indeed, the defendant is to be taken as denying the use of the patentee's machines mainly upon the argument that his are made under and according to Emmons' patent, and that consequently he does not use the plaintiff's. The assertion is undoubtedly fortified by the farther one that Emmons' machine is different and distinct from that described in the plaintiff's patent, and that the latter cannot be brought to practical use. But supposing the proof establishes the substantial identity of the two machines, the fact of infringement, I think, is fully made out by the complainant.

The conclusion to which my mind is brought on the main points in contestation in this case does not render it indispensable that I should pronounce definitely upon the question whether Emmons' invention and patent supersedes that of Woodworth's; but, as much testimony has been produced by both parties on the subject, it may be appropriate in this connection to state that a careful consideration of the proofs on this point offered by the respective parties leads me to believe that Emmons had not previous to the invention and patent of Woodworth brought into use any discovery which interferes with that patent, nor had he, if his patent is the fruit of his own invention, followed up his discovery, and rendered it practical, so as to supplant the invention of Woodworth, by that patent taken out by him April 25, 1829. Kneass v. Schuylkill Bank [Case No. 7,875]; Whittemore v. Cutter [Id. 17,601]. The arrangement made by Woodworth with Emmons the 28th day of November, 1829, for the mutual use by the patentees (and their assigns) of the respective patents, and the assignment by Woodworth and Wilson, Dec. 14, 1830, of his right and interest under both patents, were urged on the part of the defendant as an estoppel to Woodworth and his assigns, denying the validity of Emmons' patent. But the arrangement between the patentees was manifestly a compromise to avoid litigation, and never intended and should not be construed to be an acknowledgment by either of the validity of the other's patent. The claimants under Emmons' patent could not be concluded by his accepting such a species of license under Woodworth's from denying the validity of the latter, nor can Woodworth or his assigns, for like cause, be placed in a more disadvantageous situation in respect to Emmons' patent; and I shall accordingly, in considering the objections to the plaintiff's right brought forward and urged in this case, lay out of view the discovery and patent of Emmons, and the subsequent arrangement between him and

Woodworth, unless the testimony shall be found to establish a substantial difference in the structure of the two kinds of machines, and that the defendant's machines embody only those differences.

Upon the merits of the case, the complainant founds his claim to the interference of the court by injunction on two general propositions: (1) That he is in possession and use of machines constructed conformably with the specifications of his patent; and (2) that the validity of the patent has been established by a verdict at law. The defendant meets the case, by maintaining: (1) That the patentee was not the first and original inventor of the machine patented. (2) That the same machine is described by Booth, in an English book (10 Repertory of Arts & Manufactures, published in the year 1799). (3) That the patentee surreptitiously appropriated the discovery of Dunbar. (4) That the specification is not reasonably certain, is ambiguous, and not sufficient to enable mechanics skilled in the business to construct from it a machine that will work. (5) That the specification claims the application of the machine to uses for which it will in no way answer. (6) That the patent is for an improvement in the cutters used in the machine, and that defendant never used them. (7) It is for various distinct improvements and inventions having no connection with each other, and void for that cause. (8) It is for an original invention, and not for a combination. (9) If it is for a combination, the patent is void, because no one single combination is claimed. On the contrary, it must necessarily claim three or more distinct combinations, each independent of the other, and complete in itself. (10) That the patent is not to be established by one verdict in its favor as to authorize an injunction, because on two other trials at law verdicts have been rendered against the patent, and in one other the plaintiff submitted to a nonsuit, and in another the jury were discharged because they could not agree. (11) That the extension of the patent to the administrator in 1842 was void, and consequently the patent is now expired. (12) If the extension is valid, it inures to the benefit of the assignees of the original patent, and the defendant as such is protected in its use in the city of New York. These general positions were ramified into numerous propositions of law and fact, and were supported and combatted by full and able arguments by the respective counsel. Thirty-two depositions were read by the complainant in support of his bill, and to rebut the proofs of the defendant, and forty-three depositions were read by the defendant to prove the patentee was not the original inventor, that the specification was ambiguous and insufficient, and that the defendant had not violated the patent right set forth on the specification. To this mass of evidence were added numerous documents, conveyances and agreements, supposed to bear on some of the points of the case. The reading of these papers and the argument occupied the whole sitting of the court for nine days.

It is not to be supposed that, in disposing of an interlocutory motion of the character of that now pending, the court will give the delay or bestow the same minute and critical examination upon the law and facts brought in review as if the proceeding called for a final judgment in the case, concluding the rights of the parties. When a fair prima facie case of infringement is presented by a patentee, courts of equity will protect his interest by injunction, until the right can be investigated and adjudicated on a trial at law, and not leave him to be ruined by the use of his discovery in hostility to him, whilst he is vindicating his right to it. Phil. Pat. 451; 9 Johns. 570. And an injunction will be granted although there be a conflict of affidavits as to the right. Brooks v. Bicknell [Case No. 1,944]; Van Hook v. Scudder [Id. 16,853], Thompson, Circuit Justice, 1843. This will be clearly so where there has been a verdict obtained in affirmance of the right of the patentee (1 Web. Pat. 471); and the United States circuit courts regard a verdict when the validity of the patent is in issue, obtained by a patentee in one circuit, as affording a prima facie case, sufficient to entitle him to an injunction in any other circuit, or to defeat his application where the verdict is against him. The validity of this patent has been repeatedly contested, and in various of the United States courts. The first trial was in this court, of October term, 1837; and after a full investigation of the facts, and it being announced by the court that the jury would be instructed that the specification described and claimed a combination of machinery for planing, turning, and grooving, and if they found the patentee's method in the application of circular saws for reducing floor plank and other materials to a width was known and in use before his discovery, and he described no new combination or contrivance for their use in his machine, his patent would be void for embracing more than he had a right to, the plaintiff thereupon submitted to a nonsuit. In October term, 1843, a feigned issue was tried in the Northern circuit of this state, before the district judge, in which all the objections now taken to the validity of the patent were raised, and a verdict was rendered for the defendants. Gibson v. Gould [Case unreported]. In November, 1843, a trial at law was had in the Western circuit of Pennsylvania, before the district judge, and there also a verdict was given in favor of the defendants. Lippincott v. Kelly [Case No. 8,381]. In both those cases exceptions were taken to the opinions of the judges, and motions grounded on those exceptions are pending for a new trial. In May, 1844, another trial at law was had in the Massachusetts circuit, in which a verdict was given for the plaintiff; and on a motion for a new trial, be-

cause of the ruling of the judge to the jury, and also on motion in the same cause for an injunction, the questions of law were fully argued, and the court sustained the verdict, and granted an injunction against the defendant. Washburn v. Gould [Id. 17,214]. This decision was soon followed by awarding injunctions in two other cases, on bills filed therein upon the doctrines settled in the former case. Woodworth v. Sherman [Id. 18,019]; Woodworth v. Cheever [Case unreported].

Admitting these several verdicts emanated from courts co-equal in authority, yet there is a broad distinction in so far as the finding of the jury is supposed to be influenced by the opinion of the court as to the weight of opinion between the ruling of a judge at nisi prius in the hurry of a trial, and most generally upon first impressions, and the after deliberate adjudication of the same judge on the same points, with the aid of argument of counsel and his own researches and reflexion. Before the verdicts in New York and Pennsylvania, though two against one, can overbalance or neutralize that in Massachusetts, it must appear that the jury passed upon the facts under substantially like instructions, or at least without any erroneous impressions or bias as to the law applied to the case.

First as to the verdict at Albany: It would appear upon the proofs that the judge must have been misunderstood by the jury as to the various particulars of his instructions, or that they regarded portions of them as immaterial or not intended to influence their finding. The judge, subsequent to the trial, furnished a written report of his charge to the commissioner of patents, which is to be regarded as representing accurately the instructions he meant to give, and which he deemed important to the issues; yet the affidavits of five of the jurors who sat upon the trial show that they understood him widely differently, and were governed in their verdict by such acceptation of his meaning, because they say they instantly concluded on retiring that, under the rules of law laid down by the judge, they must find for the defendants, and within five minutes returned into court with a verdict for them, without discussing or determining the material facts in issue. The statement of the charge adopted by those jurors embraces matters not included in the report of the judge, and, if stated by him, were doubtless given under such qualifications as, in his opinion, would not influence the verdict, and did not render it material to repeat them in his report, or, which may be equally probable, the jury may have misconceived or misapprehended the remarks of the judge, or possibly have confounded their recollections of the arguments of counsel, with what they supposed were the instructions of the judge. According to Mr. Harris' deposition, which the jurors say gives their recollection of the charge, the judge instructed the jury, upon the question whether the machines used by the defendants were a violation of the patent, that it appeared there was in them no carriage; that the carriage is an important part of the combination, and, unless used by the defendants, they do not infringe the patent, because, it being for a combination, it is no infringement to use any of the parts of the combination, if the whole combination is not used. The jurors depose that the charge on this point would have alone controlled their verdict, but they were also of opinion that, according to the principles laid down by the judge in his charge, the specification of the machine by Woodworth was insufficient, and that for that reason the patent was invalid. The same jurors had given a previous affidavit, which was read by the defendant, and in that their verdict is put upon the ground that the jury were fully satisfied the patent was invalid for several different reasons, one of which was that Bentham had invented the same machine, and that a full description of it had been published in the 10th volume of the Repertory of Arts in 1799. If there be a conflict in the representations of these two depositions, so as to leave a doubt on the mind whether the jurors decided the case upon their own judgment of the priority of the invention, or were governed by the charge of the judge alone, this court is, at best, bound to credit their assertions, corroborated by the affidavit of the attorney Mr. Harris, who speaks from written notes taken at the time; that they understood the judge to give instructions of the import they have stated; and such direction as to the law being on their minds, it must now be presumed that it had an important influence in determining the verdict rendered by them. The court regrets the frailty of these gentlemen in subscribing and attesting to depositions susceptible of any opposite constructions, and is more solemnly admonished by the occurrence of the hazard of determining important interests on the statements of affidavits taken ex parte, especially when the witness is called to give only impressions or opinions, and not facts passing under his own observation.

In the judge's report of the charge, it is only stated that he submitted to the jury the question of infringement, it being insisted by the defendants that their machine was so essentially different from the patentee's that the use of it did not constitute an infringement of theirs. This is undoubtedly matter of fact to be referred to the jury, but, according to the principles previously laid down by the judge, it became equally his province to decide whether the patentee claimed the carriage as a constituent part of his combination, and it would therefore be highly probable that he would submit his views on that point to the jury, especially as the report at large of the case shows that one ground of defense was that the defendants' machines used no carriage; and if, as Mr. Harris and the jurors accepted it, the charge imported that the defendants were guilty of no violation of the patent in using

the patentee's machines, provided they omitted the carriage, such instruction must have had a material bearing on the determination of the fact whether an infringement had been committed. It does not appear that the case has yet been submitted to the judge for reconsideration, and as both Judges McLean and Story take a different view of the law in relation to this particular in this patent, I shall follow their conclusions that the omission of the carriage in constructing a machine will not protect a party against a charge of infringement of this patent, unless a jury shall have found as matter of fact that the carriage is a constituent and essential part of the combination claimed by the patent.

There are various other points in the charge of the judge yet waiting his review, on a motion for a new trial, and the verdict rendered so promptly after the charge ought not to be held to conclude the patentee's right until the controverted questions of law propounded on the trial shall have been definitely settled.

The same general remarks are applicable to the verdict rendered in Pennsylvania; a motion for a new trial being pending in that court, because of misdirections to the jury on points of law. One point ruled by the judge on that trial is not in consonance with the adjudications of all the other courts. He instructed the jury that the patent was not for a combination, and such instruction must have had the most material bearing with the jury, for, if we may reasonably presume evidence was laid before them similar to that given on every other trial, there could be but slight ground for upholding the patent as for an original invention of the instruments and parts of which the machine was composed. I think, therefore, upon the evidence in relation to those three trials. that I cannot regard the last verdict found at Boston as counterbalanced or impaired by those rendered in the Northern district of New York and the Western district of Pennsylvania.

Looking, then, to the last verdict found, as one rendered after a most searching investigation of the law and facts, and confirmed, after elaborate argument and review by counsel, in a written opinion of the court, I cannot hesitate to regard it as more satisfactory evidence to my mind of the true import and effect or the testimony impugning and supporting the patent than can be deduced from the depositions laid before me. I heard attentively those depositions read in court and the comments of counsel upon them. I have carefully reperused them in my study, and am free to avow that if called upon to adjudge the merits of the cause upon those proofs, I should feel the greatest doubt and uncertainty as to where the real right lies. There is in them an irreconcilable clashing of statements between witnesses as to the priority of the invention of the patentee, as to the sufficiency of the specification, as to the utility of the discovery, and as to the violation of the patent by the defendant's machine. Independent of the usual objections to expert affidavits, there is a tone pervading many of these that indicates a partizan feeling, and the witnesses are brought to express themselves with an emphasis and intensity of language that is rarely, if ever, disclosed on oral examinations, or, if exhibited, will commonly be traced to some animosity or bias, affecting materially the credit of the witness; and furthermore, although most of the witnesses on both sides would appear to be men of intelligence, yet they subscribe to merely common forms of depositions, strongly implying that, if they furnish the facts on which the deposition is founded, some one else has supplied the language, and that the court has not before it the views and judgment of the witness communicated precisely as the impression rests on his own mind. No one can fail to appreciate the importance in nicely balanced questions of fact of hearing the witness give his recollections or opinions in his own words with the explanations and corrections suggested by the statements of others in his hearing, or drawn out by the course of examination. I recur, therefore, to the previous intimation that I adopt as more satisfactory the conclusions of a jury on these points, formed from a viva voce examination of witnesses (and very many of them those whose depositions are now before me), than the one I might form myself from a perusal of these numerous and conflicting affidavits; and I shall accordingly accept the verdict on this patent at Boston as determining, prima facie, that the patentee is the first and original inventor; that his specification is not void for ambiguity or want of certainty and distinctness in describing his discovery; that the specification and drawings are sufficient to enable a person skilled in the business to construct the machine patented, and to render it practical and useful; that it will perform the services claimed by the specification; and that the disclaimer of the circular saws was filed within a reasonable time.

I have already intimated that following the decision of Judge Thompson, in respect to what I understand to be substantially, if not incidentally, the same machines used by the defendant, I consider them an infringement of the patentee's right; that they are constructed substantially like his; and that it does not appear from the proofs that the differences introduced into the defendant's machines are such as will support a distinct patent right.

Upon the most essential points of law raised by the defendant, as objections to an injunction, it is sufficient for me in this interlocutory proceeding to state that I regard it the true construction of this patent so far at least as to control this incidental motion for an injunction: That the extension of the patent to the administrator vests a legal and valid title in him. Brooks v. Bicknell [Case

No. 1,944]; Washburn v. Gould [Id. 17,214]. That this right does not inure to the benefit of the assignees of the original patent, they holding no more than a bare assignment of the patent interest as it was when conveyed to them, and their interest being limited to the period of that patent. 2 Story, Append.; Woodworth v. Sherman [Case No. 18,019]. And I am of opinion that the extent to which assignees may enjoy the benefit of a renewed patent is to be determined solely by the stipulations of the assignment. Section 18 of the act of 1836 [5 Stat. 117], only gives effect to the contract between the assignor and assignee in this behalf. That the patent is to be construed as a combination of the various instruments described, so as that, by a common moving form, the various results described in the specification will be performed. Woodworth v. Dit [unreported] N. Y. Cir. Ct., Dec., 1837, Thompson, Circuit Justice, and Betts, District Judge; Gibson v. Gould [supra], Conkling, District Judge; Van Hook v. Scudder [Case No. 16,853], in equity, Thompson, Circuit Judge; Washburn v. Gould [Id. 17,214]. And that the specification and drawings accompanying it sufficiently describe such invention.

And, upon the whole case, I decree in favor of the complainant, and adopt the terms of the order settled by the court in the case of Van Hook v. Scudder, and order it entered in this cause.

The defendant, by his counsel, moves to modify the above order, so as to extend the time to the 20th instant (instead of the 13th), to execute the bond, etc., or, if security is not filed, that no injunction issue, unless the plaintiff files a bond on his part conditioned to indemnify the defendant if on a trial at law the right is found in his favor, or the decision shall be for him on final hearing in this court. This latter bond is moved for on the authority of the order of Judge McLean—Brooks v. Bicknell [supra]—in the case cited in the above opinion. This is a matter in the state practice regulated by positive law, or standing rule of court. 1 Hoff. Ch. Prac. 80; 1 Barb. Ch. Prac. 622. And it is probable that there may be some rule governing the practice in this behalf in the 7th circuit. If not, this is essentially a matter of practice which each court may regulate at its discretion, conforming to the procedures of the state within the circuit, or adopting an independent method for itself. The supreme court has laid down no rule on the subject nor has this court ever adopted one, and in the English chancery, in cases of special injunctions, embracing waste, patent, etc., it is no where intimated by elementary writers of the highest authority that a bond is exacted as a precedent condition to the injunction. 1 Turn & Van, 977, 978; Eden, Inj. 231; 1 Madd. 126, 127. The case of Van Hook v. Scudder [supra], which is made the basis of the decision in this case, and the decree in which is specifically adopted, was well considered by the late presiding judge, and there no condition of security was imposed on the complainant. In that case, as this, the right of the patentee was directly controverted, and it was insisted, that such right was, at least, rendered doubtful by the proofs. I do not feel disposed to go out of that case, especially as the defendant stands before me as the successor of those defendants, using in effect the machines then enjoined. Upon general principles, when a patentee has set in operation a valuable contrivance, never before brought into public use, I should be disposed to give him the full benefits of the law in upholding his invention, without trammelling him with restrictions, which might exclude him from the courts or enable others of greater wealth to break him down in the controversy. It seems to me it will require grave consideration before the court promulges the rule that a patentee shall not have an injunction against the violation of his discovery whenever a defendant denies the validity of the patent without first furnishing security to pay damages to his adversary in case of failing to sustain his patent. The reasoning against the doctrine will not be suggested on this occasion. I am not satisfied of its equity as a general rule, and I perceive in the peculiar condition of this case nothing requiring its introduction and application at this time. That part of the motion is accordingly denied. I am not willing to vary the terms of the order already granted. The defendant has been informed of it a reasonable time, to provide the security required. But as he is represented to be an indigent man, the court will not allow his pecuniary inability to debar him of the equity secured by the order, and he will accordingly be permitted, at any time within ten days after injunction served, to give the bond directed, and thus suspend or supersede the operation of the writ.

[See Case No. 16,854.]

Case No. 16,856.

VANHORN v. CHESNUT.

[2 Wash. C. C. 160.][1]

Circuit Court, D. Pennsylvania. April Term, 1808.

EJECTMENT—WARRANT—SURVEY.

An ejectment cannot be maintained on a warrant, without a survey, or purchase money paid.

[Cited in Goodlet v. Smithson, 5 Port. (Ala.) 245; Winter v. Jones, 10 Ga. 190.]

Ejectment. The title of the lessor of the plaintiff was founded upon an application of John Irvin, for the land in question, to include his improvement, made in 1776. In 1774, this land, as appeared by an abstract

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

from the execution book of the prothonotary's office of the county in which the land lay, was levied upon by a writ of fieri facias, sold by the sheriff under a venditioni exponas, and purchased by a person under whom the defendant claimed. The only question of fact in the cause was, whether the fieri facias was levied on this land, or on another tract belonging to the same person. Irvin never had a survey made of the land, nor had he paid any part of the purchase money to the state; but on the contrary, the purchaser under the execution, to secure his title, was obliged to pay it.

A motion for a nonsuit being made, on the ground that the plaintiff had not acquired a legal title, THE COURT nonsuited the plaintiff, for the reason assigned.

Mr. Dallas, for plaintiff.

Mr. Ingersoll, for defendant.

Case No. 16,857.

VANHORNE v. DORRANCE.

[2 Dall. 304.] [1]

Circuit Court, D. Pennsylvania. April Term, 1795.

INDIAN TITLES—PURCHASES BY INDIVIDUALS WITHOUT LEGISLATIVE AUTHORITY—CONSTITUTIONAL LAW—EMINENT DOMAIN—COMPENSATION—LEGISLATIVE POWER—CONSTRUCTION OF STATUTES.

[1. A purchase of lands lying within the limits of Pennsylvania, by Connecticut settlers, from the Indian tribes, without the consent of the Connecticut legislature, and against the express prohibition of the Pennsylvania statutes, is null and void, and conveys no title.]

[2. The legislature of Pennsylvania had no power, under the constitution of the state, to pass an act divesting one person of his estate in lands and vesting it in another, without making just compensation to the former.]

[3. The legislature of Pennsylvania, upon passing an act for taking the land of a citizen upon the ground of public necessity, cannot itself, without the participation of the proprietor of the land or the intervention of a jury, fix the amount of compensation. This can be done constitutionally only in three ways: (1) By the parties,—that is, by a stipulation as to the value, between the proprietor and the legislature; (2) by commissioners mutually elected by the parties; (3) by the intervention of the jury.]

[4. Where lands are taken on the ground of public necessity, by a legislative act, the legislature has no constitutional power to provide, except with the consent of the owner, that compensation shall be made in other lands or in anything except money, which is the universal medium of exchange and standard of value.]

[5. The act of the Pennsylvania legislature quieting and confirming the title of certain Connecticut settlers to lands claimed by them in Lucerne county (Act March 28, 1787) is unconstitutional and void, because it attempts to divest the title of one person to real estate, and vest it in another, and because it provides for making compensation in other lands, the quantity of which and the validity of the claims to the lands taken are to be determined by a board of property, without the consent of the owner, and without the intervention of a jury.]

[6. Even if the confirming act of March 28, 1787, were conceded to be constitutional, it did not operate to divest the title of the owner of the lands and vest it in the Connecticut claimant immediately upon its passage; but, as it required such settlers to present their claims to the commissioners, supported by reasonable proofs, and the commissioners were to pass thereon, and surveys were to be made and returned, etc., these acts are to be considered as conditions precedent, and no title could pass until the completion thereof.]

[7. An act repealing a statute which confirmed to certain claimants of land their title thereto upon their complying with certain conditions precedent is not an ex post facto law, or a law impairing the obligation of contracts, where the conditions have not been complied with at the time of the repeal.]

[8. A statute should never receive an equitable construction in order to overthrow or divest an estate.]

[9. Every statute derogatory to the rights of property, or which takes away the estate of a citizen, ought to be strictly construed.]

This was a cause of great expectation, involving several important questions of constitutional law, in relation to the territorial controversy between the states of Pennsylvania and Connecticut. After a trial, which continued for 15 days, the presiding judge delivered the following charge to the jury, comprising a full review of all the important facts and principles, that had occurred during the discussion.

PATERSON, Circuit Justice (charging jury). Having arrived at the last stage of this long and interesting cause, it now becomes the duty of the court to sum up the evidence, and to declare the law arising upon it. A mass of testimony has been brought forward in the course of the trial, the far greater part of which is altogether immaterial, and can be of no use in forming a decision. The great points, on which the cause turns, are of a legal nature; they are questions of law; and, therefore, for the sake of the parties, as well as for my own sake, they ought to be put in a train for ultimate adjudication by the supreme court. In the administration of justice it is a consolatory idea, that no opinion of a single judge can be final and decisive; but that the same may be removed before the highest tribunal for revision, where, if erroneous, it will be rectified. For the sake of clearness, I shall consider—1st. The title of the plaintiff. 2d. The title of the defendant.

The Title of the Plaintiff.

In deducing the title, the plaintiff exhibited: (1) The charter or grant from Ch. 2 to William Penn. The lands in question lie within the limits of this charter. (2) A deed from the Six Nations to Thomas and Richard Penn. To this deed a map is annexed and made part of it, by which the land conveyed is accurately delineated, or laid down. This mode of procedure is eminently just and laudable; it furnishes a precedent, which, as far as possible, ought to be observed in every

[1] [Reported by A. J. Dallas, Esq.]

transfer of land made by the Indians, as it obviously tends to quiet the spirit of jealousy, to remove suspicion, and prevent imposition and fraud. (3) October 29, 1768, a warrant to survey for the proprietors, certain tracts of land containing twenty thousand acres. (4) December 8 and 9, 1768, survey of the above lands. The land in controversy lies within the Indian deed to the Penns, and is covered by this survey. (5) March 1, 1769, lease from Thomas & Richard Penn to Thomas Van Horne, for the term of seven years, of lot No. 38, containing one hundred acres. (6) Instructions to lay out and fell the land. (7) February and March, 1771, allotment to Thomas Van Horne of lot No. 20, containing 190 acres and 90 perches. (8) January 15, 1772, warrant from Richard Penn, lieutenant governor, to make a separate return of lot No. 20, to Thomas Van Horne. A separate return was made accordingly, and marked on the general survey of March, 1771. (9) January 17, 1772, patent from Thomas and John Penn to Thomas Van Horne for lot No. 20. The consideration money was paid agreeably to contract. (10) November 15, 1774, deed from Thomas Van Horne to Cornelius Van Horne, lessor of the plaintiff, for lot No. 20.

It is in evidence, that this lot was built upon, fenced, tilled, and improved by Van Horne. It is also in evidence, that John Dorrance, the defendant, is in possession of, and resides upon, the said lot. Such is the title upon which the plaintiff rests his cause. It is clearly deduced and legally correct; and, therefore, unless sufficient appears on the part of the defendant, will entitle the plaintiff to your verdict. To repel the plaintiff's right, and to establish his own, the defendant sets up a title—1st. Under Connecticut. 2d. Under the Indians. 3d. Under Pennsylvania.

Under Connecticut. The title under Connecticut is of no avail: Because the land in controversy is ex-territorial; it does not lie within the charter bounds of Connecticut, but within the charter-bounds of Pennsylvania. The charter of Connecticut does not cover or spread over the lands in question. Of course no title can be derived from Connecticut. Here then the defendant fails.

Under the Indians. The Indian deed, under which the defendant claims, bears date the 11th of July, 1754. It has been observed, that this deed is radically defective and faulty; that fraud is apparent on the face of it; and, particularly, that the specification or description of the land is written on a razure. Of this, gentlemen, you will judge, as the deed will be given to you for inspection. Permit me to observe, that there are several ways, by which a deed may be voided or rendered of no effect. One of these is by razure, addition, interlining, or other alteration, in any material part, if done after its execution. It is the province of the jury to determine, whether any such alteration was made after the delivery of the deed. Besides, this deed appears to have been executed at different times; and not in that open, public, national manner, in which the Indians sell and transfer their lands. But if the deed was fairly obtained; if it has legal existence, then what is its legal operation? By the charter to William Penn, the right of pre-emption attached, and was vested in him, to all the lands comprehended within its limits. The Penn family had, exclusively, the right of purchasing the lands of the Indians; and, indeed, the Indians entered into a stipulation of that kind. Again, this deed is invalid by the laws of Pennsylvania. The legislature of Pennsylvania, by an act passed the 7th Feb., 1705, declare: "That if any person presume to buy any land of the natives, within the limits of this province and territories, without leave from the proprietary thereof, every such bargain or purchase shall be void and of no effect." 1 Laws Pa. (Dall. Ed.) 5. By an act passed the 14th Feb., 1729-30, it is further declared: "That every gift, grant, bargain, sale, written or verbal contract or agreement, and every pretended conveyance, lease, demise, and every other assurance made, or that shall hereafter be made, with any of the Indian natives, for any lands, &c. within the limits of this province, without the order or direction of the proprietary or his commissioners, shall be null, void, and of no effect." 1 Laws Pa. (Dall. Ed.) 248.

The land in controversy, being within the limits of Pennsylvania, the Connecticut settlers were, in legal estimation, trespassers and intruders. They purchased the land without leave, and entered upon it without right. They purchased and entered upon the land without the consent of the legislature of Connecticut. True it is, that the legislature of Connecticut gave a subsequent approbation, but this was posterior to the deed executed by the Six Nations to Penn, at Fort Stanwix, and the principle of relation does not retrospect so as to affect third persons. The consequence is, that the Connecticut settlers derive no title under the Indian deed.

The title which the defendant sets up under Pennsylvania. This is the keystone of the defendant's title, as one of his counsel very properly expressed it. It required no great sagacity to perceive, that the defendant's hope of success was founded on a law of Pennsylvania, commonly called "the quieting and confirming act." This act, and the two subsequent ones of a suspending and a repealing nature, open an extensive and important field for discussion. In general verdicts. it frequently becomes necessary for juries to decide upon the law as well as the facts. To form a correct judgment, legal principles must be taken up and applied, and when this is done in a proper manner, it gives stability to judicial decisions, and security to civil rights. Hence uniformity and certainty; hence the decisions of to-morrow will be like the decisions of to-day; they will run in the

same line, because they are founded on the same principles. To aid you, gentlemen, in forming a verdict, I shall consider:

1. The constitutionality of the confirming act; or, in other words, whether the legislature had authority to make that act. Legislation is the exercise of sovereign authority. High and important powers are necessarily vested in the legislative body; whose acts, under some forms of government, are irresistible and subject to no controul. In England, from whence most of our legal principles and legislative notions are derived, the authority of the parliament is transcendant and has no bounds. "The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendant and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, 'Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.' It has sovereign and uncontroulable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: This being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown; as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of king Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo." 1 Bl. Comm. 160. From this passage it is evident, that, in England, the authority of the parliament runs without limits, and rises above controul. It is difficult to say what the constitution of England is; because, not being reduced to written certainty and precision, is lies entirely at the mercy of the parliament: It bends to every governmental exigency; it varies and is blown about by every breeze of legislative humour or political caprice. Some of the judges in England have had the boldness to assert, that an act of parliament, made against natural equity, is void; but this opinion contravenes the general position, that the validity of an act of parliament cannot be drawn into question by the judicial department: It cannot be disputed, and must be obeyed. The power of parliament is absolute and transcendant; it is omnipotent in the scale of political existence. Besides, in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: Every state in the Union has its constitution reduced to written exactitude and precision.

What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the constitution; they owe their existence to the constitution: they derive their powers from the constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the legislature, repugnant to the constitution, is absolutely void.

In the second article of the declaration of rights, which was made part of the late constitution of Pennsylvania, it is declared: "That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding; and that no man ought or of right can be compelled, to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent; nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be, vested in, or assumed, by any power whatever, that shall, in any case, interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship." Declaration of Rights, art. 2. In the thirty-second section of the same constitution, it is ordained; "that all elections, whether by the people or in general

assembly, shall be by ballot, free and voluntary." Const. Pa. § 32. Could the legislature have annulled these articles, respecting religion, the rights of conscience, and elections by ballot? Surely no. As to these points there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. If the legislature had passed an act declaring, that, in future, there should be no trial by jury, would it have been obligatory? No. It would have been void for want of jurisdiction, or constitutional extent of power. The right of trial by jury is a fundamental law, made sacred by the constitution, and cannot be legislated away. The constitution of a state is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves. I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void. The constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the judiciary in this country is not a subordinate, but co-ordinate, branch of the government.

Having made these preliminary observations, we shall proceed to contemplate the quieting and confirming act, and to bring its validity to the test of the constitution. In the course of argument, the counsel on both sides relied upon certain parts of the late bill of rights and constitution of Pennsylvania, which I shall now read, and then refer to them occasionally in the sequel of the charge.

(The judge then read the 1st, 8th, and 11th articles of the declaration of rights; and the 9th and 46th sections of the constitution of Pennsylvania. See [Dall. Ed.] 1 Laws Pa. pp. 55, 56, 60, Append.) From these passages it is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact, and, by the late constitution of Pennsylvania, was made a fundamental law. Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of the kind; the parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation, and shock all mankind. The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the constitution. In short, it is what every one would think unreasonable and unjust in his own case. The next step in the line of progression is, whether the legislature had authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation. That the legislature, on certain emergencies, had authority to exercise this high power, has been urged from the nature of the social compact, and from the words of the constitution, which says, that the house of representatives shall have all other powers necessary for the legislature of a free state or commonwealth; but they shall have no power to add to, alter, abolish, or infringe any part of this constitution. The course of reasoning, on the part of the defendant, may be comprized in a few words. The despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it; and if this be the case, it cannot be lodged any where with so much safety as with the legislature. The presumption is, that they will not call it into exercise except in urgent cases, or cases of the first necessity. There is force in this reasoning. It is, however, difficult to form a case, in which the necessity of a state can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. It is immaterial to the state, in which of its citizens the land is vested; but it is of primary importance, that, when vested, it should be secured, and the proprietor protected in the enjoyment of it. The constitution encircles, and

renders it an holy thing. We must, gentlemen, bear constantly in mind, that the present is a case of landed property; vested by law in one set of citizens, attempted to be divested, for the purpose of vesting the same property in another set of citizens. It cannot be assimilated to the case of personal property taken or used in time of war or famine, or other extreme necessity; it cannot be assimilated to the temporary possession of land itself, on a pressing public emergency, or the spur of the occasion. In the latter case there is no change of property, no divestment of right; the title remains, and the proprietor, though out of possession for a while, is still proprietor and lord of the soil. The possession grew out of the occasion and ceases with it: Then the right of necessity is satisfied and at an end; it does not affect the title, is temporary in its nature, and cannot exist forever. The constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right not ex gratia from the legislature, but ex debito from the constitution. It is sacred; for, it is further declared, that the legislature shall have no power to add to, alter, abolish, or infringe any part of, the constitution. The constitution is the origin and measure of legislative authority. It says to legislators, thus far ye shall go and no further. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous. One incroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the constitution eventually destroyed. Where is the security, where the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another? The rights of private property are regulated, protected, and governed by general, known, and established laws; and decided upon, by general, known, and established tribunals; laws and tribunals not made and created on an instant exigency, on an urgent emergency, to serve a present turn, or the interest of a moment. Their operation and influence are equal and universal; they press alike on all. Hence security and safety, tranquillity and peace. One man is not afraid of another, and no man afraid of the legislature. It is infinitely wiser and safer to risk some possible mischiefs, than to vest in the legislature so unnecessary, dangerous, and enormous a power as that which has been exercised on the present occasion; a power, that, according to the full extent of the argument, is boundless and omnipotent: For, the legislature judged of the necessity of the case, and also of the nature and value of the equivalent. Such a case of necessity, and judging too of the compensation, can never occur in any nation. Singular, indeed, and untoward must be the state of things, that would induce the legislature, supposing they had the power, to divest one individual of his landed estate merely for the purpose of vesting it in another, even upon full indemnification; unless that indemnification be ascertained in the manner which I shall mention hereafter.

But admitting, that the legislature can take the real estate of A. and give it to B. on making compensation, the principle and reasoning upon it go no further than to shew, that the legislature are the sole and exclusive judges of the necessity of the case, in which this despotic power should be called into action. It cannot, on the principles of the social alliance, or of the constitution, be extended beyond the point of judging upon every existing case of necessity. The legislature declare and enact, that such are the public exigencies, or necessities of the state, as to authorise them to take the land of A. and give it to B.; the dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract, and the constitution, direct, and they accordingly declare and ordain, that A. shall receive compensation for the land. But here the legislature must stop; they have run the full length of their authority, and can go no further: they cannot constitutionally determine upon the amount of the compensation, or value of the land. Public exigencies do not require, necessity does not demand, that the legislature should, of themselves, without the participation of the proprietor, or intervention of a jury, assess the value of the thing, or ascertain the amount of the compensation to be paid for it. This can constitutionally be effected only in three ways: (1) By the parties—that is, by stipulation between the legislature and proprietor of the land. (2) By commissioners mutually elected by the parties. (3) By the intervention of a jury.

The compensatory part of the act lies in the ninth section. "And whereas the late proprietaries, and divers other persons have heretofore acquired titles to parcels of the land aforesaid, agreeably to the laws and usages of Pennsylvania, and who will be deprived thereof by the operation of this act, and as justice requires, that compensation be made for the lands, of which they shall be thus divested; and as the state is possessed of other lands, in which an equivalent may be rendered to the claimants under Pennsylvania, and as it will be necessary, that their claims should be ascertained by a proper examination: Be it therefore enacted, by the authority aforesaid, that all persons having such claims to lands, which will be affected by the operation of this act, shall be, and they are hereby required, by themselves, guardians, or other lawful agents, within twelve months from the passing of this act, to present the same to the board of property, therein clearly describing those lands, and stating the grounds of their claims, and also adducing the proper proofs, not only of their

titles, but of the situations, qualities, and values of the lands so claimed, to enable the board to judge of the validity of their claims, and of the quantities of vacant lands proper to be granted as equivalents. And for every claim, which shall be admitted by said board, as duly supported, the equivalent, by them allowed, may be taken either in the old or new purchase at the option of the claimant; and warrants, and patents, and all other acts of the public offices relating thereto, shall be performed free of expence. The said board shall also allow such a quantity of vacant land, to be added to such equivalent, as shall, in their judgment, be equal to the expences, which must necessarily be incurred in locating and surveying the same. And that the board of property may, in every case obtain satisfactory evidence of the quality and value of the land, which shall be claimed as aforesaid, under the proprietary title, they may require the commissioners aforesaid, during their sitting in the county of Luzerne, to make the necessary enquiries, by the oaths or affirmations of lawful witnesses, to ascertain those points; and it shall be the duty of the said commissioners to enquire and report accordingly." Act Pa. March 28, 1789, § 9. In this section two things are worthy of consideration: (1) The mode or manner, in which compensation for the lands is to be ascertained. (2) The nature of the compensation itself. The Pennsylvania claimants are directed to present their claims to the board of property—and what is the board to do thereupon? Why, it is, (1) to judge of the validity of their claims. (2) To ascertain, by the aid and through the medium of commissioners, appointed by the legislature, the quality and value of the land. (3) To judge of the quantity of vacant land to be granted as an equivalent. This is not the constitutional line of procedure. I have already observed, that there are but three modes, in which matters of this kind can be conducted consistently with the principles and spirit of the constitution, and social alliance. The first of which is by the parties, that is to say, by the legislature and proprietor of the land. Of this the British history presents an illustrious example in the case of the Isle of Man. "The distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue (it affording a commodious asylum for debtors, outlaws, and smugglers) authority was given to the treasury, by statute 12 Geo. I., c. 28, to purchase the interest of the then proprietors for the use of the crown; which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III., cc. 26, 38, whereby the whole island and all its dependencies, so granted as aforesaid (except the landed property of the Atholl family, their manerial rights and emoluments, and the patronage of bishopricks, and other ecclesiastical benefices) are unalienably vested in the crown, and subjected to the regulations of the British excise and customs." 1 Bl. Comm. 107. Shame to American legislation! That in England, a limited monarchy, where there is no written constitution, where the parliament is omnipotent, and can mould the constitution at pleasure, a more sacred regard should have been paid to property, than in America, surrounded as we are with a blaze of political illumination; where the legislatures are limited; where we have republican governments, and written constitutions, by which the protection and enjoyment of property are rendered inviolable. The case of the Isle of Man was a fair and honorable stipulation; it partook of the spirit and essence of a contract; it was free and mutual; and was treating with the proprietors on equal terms. But if the business cannot be effected in this way, then the value of the land, intended to be taken, should be ascertained by commissioners, or persons mutually elected by the parties, or by the intervention of the judiciary, of which a jury is a component part. In the first case, we approximate nearly to a contract; because the will of the party, whose property is to be affected, is in some degree exercised; he has a choice; his own act co-operates with that of the legislature. In the other case, there is the intervention of a court of law, or, in other words, a jury is to pass between the public and the individual, who, after hearing the proofs and allegations of the parties, will, by their verdict, fix the value of the property, or the sum to be paid for it. The compensation, if not agreed upon by the parties or their agents, must be ascertained by a jury. The interposition of a jury is, in such case, a constitutional guard upon property, and a necessary check to legislative authority. It is a barrier between the individual and the legislature, and ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation, except in cases of absolute necessity, or great public utility. By the confirming act, the value of the land taken, and the value of the land to be paid in recompense, are to be ascertained by the board of property. And who are the persons that constitute this board? Men appointed by one of the parties, by the legislature only. The person, whose property is to be divested and valued, had no volition, no choice, no co-operation in the appointment; and besides, the other constitutional guard upon property, that of a jury, is removed and done away. The board of property thus constituted, are authorised to decide upon the value of the land to be taken, and upon the value of the land to be given by way of equivalent, without the participation of the party, or the intervention of a jury.

2. The nature of the compensation. By the act the equivalent is to be in land. No just compensation can be made except in money. Money is a common standard, by comparison

with which the value of any thing may be ascertained. It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompence in value, a quid pro quo, and must be in money. True it is, that land or any thing else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalise the act, and make it valid; nothing short of it will have the effect. It is obvious, that if a jury pass upon the subject, or value of the property, their verdict must be in money.

To close this part of the discourse: It is contended that the legislature must judge of the necessity of interposing their despotic authority; it is a right of necessity upon which no other power in government can decide: That no civil institution is perfect; and that cases will occur, in which private property must yield to urgent calls of public utility or general danger. Be it so. But then it must be upon complete indemnification to the individual. Agreed: But who shall judge of this? Did there also exist a state necessity, that the legislature, or persons solely appointed by them, must admeasure the compensation, or value of the lands seized and taken, and the validity of the title thereto? Did a third state necessity exist, that the proprietor must take land by way of equivalent for his land? And did a fourth state necessity exist, that the value of this land-equivalent must be adjusted by the board of property, without the consent of the party, or the interference of a jury? Alas! how necessity begets necessity. They rise upon each other and become endless. The proprietor stands afar off, a solitary and unprotected member of the community, and is stript of his property, without his consent, without a hearing, without notice, the value of that property judged upon without his participation, or the intervention of a jury, and the equivalent therefor in lands ascertained in the same way. If this be the legislation of a republican government, in which the preservation of property is made sacred by the constitution, I ask, wherein it differs from the mandate of an Asiatic prince? Omnipotence in legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of laws, of courts, of constitutions, and call ourselves free! In short, gentlemen, the confirming act is void; it never had constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made.

II. But, admitting the confirming act to be constitutional and valid, the next subject of enquiry is, what is its operation, or, in other words, what construction ought to be put upon it? It is contended, on the part of the defendant, that on the passing of the act, the estate was divested from the Pennsylvania claimants, and instantly vested in the Connecticut settlers. To decide upon this question, it will not be amiss to lay down a rule or two of exposition, applicable to the act under consideration. A statute shall never have an equitable construction in order to overthrow or divest an estate. Every statute, derogatory to the rights of property, or that takes away the estate of a citizen, ought to be construed strictly.

Let us test this act by the foregoing rules. The act is entitled, "An act, for ascertaining and confirming to certain persons, called 'Connecticut Claimants,' the lands by them claimed within the county of Luzerne, and for other purposes therein mentioned," and was passed the 28th of March, 1787. The first five sections, being material in the discussion of this part of the subject, run in the following words. (Here the judge read the law.) The act requires: That the Connecticut settlers shall prefer their claims to the commissioners. That they shall support their claims by reasonable proof. That the commissioners shall adjudicate upon or confirm the claims. That they shall have the lots, to which claims are set up and admitted, surveyed; that they shall make return of their surveys and their book of entries to the supreme executive council, who shall cause patents to be issued for their confirmation, and each patent shall comprehend all the parcels of land, which are to be confirmed to the same claimant, to whom, by the return of the commissioners, the same shall be found to belong. The mere offering or presenting of the claim is not sufficient. It must be supported by reasonable proof, and ascertained, and established by the commissioners. These acts must be performed before the estate passes out of the Pennsylvania claimants, and is vested in the Connecticut settlers. They are antecedent acts, and in nature of a condition precedent. Now conditions precedent are such as must happen or be performed before the estate can vest or be enlarged; they admit of no latitude; they must be strictly, literally, and punctually performed. It is a known maxim, that where the estate is to arise upon a condition precedent, it cannot vest till that condition is performed; and this has been so strongly adhered to, that even where the condition has become impossible, no estate or interest grew thereupon. Where a condition copulative precedes an estate, the whole must be performed before the estate can arise; or where an act is previous to any estate, and that act consists of several particulars, every particular must be performed before the estate can vest or take effect. Co. Litt. 206, 218; 1 Atk. 374, 376; Comyn. 732.

The estate of the Pennsylvania claimants was not divested on the passing of the act; it was not divested on presenting the claim on the part of the Connecticut settlers. Other acts were previously necessary, and, in particular, the commissioners must pass upon and confirm the claim, before the estate is divested from the one party and vested in the other. These things precede, and must be done before any estate can vest in the defendant; but they have not been done, and therefore the estate remains in the plaintiff. This construction corresponds with the meaning and spirit, the tendency and scope, of the act itself. The intention of the legislature was to vest in Connecticut claimants of a particular description a perfect estate to certain lands in the county of Luzerne; but then it was upon condition; it was to operate upon, secure, and sanctify, such claims only as should be admitted and ascertained, approved and established, by the commissioners. This is further evident from the powers and functions of the commissioners, who were to enquire, examine, hear proofs, &c., respecting the claims; and for what purpose? Why, that they might admit and approve of such as were supported by satisfactory evidence, and make return thereof to the executive council, who should thereupon cause patents to be issued for their confirmation. Until the commissioners had decided in favor of a claim, it remained in statu quo; the act did not cover and protect it. Further, if the act will admit of two constructions, that one certainly ought to be adopted, which is in favor of the legal owner, and which will not divest his estate, till the terms specified in the act shall have been fully complied with. When the legislature undertake to give away what is not their own, when they attempt to take the property of one man, which he fairly acquired, and the general law of the land protects, in order to transfer it to another, even upon complete indemnification, it will naturally be considered as an extraordinary act of legislation, which ought to be viewed with jealous eyes, examined with critical exactness, and scrutinized with all the severity of legal exposition. An act of this sort deserves no favor; to construe it liberally would be sinning against the rights of private property. Besides, it was the manifest intention of the makers of the act, that a just compensation should be made in land, to the Pennsylvania claimants; upon this principle the act proceeds; and therefore, if it appear, that such compensation cannot be made, or that it is very dubious, whether it can be effected, the court ought not to give such a construction, as will deprive the owner of his estate, with little or no prospect of being recompensed in value. If either party ought to be driven to the necessity of controverting the question with the state of Pennsylvania, it ought to be the Connecticut settlers, who have no legal title to the land, and not the Pennsylvania claimants, in whom is vested a good estate at law. Deeming the construction, which has been put upon the act, to be the found one, it precludes the enquiry, how far a patent of confirmation was necessary to substantiate the claim of the defendant, so as to render it available in a court of common law.

III. The nature and operation of the suspending act. This act was passed the 29th of March, 1788, and is as follows. (Here the judge read the act at large.) This act was passed before the adoption of the constitution of the United States, and therefore is not affected by it. If the legislature had authority to make the confirming act, they had, also, authority to suspend it. Their constitutional power reached to both, or to neither. By the act of the 28th of March, 1787, the commissioners were to ascertain and confirm the claims of the Connecticut settlers, upon the doing whereof the estate, if the law was constitutional, would become vested in them. This has not been done; the claim in the present instance has not been ascertained and confirmed; and as this act suspends or revokes these ascertaining and confirming powers, it never can be done. Of course, there is an end of the business. The parties are placed on their original ground; they are restored to their pristine situation.

IV. After the opinion delivered on the preceeding questions, it is not necessary to determine upon the validity of the repealing law. But it being my intention in this charge to decide upon all the material points in the cause, in order that the whole may, at once, be carried before the supreme judicature for revision, I shall detain you, gentlemen, a few minutes only, while I just touch upon the constitutionality of the repealing act. This act was passed the 1st of April, 1790. The repealing part is as follows. (Here the judge read the 1st and 2d sections of the act. See 2 Laws Pa. [Dall. Ed.] p. 786.) This act was made after the adoption of the constitution of the United States, and the argument is, that it is contrary to it; (1) because it is an ex post facto law; (2) because it is a law impairing the obligation of a contract.

1. That it is an ex post facto law. But what is the fact? If making a law be a fact within the words of the constitution, then no law, when once made, can ever be repealed. Some of the Connecticut settlers presented their claims to the commissioners, who received and entered them. These are facts. But are they facts of any avail? Did they give any right or vest any estate? No—whether done or not done, they leave the parties just where they were. They create no interest, affect no title, change no property, when done they are useless and of no efficacy. Other acts were necessary to be performed, but before the performance of them, the law was suspended and then repealed.

2. It impairs the obligation of a contract, and is therefore void. If the property to the lands in question had been vested in the state

of Pennsylvania, then the legislature would have had the liberty and right of disposing or granting them to whom they pleased, at any time, and in any manner. Over public property they have a disposing and controlling power, over private property they have none, except, perhaps, in certain cases, and those under restrictions, and except also what may arise from the enactment and operation of general laws respecting property, which will affect themselves as well as their constituents. But if the confirming act be a contract between the legislature of Pennsylvania and the Connecticut settlers, it must be regulated by the rules and principles which pervade and govern all cases of contracts; and if so, it is clearly void, because it tends, in its operation and consequences, to defraud the Pennsylvania claimants, who are third persons, of their just rights; rights ascertained, protected, and secured by the constitution and known laws of the land. The plaintiff's title to the land in question, is legally derived from Pennsylvania; how then, on the principles of contract, could Pennsylvania lawfully dispose of it to another? As a contract, it could convey no right, without the owner's consent; without that, it was fraudulent and void.

I shall close the discourse with a brief recapitulation of its leading points.

1. The confirming act is unconstitutional and void. It was invalid from the beginning, had no life or operation, and is precisely in the same state, as if it had not been made. If so, the plaintiff's title remains in full force.

2. If the confirming act is constitutional, the conditions of it have not been performed; and, therefore, the estate continues in the plaintiff.

3. The confirming act has been suspended —and

4. Repealed.

The result is, that the plaintiff is, by law, entitled to recover the premises in question, and of course to your verdict.

Verdict for the plaintiff.

Writ of error was brought on the judgment in this case, and is now depending in the supreme court. [Unreported.]

Case No. 16,858.

Ex parte VAN HOVEN.

[4 Dill. 411;[1] 22 Int. Rev. Rec. 217; 3 Cent. Law J. 366; 1 Cin. Law Bul. 178.]

Circuit Court, D. Minnesota. April, 1876.

JURISDICTION IN MATTER OF EXTRADITION—TREATY WITH BELGIUM—COMPLAINT—WARRANT.

1. The sixth article of the treaty of May 1st, 1874 [18 Stat. 804], between the United States and Belgium, expressly provides for requisition on the part of the government applying, and consent of the government applied to. It is not necessary that the warrant on such requisition be issued by the president. It is sufficient if it issue from the state department, under its official seal. In foreign relations, and executive acts imposed by treaty stipulations, the president acts through that department.

[Cited in Castro v. De Uriarte, 16 Fed. 97.]

2. Where the complaint charges the crime of forgery as having been committed on a certain day in the jurisdiction of the foreign government, in that one "willfully, etc., uttered and put in circulation forged or counterfeit papers, or obligations, or other titles, or instruments of credits," without specifying the kind of obligations forged, or the character of the papers, or nature of titles, etc., it is defective at common law, does not fairly inform accused of the charge, and does not show probable cause for arrest.

[This was a petition by Henry Van Hoven for a writ of habeas corpus.]

C. K. Davis, for the petitioner.
John Y. Page, contra.

NELSON, District Judge. The counsel for the petitioner, upon the argument of the demurrer, has presented, and urged with great ability, objections to the proceedings instituted by the Belgian government to obtain the extradition, which may be reduced to two in number: 1. That the commissioner had no jurisdiction, under the treaty stipulations between the two countries, to issue any warrant for the arrest and examination of persons charged with the commission of forgery, with a view to their extradition. 2. That the complaint upon which the warrant was issued by the commissioner does not make out a case or contain such a statement of the offence as would justify a warrant of arrest.

I shall take up the first objection, and, with a view of stripping the case of some questions that were presented on the argument, state that, in my opinion, the judicial arm of the government is powerless to arrest any alleged fugitive from justice whose extradition is demanded by a foreign government under any treaty with the United States, without a requisition having been previously made by the foreign government upon the United States, and its authority obtained to apprehend such fugitive. The sixth article of the treaty proclaimed May 1, 1874, between the United States and Belgium, provides expressly for such requisition and consent to the arrest on the part of the government applied to.

Has such requisition been made and consent been obtained? The mandate or warrant issued by the department of state recites the fact that such requisition was made by the proper officers of the Belgian government in pursuance of the treaty, and this mandate is the only evidence that the president of the United States initiated the proceedings or authorized the apprehension of the prisoner.

The objection that such warrant is not issued by the president of the United States, because it emanates from the state depart-

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

ment, and is signed by the secretary of state and under his official seal, in my opinion is not tenable. The history of the government shows that, in all our foreign relations, the president, in performing executive acts imposed by treaty stipulations or otherwise, acts through the department of state, and under its official seal. And when, as in this case, a warrant or mandate is signed by the secretary of state, it is the act of the president through the proper executive department of the government. Thus, upon the face of the papers, which are admitted by the demurrer to be true, the requisition has been properly made by the Belgian government, and a proper warrant has been issued by the president of the United States to authorize the commissioners to act. I have no authority to go behind the warrant which has been issued by the president through the state department, and it must be taken as a fact that the president discharged his executive functions in accordance with the terms of the sixth article of the treaty.

The act of congress in relation to "extradition" (title 66, Rev. St. U. S. p. 1026) authorizes certain judicial officers, "whenever a treaty for extradition exists between the government of the United States and any foreign government, upon complaint being made, under oath, charging any person found within the limits of any state, district, or territory, who, having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, to issue his warrant for the apprehension of the person so charged, that he may be brought before such commissioner, to the end that the evidence of criminality may be heard and considered." And in case such commissioner deems the evidence sufficient to sustain the charge made, he certifies the same, together with all the testimony, to the secretary of state, that a warrant may issue for his surrender.

This act of congress applies to all treaties made before or after its passage, and was necessary, in order to give the judicial department of the government jurisdiction to investigate the charge of crime alleged to have been committed within the limits of a foreign government.

The commissioner of the circuit court of the United States for the Southern district of New York, in obedience to the warrant of the president, and upon complaint made by the consul-general of Belgium, resident in the city of New York, has issued his warrant of arrest for the purpose of investigating the charges made against the prisoner, and he had authority so to do, provided the complaint by the consul-general made out a proper case.

And this brings me to a consideration of the next and last objection. The complaint charges that Van Hoven committed, within the jurisdiction of the kingdom of Belgium, the crime of forgery, as it is specifically mentioned in the treaty of 1874, to-wit: "With having, within the jurisdiction of the kingdom of Belgium, and in violation of the laws thereof, and for his own benefit, and on or about the 21st day of December, 1875, wilfully and knowingly and maliciously uttered and put in circulation forged papers, or counterfeit papers, or counterfeit obligations, or other titles, or instruments of credits." This is the charge in hæc verba, without specifying the kind of obligations forged, or the character of the papers, or the nature of the titles, or instruments of credits forged.

Is such a complaint sufficiently definite for the purpose of jurisdiction? It is not necessary that a complaint should be drawn with the formal precision of an indictment, but the accused should be fairly informed of the charge made, so that he may be able to meet the investigation.

In the Case of Henrich [Case No. 6,369], the court says: "The complaint upon which the warrant of arrest is asked, should set forth clearly, but briefly, the substance of the offence charged, and the substantial, material features thereof." I think, tested by the above decision, the complaint does not show probable cause for the arrest, and, at common law, is defective. The consul does not pretend to be familiar with the particulars of the alleged crime, and he has no personal knowledge of any of the facts, and states that he makes the complaint by virtue of his office, and for the purpose of giving effect to the treaty. Clearly, under our system of criminal jurisprudence, such a complaint would not authorize the arrest of one of our citizens, and it cannot have been the intention of the treaty-making power, or the congress of the United States, to have permitted the arrest of an alleged fugitive upon a complaint which would be defective in the former case. The petitioner, therefore, must be discharged from custody. Ordered accordingly.

The foregoing decision of Nelson, J., was given in April, 1876. An appeal was taken from the order of discharge, and that order was affirmed by the circuit court, at the June term, 1876. The petitioner, after the order for his discharge was made, was again arrested, and sued out another writ of habeas corpus. See [Case No. 16,859].

Case No. 16,859.

Ex parte VAN HOVEN.

[4 Dill. 415.] [1]

Circuit Court, D. Minnesota. 1876.

EXTRADITION—TREATY WITH BELGIUM—WARRANT OF ARREST—MANDATE OF THE SECRETARY OF STATE — SUFFICIENCY OF COMPLAINT.

1. Under the extradition treaty of the United States with Belgium,—treaties 1873–74, p. 120 [18 Stat. 804],—it is no ground of discharge of the alleged fugitive, on habeas corpus, that the warrant of arrest was issued by the proper judicial officer instead of by the president.

2. It need not appear by distinct recital in the mandate of the secretary of state to the judicial officers of the government, that a warrant for the arrest of the alleged fugitive, for the crime imputed to him, ever issued in Belgium. The judicial department will presume from the

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

mandate of the secretary of state that this was done.

3. A complaint, under oath, made by the consul-general of Belgium, before a proper commissioner in the Southern district of New York, upon the strength of telegrams and depositions taken in Belgium, *held* sufficient to justify the court in remanding the prisoner for examination by the commissioner before whom the complaint was made and who issued the warrant of arrest.

Henry Van Hoven presented a petition to this court June 22, 1876, setting forth that he is restrained of his liberty and imprisoned by David H. Crowley in the city of St. Paul, and district of Minnesota; that he is informed and believes that he is imprisoned under the color of the authority of the United States, by virtue of certain proceedings initiated for the extradition of the petitioner under a certain treaty entered into between the United States of America and the kingdom of Belgium, on the 19th day of March, 1874; that he is thus restrained of his liberty in violation of the constitution of the United States and of said treaty. The petitioner prays for a writ of habeas corpus for the reason that no warrant has been issued for his arrest and detention and that he is not charged with any crime mentioned in the treaty, and that no legal proceedings whatever have been had for his extradition, and that his arrest and detention are in violation of law. A writ of habeas corpus was allowed, returnable forthwith. At the hearing, David H. Crowley, in obedience to the writ of habeas corpus, appeared in court with Henry Van Hoven in charge, and made a return, setting forth that he was a deputy marshal of the United States for the Southern district of New York, and that he held the petitioner by virtue of a warrant issued by Kenneth G. White, a commissioner of the circuit court of the United States for the Southern district of New York, specially appointed to execute the provisions of title 66 of the Revised Statutes for giving effect to certain treaty stipulations, commanding all marshals of the United States for any district, and their deputies, and each of them, to bodily apprehend, arrest, and imprison the said Van Hoven, which warrant was delivered April 7th, 1876, to the marshal of the Southern district of New York, and April 16th the respondent was directed and authorized by said marshal to execute said warrant. This warrant, in substance, states that Charles Mali, consul for the kingdom of Belgium, has made complaint and application before Kenneth G. White, commissioner as aforesaid, in the city of New York, in the Southern district of New York, for the arrest of Henry Van Hoven, charged with the crime of forgery, to wit: "With having, within the jurisdiction of the kingdom of Belgium, in violation of the laws thereof, and for his own benefit, and on or about the 21st day of December, 1875, wilfully and knowingly and maliciously uttered and put in circulation, and offered for discount, and caused to be discounted by the firm of Nagelmacker & Sons, doing business as bankers in the city of Liege, and received the proceeds of two certain bills of exchange, drawn and endorsed by the said Van Hoven, for the amount of eight thousand francs, and purporting to have the acceptance of a certain A. Lefevre, doing business as merchant at Brussels, at Rue Veuve, the said acceptance being a forgery, and known to be such by the said Van Hoven." The warrant recites also a similar discount of a bill of exchange for nine thousand five hundred francs, by the banking house of Messrs. Victor Terwangue & Co., in the city of Liege, in Belgium, purporting to have upon it the acceptance of a certain Vois Comprier, at Maestricht, the said acceptance being a forgery. The respondent further makes return of the complaint of Charles Mali, the consul-general of Belgium at the city of New York, annexed to the warrant of the commissioner, with certain depositions of witnesses taken before a judge in the kingdom of Belgium, and also a mandate issued under the hand of the secretary of state of the United States and the seal of the department of state.

The mandate of the secretary of state is in the following words:

"Department of state, to any justice of the supreme court of the United States, any judge of the circuit or district court of the United States in any district, any judge of a court of record of general jurisdiction in any state or territory of the United States, or to any commissioner specially appointed to execute the provisions of title 66 of the Revised Statutes of the United States, for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivery up of certain offenders: Whereas, pursuant to the provisions of the convention between the United States of America and Belgium, of the 19th March, 1874, for the mutual delivery of criminals, fugitives from justice, in certain cases, Mr. Maurice Delfosse, accredited to this government as envoy extraordinary and minister plenipotentiary of Belgium, has made application to the proper authorities thereof for the arrest of one Van Hoven, charged with the crime of forgery, and alleged to be a fugitive from the justice of Belgium, and who is believed to be within the jurisdiction of the United States; and, whereas, it appears proper that the said Van Hoven should be apprehended and the case examined in the mode provided by the laws of the United States aforesaid: Now, therefore, to the end that the above named officers, or any of them, may cause the necessary proceedings to be had in pursuance of said laws, in order that the evidence of the criminality of the said Van Hoven may be heard and considered, and, if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the secretary of state, that a warrant may issue for his surrender pursuant to said con-

vention, I certify the facts above recited. In testimony whereof, I have hereunto signed my name and caused the seal of the department of state to be affixed. Done at the city of Washington, this 8th day of March, A. D. 1876, and of the independence of the United States the one hundredth. (Signed.) Hamilton Fish, Secretary of State."

The complaint of Charles Mali, the consul-general of Belgium at the city of New York, upon which the commissioner issued his warrant for the arrest of Van Hoven, is in the following words:

"Circuit Court of the United States for the Southern District of New York, in the Matter of the Application of the Belgian Government for the Extradition of Henry Van Hoven—Before Kenneth G. White, United States Commissioner. Southern District of New York, ss: Charles Mali, being duly sworn, deposes and complains as follows: That he is the consul-general of the kingdom of Belgium at this city of New York, and that he acts herein as such consul as aforesaid. That the above named Henry Van Hoven is charged with the commission, within the territories and jurisdiction of the said kingdom of Belgium, of the crime of forgery, as it is specifically mentioned and provided for in a convention between the United States of America and the kingdom of Belgium for the surrender of criminals, proclaimed on May 1st, 1874, after the same was concluded at Washington, on the 19th of March, and after the ratifications were exchanged, on the 31st of March, 1874, and April 30th, 1874, in consequence of its being advised by the senate on the 27th of March, 1874. That the above named Henry Van Hoven is a fugitive from the justice of Belgium, and that he is to be found within the territories, limits, and jurisdiction of the United States. That, in pursuance of the aforesaid convention between the United States and the kingdom of Belgium, Maurice Delfosse, envoy extraordinary and minister plenipotentiary of the kingdom of Belgium, accredited to this government, has made due requisition on the president of the United States for the surrender of the said Henry Van Hoven, and upon such requisition the secretary of state has issued a mandate, dated the 8th day of March, 1876, certifying to the propriety that the said Henry Van Hoven should be apprehended, and his case examined in the mode provided by the acts of congress, as is more fully shown in the said mandate, which is hereto annexed and made a part of this complaint, and to which deponent prays to refer. Wherefore the said consul, by virtue of his office as aforesaid, and for the purpose of giving effect to the said convention, now charges, on information and belief, the said Henry Van Hoven with the commission of the crime of forgery, to-wit: with having, within the jurisdiction of the kingdom of Belgium, and in violation of the laws thereof, and for his own benefit, and on or about the 21st day of December, 1875, wilfully and knowingly and maliciously uttered and put in circulation, and offered for discount to, and caused to be discounted by, the firm of Nagelmacker & Sons, doing business as bankers in the city of Liege, and received the proceeds of two certain bills of exchange drawn and endorsed by the said Van Hoven, for the amount of eight thousand francs, and purporting to bear the acceptance of a certain A. Lefevre, doing business as merchant at Brussels, Belgium, at Rue Veuve, the said acceptance being a forgery, and known to be such by the said Van Hoven; and for having, on or about the same date of the 21st day of December, 1875, wilfully, knowingly, and maliciously uttered and put in circulation, and offered for discount to, and caused to be discounted by, the firm of Victor Terwangue & Co., doing business as bankers in the city of Liege, Belgium, and recovered the proceeds of another certain bill of exchange drawn and endorsed by the said Van Hoven, for the amount of nine thousand five hundred francs, and purporting to bear the acceptance of a certain Vois Comprier, at Maestricht, the said acceptance being a forgery, and known to be such by the said Van Hoven. That the information of said complainant, Charles Mali, is derived from telegrams from the proper authorities of the kingdom of Belgium, as well as from certain depositions of Gustave Tripnels, Victor Terwangue, and Augustin Dubois, properly taken before Adolph Nilson, one of the justices of the district of Liege, Belgium, and duly certified by John Wilson, consul of the United States of America at Brussels, kingdom of Belgium, to be legally and properly authenticated, so as to be entitled to be received in evidence in support of the criminal charges mentioned therein, and for the purpose of extradition proceedings, as is provided in section 5271 of title 66 of the Revised Statutes of the United States. And the said consul, therefore, entering this complaint, made under oath, charging the said Henry Van Hoven with the crime of forgery, as enumerated in article 11 of said convention for the extradition of said criminals between the kingdom of Belgium and the government of the United States, makes application to Kenneth G. White, a commissioner appointed by the circuit court of the United States of America for the Southern district of New York, in the Second circuit, that his warrant be issued for the apprehension of said Henry Van Hoven, so charged, that he may be brought before the said commissioner, to the end that the evidence of his criminality may be heard and considered, and that on such hearing a certificate be made by the said commissioner as to the evidence thereof being deemed by him sufficient to sustain the charge under the provisions of the aforementioned convention, and for the purpose of the surrender of the said Henry Van Hoven, according to the stipulations of said convention. (Signed.) Charles Mali, Consul of Belgium."

"Sworn to before me, this 7th day of April, 1876. Commissioner duly appointed by the cir-

cuit court of the United States for the Southern district of New York, and specially appointed to execute the provisions of title 66 of the Revised Statutes of the United States, for giving effect to certain treaty stipulations."

The first article of the said treaty with Belgium (Treaties 1873–74, p. 120), is as follows: "The government of the United States and the government of Belgium mutually agree to deliver up persons who, having been convicted of or charged with any of the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other: provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime had been there committed." Among the crimes enumerated in the second article is the crime of forgery and the uttering of forged papers. The sixth article of the treaty is as follows: "Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties; or, in the event of the absence of these from the country, or its seat of government, they may be made by superior consular officers. If the person whose extradition may be asked for shall have been convicted of a crime, a copy of the sentence of the court in which he may have been convicted, authenticated under its seal, and an attestation of the official character of the judge by the proper executive authority, and of the latter by the minister or consul of the United States or of Belgium respectively, shall accompany the requisition. When, however, the fugitive shall have been merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, and of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid. The president of the United States, or the proper executive authority of Belgium, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to the law and the evidence, the extradition is due pursuant to the treaty, the fugitive may be given up, according to the forms prescribed in such cases."

The prisoner, on the said return, moves to be discharged from the custody of the said Crowley.

C. K. Davis, for petitioner. John Y. Page, for Crowley.

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

DILLON, Circuit Judge. Requisition for the surrender of the petitioner to the Belgium government is recited, in the mandate of the secretary of state, to have been duly made upon the executive authority of this government. Complaint before a duly authorized commissioner was made by the consul-general of Belgium in New York, and a warrant for the apprehension of the petitioner issued, on which he has been arrested and is now in custody, for the purpose of being taken before the commissioner who issued the warrant, for an examination of the charge against him, made in the complaint.

It is urged that the petitioner is entitled to be discharged on several grounds:

1. That, under the treaty (article 6), the president of the United States is required to issue a warrant for the apprehension of the fugitive, that he may be brought before the proper judicial authority for examination. The object of this provision is that the legal proceedings for the surrender of a fugitive may have the sanction of the executive department. Ex parte Kaine [Case No. 7,597]. This is given in this case by the mandate of the secretary of state. In re Farez [Id. 4,644]. Under our system of the separation of the powers of the government into departments, the warrant of arrest issues from the judicial department, and the substance, spirit, and purpose of the treaty have been complied with in this regard.

2. It is urged that the petitioner is entitled to be discharged because it does not affirmatively appear in the mandate of the secretary of state, or in the complaint, that any warrant for the arrest of the petitioner in Belgium, for the crime imputed, ever issued in that country. Under the treaty it may be true that no surrender of the petitioner to the Belgian government can legally be demanded, unless proceedings in that country have been instituted, and a warrant of arrest there issued. Such warrant, and the depositions upon which the warrant issued, must accompany the requisition upon this government for the surrender. Such is the treaty. The judicial department will presume, from the mandate of the secretary of state, that this was done. It may be that if it is shown on the hearing, or at any subsequent stage of the proceedings, that no warrant for the arrest of the petitioner in Belgium ever issued in that country, and no depositions, such as are required by the treaty, were ever made in Belgium, the judicial department of this country, on its power being invoked, would prevent the extradition. Ex parte Kaine, supra.

3. It is next urged that the complaint is insufficient, because filed by the consul-general, who does not profess to have any personal knowledge of the matters charged against the petitioner, but whose information is derived from telegrams from the Belgian authorities, and certain depositions taken in Belgium, not before us. In re Farez [Cases Nos. 4,645 and 4,646]. Unlike the first complaint in this case, the present complaint is specific in the charges made against the defendant. This court cannot hear the case on the merits. It

belongs to the commissioner who issued the warrant to decide whether, according to the law and the evidence, the extradition is due pursuant to the treaty. Under the decisions and practice in the Second circuit, the order of the commissioner may, it would seem, be revised and corrected by the federal courts therein, at the instance of the petitioner. In re Henrich [Case No. 6,369]. Motion to discharge the petitioner denied. Ordered accordingly.

NOTE. The order of Nelson, J., in this case when before him was affirmed on appeal; and a petition was presented for another writ of habeas corpus, to the circuit court, at the June term, 1876, in the proceeding upon which the foregoing opinion of the circuit judge was pronounced. Subsequently, the petitioner filed in the circuit court a plea to the effect that, in fact, no criminal proceedings whatever had ever been instituted in Belgium against him, and that no warrant ever issued, and no depositions had ever been taken in that country. This plea was traversed by the officer having the petitioner in custody, and on a hearing subsequently had before Nelson, J., the warrant of arrest in Belgium, and certain depositions there taken, were produced, whereupon the petitioner was remanded to the custody of the deputy marshal, to be taken for examination before the commissioner who issued the warrant of arrest.

In the Albany Law Journal (volume 18, p. 45), July 20, 1878, the reader will find a carefully prepared and valuable article, from the pen of Judge Spear, on the subject of "Extradition from the United States." The learned writer states the leading statutable provisions, and collects the principal decisions in this country respecting the executive and also the auxiliary judicial functions involved in the delivery, by the United States, of a fugitive criminal to a foreign government, under treaty stipulations. He concludes his paper in these words: "The law, by thus distributing the legal functions to be performed between the executive and judicial departments of the government, secures to the party accused the highest certainty that he will be surrendered to a foreign government only when all the necessary conditions are present. The judiciary cannot surrender him; and the president cannot do it until the judiciary decides that the case is a proper one for delivery, and even then the president may revise and reject that decision. This furnishes ample protection against any abuse of the extradition power, especially when we add that the writ of habeas corpus, as a means of testing the legality of the proceedings, is always available to the party, if sought before his actual surrender and removal from the country."

VAN INGEN (LIVINGSTON v.). See Case No. 8,420.

VAN INWAGEN (SCARLETT v.). See Case No. 12,437.

VAN KIRK (JONES v.). See Case No. 7,500.

Case No. 16,860.

VAN KLEECK v. MILLER et al.

[19 N. B. R. 484.] [1]

District Court, S. D. New York. April 29, 1879.

BANKRUPTCY—INVALID PREFERENCE—CONVEYANCE TO WIFE—ADJUDICATION BY STATE COURT—CONCLUSIVENESS.

[1. Several creditors may, with the aid of their debtor, conspire to get an advantage over other creditors by a voluntary preference, provided the means used are not unlawful, and the preferences are made more than two months before the filing of a petition in bankruptcy.]

[2. A sale by a debtor will not be avoided because the purchaser was aware of the intention of the seller to prefer certain of his creditors by the use of the proceeds of the sale.]

[3. The fact that a wife allows her husband to have and use her money in his own business indefinitely does not affect a claim by her, as against other creditors, after he becomes bankrupt.]

[4. The conclusiveness of an adjudication by a state court as to the distribution of a certain fund under an assignment for creditors is not affected by the fact that this involves a decision as to the legal rights of the parties as affected by the United States bankruptcy law.]

John P. H. Tallman and A. H. Wilkinson, for complainant. O. D. M. Baker, for defendants.

CHOATE, District Judge. This is a suit in equity, brought by the assignee in bankruptcy of the defendant James D. Miller to set aside various transfers and assignments of parts of his estate prior to the filing of the petition in bankruptcy, and to recover from the several defendants the same or their value, or the amounts of money alleged to have been paid to them in fraud of creditors, or in violation of the provisions of the bankrupt law [of 1867 (14 Stat. 517)]. The bill alleges a combination or common design on the part of the defendants to effect the fraudulent and unlawful disposition of the estate, the several portions of which came to the several defendants. Objection was made to what is called by the counsel for the defendants the improper joinder of six separate causes of action, and a motion was made after the proofs were in that he elect which cause of action he would proceed upon, and that the bill be dismissed as to the rest; there being, as it is claimed, an entire failure to prove that the several alleged illegal transfers and payments were made in pursuance of a common design on the part of the defendants; but the disposition made of the case renders it unnecessary to consider this point. A bill is not multifarious, though brought to recover from several defendants different portions of the estate of a debtor, if the alleged illegal transfers were the result of a common purpose on the part of the defendants to dismember the estate. Boyd v. Hoyt, 5 Paige, 65; Platt v. Preston [Case No. 11,219].

The defendants who have answered the bill, and against whom the principal relief is sought, are Alfred Stall, the alleged fraudulent grantee of a farm in the town of Milan; Emily E. Morse, the daughter of the bankrupt, an alleged fraudulent grantee of a house and lot of land in Stanford, Dutchess county; William Vail and Henry Tallmadge former creditors of the bankrupt, to whom it is alleged that he transferred parts of his estate by way of preference; Pamelia Miller, the wife of the bankrupt, to whom it is al-

[1] [Reprinted by permission.]

leged that he transferred, and suffered to be transferred, by means of a levy on execution, parts of his property, either without consideration and in fraud of creditors, or, if there was a consideration in an antecedent debt, by way of an illegal preference; and Daniel W. Guernsey, to whom it is alleged an illegal assignment of a chose in action was made as security for a hundred dollars, without consideration, and fraudulently as to creditors.

The petition in bankruptcy was filed by the creditors of James D. Miller on the 15th of May, 1877. Prior to his bankruptcy, Miller was a farmer, living at Stanford, Dutchess county. He owned a house and lot in that place, on which he lived; a farm in the adjoining town of Milan; a wood lot; a house and lot in the city of Poughkeepsie; some bonds and mortgages and personal chattels; and he had a claim against his son, John H. Miller, for money lent. There was also standing in his name as owner another house and lot in Stanford, which was occupied by his daughter, Mrs. Morse. It had been purchased wholly with funds belonging to her, and the title had been taken in his name at her request. He was indebted to the defendant William Vail, his brother-in-law, in the sum of three thousand dollars; to the defendant Henry Tallmadge, his cousin, in the sum of two thousand dollars. He was liable as maker or endorser on notes used by his son, John H. Miller, in the son's business and for his accommodation, for about ten thousand dollars. He had been married about twenty years, and soon after his marriage received from his wife about one thousand four hundred dollars of her money, no part of which he had ever repaid, and on which he had paid no interest. He had also received on account of his wife during about twenty years the interest on a fund of about three thousand two hundred dollars held by trustees for her benefit, no part of which he had ever paid her. Within a few days before the 8th of February, 1877, he had represented himself to some of his creditors to be entirely solvent, and to be worth fifteen thousand dollars over and above all his debts. Shortly before the same day it became known that his son, John H. Miller, was in financial difficulties, and unable to meet his business obligations. This became known also to the defendant Pamelia Miller, the wife of the bankrupt, and on the 8th of February John H. Miller made a general assignment for the benefit of his creditors to the defendant Guernsey, who is an attorney at law, having an office at Poughkeepsie, but living in the country near the bankrupt, Miller. On that day Guernsey was at Miller's house and there met Miller and his wife, and the defendant Vail. On the same day the bankrupt executed a deed conveying to Mrs. Morse the house and lot which had been purchased with her funds, and the defendant Pamelia Miller joined in the deed to release her dower. On the next day suits were commenced against the bankrupt by Mrs. Miller, Vail, and Tallmadge, to recover their several alleged debts. To these actions the bankrupt interposed no defence. At or about the same time an action was commenced against the bankrupt by another creditor on one of the accommodation notes issued by John H. Miller. The defendant Guernsey was the attorney for the plaintiffs in all these actions. On the 8th of February, Miller transferred to his wife two bonds and mortgages, on which the amount due was one thousand five hundred dollars; the same day, or the next day, other property worth six hundred and forty dollars and fourteen cents; and in the complaint in her action these sums were credited and a balance of five thousand seven hundred and seventy-eight dollars was claimed, made up of one thousand four hundred dollars, with interest from April 1, 1855; divers sums, amounting to four thousand two hundred and sixty-two dollars and fifty cents, loaned between April 1, 1855, and February 9, 1877, of which had been repaid only two thousand one hundred and forty dollars and fourteen cents, this credit being in fact intended for the two bonds and mortgages and other property above referred to. February 24, 1877, the bankrupt transferred his farm in Milan to the defendant Stall for a consideration of five thousand five hundred dollars, which was paid in a bond and mortgage, made payable at Miller's request, to the defendant William Vail, for four thousand five hundred dollars and a note for one thousand dollars. These securities were delivered by Stall to Miller on the 24th of February, when the deed was delivered. The conveyance was made in pursuance of an oral agreement between Miller and Stall made a week or more before that day, but the form of the mortgage, as payable to Vail, was not mentioned until the day of the transfer. Stall entered into possession under his deed, went into the place to live April 2d, and since that time has remained in possession. His deed was not recorded until June 6, 1877. On the 2d of March judgments were entered against Miller in the actions brought by his wife, Vail, and Tallmadge, but, before the judgments were entered, Miller had transferred to Tallmadge in payment of his debt the note for one thousand dollars received from Stall and a note of Mrs. Miller, his wife, for one thousand one hundred and five dollars, the two being together the amount of Tallmadge's claim, and he had also transferred to the defendant Vail the bond and mortgage for four thousand five hundred dollars received from Stall in settlement of Vail's claim, taking back from him Vail's note for one thousand three hundred and twenty-six dollars, the excess of the bond and mortgage over Vail's claim. This note was given to Mrs. Miller in consideration of her giving the note to Tallmadge. On these payments being made known to the defendant Guernsey, he had the judgments in favor of Tallmadge and

Vail satisfied of record. An execution was issued on the judgment in favor of Mrs. Miller, under which a levy was made on the house and lot where Miller lived, and they were sold on the execution and bid in by Mrs. Miller for three thousand dollars, and Miller and his wife have ever since continued to live there as before. On the 24th of March, Miller made an assignment of his interest in the dividend coming from the estate of John H. Miller under the voluntary assignment for the benefit of his creditors—First, to the defendant Guernsey, for the amount of one hundred dollars; and, secondly, to his wife, for the balance of her claim against him; and, thirdly, to another creditor. The amount of this dividend, though not then ascertained, afterwards proved to be one thousand and eighty-two dollars and seventy cents.

The effect of these various transfers and operations undoubtedly was that all the property of Miller available to pay his debts, or that he was possessed of, had gone to his three creditors, Vail, Tallmadge and Mrs. Miller, or been transferred to his daughter Mrs. Morse, and there was nothing left for his other creditors; and I think the testimony tends strongly to show that from the 8th day of February, when these transactions commenced, the defendants Vail, Tallmadge, and Mrs. Miller knew that Miller was unable, in consequence of his son's failure, to pay all his debts, and that these transactions were designed to secure and prefer Vail, Tallmadge, and Mrs. Miller over the other creditors, and that, so far as they severally took part in these operations, they were acting upon this common purpose and design; but so far as the transfers complained of prior to the 15th of March, 1877, were merely transfers in payment and satisfaction of the debts of Miller, there is nothing in the bankrupt law making such preferences unlawful; the same having been made more than two months before the filing of the petition in bankruptcy. There is nothing in the laws of New York forbidding such preferences, nor anything in the laws of the state or of the United States making it unlawful for several creditors, with the aid of their debtor, to conspire or combine together to get an advantage over other creditors by and through such a voluntary preference, provided that the means used are not unlawful, and subject, of course to the preferences being avoided if it shall turn out that within two months thereafter a petition in bankruptcy shall be filed. The evidence undoubtedly tends to show on Miller's part an intent to prefer Vail and Tallmadge, and there is evidence tending to show that they had such knowledge of the condition of his affairs that if the transfers had been within two months of the bankruptcy they would be avoided under Rev. St. § 5128, but this is the utmost that the testimony shows as to the transfers to these defendants. No case is made against them under Rev. St. § 5129, which avoids transfers and payments intended to prevent the property from coming to the assignees, or being distributed under the bankrupt law, or to evade its provisions. This section includes the common case of voluntary conveyances, payments, and transfers to conceal and cover up property, or upon secret trusts for the benefit of the debtor when he is insolvent or in contemplation of insolvency or bankruptcy; but it does not include cases where the real and actual intention is to pay debts, however obnoxious the transaction may be to the provisions of section 5128, as preferences. Now in the present case, all the acts of these two parties in connection with the transaction complained of, as well as those of the debtors in relation to the transfers to these two creditors, tend only to show a purpose to get these debts paid. There is no evidence which would warrant a finding that what these two creditors took they took upon any secret trust, or for the benefit of anybody but themselves, or otherwise than in payment of their claims, and as these transfers to them were more than two months before the filing of the petition the bill must be dismissed as to them.

As to the conveyance of the house and lot to Mrs Morse, it was clearly shown by the testimony that the property had been purchased with her money, and for convenience and at her request the title had been taken in the name of the bankrupt. Nor was this with any design to deceive or defraud creditors. Although the laws of New York may not recognize and enforce such trust as against the party so holding the legal title yet there is nothing in the laws of the state which forbids or makes unlawful, or holds to be in fraud of creditors, the voluntary performance of the obligation to make a conveyance in pursuance of such a trust. When the conveyance is made it rests upon and is supported by a valuable consideration, namely, the money received. But the most unfavorable view that can be taken of the transaction is that it was a preference, for the bankrupt was undoubtedly indebted to Mrs. Morse for the purchase money. If the property is to be regarded as belonging to him, and the transfer having been made more than two months before the filing of the petition, it is not void as a preference, under Rev. St. § 5128. The bill, as to this defendant, must be dismissed.

The claim made against the defendant Stall is that the Milan farm was conveyed to him for a totally inadequate consideration; that it was worth eight thousand dollars, and was sold to him for five thousand five hundred dollars; that he was a party to the combination or conspiracy to divest the bankrupt of his property for the benefit of a few of his creditors; that the conveyance was kept secret, the deed not being recorded till June 6th; and that the transfer was, in fact, fraudulent as against creditors, as being intended to aid the bankrupt in secreting, concealing, and fraudulently disposing of his property.

Stall, the purchaser, undoubtedly knew that Miller was selling this farm because he was in financial difficulties. He was informed by Miller that he would not probably be able, except for a short time, to convey a good title. What took place at the time the deed was delivered was notice to him, probably, that the proceeds of the farm were being used by Miller in paying some of the creditors of Miller, but beyond this I think the evidence does not warrant the conclusion that he knew or had reasonable cause to believe that Miller was intending so to dispose of his property as to exclude any of his creditors from the benefit thereof, or that he was contemplating bankruptcy or insolvency. And even if he was fully aware of the intention of Miller to prefer certain of his creditors by the use of the proceeds of the sale of this farm, that would constitute no ground for avoiding the sale; certainly not as the preferences were not themselves unlawful, as has hereinbefore been held, unless the sale was fraudulent on other grounds. Was the sale, then, fraudulent as not made in good faith, or as being a cover for a secret trust, or as designed to aid Miller to defraud his creditors, or by reason of inadequacy of consideration? Gross inadequacy of consideration is, in itself, very strong evidence of an intention contrary to that which appears on the face of the conveyance. It is a circumstance strongly pointing to an intention to create a secret trust, or to cover up, conceal, and keep from creditors the property of the grantors. But in this case the weight of the testimony is, I think, that Stall gave a reasonably fair price for the farm. Miller was anxious to sell, and Stall knew it. Stall was, in fact, looking for a farm to hire or work on shares, and Miller offered him this farm for five thousand five hundred dollars, and Stall accepted his offer. Miller had put it in the hands of a real-estate broker to sell, and the broker had held it at eight thousand dollars, but found no purchasers. Miller himself had offered it to another party at five thousand five hundred dollars, but he had refused to buy. Persons familiar with the value of land in the neighborhood testified that they considered the price which Stall gave all that it was worth. There was evidence that Miller had represented it shortly before as worth eight thousand dollars, but such declarations by an owner, even if not affected or induced by some motive to exaggerate the value at the time, are of scarcely any weight as evidence. Very few sales of real estate within the last six years would stand if the fairness of the price were to be tested by the prior expectations or declarations of the owner as to the value of the property. There is not the slightest reason to believe from the evidence that the sale was not a real sale as between the parties, or that the land was held by Stall in any way or to any extent for the benefit of Miller, or upon any secret trust whatever. Even if he bought it for a low price, taking advantage of the necessities of Miller, it has been held too often that this is not in itself a fraud to render it necessary to cite authorities. Certainly the inadequacy of price is not proved by the testimony, and if it existed was not so gross as to base upon it any charge of fraud. The failure to record the deed does not affect his title. The deed was not kept off the record in pursuance of any request of Miller. The failure to record it appears to have been accidental, or the mere result of carelessness. The record was not necessary to the passing of the title, nor does the failure to record make the deed void or fraudulent as to creditors. The case is, therefore, unlike those in which, by the law of the state, a conveyance unrecorded or unfiled is conclusively and absolutely void as to creditors, as in the case of an unfiled chattel mortgage by the law of New York. Platt v. Preston, supra. Even an agreement on Stall's part with the bankrupt not to record the deed, or to keep it secret, would, it seems, not make the conveyance void, the object of the bankrupt law not being "to prevent false credits," but to secure "ratable distribution" of the assets of the bankrupt. Sawyer v. Turpin, 91 U. S. 121. The bill must, therefore, be dismissed as to this defendant.

The case against Mrs. Miller, the wife of the bankrupt, as to all property transferred to her more than two months before the filing of the petition in bankruptcy—that is to say, all except the transfer of the dividend coming from the estate of John H. Miller—depends on the question whether the bankrupt was indebted to her to the extent of the property so transferred. If he was so indebted, the transfers were only preferences, and, being more than two months before the bankruptcy, they cannot be impeached under Rev. St. § 5128. Assuming the fact of indebtedness, no different intent on Miller's part or on hers is shown from that which actuated the transactions with Vail and Tallmadge, already fully discussed. The amount of the property so transferred, including that seized on her execution on the 2d of March, is claimed by the plaintiff to have been in value somewhere from five thousand six hundred and fifty dollars to six thousand eight hundred and fifty dollars. The amount of the judgment recovered by her, after crediting two thousand one hundred and forty dollars of this property, was five thousand seven hundred and ninety-eight dollars and thirty-four cents. While a judgment suffered by default by a bankrupt is not conclusive on the assignee, either as to the fact or amount of indebtedness, where the question is of an intended fraud against creditors (Humes v. Scruggs, 94 U. S. 22), yet it is obvious that if this judgment was properly rendered, upon the facts as they actually existed, there was an indebtedness exceeding the amount of the property transferred to Mrs. Miller. The payment of the sums of one thousand four hundred dollars and three hundred and forty

dollars of her money to her husband soon after their marriage, and the subsequent receipt by him of the income of the fund held in trust for her benefit during a period of nearly twenty years, were proved, not only by the testimony of the bankrupt and his wife, but by other disinterested and unimpeached witnesses. There was no evidence tending to control the testimony of the bankrupt and his wife that for these original payments he promised to give her notes whenever she should request it, nor was there any evidence tending to control their testimony that none of these moneys had ever been repaid. There was no evidence from which it could be justly inferred that she had ever given these moneys, or any of them, to him, and I do not doubt that, under the laws of New York, she was, upon the proofs here exhibited, entitled to recover them, with interest, as moneys lent. Her claim was not, in my judgment, seriously affected, or its bona fides impaired, by the statement made by her, that her husband owed her one thousand four hundred dollars. Taking her whole testimony together, and making proper allowances for her age and unfamiliarity with business matters, and especially considering the proof adduced wholly independently of her testimony, it is evident that in this statement she referred to the sums first loaned, and that her testimony is not to be taken as a denial or disproof of any indebtedness for interest or subsequent loans to him. The facts that no note was ever given, and no request for repayment made, till he got into difficulty on account of his son's failure, are not, in my judgment, considering the relations of the parties, circumstances of sufficient weight to overcome the evidence of promises to repay, proved as to a part of these moneys, and implied by the law from the fact of their receipt as to the others. Until that event there was no occasion for taking security or insisting on payment. The case of Humes v. Scruggs, ut supra, is relied on by complainant's counsel as sustaining his position, that, if a wife allows her husband to have and use her money in his own business indefinitely, she cannot then claim it as against other creditors after he becomes bankrupt. The case does not sustain the point. The gist of that decision was that a conveyance by a husband to a wife, even several years before the commencement of bankruptcy proceedings, of property many times exceeding in value the indebtedness of the husband to the wife, will be held to be a fraud upon creditors, if made when he is hopelessly insolvent. In the particular case before the court the property was in value five times the amount of the debt, and the husband was, at the time of the conveyance, as his wife well knew, hopelessly insolvent. Under such circumstances it was entirely clear that the conveyance was a mere cover under pretence of paying a debt due the wife for a voluntary settlement on her which the husband's financial circumstances rendered fraudulent, or else for a secret trust for his benefit in fraud of his creditors. The point of the decision is in these words of the court: "If the husband in a state of absolute bankruptcy conveys to his wife property fairly worth fifteen thousand dollars to twenty thousand dollars, with no present consideration passing, but with a recital of past indebtedness to her to less than a fifth of its value, the transaction is fraudulent and void as to creditors." In repelling the suggestion as unfounded that the wife's money had been invested in the purchase of the property so transferred, the court used this language: "If the money which a married woman might have had secured to her own use is allowed to go into the business of her husband, and be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is used for a series of years, there being no specific agreement when the same is purchased, that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. He cannot retain it until bankruptcy occurs, and then convey it to his wife. Such conveyance is in fraud of the just claims of the creditors of the husband." This language is not to be deemed as asserting the doctrine that the wife whose moneys are so received by the husband ceases to be his creditor for the moneys so received, or forfeits, by what she has allowed the husband to do with the money, any of her rights as creditor in case of bankruptcy. The particular question under discussion was, whether, on the facts stated, a trust in the land itself, in favor of the wife, could be implied as against creditors, and this trust was held not to be established. The case does not establish any difference in the position of a bankrupt's wife as a creditor from that of any other creditor, nor does it establish the doctrine that the act of the wife or any other creditor in aiding the debtor to create or keep up a false credit, without any active fraud or misrepresentation to creditors,—that is, by the mere suffering or permitting him to use money or property as his,—is a fraud that the bankrupt law takes notice of as impairing the rights of a creditor, or his capacity to take and hold property in payment of his debt, even though it be a known preference, provided he obtains it more than two months before the bankruptcy. There is nothing in this case cited inconsistent with the case of Sawyer v. Turpin, cited above, which distinctly holds that no such doctrine is recognized by the court as the result of the bankrupt law. On the grounds, therefore, that these preferential transfers to Mrs. Miller were sustained by a valid consideration in an existing indebted-

ness, and were made more than two months before the filing of the petition, this part of the complainant's case against her wholly fails.

There remains to consider the transfer to Mrs. Miller on the 24th of March of the dividend coming from John H. Miller's estate. This was within less than two months before the bankruptcy, and might be impeached as an unlawful preference in this suit but for the proceedings in respect thereto had in an action in the state court, in which both Mrs. Miller and this complainant the assignee in bankruptcy, were parties. The material facts in relation to that other proceeding are that on the 25th of August, 1878, six months before this suit was commenced, the defendant Guernsey, as assignee of John H. Miller under the voluntary assignment, commenced an action in the supreme court of the state of New York against John H. Miller and his creditors entitled to the benefit of that assignment, for the settlement of his accounts and the distribution of the assigned fund. The complainant, as assignee in bankruptcy of James D. Miller, was made a party defendant, and appeared, put in an answer, and claimed the dividend belonging to James D. Miller, as his assignee in bankruptcy. Upon the trial it appeared that an earlier assignment had been made by the bankrupt to his wife, Mrs. Miller, and thereupon, by direction of the court, she was made a party defendant, and after she came in and put in an answer, claiming the dividend as belonging to her under the assignment from the bankrupt dated March 24, 1878, a further hearing was had, and the assignee in bankruptcy, complainant herein, and Mrs. Miller litigated the question of the validity of Mrs. Miller's assignment, this complainant insisting that it was void on the same grounds alleged and insisted on in this suit. After hearing the cause, that court decided and entered a decree sustaining the validity of her assignment. This complainant appealed from that decree to the general term of the same court, and the general term reversed the decree, holding that the assignment to Mrs. Miller was void as a preference, and a decree was entered accordingly in favor of this complainant. It is now insisted by the complainant that the state court had no jurisdiction to hear and determine this matter in controversy between himself as assignee in bankruptcy and this defendant, Mrs. Miller, on the ground that this court only has jurisdiction to hear and determine that question, and that all that the state court could properly do in the premises was to remand the fund to this court for the decision of this question. There is, however, no foundation for this claim. That suit was one of which the state court had jurisdiction. It had also jurisdiction of the parties. It was obliged, in the due course of its proceedings in that suit, to determine which of the two parties before it was entitled to receive a certain portion of the fund to be distributed. Each claimed it. Their titles to it were conflicting. The mere fact that in the determination of this question it became necessary to pass upon the legal rights of the parties as affected by the provisions of the bankrupt law did not take away or impair the jurisdiction of the court, or prevent it from deciding to which of the two parties the dividend belonged. The laws of the United States, so far as they affect the rights of parties litigant in suits tried before a state court, are necessarily taken notice of and applied by those courts as are any other laws affecting those rights and binding on the parties. It is only very recently that the fact that a right arising under a law of the United States has been by act of congress made the ground for giving federal courts jurisdiction of actions to enforce such rights, and this circumstance has been only made by the act the ground for conferring this jurisdiction on the federal courts concurrently with the state courts. St. 1875, c. 137, § 1 [18 Stat. 470]. In many matters the bankrupt law gives the federal courts exclusive jurisdiction, but the case pending in the state court now in question was not one of them. Nor is there any statute of the United States which provides that the federal courts shall exclusively determine the question, however it may arise, whether an alleged transfer or payment is a fraudulent preference under the bankrupt law. The statute of 1874, c. 390, § 2 [18 Stat. 178], amending the bankrupt law, has no bearing on the question, because, whatever effect that statute may have in restricting the jurisdiction of the state courts, it applies only to actions for collection of the assets of the bankrupt. Brewers' & Maltsters' Ins. Co. v. Davenport, 10 Hun, 264; Olcott v. Maclean, Id. 277. The complainant, therefore, having in a prior suit litigated this very question with this defendant, and having there obtained a judgment in his favor, cannot maintain this bill for the same relief. See In re Dakin [Case No. 3,539]. And as to the defendant Pamelia Miller this bill must be dismissed, but without prejudice to any rights accrued or to accrue in said suit in the state court.

No case is made out against the defendant Guernsey. In his answer he disclaimed all interest in the dividend on John H. Miller's estate under the assignment to him, and upon the proofs it appears that in the suit above referred to he had, by his complaint and other proceedings, disclaimed and effectually estopped himself from claiming any such interest. Therefore this suit, as against him, was unnecessary, and the bill must be dismissed.

The defendant Martha R. Stall, wife of Alfred Stall, seems to have been joined only in order that she may be decreed to unite

with her husband in a reconveyance of the Milan farm. The case against her fails, as the conveyance to Alfred Stall is not to be set aside.

As to all the answering defendants the bill is dismissed, with costs.

Case No. 16,861.

VAN KLEECK et al. v. THURBER.

[1 Pa. Law J. 402.]

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

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—ACTS OF BANKRUPTCY—FRAUDULENT ARREST—DISMISSAL OF PETITION.

1. It seems that the clause in the first section of the bankrupt act which makes it an act of bankruptcy for a debtor to "willingly or fraudulently procure himself to be arrested" extends to the case of a debtor who, in the state of New York, willingly or fraudulently procures himself to be arrested by a creditor, although he is not arrested, the laws of the state forbidding arrests in action founded on contract.

2. To render an act of preference an act of bankruptcy, it is not necessary that it should be shown to have been spontaneous.

3. A petition by a creditor for a decree of bankruptcy against his debtor will not be dismissed on the ground that a suit at law has been commenced and prosecuted to judgment by the petitioning creditor against the debtor since the filing of the petition.

In bankruptcy. The petition in this case charged the respondent [Ira L. Thurber] who was a retail merchant, with having on the 27th day of June last, in contemplation of bankruptcy, confessed a judgment to Isaiah Thurber for $1,236 56, besides cost, for the purpose of giving him a preference or priority over the other creditors of the respondent. The answer of the respondent set forth that a suit had been commenced against him by the said Isaiah Thurber, and that having no defence to the action he had given a plea of confession: but he denied that by so doing he had acted in contravention of the bankrupt act. Depositions had thereupon been taken, by which it appeared that on being pressed for payment by the petitioning creditors [W. H. Van Kleeck and E. Van Kleeck], to whom he owed about $1400, and who resided in New York, he went from his residence in the county of Owego to Utica, where his father resided, and put up at his father's house. That while there a suit was instituted against him, and that on the same day he gave a plea of confession comprising a debt owing by him to his brother-in-law, as well as the debt which he owed to his father; and containing a judgment at any time after the entry thereof. The judgment in question was entered on the same day. Many circumstances were shown tending strongly to prove that the suit was instituted with the full knowledge and consent of the respondent, and was in fact a concerted proceeding between his father and brother-in-law on the one side, and himself on the other. It appeared also that on the first day of August, and a few days after this petition was filed, a suit was commenced by the petitioners against the respondent for the debt set forth in their petition, in which suit a judgment had been obtained, on which a fieri facias had been issued. But in the mean time all the respondent's property which was subject to execution had been sold on an execution issued on the judgment above mentioned in favour of the respondent's father and brother-in-law, and the proceeds fell short of satisfying the judgment. It was clear from the evidence that at the time the respondent confessed this judgment he had no well founded hope of being able to continue his business, and he soon afterwards, in fact, abandoned it.

Mr. Doolittle, for petitioning creditors.
Mr. Beardsley, for respondent.

CONKLING, District Judge. The prayer of the petition has been zealously and ably resisted by the counsel for the respondent, on the grounds (1) that the mere confession of a judgment to a bona fide creditor, even though done in contemplation of bankruptcy, and for the purpose of securing a preference or priority to such creditors, was not an act of bankruptcy; (2) that the act charged against the respondent in the present case was not voluntary, and that for this reason it did not constitute an act of bankruptcy; and (3) that the petitioning creditors having proceeded at law against the respondent after filing their petition in this court, had thereby forfeited their right further to prosecute their petition, and that upon this ground the petition ought to be dismissed.

The first section of the bankrupt act of 1841 [5 Stat. 440] declares that certain descriptions of persons, under certain specified circumstances, may be compulsorily declared bankrupt, whenever any such person "shall depart from the state, district, or territory, of which he is an inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested; or shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands, or tenements, to be attached, distrained, sequestered, or taken in execution; or shall remove his goods, chattels, and effects, or conceal them to prevent their being levied upon, or taken in execution, or by any other process; or make a fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods or chattels, credits, or evidences of debt."

I agree with the respondent's counsel that no person can lawfully be declared a bankrupt in invitum, who is not proved to have committed some one of the acts above described. I fully acquit the respondent of any intention which independently of the bankrupt law could be pronounced fraudulent. Fearing that he should be unable to pay all that he owed, it was natural, and may not have been immoral for him to desire to secure his

relatives in preference to his other creditors. But it appeared to me entirely clear on the argument, and a deliberate examination of the evidence since has only strengthened my conviction, that the suit in which the plea of confession was given, was commenced with his knowledge and assent, express or implied, and in consequence of the information which he voluntarily communicated to his father for the express purpose of having measures taken for his security. It is unnecessary to refer more particularly to the circumstances attending the transaction. They all point to one conclusion and afford no colour for any other. Did not the respondent then "willingly procure himself to be arrested," according to the just import of this clause in the bankrupt act? It is true there was actual arrest. The suit was commenced by the service of a declaration, without any antecedent process. This mode of instituting suits is authorized by the laws of this state, and is the mode as I understand, now usually resorted to. The service of a declaration is just as effectual for the purpose of bringing the defendant into court, and enabling the plaintiff to obtain a judgment against him, as the service of a capias generally was. The action in this case being founded on contract, the laws of New York moreover forbade the arrest of the defendant. If then the defendant willingly or fraudulently procured the suit to be commenced, did he not do precisely what is meant by the phrase in the bankrupt act, "willingly or fraudulently procure himself to be arrested?" It cannot be doubted that this clause embraces arrests on mesne process, if indeed it does not relate exclusively to such arrests. But the fact that such arrests cannot be made in this state, is but the accidental effect of recent local legislation. In most of the other states it is otherwise. To say, therefore, that if a debtor procures a suit to be commenced against him in a state where this can only be done by an arrest, is an act of bankruptcy; and that to do this in a state where no arrest can lawfully be made, is not—would be to make a wide distinction between acts, in all other respects, in substance and effect, identical; and, what is of the last importance to consider, would moreover, in a most essential particular, destroy the uniformity of the bankrupt act. It was insisted that this part of the act ought to be strictly construed. This may be admitted: but it will not thence follow that the obvious intention of the legislature is to be disregarded, even though the words of the act, literally interpreted, may fall short, in significancy of what they were clearly intended to import. It is worthy of remark, moreover, that the clause in question appears to have been copied verbatim from the English act, 1 Jac. I. c. 15, § 2. In England, it was literally significant of all that was intended; and the reasonable presumption is that congress designed to use it in the like comprehensive sense, though it was probably adopted without adverting to the fact that in this state there could in general be no arrest of the person of the defendant in a suit against him for the recovery of a debt. I am strongly inclined to the opinion, therefore, that in order to effectuate the evident intention of the legislature, and to render the bankrupt act "uniform" in its effect, the clause in question ought in this state to be so construed as to embrace the institution of a suit by the procurement of the debtor, in the mode and form prescribed by the local law, although this law does not permit an actual arrest. But there is another ground on which so far as the objection now under consideration is concerned, I am of the opinion that the respondent may be adjudged to have rendered himself amenable under the act. I did not understand his counsel to deny that the first and second clauses of the second section of the act were to be considered as explanatory of that part of the first section which I have already quoted, nor that the acts of preference therein specified were acts of bankruptcy. Such is the view now taken of these clauses by the national courts, so far as I am informed, and in this light they seem to have been viewed especially by Mr. Justice Thompson in the case of Wakeman v. Hoyt [Case No. 17,051]. This first clause is as follows: "That all future payment, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser or surety, or other persons, any preference or priority over the general creditors of such bankrupts—shall be deemed utterly void, and a fraud upon this act." Now I think nothing can be clearer than that the intention here was to forbid the giving of preferences in contemplation of bankruptcy of every form. The studious enumeration upon particular modes of doing so, is sufficiently indicative of this intention, to say nothing of the improbability and inconsistency of a different intention. It would have been very remarkable therefore, if, after all, the legislature had failed to use words which by fair interpretation, would embrace so common and so effectual a mode of giving preferences as that of voluntarily confessing judgment. And yet, the counsel for the respondent strenuously insisted that this was a case not provided for. He denied that a judgment was a "security;" and especially that it was so in the present case, because the defendant had no lands on which it could become a lien. If he had no lands, it was an accidental fact which may have rendered the security less effectual; but which in my judgment can have no influence upon the decision of the case. Nor have I any doubt that a judgment is to be deemed a security within the act; and especially where, as in this case, defendant by the express stipulations surrenders his legal right to a stay of execution. The judgment was given and obtained for the sole and avowed purpose of securing a priority, and has been effectively used for this purpose, by the sale

on execution of all the property of the defendant subject to execution, and by having been made the foundation of a creditor's bill to reach the defendant's rights in action.

2. But it is insisted that the security was not voluntarily given. I think the evidence fully warrants the opposite conclusion. The fact that within a few days after the respondent had made an appointment by correspondence with the petitioning creditors to meet them for the purpose, if possible, of effecting some satisfactory arrangement with them relative to the debt he owed them, he went to the residence of his father and communicated his situation to him and his brother-in-law—taken in connection with the incidents which followed—goes far to stamp him with the character of an original and voluntary actor in the whole transaction. It is said that a man who is sued for a debt which he really owes may lawfully give a cognovit, because in such a case he would be presumed to have acted, not voluntarily, but under the coercion of a suit, and for the purpose of saving costs. This may perhaps be admitted in reference to a suit commenced against the will of the defendant; though even in such a case, if it should appear that other creditors were prosecuting their claims simultaneously, there would be strong ground for holding that the debtor had no right thus to lend his aid to the one creditor in his effort to obtain a priority over the others. I repeat, however, that I consider the conclusion from the evidence to be irresistable, that the giving of the cognovit was but a part of one of the same transactions, to which the respondent is to be considered as having virtually been a party. In substance and legal effect, I deem it exactly equivalent to the execution by the respondent of a bond and warrant of attorney; and indeed it is not to be doubted, from the evidence in the case, that if the legal gentleman employed by the plaintiff, had advised this latter course, it would have been adopted. But is it necessary in order to bring an act of preference within the first clause of the second section of the bankrupt act, that the preference should appear to have been given voluntarily, or in other words, without threat, or solicitation on the part of the creditor? This is a very important question; because if this otherwise highly salutary provision is to be thus limited by construction, it is clear, I think, that the facility with which it may be evaded, is likely to render it little better than a dead letter. It is important to remark that the decisions in the English courts upon this point, which are supposed by the counsel for the respondent to afford countenance to the objection I am now considering, are not founded on any express provision in the English bankrupt acts, forbidding preferences, and declaring them fraudulent; like that in the American act; but that the doctrine established by these decisions has been deducted by the courts from the general spirit and design of the bankrupt laws. It was natural therefore, and in accordance with the cautious and commendable spirit which so strongly characterises the adjudications of the English courts, that they should limit this doctrine in the manner they have done: though even in England this limitation is subject to very material exceptions and qualifications. See, amongst other cases, Thornton v. Hargreaves, 7 East, 544; Linton v. Bartlet, 3 Wils. 47, cited in Cowp. 124. But congress, in expressly adopting the general principle, condemnatory of preferences, have not thought proper, in terms at least, thus to limit it; and my opinion from the beginning has been, that the provision as it stands, ought to be literally interpreted. I have nevertheless felt trammelled by the course of decision in the English courts to which I have referred; and while upon the one hand I have hesitated to disregard them, on the other hand, I have been careful not to adopt them as a rule of decision—thus leaving the question open in this court for further and more mature consideration. I am at length however, happily relieved in a great measure, from the responsibility of deciding it. In the case of Wakeman v. Hoyt, already cited, it expressly appears from the report, that the security, the giving of which was charged as an act of unlawful preference, was given at the pressing instance of the creditors by whom it was received—and this circumstance appears to have been considered immaterial by Mr. Justice Thompson, who decided that the giving of the security in question was an act of bankruptcy. And in the case of Arnold v. Maynard [Case No. 561] the precise question now under consideration was one of the questions adjourned for final decision from the district court to the circuit court for the district of Massachusetts; and the decision of the latter court was, that it makes no difference under our act, whether the preference imputed to the debtor as an act of bankruptcy was spontaneous on his part, or was induced by the request or demand of the creditor.

3. It remains to inquire whether the petition ought to be dismissed on the ground that, a few days after it was filed, the petitioners commenced a suit at law against the respondent and have prosecuted the same to judgment and execution. The only authority cited in support of this objection is that of Ex parte Lewes, 1 Atk. 154. Upon looking at the report of the case, I find it consists only of the brief note read by the counsel at the argument, from, I believe, Eden on Bankruptcy. In that case it would appear that the petitioning creditor, after suing out a commission of bankruptcy, had imprisoned his debtor in a suit at law brought to recover his debt; and the decision was that the debtor should be discharged from such imprisonment. But the chancellor is reported to have said that, if the petitioning creditor "were to elect to proceed at law, the commission must be superseded;" and it is upon this remark that the counsel for the respondent rested his objection. The foundation, it will readily be seen, is but a slender one. I have considered it my duty

nevertheless to examine the point, and have become well satisfied that I have no right to dismiss the petition on this ground. I have been able to find no instance in which this has ever been done; while I have met with several cases from which it is plainly inferable that no such practice exists in England. The practice is (as indeed was done in the very case relied on) not to arrest the proceedings in bankruptcy, but to restrain the petitioning creditor, when necessary to prevent injustice, from proceeding at law. Thus, in the case Ex parte Bozannet, 1 Rose, 181 (see, also, 1 Henly, Bankr. 114), in which the petitioning creditor after suing out a commission of bankruptcy took out execution against the debtor, and seized his goods, Lord Elden directed the goods to be restored. In Burnaby's Case, 1 Strange, 653, it was held that a creditor who had his execution could not petition for a commission of bankruptcy, and the commission was superseded for this reason: but it was done exclusively on the ground that having the body of the debtor in execution is a satisfaction of the debt. In the case of Cohen v. Cunningham, 8 Term R. 123, even this decision was strongly questioned, and was supposed by the counsel for the plaintiff to have been overruled by Burchall's Case, 1 Atk. 143. The court admitted that these cases were apparently contradictory; but considering the doctrine of Burnaby's Case to be sound, endeavoured to reconcile the two cases by supposing that in Burchall's Case the debtor might possibly have been taken in execution after the commission was issued—thus conceding that in such case (which is evidently stronger than the present) the commission could be sustained. It is clear, therefore, that this objection cannot prevail. Where the petitioning creditor chooses to resort to a collateral remedy by suit at law from abundant caution, or from whatever other motive, doubtless the court may, upon an application for that purpose, determine, according to the circumstances of the case, whether, and to what extent, he shall be allowed to prosecute it, and whether the costs incurred by him shall, in the event of a decree of bankruptcy, be paid out of the estate of the bankrupt. A decree of bankruptcy must be entered.

VAN LEAR (DODGE v.). Case See No. 3,956.

Case No. 16,862.

VAN LIER v. DORD.

[Betts' Scr. Bk. 214.]

District Court, S. D. New York. April 8, 1851.

SHIPPING — ILLNESS OF MASTER — LIABILITY OF OWNER FOR MEDICAL ATTENDANCE.

The owner of a sea-going vessel is liable for the expenses of medical attendance rendered the master on board the vessel in a sickness incurred in her service. The master having been attacked with cholera in port, before the vessel was unladen, and having died on board, *held*, that the physician could recover from the owner a reasonable compensation for his attendance on the master during that illness.

[This was a suit by Martinus A. Van Lier against Claudius Dord, owner of the brig Palmetto, to recover for medical services rendered to the master of the brig.]

BETTS, District Judge. E. H. Johnson, the master of the brig, came into this port in command of her, in the month of August, 1849. This is her home port. It was not proved that this was the residence of the master. His wife was here at the time, but lodged at a hotel. The master, whilst in command of the brig, was taken sick with the cholera, and was attended on board the vessel by the libellant, a regular physician of the city. The disease was very evident, and the attendance of the libellant was assiduous, he having staid on board one night with the patient, who lived two days and one night. The physician called in to consult with the libellant stated the case was very critical, and that the services of the libellant were worth $50. A part of the crew were on board the vessel, but it did not appear whether her cargo was discharged or not.

The only point made in the case for the defendant was, that the ship or owner is not by law responsible for the cure of the master, taken sick on board her, and in her service. This point was fully settled by Judge Story, in the case of The George [Case No. 5,329], and he insisted that the rule of the maritime law in respect to the cure of seamen embraced the master equally with the crew. I find no other decision in which the precise question arose. The doctrine as applicable to seamen meets the approbation of commentators generally (Curt. Merch. Seam. 108, and the foreign codes cited; Abb. Shipp., by Perkins, 259, note 1; 3 Kent, Comm. 184); and it seems a fair sequent to the privilege in respect to them, that it should extend to all concerned in the navigation and preservation of the ship and cargo. The reasonable presumption that seamen make their contracts with a view to this privilege as part of their compensation ought to embrace the master equally with the crew, and if it is not intended he should be placed on the same footing with the sailors the owners may easily provide for the exception by express agreement with him. The right is not limited to the service of seamen abroad. It is enforced in their favor in their home ports also. Reed v. Canfield [Case No. 11,641].

Without entering into a discussion of the general principles upon which the allowance is founded in the maritime courts of commercial nations, I shall, until higher authority is produced against the allowance, follow the views of Judge Story, and hold the libellant entitled to be paid for his attendance and the medicine furnished the master by the

owner. The value of this upon the evidence is at least $50.

Decree for $50, with interest from Sept. 5, 1849, the time the suit was commenced, and costs.

Case No. 16,863.

VAN MARTER v. MILLER et al.

[15 Blatchf. 562; 4 Ban. & A. 124.] [1]

Circuit Court, N. D. New York. Feb. 8, 1879.

PATENTS — CONSTRUCTION OF CLAIMS — TUBS FOR DISTILLING OILS.

1. The reissued letters patent granted to Barton P. Van Marter, August 17th, 1869, on the surrender of the original letters patent granted to him, January 19th, 1869, for an improvement in tubs for distilling essential oils, in claiming "the cover, when provided with the rubber ring, substantially as described," claim the arrangement only when the rubber ring is located between the cover and the ends of the staves.

[Cited in H. W. Johns Manuf'g Co. v. Robertson, 60 Fed. 905.]

2. The construction of the claim narrowed, in view of the state of the art.

[Cited in Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 30; Westinghouse v. New York Air-Brake Co., 59 Fed. 596.]

3. The claim does not cover a device in which a rim is inserted within the tub a short distance below the top of the staves, and is fastened to the inner sides of the staves, and the rubber packing is placed upon such rim.

[This was a bill in equity by Barton P. Van Marter against J. Horton Miller and others to restrain the infringements of certain letters patent.]

C. W. Smith and James A. Allen, for plaintiff.

J. Welling, for defendants.

WALLACE, District Judge. This is an action for the infringement of a patent granted to the complainant, January 19th, 1869 [No. 81,115], and reissued August 17th, 1869 [No. 3,612], for an improvement in tubs for distilling essential oils. In a former suit brought in this court upon the patent [case unreported] it was decided by my predecessor, that the complainant's device was a patentable improvement, and was not anticipated by the devices theretofore used, so far as appeared from the proofs in that case. It was not necessary, however, for the purposes of that case, to determine the precise scope and limitations of the several claims of the patent, and this was not attempted. It will be necessary, in this case, to define them with precision.

In construing a patent, it is, first, pertinent to ascertain what, in view of the prior state of the art, the inventor has actually accomplished, and, this having been found, such a construction should be given as will secure the actual invention to the patentee, so far as this can be done consistently with giving due effect to the language of the specification and claim.

The improvement contemplated by the patentee consists in the employment of several devices, some of which it is not necessary to refer to now, because their consideration is in no way involved in this case. The particular improvement now in question was intended to remedy the difficulties experienced in filling and emptying the tub with the plant during the process of distilling, and also to obtain a more efficient joint, to prevent the escape of the steam during the distilling process.

In the tubs formerly used, the top of each tub was closed by a head similar to a barrel head, but which had an opening and cover considerably less in diameter than the head, and which was some two feet in diameter, through which the operator was obliged to pack and remove the plant. This was a tedious operation, it being necessary that a man should get into the tub and arrange the plant as passed in through the opening, and after distillation, the straw was slowly removed by a hook. To render the opening, when closed, steam tight, the cover, when inserted, was coated with a paste which closed the joint, and was strongly fastened in its place. During the process of distilling, the steam dissolved the paste and escaped through the seam in the opening, more or less. To remedy these difficulties, the patentee proposes to so construct the tub as that the cover will constitute the entire top of the tub, and be readily removed from, or adjusted to, the sides, at the will of the operator, and to employ a "rubber ring between the cover and the upper ends of the staves, by means of which, when pressure is applied to said cover, a steam tight joint will be produced."

Others, before the patentee, had used the tubs with covers extending over the entire top of the tub, the ends of the staves being bevelled, and the edges of the cover bevelled, also, to correspond. With some of these constructions a paste was applied to cover the seam; with others canvas was inserted in the seam; and one tub was used with a thin rubber covering extending over the entire inner face of the cover.

The operation of these various contrivances was more or less satisfactory, but none of them presented such an efficient and convenient apparatus as the complainant's. The advantages obtained by the complainant are thus summarized by Judge Hall: "The placing of india rubber packing upon that part of the cover resting upon the upper ends of the staves of the tub, thus allowing the upper head formerly used in the tub to be entirely removed, and thereby facilitating the removal of the charge after distillation, and also enabling the heavy pressure required to make the joint steam tight to act directly upon the

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

ends of the staves, as the portion of the tub which can best resist it, was a very decided improvement."

While, undoubtedly, the complainant effected a better organization of the distilling tub, mechanically, than was found in those theretofore used, it is somewhat difficult to discover what there was of invention or patentable novelty in what he did. There was nothing new in employing a cover which constituted the entire head of the tub; nor was there in employing rubber packing to make a joint steam tight, because that was a well-known expedient. There was nothing involving invention in the means employed to fasten down the cover during distillation, and this is not even contended for in this case. The patentee employed rubber packing in a seam between the ends of the staves and a cover extending over the entire tub, when others had employed paste or canvas. Upon the authority of the former case, this is to be considered as invention, but it is invention which resides within very narrow boundaries.

Turning to the language of the description in the patent, the location of the rubber ring between the cover and the ends of the staves is treated as of controlling importance, and is uniformly referred to as between the cover and the ends of the staves. However the mechanical fact be, it seems clear, that the patentee regarded it as indispensable to the efficiency of his device, that the rubber ring should be located between the cover and the ends of the staves constituting the sides of the tub. His experts concur in this opinion, and the opinion of Judge Hall in the former case brought upon the patent, assumes that this location is of primary importance, as enabling the pressure required upon the cover to make it steam tight, to act upon the ends of the staves, as the strongest resisting point. In that case, the infringing device substantially appropriated this location of the rubber ring. The testimony of the complainant himself, given upon that trial, concedes that the rubber ring must rest, to some extent, upon the ends of the staves, to constitute an infringement.

The defendants here have inserted a rim within the tub, a short distance below the top of the staves, fastened to the inner sides of the staves, and upon this have placed the rubber packing. There is no difference in principle, whether the rim is fastened into the staves by mortising, or by nails, or is supported by brackets. By this arrangement the cover of the tub, when closed, is not supported by the ends of the staves, nor is the pressure required to hold down the cover resisted by the ends of the staves. Evidently, it requires no invention to substitute the defendants' construction for that of the complainant's, and the defendants have probably appropriated all the practical advantages of the complainant's device. This, however, does not suffice to make them infringers. They escape because the complainant's improvement resides rather in the excellence of his mechanical construction than in the invention as conceived by him and as secured to him by his patent; and, while the defendants are not permitted to appropriate the invention, they are at liberty to avail themselves of anything else found in the complainant's device.

If the complainant had been the first to discover the utility of rubber as a steam packing, or the first to utilize the entire head of the tub as a cover, in distilling tubs, or even the first to apply rubber as a steam packing in a distilling tub, so that the entire head of the tub could be used as a cover, he would be entitled to a more liberal construction of his patent than is now accorded; but, even then, it would be difficult to construe the language of the specification so as to secure to him such an invention. As it is, the only claim which can be sustained is the one for "the cover when provided with the rubber ring, substantially as described," that is, when located between the cover and the ends of the staves.

The bill must be dismissed.

VAN METER v. MITCHEL. See Cases Nos. 16,865 and 16,865a.

VAN METER (RICHARD v.). See Case No. 11,763.

Case No. 16,864.

VAN METRE v. MITCHELL.

[See Case No. 16,865.]

Case No. 16,865.

VAN METRE v. MITCHELL.

[2 Wall. Jr., 311;[1] 7 Pa. Law J. 115; 4 Pa. Law J. 111.]

Circuit Court, W. D. Pennsylvania. Oct., 1853.

FUGITIVE SLAVES—"HARBOURING" AND "CONCEALING"—ACTION OF DEBT FOR PENALTY.

1. A law of congress enacts, that if any person shall harbour or conceal a fugitive from labour after notice that he or she is so, such person shall forfeit and pay $500 to be recovered by action of debt; saving moreover to the owner of such fugitive a right of action on account of the injuries, &c.

2. "Notice" here means knowledge, and "harbouring" means entertaining or sheltering a fugitive with the purpose of encouraging him in his desertion of his master; with the purpose to further his escape, and to impede and frustrate the master's reclamation of him. "Harbouring" is not here synonymous with "concealing" used in the same phrase with it, and there may be harbouring without any concealment.

3. Under this act, if the plaintiff sues in debt for the penalty of $500, which it gives for illegally harbouring and concealing, he may recover it upon proof of such harbouring or conceal-

[1] [Reported by John William Wallace, Jr., Esq.]

ment, irrespectively of any proof of actual damage to himself. But if he brings case "on account of the injuries," for which the act saves a right of action, he can recover only to the amount of actual damage, which he shows he has suffered.

[Cited in Oliver v. Weakley, Case No. 10,502.]

4. The court makes some remarks upon conscience, and declares perverse conscience to be no excuse for violating the laws of the land.

The constitution of the United States declares (article 4, § 3) that "no person held to service or labour in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation thereof, be discharged from such labour or service, but shall be delivered up on claim of the party to whom such service or labour may be due"; and a law of congress (February 12th, 1793, § 3 [1 Stat. 302]) passed to give effect to the provision of the constitution, enacts that when a person held to labour in any one of the United States, shall escape into any otner of them, the person to whom such labour is due, or his agent, may seize or arrest him or her. It then prescribes a mode in which the reclamation is to be made, and enacts (section 4) that any person who shall knowingly and willingly obstruct or hinder such claimant in so seizing or arresting such fugitive, or shall rescue the fugitive when so arrested, or shall harbour or conceal such person after notice, that he or she was a fugitive from labour, shall, for either of the said offences, forfeit and pay the sum of $500 to be recovered by action of debt; saving moreover to the person claiming such labour or service his right of action, for or on account of the said injuries, or either of them. Under this statute two suits of different plaintiffs and defendants were tried in this circuit; one, some time since, of debt for the penalty of $500; the other, some terms ago; now tried a second time, the jury not having agreed on the former trial, an action on the case, on account of the injuries for which the last clause above quoted saves a right of action. Both cases and all three trials are reported here in connection. In the first case (Van Metre v. Mitchell) the negro Jared and another negro ran away from their master in Virginia, and came without stopping to the defendant Mitchell, in the town of Indiana, and county of that name, in Pennsylvania. Why they made their way to that place, or by whom they were directed to make application to the defendant, did not appear. But there, as in a few other parts of Pennsylvania, it was matter of common knowledge—though not perhaps capable of the clearest proof—that fanatics, "friends of humanity," were banded together under professions of conscience and philanthropy, and vows of propagandism to disregard the constitution and laws of the country, which secure to our Southern citizens a right to follow and reclaim their runaway slaves. A regularly organized association existed there, as in some other places, to entice negroes from their owners, and to aid them in escaping to the North. And there was a good deal of evidence to prove the connection of the defendant with these persons. He appeared, if the evidence against him was true, to be a "philanthropist" by distinction, "a Friend of the Black Man." He discoursed intemperately against Southern planters as kidnappers, dealers in human flesh, monsters in men's form, and emissaries of hell. When a Southern planter came to Indiana to see if his slaves were there, Mitchell gave out to black people that "Indians were abroad," and paid the negroes in his employ their wages forthwith. When requested by a supposed agent of an owner for leave to visit his farm, leave was granted only on condition that he would not molest any man of colour upon it. He cautioned persons—such supposed agents—to be careful how they interfered with any negroes in Indiana, as they were armed, had guns and knives, and were able to take care of themselves, and most likely would fight. When one of them was arrested, and the defendant was asked about the others, and if they had best leave the place, he said that they had been apprised of their danger that evening, and were safe: that they were safe where they were, being armed. On one occasion he had a meeting of "Friends of the Black Man," in his house, a runaway negro being secreted in a back room; and a committee was appointed to protect and counsel the fugitives, and to have them paid their wages whenever necessary. When Jared and his companions arrived at Indiana, the defendant sent them with a letter to his tenant residing on his farm, about nine miles from town. They were directed to take possession of a vacant house on the defendant's farm, and were furnished with bedding, cooking utensils, grain, a cow, and axes. They were employed by the defendant to labour on his farm in making fences and otherwise, and also hired themselves to work for the neighbours. The defendant gave them money with which they bought ammunition and gun caps, and they had guns and dirks. They remained in the defendant's house in this way about four months; and the defendant well knew that they were fugitive slaves, and that Van Metre, the plaintiff, owned them. But no notice, that is to say no formal or specific notice, was ever given by the plaintiff to the defendant of that fact. It was well known to people in the town of Indiana, and in the neighborhood of it, that these slaves were on Mitchell's farm; and except that he once asked a partner of his, who had a saw mill some distance from town, if he could not find employment for the negroes at this mill, alleging as a motive, "that they would be out of the way if they were there"—there was no evidence that Mitchell desired to conceal their place of retreat, or made any secret about it. Two counts of the declaration charged the defendant with "harbouring and concealing;" two others with "harbouring."

For the defendant.

On the two counts which allege "harbouring and concealing," there can be no recovery. Admitting, here, for the sake of argument, that

there has been a "harbouring," there was no "concealing" with it. The proof shows rather an avowed, concerted and systematic defiance of law. Certainly whatever was done was without concealment. If there was a previous conspiracy to make a general and public resistance to the law, that is treason, and the offence is to be proceeded with under a different statute and with a different penalty. Then as to the next two counts which allege "harbouring" only, Dr. Webster, whose Dictionary is at least authority to show how words are used in America, gives the word "secrete" as a definition of the word "harbour." The act of congress, itself, seems to use "conceal" as synonymous with "harbouring," or at least as explanatory of it. The language is not, shall "either conceal or harbour." Bouvier, in his American Law Dictionary, defines "harbour" "to receive clandestinely and without lawful authority a person for the purpose of concealing him; so that another, having a right to the lawful custody of such person shall be deprived of the same." There must, then, be a reception "clandestinely;" that is, "secretly, privately; in private, in secret" (Dr. Johnson); and such reception must have both a certain purpose and a certain result.

II. There was no notice here. If the omission referred to of the word "either," is thought unimportant because the language of the act is precise, certainly the use of "notice" instead of "knowledge" is important. In law, "knowledge" is not "notice." This has been decided in regard to an indorser.

III. The whole legislation on the subject of slavery is in derogation of human liberty. It is against the spirit of the common law. Slavery—that horrid inheritance fastened upon our country by the rapacity and oppression of our French and British ancestry—is an institution local merely. Pennsylvania had scarcely roused herself to independence before she made her great "Act" for its gradual abolition and proclaimed in memorable words her deep sense of its sin and shame.[2] This court will not strain language to remand that captive who has sought refuge on its soil, nor help again to rivet on his poor limbs the manacles that have once fallen to the ground. It will not strain language to harden the heart of humanity, nor to offend the scrupulous, perhaps the over-sensitive conscience which teaches our weaker brethren that slavery is sin.

GRIER, Circuit Justice (charging jury).[3] [The plaintiff in this case claims to recover from the defendant, the sum of $500, being the penalty given by the 4th section of the act of congress of the 12th of February, 1793, against persons who "harbour or conceal fugitives from labour." The declaration avers: 1st, that, by the laws of Virginia, a certain person named Jared, was held to service and labour by the plaintiff; 2nd, that Jared escaped into the commonwealth of Pennsylvania; and, 3rd, that the defendant, with notice or knowledge of these facts, did harbour and conceal the said Jared, contrary to the act of congress in such case made and provided, and thereby became liable to pay the sum of $500, the penalty inflicted for such offence. A third and fourth count in the declaration charged the defendant with harbouring only, without the charge of con-

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[2] See preamble to "An Act of 1st March, 1780, for the gradual abolition of slavery," as follows: "I. When we contemplate our abhorrence of that condition, to which the arms and tyranny of Great Britain were exerted to reduce us, when we look back on the variety of dangers to which we have been exposed, and how miraculously our wants in many instances have been supplied and our deliverances wrought, when even hope and human fortitude have become unequal to the conflict, we are unavoidably led to a serious and grateful sense of the manifold blessings which we have undeservedly received from the hand of that Being, from whom every good and perfect gift cometh. Impressed with these ideas, we conceive that it is our duty, and we rejoice that it is in our power to extend a portion of that freedom to others which hath been extended to us, and release from that state of thraldom, to which we ourselves were tyrannically doomed, and from which we have now every prospect of being delivered. It is not for us to inquire why, in the creation of mankind, the inhabitants of the several parts of the earth were distinguished by a difference in feature or complexion. It is sufficient to know that all are the work of an Almighty hand. We find, in the distribution of the human species, that the most fertile, as well as the most barren parts of the earth are inhabited by men of complexions different from ours and from each other; from whence we may reasonably, as well as religiously infer, that He, who placed them in their various situations, hath extended equally his care and protection to them all, and that it becometh us not to counteract his mercies. We esteem it a peculiar blessing granted to us, that we are enabled this day to add one more step to universal civilization, by removing, as much as possible, the sorrows of those, who have lived in undeserved bondage, and from which, by the assumed authority of the kings of Great Britain, no effectual, legal relief could be obtained. Weaned, by a long course of experience, from those narrow prejudices and partialities we had imbibed, we find our hearts enlarged with kindness and benevolence towards men of all conditions and nations; and we conceive ourselves at this particular period extraordinarily called upon, by the blessings which we have received, to manifest the sincerity of our profession, and to give a substantial proof of our gratitude. II. And whereas the condition of those persons, who have heretofore been denominated negro and mulatto slaves, has been attended with circumstances, which not only deprived them of the common blessings that they were by nature entitled to, but has cast them into the deepest afflictions, by an unnatural separation and sale of husband and wife from each other and from their children, an injury, the greatness of which can only be conceived by supposing that we were in the same unhappy case. In justice, therefore, to persons so unhappily circumstanced and who, having no prospect before them whereon they may rest their sorrows and their hopes, have no reasonable inducement to render their service to society, which they otherwise might, and also in grateful commemoration of our own happy deliverance from that state of unconditional submission, to which we were doomed by the tyranny of Britain."

[3] [From 7 Pa. Law J. 115.]

cealing. The allegations the defendant by his plea has denied, and they constitute the issues you are now sworn to try.

[To men of your intelligence, it is perhaps unnecessary to remark, that in order to discharge the duty you have sworn to perform, of rendering a true verdict on the issues presented to you, the law of the land as stated to you by the court, and applied by you to the facts of the case, constitute the only elements of such a verdict. No theories or opinions which you or we may entertain with regard to liberty and human rights, or the policy or justice of a system of domestic slavery, can have place on the bench or in the jury box. We dare not substitute our convictions or opinions, however honestly entertained, for the law of the land.

[The extradition of criminals or slaves, escaping from one country to another, has generally been considered as a matter of comity and not of right; and the common law and law of nations which refuse to deliver up persons guilty of mere political offences, most probably have borrowed this principle from the Jewish Code (Deut. xxiii. 15): "Thou shalt not deliver unto his master the servant which has escaped from his master unto thee," &c. The institutions of the Jews, while they tolerated slavery, and would not permit the harbouring or concealing of the slave of one Jew, by another, nevertheless forbade their extradition when they escaped into Judea, from a Gentile or foreign nation. And therein our own laws are assimilated to theirs. While we would not deliver up slaves escaping from a foreign nation, the people of these United States, as one people, united under a common government, have bound themselves by the great charter of their Union, to deliver up slaves escaping from one state to another. "Whatever may be our private opinions," says Chief Justice Tilghman, "on the subject of slavery, it is well known, that our Southern brethren would not have consented to become parties to a constitution, under which the United States have enjoyed so much prosperity, unless their property in slaves had been secured. This constitution has been adopted by the free consent of the people of Pennsylvania, and it is the duty of every man to give it a fair and candid construction and carry it into full force and effect."

[The provision of the constitution (article 4, § 3) is as follows: "No person held to service or labour in one state under the laws thereof, escaping into another, shall in consequence of any law or regulation thereof, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due." It declares, also (article 6, § 2), "that this constitution and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, and the judges in every state, shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." By virtue of this clause of the constitution the master might have pursued and arrested his fugitive slave in another state, he might use as much force as was necessary for his reclamation, he might bind and secure him so as to prevent a second escape. But as the exercise of such power without some evidence of legal authority might lead to opposition and outrage, and the master, in the exercise of his legal rights, might be obstructed and hindered, it became necessary for congress to establish some mode by which the master might have the form and support of legal process, and persons guilty of improper interference with his rights might be punished. For this purpose the act of congress of 12th February, 1793, was passed. By the third section of this act, the master or his agent is empowered to seize and arrest the fugitive and take him before a judge or a magistrate, and, having made proof of his ownership, obtain a certificate which should serve as a legal warrant for removing the fugitive. The fourth section describes four different offences against the master, which were made liable to be punished with a penalty of $500: 1st, knowingly and wilfully obstructing the claimant in seizing or arresting the fugitive; 2d, rescuing the fugitive when so arrested; 3d, harbouring; and, 4th, concealing such person after notice that he is a fugitive from labour. Two counts of the plaintiff's declaration charge the defendant with harbouring and concealing; two others, with harbouring only. What will constitute the offence by which this penalty is incurred, it will be the province of the court to instruct you, and yours to decide whether the testimony establishes the defendant's guilt. I may here remark, that counsel, in the course of their argument, have referred to an act of assembly of Pennsylvania, passed at the last session, for the purpose, as it was affirmed, of encouraging mobs to rescue fugitive slaves, and to resist their masters in their endeavors to reclaim them; for the honour of the state I venture to assert, that the aim and object of this act must have been misrepresented by those who characterize its provisions. But one thing is certain, that no possible legislation which Pennsylvania may see fit to make on this subect, can have the effect of securing from punishment, those who may incur the penalty prescribed by this act of congress. You will therefore inquire: 1st, whether Jared, the alleged fugitive, was held to labour, or in other words was a slave by the laws of Virginia; 2d, was the plaintiff the party to whom such service or labour was due? 3d, had the slave Jared escaped into Pennsylvania? and, 4th, was he harboured or concealed by the defendant, after notice that he was a fugitive from labour? The first three propositions are not contested, and the case will depend on the sufficiency of the evidence to establish the fourth. In the construction of this portion of the act two ques-

tions obviously present themselves: 1st, what is meant by "notice"; and, 2d, what constitutes "harbouring."

[On the first point the court has been relieved from much difficulty, by a late case tried before Mr. Justice McLean in Ohio, and which has been affirmed in the supreme court of the United States. See Jones v. Van Zandt [Case No. 7,501], 5 How. [46 U. S.] 216.] [3]

The meaning of the word "notice," as used in this act, has been settled, and is not now open for discussion. It means knowledge. A specific notice, either written or parol, need not be given. It is enough if the defendant knows that the person he is harbouring is a fugitive from labour. Jones v. Van Zandt, 5 How. [46 U. S.] 215–225.

[The important question in the case, therefore, and which will require your most careful examination, is whether the conduct of the defendant towards Jared comes within the category of "harbouring or concealing."] [3]

II. The word "harbour" is defined by Dr. Johnson and other lexicographers, "to entertain," "to permit to reside," "to shelter," "to secure"; and Dr. Webster adds, "to secrete." It has various shades of meaning not exactly definded by any synonyme. Mr. Bouvier's definition cited and relied on at the bar, is quoted in the opinion of the supreme court already referred to, but without the intention of affirming either the authority of Mr. Bouvier's Law Dictionary, or the correctness of the definition. For although the word may be used in the complete meaning there given to it, it does not follow that all these conditions are necessary elements in its definition. "Receiving and entertaining a person clandestinely, and for the purpose of concealment," may well be called "harbouring," as the word is sometimes used. Yet one may harbour without concealing. He may afford entertainment, lodging and shelter to vagabonds, gamblers and thieves, without a purpose or attempt at concealment, and yet it may be correctly affirmed of him, that he "harbours" them.

The act of congress, by using the terms "harbour or conceal," assumed, I think, that the terms are not synonymous, and that there might be a harbouring without concealment. The act seems to be drawn with great care and accuracy, and bears no marks of that slovenly diction which sometimes characterizes acts of assembly, where numerous synonymes are heaped together, and words are multiplied only to increase confusion and obscurity. But neither in legal use, nor in common parlance, is the word "harbour" precisely defined by the words "entertain" or "shelter," given by Dr. Johnson as two of its meanings. It implies impropriety in the conduct of the person giving the entertainment or shelter in consequence of some imputations on the character of the person who receives it. An innkeeper is said to entertain travellers and strangers, not to harbour them; but may be accused of harbouring vagabonds, deserters, fugitives or thieves; persons whom he ought not to entertain.

The act of congress does not intend to make common charity a crime, or treat that man as guilty of an offence against his neighbour, who merely furnishes food, lodging or raiment to the hungry, weary or naked wanderer, though he be an apprentice or a slave. On the contrary, it contemplates not only an escape of the slave, but the intention of the master to reclaim him. It points out the mode in which this reclamation is to be made, and it is for an unlawful interference or hindrance of this right of reclamation, secured to the master by the constitution and laws, that this action is given.

The harbouring made criminal by this act, then, requires some other ingredient besides a mere kindness, or charity rendered to the fugitive. The intention or purpose which accompanies the act, must be to encourage the fugitive in his desertion of his master, to further his escape, and impede and frustrate his reclamation. "The act must evince an intention to elude the vigilance of the master, and be calculated to obtain the object." Jones v. Van Zandt [Case No. 7,501].

[3] [It will be your duty, gentlemen, to apply these principles to the evidence in the case, and find your verdict accordingly; you will inquire first, whether the defendant gave entertainment and shelter to the fugitive Jared. The evidence on this point is, that Jared and another escaped from their master in Virginia, and came, without stopping on the way, to the defendant in the town of Indiana, about the last of April, 1845; but why they made their way to that place, or by whom they were directed to make application to the defendant, does not appear; that the defendant sent them with a letter to his tenant residing on his farm, some nine miles from Indiana; that they were directed to take possession of a vacant house on the land of the defendant; that he furnished them with bedding, cooking utensils, grain, a cow and axes; that they were employed to labour for him on his land, in making fences, or otherwise, and hired themselves to work for other neighbors; that they remained in the defendant's house till September; and that the defendant well knew they were fugitive slaves, and to whom they belonged. These facts, if believed, would prove that defendant gave the fugitive Jared shelter and entertainment with full knowledge that he was a fugitive from labour. Secondly, was this done for the purpose of concealing him from the search of his master or for furthering his escape, and impeding and obstructing the master in his recapture? On this point you will form your judgment, both from the declarations and actions of the defendant; a man is presumed to intend what is the natural and necessary result of his

[3] [From 7 Pa. Law J. 115.]

[3] [From 7 Pa. Law J. 115.]

actions. It appears from the testimony, that the fact was notorious to the people of the town of Indiana, and the neighborhood, that these slaves were on the defendant's farm, and that he himself made no secret of it. On the other hand, one of the witnesses, a partner of defendant, was asked by him if he could not find employment for the negroes at his saw mill, alleging as a reason, "that they would be out of the way there." That is all the evidence of a desire to conceal their place of retreat from the public, that I recollect.] [3]

I can imagine a harbouring of slaves, without any affectation of concealment, which might be as injurious to the master, and as effective in promoting the escape of the slave, and frustrating the vigilance of the master. If a man should furnish a house in the woods as a rendezvous for fugitive slaves, encourage them in remaining there, and in enticing others to join them, should countenance and assist them with the means of resistance to their recaption, and furnish them information of pursuit, in order to further their escape, or prepare them to resist; such a harbouring might be as injurious to the master, and is as fully within the meaning of the statute, as if the fugitives had been concealed. Such protection might be made more efficacious in enabling them to elude the vigilance of their master, than any attempt to conceal them. What amounts to concealment, also, may depend much on circumstances. It does not necessarily require that the subject of it be secreted in a garret or a cellar, a barn or a covered wagon. The highways of a remote and uncultivated county like Indiana may be better places of concealment than the by-ways of many other places; and the limits of the whole county as good a place to secrete fugitives from a distant state, as any that may be imagined, especially if the fugitives have a committee of sympathisers to watch over their interests, and give them warning of the approach of danger.

But assuming that the evidence is not sufficient to establish the charge of harbouring and concealing. Inquire, then, whether shelter and entertainment was afforded to the fugitives, for the purpose and with the effect of encouraging them in the desertion of their master, and furthering their escape, and to impede or frustrate their arrest.

Look at the conduct and declarations of the defendant. Does he furnish a place of rendezvous or a harbour, not only for the fugitive in question, but for all whom they can entice to leave their masters? Is he the confidant of their schemes for rescuing other slaves, or enticing them to escape? and when they have succeeded, do the new fugitives come immediately to the defendant and proceed to his farm, the bearer of letters from the defendant to his tenant? When he is requested by a supposed agent of the owners to be permitted to see the fugitives on his farm, does he make it a condition of his compliance that he shall not molest them? When there is danger of their recaption, does he have information conveyed to them that there are "Indians abroad?" a slang phrase, well understood in the country as a warning to be on their guard, and make their escape. Does he give them money to buy ammunition or gun caps? Does he express his confidence that they are sufficiently armed, and able to resist successfully any force sent to arrest them; that they have a gun, dirk and axes, and know how to use them? When an arrest had been made of one of them, and he is inquired of, as to the safety of the others, does he say, "that they had been apprised of their danger that evening, and were safe—that they were safe where they were," and well armed, and therefore there was no reason for concealment or flight? Does he call a meeting at his own house of persons friendly to the fugitives, and have one of them in his back room? At this meeting is a committee appointed to protect and counsel the fugitives; to settle up their wages, that they may escape if threatened with pursuit? Is the defendant, on the next day, engaged in settling with the fugitives through their committee, stating, "there were Indians abroad the night before, and that he would settle up and let them go?"

This mala mens, or fraudulent intent required by the act to constitute illegal harbouring, is not to be measured by the religious or political notions of the accused, or the correctness or perversion of his moral perceptions. Some men of disordered understanding or perverted conscience may conceive it a religious duty to break the law, but the law will not tolerate their excuse. If the defendant was connected with any society for the purpose of assisting fugitives from other states to escape from their masters, and in pursuance of such a scheme, afforded this shelter and protection to the fugitive in question, he would be legally liable to the penalty of this act, however much his conscience, or that of his associates, might approve his conduct. With any opinions of the defendant, you have no concern. He may adopt and entertain, as opinions, whatever folly likes him: and as long as these remain opinions, he will go unpunished. He is on trial for his acts: and if his opinions, ceasing to be speculative, have ended in conduct, let no morbid sympathy—no false respect for pretended "rights of conscience"—prevent either court or jury from judging him justly, without favour as without fear.

"Be careful," says the great casuist Taylor, "that prejudice or passion, fancy or affection, error and illusion, be not mistaken for conscience. Nothing is more usual," he adds, "than to pretend conscience to all the actions of men, which are public, and cannot be concealed. . . . The disobedient refuse to submit to the laws, and they also in many cases pretend conscience"; "and so . . . . dis-

[3] [From 7 Pa. Law J. 115.]

obedience and rebellion are become conscience, in which there is neither knowledge, nor revelation, nor truth, nor charity, nor reason, nor religion." . . . . "What they think is not against conscience, they think or pretend to think it is an effect of conscience; and so their fond persuasions, and fancies are made sacred, and conscience is pretended, and themselves and every man else is abused. . . . . They think that some sacredness or authority passes upon their passion or design if they call it conscience." "Conscience," he declares in another place, "is tied to laws." And he distinguishes between the "right or sure conscience,"—which is right reason reduced to practice and conducting moral actions—and "the perverse conscience" which is seated in the fancy or affections, "a heap of irregular principles and irregular defects, and is the same in conscience as deformity is in the body, or peevishness in the affections." "It is not enough," he says, "that the conscience be taught by nature: but it must be taught by God, conducted by reason, made operative by discourse, assisted by choice, instructed by laws and sober principles, and then it is right, and it may be sure."

He specially considers the class of duties where, in seeking guides to a knowledge of what is obligatory on us, "lawyers" are to be preferred to "divines." While declaring that "all the general measures of justice are the laws of God, and therefore cognizable by the ministers of religion," he adds that as "these general measures, like a great river into little streams, are deduced into little rivulets and particularities by the laws and customs, by the sentences and agreements of men, therefore they must slip from the hands of the spiritual man to the prudent and secular. The divine can condemn all injustice, murder, incest, injurious dealing; whether all homicide be murder, all marriage of kindred be incest, or taking that which another man possessed be injustice, must be determined by laws and the learned in them." Ductor Dubitantium, bk. 1, c. 1, rule 3, §§ 1, 2;- Id. c. 11, rule 1; Id. c. 1, rule 7, § 13; Id. c. 11, rule 4, § 8; Id. c. 4, rule 10, § 85.

If you believe from the testimony, that the entertainment and shelter given to the fugitives were but an exercise of the common principles of humanity, without any intention of encouraging the escape of the fugitive, or impeding or frustrating his recaption or reclamation by his master, or without any act calculated to have that effect, you will find for the defendant.

If, on the contrary, you believe he has afforded shelter and entertainment to the fugitive, to further his escape, and enable him to elude the vigilance of his master, and that his acts were calculated to effect that object, you will find for the plaintiff $500.

Verdict accordingly.

[For a motion in arrest of judgment, see Case No. 16,865a.]

Case No. 16,865a.

VAN METRE v. MITCHELL.

[1 Pittsb. Leg. J. 122; 2 Am. Law Reg. 279.]

Circuit Court, W. D. Pennsylvania. Nov., 1853.

FUGITIVE SLAVE—ACTION FOR DAMAGES.

[An action will lie at common law for recovery of damages on account of the harboring and concealing of a fugitive slave.]

[This was an action by Garret Van Metre against Robert Mitchell to recover the statutory penalty for harboring and concealing a fugitive slave belonging to plaintiff. There was a verdict for plaintiff (see Case No. 16,865), and defendant moves in arrest of judgment.]

Mr. Shaler, for plaintiff.

Mr. Dunlop, for defendant.

IRWIN, District Judge. The declaration contains two counts for damages for injuries, in substance as follows: "That a certain negro, called Jarred, who, by the laws and customs of Virginia, was held to service and labor in that state by the plaintiff, on the first of September, 1845, left the said service and labor, fled and escaped into the Western district of Pennsylvania; that he was pursued by the plaintiff, with the intent of recapturing him; but that the defendant, well knowing the premises, and with the intent of preventing the plaintiff from arresting the fugitive, and removing him to Virginia, concealed and harbored him, thereby enabling the said fugitive to escape from the labor and service to which he was lawfully held, by means of which, his said labor and service became totally and entirely lost to the plaintiff. The jury having given a verdict for the plaintiff, I will assume the facts just stated to have been fully proved.

The declaration does not conclude against the form of the statute of the 12th of February, 1793 [1 Stat. 302], respecting persons escaping from the service of their masters; nor does it refer to it in any manner, and for this omission a motion is made in arrest of judgment. Can the action be maintained without this conclusion or reference; or, in other words, can an action be supported at common law for the injuries complained of? The fourth section of the act of 1793, which imposes a penalty of five hundred dollars for knowingly rescuing, harboring or concealing a fugitive from labor, concludes with this clause: "Saving moreover to the complainant his right of action for or on account of said injuries, or either of them." What right of action is meant by the clause? Does it arise from and is it limited to the clause itself, so that whatever may be the condition of the fugitive—whether he owes service and labor as a slave, a servant for a term of years, or an apprentice—it is necessary, in case of such injuries as the jury have found, to proceed under the statute and not at com-

mon law? The question can only be truly answered by going beyond the statute of 1793; for if there was no remedy for the injuries contained in the fourth section of that act until the time of its passage, there was, then, no vitality in the constitutional provision on the subject of fugitives from labor, or in so much of the judicial act of 1789 [1 Stat. 73], which confers jurisdiction in the courts of the United States to give relief for injuries "according to law and usage," until the 12th of February, 1793. Such a construction, it is conceived, is not warranted by the letter or spirit of either constitution or law. The clause in the constitution is in the following words: No person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due. A claim in a judicial sense is a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty; and where an act is required, the means are given to make effectual the right, which is seldom possible by a mere delivery to the owner of the fugitive. Before the act of 1793, as well as in this and other instances, this injustice has been but too frequent. The fugitive might have been concealed, harbored and assisted to escape into a foreign country, so that his services might not only have been partially, but totally lost to the owner. I cannot believe that such injuries could have been without remedy. The claim to a fugitive from labor is a controversy arising under the constitution, under the express delegation of judicial power given by that instrument, and the courts of the United States, under the judiciary act of 1789, have "all the powers necessary for the exercise of their respective jurisdiction, and agreeable to the principles and usages of law," which principles and usages are those of the common law. U. S. v. Burr [Case No. 14,692a]. In the case of Johnson v. Tomkins [Id. 7,416], Judge Baldwin, in delivering the opinion of the court, says: "This right of the master results from his ownership, and the right to the custody and ownership of the slave is by the common law, and the eleventh section of the abolition law of Pennsylvania, and other laws of that state;" and in the same case he further states: "The constitution of the state and Union is not the source of those rights. They existed in their plenitude before any constitutions, which do not create, but protect and secure them against any violation by the legislatures or courts, in making, expounding and administering laws." If this opinion of the court is sound,—and I do not see how it can be regarded otherwise,—it follows, that if there had been no constitutional provision or statute for the recaption and delivery of fugitives from labor, the owner of an escaped fugitive would have had a remedy by action for damages in the court of a state into which he had fled and was harbored, or in a court of the United States, if either had common law jurisdiction. And in the case of Pennsylvania v. Kerr, Add. 326, it was objected by the defendant's counsel that a master could not give authority by advertisement to take his runaway apprentice, as "an act for the regulation of apprentices points out a particular proceeding in case of absconding apprentices." But the court decided "that the act of assembly does not change the common law, but gives further remedy." This last decision is precisely in point, as it cannot be doubted that the words "fugitives from labor" in the act of 1793 extends to apprentices as well as to slaves. From principle and authority thus far I am fortified in the opinion that damages may be recovered for injuries of the nature contained in the plaintiff's declarations at common law; but in the case of Jones v. Vanzandt [Case No. 7,501], which was an action for damages for harboring and concealing a fugitive from labor, the plaintiff among several counts under the act of 1793, inserted one at the common law which became important from several of the former having been abandoned, and a finding for the plaintiff upon two others including the latter. On a motion for a new trial which was ordered, Judge McClean said, that "the defendant is charged with harboring slaves of the plaintiff who had escaped from his service in Kentucky. But the wrong charged is no legal wrong except it is made so by statute, and the fourth count does not refer to the statute, which is a public one, and the only foundation of the plaintiff's right." And in another part of the learned judge's opinion, he says: "It is clear that the plaintiff has no common law right of action for the injury complained of." This decision from the learning and eminent standing of the judge who made it is entitled to the highest respect, and in a doubtful case, I should have mistrusted my own judgment in differing from him. The opinion incited deeper reflection, and if possible deeper conviction, that the conclusion I have arrived at is the law, and indeed as if to fortify this conclusion, Judge McClean himself has said in the same case, that "the statute creates the right and declares what shall constitute the wrong, and for every redress the common law gives a remedy by action for the injury done." If this is true in a case where the statute creates the right, it cannot be disputed in a case where the right existed prior to the statute, and which so far from taking away only serves to confirm. The words "saving moreover to the person claiming such service and labor, his right of action for or on account of the said injuries or either of them" must be construed to mean to preserve, to spare, or to retain a right existing anterior to the statute. Certainly the words "saving his right" in the absence of negative words, cannot mean to take

away a right; they are the appropriate words, in a statute which gives a new remedy, but which intends at the same time to reserve a pre-existing right; by the new remedy a party may take his election to proceed upon the statute or at the common law; the saving clause in the statute is cumulative, and in affirmance of the common law.

Motion in arrest of judgment is therefore overruled, and judgment must be entered upon the verdict.

VAN METTER v. MITCHELL. See Case No. 16,865.

VAN NAME (TRIPLET v.). See Case No. 14,176.

VAN NESS (BALTIMORE & O. R. CO. v.). See Case No. 830.

VAN NESS (BANK OF UNITED STATES v.). See Case No. 938.

VAN NESS (BEATTY v.). See Case No. 1,198.

VAN NESS (BROHAWN v.). See Case No. 1,920.

VAN NESS (CRAMPTON v.). See Case No. 3,348.

VAN NESS (GILLIS v.). See Case No. 5,440.

Case No. 16,866.

VAN NESS v. HEINEKE.

[2 Cranch, C. C. 259.] [1]

Circuit Court, District of Columbia. Oct. Term, 1821.

DEPOSITIONS — CAPTION — CERTIFICATE OF MAGISTRATE.

It is no objection to a deposition that, in the caption, it is not stated in what county the cause is depending; nor that the name of one of the parties is misspelled, nor that the magistrate has not certified that he reduced the testimony to writing in the presence of the witness, nor that the witness signed it in the presence of the magistrate.

[Cited in Re Thomas, 35 Fed. 823.]

Mr. Lear, for plaintiff, offered a deposition in evidence.

Mr. Marbury, for defendant, objected to the reading of it: (1) Because the cause is stated, in the caption of the deposition, as depending in the circuit court of the District of Columbia, without stating in which county. (2) Because the name of the defendant is misspelled. In the deposition it is spelled Henick, but in the writ it is spelled Hinneckee. In the declaration it is spelled Henick, as in the deposition. (3) Because the deposition, although written by the magistrate, is not certified to have been written in the presence of the witness; nor to have been signed by the witness in the presence of the magistrate.

THE COURT overruled the objection.

THRUSTON, Circuit Judge, thought the first objection was fatal.

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

Case No. 16,867.

VAN NESS v. HYATT et al.

[5 Cranch, C. C. 127.] [1]

Circuit Court, District of Columbia. March Term, 1837.[2]

UNRECORDED LEASE—EQUITY OF REDEMPTION IN LEASEHOLD ESTATE—EXECUTION.

1. A lease for ten years, not recorded, is good for seven years, under the law of Maryland.

2. The equity of redemption of a leasehold estate cannot be seized and sold under a fieri facias.

Bill in equity [by John P. Van Ness against Alpheus Hyatt, James Shields, Ann Blanchard, Charles Glover, and Jane, his wife, Mary Franks, and James Moore] to redeem a mortgage of a leasehold estate; the complainant claiming as purchaser of the equity of redemption sold under a fieri facias against Shields, the mortgagor, upon a judgment for $30.25, recovered before a justice of the peace. The cause was set for hearing on the bill, answers, general replication, and exhibits. The material facts appear to be as follows: On the 31st of December, 1818, William Cocking, being seized in fee of part of lot 12, in square 406, in the city of Washington, by indenture of that date, leased the same to the defendant, James Shields, for ten years from the 1st of January, 1819, at the rent of $35 a year, clear of taxes, &c., and to build a two-story brick house thereon within twelve months, with leave to purchase the fee-simple at the end of the ten years, by paying $375 and all arrears of rent. This lease was duly acknowledged, but was never recorded. Shields built the two-story house according to contract, and on the 23d of September, 1823, mortgaged the house and lot to the defendant, John Franks, to secure a debt of $1,129.18. On the 19th of August, 1825, Charles W. Botelor, a constable of Washington county, D. C., executed a deed to Mr. Van Ness, duly acknowledged and recorded, which recites a writ of fieri facias, stating a judgment on the 8th November, 1825, in favor of Mr. Van Ness against Shields for $28.40, and $1.27 interest and fifty-eight cents costs, commanding the constable to levy the debt, damages, and costs, "of the goods, chattels, lands, and tenements" of Shields; and that the constable "laid the same upon a certain lot of ground of him, the said James Shields, that is, upon the right, title, estate, interest, and claim of him, the said James Shields, therein lying and being in the city of Washington, and being part of lot No. 12, in square 406, beginning," &c., "as the same was then occupied and held by the said Shields;" and on the 10th of July, 1824, exposed "the said part of a lot, &c., that is, all the right, title," &c., to public sale to the highest bidder, and

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

[2] [Affirmed in 13 Pet. (38 U. S.) 294.]

that Mr. Van Ness became the highest bidder and purchaser thereof for $54, and has paid the purchase-money to the constable, in consideration of which, and of five dollars paid, &c., the constable gives, grants, bargains and sells, transfers and assigns to Mr. Van Ness, his executors, administrators, and assigns, "the said part of a lot, that is, the right, title, estate, interest, and claim of him, the said James Shields therein, so as aforesaid taken on the said writ of fieri facias, and so as aforesaid exposed to sale in virtue of said writ, with the improvements and appurtenances to the same belonging, unto the said John P. Van Ness, his executors, administrators, and assigns, and to their only proper use and behoof." There was no habendum in the deed. The recitals in the deed were admitted by the parties to be true, so that the judgment, execution, levy, and sale of Shield's right, the purchase by Mr. Van Ness, and the payment of the purchase-money, are admitted; provided, that such a right, as Shields then had, could be levied upon, taken, and sold, under such a fieri facias. On the 7th of May, 1825, Franks assigned his mortgage to the defendant, Alpheus Hyatt, for a full and valuable consideration; and on the 9th of May, 1825, Shields assigned to Hyatt all his equity of redemption, in consideration of $200. There was no evidence, that, at the time of these assignments, Hyatt had any notice or knowledge of the judgment against Shields. William Cocking died seized of the reversion in fee-simple, which descended to his two daughters, Ann Blanchard and Jane Glover, who, on the 16th of April, 1826, assigned to Hyatt all their right as heirs at law of the lessor, William Cocking, for a valuable consideration. The execution recites, that "whereas on the 8th day of November, 1823, a certain John P. Van Ness, by the judgment of —— recovered against a certain James Shields, the sum of $28.41, debt, &c., which judgment was superseded by one James B. Holmead," the constable was commanded that of the goods and chattels, lands and tenements of the said James Shields, and James B. Holmead, he should cause to be levied the debt, &c. The levying of the execution, and the sale under it, being before the assignment of the equity of redemption by Shields to Hyatt, there was nothing left for the assignment to operate upon, if that equity was lawfully levied upon, and sold under the execution; and that is the principle question in the case.

R. S. Coxe, for complainant, cited the following authorities: Rex v. Inhabitants of St. Michael, 2 Doug. 630; M'Call v. Lenox, 9 Serg. & R. 312; Jackson v. Hull, 10 Johns. 481; Monell v. Lawrence, 12 Johns. 521, 529; Waters v. Stewart, Caines, Cas. 47; Wilson v. Troup, 2 Cow. 230; Hitchcock v. Harrington, 6 Johns. 294; Inhabitants of Groton v. Inhabitants of Boxborough, 6 Mass. 50; Bolton v. Ballard, 13 Mass. 229; Town of Barkhamsted v. Town of Farmington, 2 Conn. 600; Collins v. Torry, 7 Johns. 278; Runyan v. Mersereau, 11 Johns. 538; Jackson v. Dickenson, 15 Johns. 309; Coles v. Coles, Id. 319; Titus v. Neilson, 5 Johns. Ch. 452; 5 Gwill. Bac. Abr. 16, tit. "Mortgage," c; Harrison v. Eldridge, 2 Halst. [7 N. J. Law] 392; Casborne v. Scarfe, 1 Atk. 603; 2 Fonb. 262, note; Jackson v. Willard, 4 Johns. 41; D'Arcy v. Blake, 2 Schoales & L. 387; Jackson v. Bronson, 19 Johns. 326; Campbell v. Pratt, 9 Cranch (13 U. S.) 459.

Mr. Morfit, contra, cited Harding v. Stevenson, 6 Har. & J. 267; Warren v. Childs, 11 Mass. 226; Metcalf v. Scholey, 2 Bos. & P. (N. R.) 461; Wilkes v. Ferris, 5 Johns. 335, 343; Scott v. Scholey, 8 East, 467; Shirley v. Watts, 3 Atk. 200; Burden v. Kennedy, Id. 739; Lyster v. Dolland, 3 Brown, Ch. 480, and 1 Ves. Jr. 431; Warren v. Howe, 3 Dowl. & R. 494, 2 Barn. & C. 281; Cadogan v. Kennet, Cowp. 432; Plunket v. Penson, 2 Atk. 292; Cox's Case, 3 P. Wms. 342; Cattel v. Warwick, 1 Halst. [6 N. J. Law] 192; St. Mass. March 1, 1799; State v. Laval, 4 McCord, 341; Reads v. Symmes, Ohio Cond. R. 141; Phelps v. Butler, Id. 331; Denton v. Livingston, 9 Johns. 99, 100; Bogart v. Perry, 1 Johns. Ch. 56, 57; Davis v. Maynard, 9 Mass. 242; Punderson v. Brown, 1 Day, 93; Scripture v. Johnson, 3 Conn. 211; Boring v. Lemmon, 5 Har. & J. 223; Perry v. Coates, 9 Mass. 537; Maine Fire & Marine Ins. Co. v. Weeks, 7 Mass. 438; Ingalls v. Lord, 1 Cow. 240; Com. Dig. "Execution," C, 4; Picquet v. Swann [Case No. 11,133]; Bac. Abr. "Execution," C, 4.

CRANCH, Chief Judge. The first question which presents itself, is: 1. Did any and what legal estate pass from Cocking to Shields, by the lease of December 31, 1818, purporting to be a lease for ten years, but not recorded. By the Maryland act of 1766 (chapter 14, § 2) it is enacted, that "no estate of inheritance or freehold, or any declaration or limitation of use, or any estate for above seven years, shall pass, or take effect, except the deed or conveyance, by which the same shall be intended to pass or take effect, shall be acknowledged," &c., "and be also enrolled in the records of the same county," &c., "within six months after the date of such deed or conveyance." At common law the lease would be good for ten years; and under the English registry acts, it would be equally good between the parties. Jones v. Gibbons, 9 Ves. 407; and the policy of the act of Maryland, 1766 (chapter 14) does not seem to require that the conveyance, as between the parties, should be void. It says that no estate for above seven years shall pass, but it does not say that an estate for seven years shall not pass by a deed purporting to be for ten years. Statutes, restricting common-law rights, should be construed strictly. The statute does not make void the deed; it only limits its operation

to seven years. Deeds must be construed most strongly against the grantor. He had power to make a lease for seven years without recording it. To give this lease the same effect, is to give to the statute all the effect which is indicated by its spirit. I think, therefore, that the lease was good for seven years, and passed a legal estate to Shields for that term. His legal estate continued, therefore, until the 1st of January, 1826; or rather until the 23d of September, 1823, when he mortgaged it to Franks by an assignment of that date. After January 1, 1826, when the legal estate expired, Franks, the mortgagee, had still an equitable interest in the house and lot for the residue of the ten years, with the privilege of buying in the fee-simple at the expiration of that term by paying three hundred and seventy-five dollars, and all arrears of rent; and Shields had a right to redeem the property from Franks by paying the mortgage debt. In the meantime, however, namely, on the 7th of May, 1825, Franks had assigned his mortgage to the defendant, Hyatt, for a valuable consideration; and Shields had, on the 9th of May, 1825, assigned to Hyatt his equity of redemption; and on the 16th of April, 1826, Hyatt purchased the reversion in fee from the heirs of Mr. Cocking; so that Hyatt obtained a complete title in fee, unless intercepted by the fieri facias and sale, in the suit of Van Ness v. Shields. That sale was made on the 10th of July, 1824, before Franks and Shields had assigned their respective rights to Mr. Hyatt. Under that sale Mr. Van Ness claims to be clothed with all the rights which Shields had, on that day. What were they? His right of redemption, namely, to redeem the residue of the term which had, at most, only five and a half years to run. This was the whole of his right as mortgagor. His right to purchase the reversion is a mere right in equity founded upon a contract. It never was any part of his legal estate in the land. It was a mere equity. All those cases, therefore, which support the doctrine that the mortgagor is to be considered as the legal owner of the estate until foreclosure, do not apply to the right to purchase the reversion. That is a mere equity which, all the books agree, cannot be touched by fieri facias.

2. The second question is, whether an equity of redemption can be seized, appraised, and sold under a fieri facias? Upon this question the decisions of the courts, in the several states, have been various and conflicting. The presen case, however, must depend upon the law of Maryland, which is the English common law, as far as it was applicable to that state, and to this part of the District of Columbia on the 27th of February, 1801. In England, it is believed, no case can be found, in which an equity of redemption has been seized and sold under a fieri facias, or extended upon an elegit. In the case of Plunket v. Penson, 2 Atk. 292, (decided in the year 1742,) Lord Chancellor Hardwicke said: "I should be glad to be informed whether there is any instance where an equity of redemption has ever been held liable to the execution of a bond-creditor in the lifetime of the mortgagor. To which the counsel in this case made answer, they could not recollect any instance when it had been so held. In the case of Sir Charles Cox's Creditors, 3 P. Wms. 342 (decided in 1734), Sir Joseph Jekyll, master of the rolls, said: "Wherefore this right of redemption, being barely an equitable interest, it was reasonable to construe it equitable assets, and consequently distributable among all the creditors pro rata;" and it was so decreed.

The fact, that a right of redemption after forfeiture cannot be enforced at common law, is conclusive evidence that it is not a legal right, nor a legal estate. In Lyster v. Dolland, 3 Brown Ch. 478, 1 Ves. Jr. 431, the mortgagee filed a bill for foreclosure; pending which he brought suit at law on the bond given for the mortgage-money, and also an ejectment upon the mortgage, and recovered judgment upon the bond, and got possession by the ejectment; and then took the mortgaged premises in execution by fieri facias upon the judgment on his bond, and the sheriff sold the same to a person in trust for the mortgagee. The personal representatives of the mortgagor brought their bill to redeem, there having been no decree of foreclosure. The defendant contended that the sale under the fieri facias was equivalent to a foreclosure. But the chancellor decided against him, and permitted the plaintiffs to redeem, "on the ground that an equity of redemption was not liable to be taken in execution." The question was afterwards, in the case of Scott v. Scholey, 8 East, 481, fully argued, and solemnly decided by the court of king's bench. Lord Ellenborough, in delivering the opinion of the court, stated the question to be, "whether an equitable interest in a term of years can be sold under a fieri facias," and said, "the sheriff's authority is derived under a writ by which he is commanded to cause to be made, of the goods and chattels of the defendant, the sum recovered; and which sum is, of course, to be made by the sale of the things taken under the execution. If the sheriff should not be able, before the writ is returnable, effectually to execute it in this particular, he is allowed to excuse himself by returning that the goods remain in his hands unsold for want of buyers; upon which another writ issues, commanding him to expose for sale the goods so remaining in his hands unsold. The language of these writs and return evidently imports that the goods and chattels which are the objects of them, are property of a tangible nature, capable of manual seizure, and of being detained in the sheriff's hands and custody, and such also as are conveniently capable of sale and transfer by the sheriff to whom the writ is directed, for the satisfaction of the creditor. The legal interest in a term of years, both in respect of the possession of which the leasehold

property itself is capable, and also in respect of the instrument by which the term is created and secured, both of which are capable of delivery to a vendee, has been always held to answer the description of the writ, and to be salable thereunder. Dyer, 363, a. But no single instance is to be found in the history and practice of the courts of common law, in which an equitable interest, in a term of years, has ever been recognized as salable, (seizable, of course, it cannot be,) under a fieri facias." And in page 485, he says: "The sale of such an interest, if it were to be made at all by the sheriff, must necessarily be made under circumstances of still greater ignorance and uncertainty as to its value, than attend sales of any other description of property; and not only without any legal means of delivering a present possession of the thing sold, but, in general, without having even the type or instrument of any legal interest whatsoever, present or future, in the subject of such sale, to exhibit to the sight, or to deliver to the hands of a purchaser. It has indeed been urged in argument, as an inconvenience on the other side, if such equities of redemption in chattel interests shall be held not to be salable, under an execution, that, by means of a mortgage of the largest leasehold property for the smallest sum imaginable, such property might be effectually protected, and withdrawn from the legal claims of every creditor. But the inconvenience, in the case put, does not extend beyond the necessity which such a step would occasion, of resorting to a different remedy, to be applied in another court, for the purpose of obtaining it. In a court of equity he might be let in to redeem such mortgage incumbrances as stood in the way of his common-law remedy by execution; or he might have a decree for the sale of the mortgage-term itself in satisfaction of his rights as an execution creditor. Shirley v. Watts, 3 Atk. 200, is an authority for this purpose, as is also the case of Burden v. Kennedy, 3 Atk. 739. In the case of Lyster v. Dolland, reported in 3 Brown, Ch. 480, and 1 Ves. Jr. 431, Lord Thurlow was, at last, of opinion that an equity of redemption of a term could not be taken in execution, though, at first, under an apprehension that the language of the tenth section of the statute of frauds applied to such a case, he had inclined to hold otherwise. But the very silence of that statute, which, while it expressly introduces a new provision in respect to lands and tenements held in trust for the person against whom an execution is sued, says nothing of the trusts of chattel-interests; affords a strong argument that those interests were intended to continue in the same situation and plight, in respect of executions in which both leasehold, and freehold trust-interests equally stood, prior to the passing of that statute." The same point was decided by the court of common pleas in the case of Metcalf v. Scholey, 2 Bos. & P. (N. R.) 461. In the case of M'Call v. Lenox, 9 Serg. & R. 312, Duncan, J., said: "In England the equity of redemption is not extendible on an execution." In Waters v. Stewart, Caines, Cas. 47, Spencer, J., said: "I take it to be well settled that in England there cannot be a sale of an equity of redemption upon a mortgage for a term of years." And Kent, J., said: "I admit that under the English law, an equity of redemption cannot be sold by process of law." In the case of State v. Laval, 4 McCord, 341, Nott, J., said: "That is what is called an equity of redemption; and I take it to be a well-settled rule of law, that a mere equity is not the subject of a levy and sale under an execution. A fieri facias can operate only on a legal estate; and it is confounding all legal distinctions, to say that an execution can be levied on an equity of redemption. It is said that in Massachusetts, Connecticut, and New York, an equity of redemption may be levied upon and sold under a fieri facias from a court of law. I have not looked into those cases because the question is quite unimportant as it regards the case now under consideration. For our act of 1791 expressly provides that the fee shall continue in the mortgagor; and that the mortgage shall be considered only as a pledge for the security of the money; and the mortgagor is entitled to redeem, even after the time stipulated, by the parties, for redemption, is past. It is true that the act of 1797, does call this, in conformity with the language of the English books, an equity of redemption; but it is clearly a misnomer. The right to redeem is, unquestionably, a legal, and not an equitable right. The mortgagor has the legal estate, because it is so expressly declared by the act. He has a legal right to redeem because that is as expressly given," "and because the aid of the court of equity is not necessary to the exercise of it." In the case of Roads v. Symmes, Ohio Cond. R. 141, the court said: "There is no principle upon which it can be held that a judgment may bind an interest which cannot be seized and sold to satisfy it." "The liability of equitable interests in land to be seized and sold upon execution, as land, has never been recognized by this court, as existing either under the territorial or state governments." And in Burden v. Kennedy, 3 Atk. 739, Lord Chancellor Hardwicke said: "Where an execution by elegit or fieri facias is lodged in a sheriff's hands, it binds goods from that time, except in the case of the crown, and a leasehold estate is also affected from that time;" "but in the present case, here is only an equity of redemption, in the debtor, in the leasehold estate, and an execution lodged will not affect this, as the legal estate is in the mortgagee."

A number of cases have been cited to show, that in several of the states, namely, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, South Carolina, and Ohio, the courts have decided that an equity of redemption may be sold under a fieri facias;

but it will be found, upon examination of those cases, that they rest upon the construction given by those courts to the words of the several statutes, subjecting real estate to execution, and of the statute of 5 Geo. II. c. 7, which has been differently construed in different states; and none of those cases can be considered as in any manner affecting the law of Maryland as it existed on the 27th of February, 1801, when it was adopted by congress as the law of this part of the District of Columbia. In no case had the courts of Maryland, before the 27th of February, 1801, ever decided that an equity of redemption could be seized and sold under a fieri facias. On the contrary, by the act of 1794 (chapter 60, § 10) it is provided, that, "whereas, it often occurs that persons, against whom judgments and decrees are obtained, hold and possess, or claim lands, tenements, or hereditaments, by equitable title only, and the creditor or creditors of such persons are often without remedy either at law or in equity, be it enacted, that, in such cases, it shall and may be lawful for the chancellor, on application, to decree a sale of such equitable interest for the benefit of the creditor or creditors applying for the same; and the purchaser or purchasers thereof, under such decree, shall, upon payment of the purchase-money, be entitled to an assignment of such equitable interest, to be made by the trustee making such sale, and shall be entitled to such remedies, both in law and equity, against all persons, and in all cases, as the person could or might have had, whose title he, she, or they may claim by virtue of such purchase." And by the act of 1810 (chapter 160) it is enacted, "that it shall and may be lawful for any sheriff or other officer to whom any writ of fieri facias shall be directed, to take, seize, and expose to sale, any equitable estate or interest which the defendant or defendants named in such writ of fieri facias may have or hold in any lands, tenements, or hereditaments;" and it provides for an assignment thereof, by the officer, to a purchaser, who is thereby entitled to such remedy against all persons, and in all cases, as the person, whose title he may so purchase, could have had. This act was passed after the separation of this part of the District from the state of Maryland, and therefore was never in force here, but it shows what the law of Maryland was before the passing of the act, namely, that an equitable estate or interest in lands could not be seized and sold under a fieri facias. It seems clear, therefore, that such was the law of Maryland on the 27th of February, 1801, and such must still be the law unless it has been altered by some act of congress. But it is said that it has been altered, as to writs of fieri facias issued upon the judgment of a justice of the peace, by the act of congress of the 24th of June, 1812, § 16 (2 Stat. 755), by which it is enacted, "that upon a fieri facias issuing out of the office of the clerk of the county of Washington, upon the judgment of a magistrate, the plaintiff, upon such fieri facias, shall be entitled to have his execution against the goods and chattels, lands and tenements, rights and credits of the defendant." The execution, in the present case, did not issue out of the office of the clerk of the county of Washington, but was issued by the magistrate himself, and is, therefore, not within the letter of the act of 1812.

But it is said, that by the third section of the act of the 1st of March, 1823 (3 Stat. 743), "to extend the jurisdiction of the justices of the peace," the justice of the peace is "authorized to issue execution or fieri facias in the same manner as executions are now issued by the clerk of the circuit court of the District of Columbia;" and it is supposed, that because the justice is to issue them in the same manner, they are to have the same effect. This does not seem to be a necessary consequence; but, admitting that it is, yet the fieri facias, issued by the clerk, never bound an equity of redemption. It cannot be contended that it is goods and chattels; and it was not lands and tenements; for the words "lands and tenements" have always, in Maryland, been understood to refer to the legal estate; and such has always been the construction given to the words "lands, tenements, and other hereditaments, and real estates," in the English statute of 5 Geo. II. c. 7, § 4, which are full as broad as the words "lands and tenements." They have, as we have seen, never been construed, in Maryland, as extending to an equity of redemption. The words "rights and credits" mean legal rights and credits only; such as might be attached and condemned under the attachment laws; not mere equitable claims or interests. But the third section of the act of March 1, 1823, does not authorize the justice who rendered the judgment to issue the execution; it authorizes any other justice to issue it upon a copy of the judgment. It is the 13th section of the act which gives power to a justice to issue execution upon his own judgment; and that section has no allusion to the executions formerly issued by the clerk; it adds nothing to the ordinary effect of a fieri facias at common law, and it expressly excepts certain articles from seizure. The 9th section gives the justice power to issue a ca. sa. or fi. fa. upon a supersedeas, (which is a judgment confessed by the debtor, with a surety, payable in six months,) which was the case here; and this section also has no reference to the executions formerly issued by the clerk, and adds nothing to the common-law effect of a fieri facias. The 3d section declares that "no judgment rendered before a justice of the peace shall have the effect to create any lien upon real estate." The reason of this provision, no doubt, was the difficulty of ascertaining the extent of such incumbrances from the judgments of twenty or thirty individual magistrates, whose memorandums, or even docket-entries, are not matter of record, and are liable to be lost; and no purchaser of land in the District

could be sure that it was free from incumbrance. When the magistrates were bound to certify all their judgments to the clerk of the court, and when all executions issued from his office, there could be no difficulty, as that office would, at once, furnish all the necessary information. Executions issued by justices of the peace, and levied upon lands, are liable to the same objection. They are made returnable to the justice, and nothing more is heard of them. They are not matter of record, and if returned, are liable to be lost; and before a title can be certified to be good, the files of every justice in the county must be examined. No deed is necessary from the officer who levies the execution, and makes the sale. The legal estate is vested in the vendee, by operation of law. Boring's Lessee v. Lemmon, 5 Har. & J. 223. The spirit of the act of March 1, 1823, is therefore against extending the operation of a magistrate's execution beyond its legal common-law effect, which I think is limited to the sale of legal estates and legal interests.

The fieri facias, in the present case, was issued upon a supersedeas, and must, therefore, have been issued by virtue of the 9th section of the act, which simply authorizes the magistrate to "issue execution by way of capias ad satisfaciendum or fieri facias against the principal debtor and his sureties, or against either of them, after the expiration of the time so mentioned in the said supersedeas." There is nothing, in this section, added to the common-law effect of the fieri facias. The only power given, is "to issue execution by way of capias ad satisfaciendum, or fieri facias." I am, therefore, of opinion that the execution and proceedings in the case of Van Ness against Shields, did not in any manner affect the equity of redemption which Shields had in the mortgaged premises; and that he had a good right to assign it to Mr. Hyatt on the 9th of May, 1825. If the equity of redemption was not affected by that execution, a fortiori the right to purchase the fee-simple within the ten years, which was a mere covenant-right, could not be affected. Mr. Hyatt had completed his title in fee before Mr. Van Ness filed his bill, and the fact, that he was a judgment-creditor, gave him no lien or priority to redeem the term, or to purchase the fee-simple, as against Mr. Hyatt, who was a bona fide purchaser for a full and valuable consideration without notice of that judgment. Whether he had, or had not notice, however, I deem to be of no importance. I am clearly of opinion that the bill ought to be dismissed with costs.

MORSELL, Circuit Judge. This is the case of a bill filed to redeem a mortgage of a leasehold estate; the complainant claiming a right to redeem as a creditor, by judgment, and under a sale by fi. fa. against the mortgagor. The facts to show the ground of the right, in substance, are: That on the 31st of December, 1818, William Cocking leased to James Shields, part of lot 12, in square 406, in the city of Washington, for ten years from the 1st of January, 1819, at $35 a year, clear of taxes, &c., and to build a two-story brick house thereon within twelve months, with leave to purchase the fee-simple at the end of the ten years, by paying $375 and all arrears of rent. This lease was duly acknowledged, but never recorded. Shields built the two-story house according to the contract. On the 23d of April, 1823, Shields mortgaged the house and lot to John Franks, to secure a debt of $1,127.18, to be paid on the 31st of December, 1828. On the 8th of November, 1823, Van Ness, the complainant, obtained a judgment against Shields for $28.40 debt, and $1.27 interest, and fifty-eight cents costs, rendered in his favor by a justice of the peace, which judgment was superseded. On the 10th of June, 1824, a fi. fa. was issued upon the judgment, by a justice of the peace, which was levied by Botelor, the constable, upon the lot of ground above described as then in possession of and occupied and held by said Shields, for all the right, title, interest, and claim of said Shields, (particularly describing the premises.) On the 10th of July, 1824, after due notice being given of the same, he, said Botelor, exposed the same to public sale, with the improvements thereon, that is, all the right, title, estate, interest, and claim of him, the said James Shields, therein, so as aforesaid taken in execution on the said writ. John P. Van Ness became the highest bidder and purchaser for $54, and has since paid the purchase-money. On the 19th of August, 1825, Botelor, as constable, made his deed to Van Ness, reciting all these circumstances, and conveying the said premises and interest to Van Ness, which are, by the admission of counsel, agreed to be true; which deed was duly recorded, &c. On the 7th of May, 1825, Franks assigned his interest in the mortgage to Alpheus Hyatt, for a valuable consideration. On the 9th of May, 1825, Shields assigned to Hyatt all his equity of redemption, in consideration of $200. Cocking died seized of the reversion, in fee-simple, which descended to his two daughters, Ann Blanchard and Jane Glover; who, on the 16th of April, 1826, assigned to Hyatt all their right as heirs at law of the lessor, William Cocking, for a valuable consideration. The bill states that a negotiation had taken place between the complainant and the said Cocking in his lifetime, upon the subject of paying the sum of money agreed on for the fee, but this is denied, and there is no proof of the fact, that it was continued afterwards with Charles Glover, who married one of the heirs of Cocking; and the correspondence, marked Exhibits 2 and 3, are filed to prove it, which I think they do prove. It also charges notice of the judgment, fi. fa., and sale, by Hyatt before his purchase of the equity of redemption of Shields; and although the fact of personal notice is not admitted in the agreement of counsel, yet the circumstances are so strong to prove it, that the conviction cannot easily be resisted. The public notice given of the

sale, the publicity of the sale itself, and the other circumstances in the case, seem to me abundantly sufficient to preserve any rights which Van Ness might have had against a subsequent purchaser of the redemption. The bill also charges "that he has been always ready and willing to redeem the same, and to pay the said sum of $375 with interest and arrearages to said Cocking and his representatives, and to pay to the said Franks in his lifetime, and his representatives since his death, the amount really due of said consideration-money in the mortgage to him from Shields, and is now ready and prepared so to do; but that they have refused," &c. The case as to the amount claimed, is not of much importance, but the principles, upon which a correct decision must rest, are of very great interest and difficulty. As to the interest which Shields took under the unrecorded deed, there is no difference in opinion between the Chief Judge and myself; that it was a good lease for seven years, or rather that it gave him a legal interest in the property for seven years, and an equitable interest for the residue of the ten years, together with rights, under the covenant, to the fee, which a court of chancery would enforce. I shall, therefore, say nothing more on that point. Shields, then, according to the facts in the case, at the time Van Ness obtained his judgment, and caused his fieri facias to be put into the hands of the officer, held the equity of redemption in the unexpired part of the term; was in the actual possession and occupation of the premises; and also had, by the condition in the mortgage, an unexpired period of time till the 31st December, 1828, to pay the money, and save the forfeiture; with the further right, secured to him by covenant upon payment of the sum mentioned in the lease, of purchasing the fee.

In the objections, offered to the recovery in this case, it has been supposed that the principal question in the case was, whether an equity of redemption, in a term of years, could be seized, appraised, and sold under a fi. fa. issued on the judgment of a single magistrate, and which, so far as this question is concerned, is supposed to be like any other common-law judgment. I think the real question in the case, is, whether Van Ness, the complainant, in virtue of his judgment and fieri facias, and sale under it, is not such a creditor and legal assignee as to be entitled, against the defendant, a subsequent purchaser of the equity of redemption, to the preferable right to redeem, and to the benefit of the covenant for the purchase of the fee, as an incident to the leasehold interest. I will, however, offer my thoughts upon the question, whether an equity of redemption in a term for years, can be seized, appraised, and sold under a fieri facias. A great number of English authorities have been referred to, for the purpose of proving that it cannot be done in England. I agree that it is so settled in England; the reason, assigned by the English authorities, is, that the fi. fa. is a common-law process; that the language of these writs and return, imports that the goods and chattels which are the subject of them are properly of a tangible nature, capable of manual seizure, and of being detained in the sheriff's hands and custody, and such also as are conveniently capable of sale and transfer by the sheriff to whom the writ is directed, for the satisfaction of a creditor. The legal interest in a term of years, both in respect of the possession of which the leasehold property itself is capable, as also in respect of the instrument by which the term is created and secured, both of which are capable of delivery to a vendee, has been always held to answer the description of the writ, and to be salable thereunder; but no single instance is to be found in the history and practice of the courts of common law, in which an equitable interest in a term of years has ever been recognized as salable, (seizable, of course, it cannot be) under a fieri facias. When this distinction was taken between a legal and equitable interest in lands, and the principle established, it was at a very early period; and when their courts decided that "an equity of redemption was nothing in the eye of the law." See 2 Wils. 86. It is not wonderful, when such was the view, that they should think it was not tangible; could not be seized and sold; but since that day the law of mortgages in England has undergone, (perhaps,) a greater change than the law on any other legal subject; almost total. It is not deemed necessary to trace particularly the change as to time or in all the particular instances. One or two shall be stated, which will show that I am not mistaken. To tenant by the curtesy, Lord Coke says, (and such is now the law,) four things are requisite to give an estate by the curtesy, namely, marriage; seizin of the wife; issue; and death of the wife. Yet it is a principle as well settled as any other in England, that a husband is entitled as tenant by the curtesy, to an equity of redemption. Again, in a very modern case of settlement, decided by one of the most enlightened judges that ever sat on the English bench, I mean Lord Mansfield, in stating the law on the subject, he says, "If the estate on which a pauper resides, is substantially his property, that is sufficient, whatever forms of conveyance there may be; and therefore a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only security. It is an affront to common sense to say the mortgagor is not the real owner." If, then, such is the character and interest of the mortgagor, the reasons for the principle no longer exist. There is, however, still felt strange veneration for an old principle which has nothing, at this day, but the most naked, sheer form left to support it. As to its not being tangible and capable of manual seizure, I think I

have shown enough to prove there is but little, if any, force in the objection.

In the language of a learned judge in Maryland, "the right itself, whether legal or equitable, is not tangible;" but the land is; and, by the sale, the interest of the party, either legal or equitable, may well pass; and if the party in possession will not give it up, the purchaser is driven to his ejectment; and if only equitable, to get possession he may resort to a court of equity, where, if the sale under the fieri facias passed the right, he would not only obtain the possession, but the legal estate also. Would it not be highly unjust that a debtor, in possession of, and using and enjoying the property as owner, under cover of such a sheer form, should be sheltered from the remedy of his creditor, awarded to him by the law as a means to realize the fruits of his judgment. However it may be in England, this empty form has not been regarded as a sufficient objection by the courts of this country, with the exception of some few of the states, amongst whom I shall endeavor to show Maryland is not one. It will appear, from decided cases, that Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, South Carolina, and Ohio, have determined that an equity of redemption may be sold under a fieri facias. It is said that those states have particular statutes on the subject, authorizing it. Whether this is so or not I cannot tell, having no opportunity of examining their statutes; but so far as I have ascertained, they are considered as only declaratory of what the law was before. But, how was the law of Maryland as it existed on the 27th of February, 1801? It is supposed, that in no case had the courts of Maryland ever decided that an equity of redemption could be sold under a fieri facias. On the contrary, that the two acts of 1794 (chapter 60) and 1810 (chapter 160) show what the law of Maryland was before, namely, that an equitable estate or interest in land could not be seized and sold under a fieri facias. I have very much misunderstood the course of legal decisions in Maryland, if their courts have not, in effect, held that such an interest was subject to a fieri facias. The act of 5 Geo. II. c. 7, which passed in the year 1732, made houses, lands, negroes, and other hereditaments and real estate liable to the payment of all debts; and subject to the like remedies and proceedings in any courts of law or equity that personal estate were. I can perceive nothing in the terms of this law, that necessarily confines the remedies to cases only of strictly legal interests in lands. The terms hereditaments and real estate are very comprehensive. It is such an interest as will descend and may be inherited by the heirs at law; and may be bargained and sold by the mortgagor. The court has decided that the mortgagor of shares in an incorporated insurance company, was entitled to vote on them, and in some other cases, I think, that the mortgagor is considered as the real and substantial owner. As to the inference which has been drawn from the acts of 1794 and 1810, I think it will appear to be incorrect, and that their provisions were principally intended to affect equitable interests only in lands existing in contract and choses in action only,—a distinction which I admit to exist. The first act is intended to enlarge the powers of the high court of chancery, and the powers given are nothing more than such a court had before as to cases of equity of redemption. So with respect to the act of 1810; it was designed to remove all doubts as to the cases of equity of redemption, and to extend it to all other equitable interests. To justify the inference drawn from those two statutes it must be supposed, that there is no difference between an equity of redemption with actual possession, in which the party has bargained and sold his legal interest conditionally, and other equitable interests or claims in land by contract or chose in action only and where he never had the legal interest. I think otherwise. I have never supposed that a fieri facias could be levied upon a mere chose in action. This, I agree, would be such an incorporeal hereditament as could not, without the provisions of the statutes, be affected by a fieri facias.

I will now refer to the Maryland authorities, or as many of them as I have been able to meet with, and I think it will appear from them that I am fully borne out in the position I have laid down. The first is the case of Campbell v. Morris [3 Har. & McH. 557], in 1797. In this case the question was raised and fully argued by the most eminent lawyers at the bar of the general court, whether an attachment, which was a common-law process, could be levied upon an equity of redemption in lands, and it was very ably argued and shown that there was no distinction, as to this matter, between an attachment and a fieri facias. The court of appeals of Maryland decided that it might be done, and ordered condemnation; on which judgment a fieri facias was taken out, and the lands seized and sold, and Campbell became the purchaser. He afterwards filed his bill to redeem, in this court, which was opposed by some other who claimed to have the right; and an appeal was prosecuted from this court's decision, to the supreme court, where the same question was raised and decided. Judge Johnson, in delivering the opinion of the court, says: "Campbell claimed as a purchaser at sheriff's sales under an attachment of the interest of the mortgagors, filed his bill for redemption, and the court decreed that he be permitted to redeem on payment," &c. The attachment was levied on the equity of redemption existing in those mortgagors; and the decision of this court, in supporting his rights, was placed upon the decision of the courts of Maryland (in which the land then lay) which maintained the validity of an at-

tachment levied upon an equity of redemption. In this case, it will be observed, the process of attachment was a common-law process; the judgment of condemnation was a common-law judgment, and the fieri facias was also such. The supreme court say that a fieri facias, issuing on such a judgment, may be levied on an equity of redemption, and a valid sale may be made under it; and that the purchaser, in virtue thereof, is to be considered such an assignee of the equity of redemption as to be entitled, on a bill filed, to redeem. If it be objected, however, to this case, that it is not authority for the proposition as generally laid down, because of the comprehensive terms used in the attachment-statute, yet the objection will not hold as to the particular case before the court, as it will hereafter be shown, when the terms used in the two statutes are to be compared. It will then appear to be a full and conclusive authority.

The next which I will refer to is the case of Purl's Lessee v. Duvall, in Prince George's county court, decided in 1820; reported in 5 Har. & J. 69. The case was an action of ejectment brought in the county court by Purl against Duvall, in which the question was made to the court, "When the judgment was obtained under which the land was sold, there was no deed for the land vesting a legal title in Purl, who had no interest therein until two years after the return of the fieri facias under which the land was seized and sold;" in other words, the defendant, in the case in which the fieri facias had issued, had, at the time, only an equitable interest in the land which was seized and sold under the fieri facias. The plaintiff prayed the court to direct the jury that the evidence so offered by the defendant, (which was his judgment, fieri facias, sale under it, and deed from the sheriff, of an equitable interest,) was not sufficient to sustain the issue on his part; and that the title by him set up under the judgment and the proceedings under the same, the sale of the sheriff, and the deed executed by him to said defendant, is not a good and valid title in law; which opinion the court, (Johnson, C. J., Key, and Plater, A. J.,) refused to give; but on the contrary were of opinion, and so directed the jury, that the plaintiff, on the preceding facts, if found to be true by the jury, was not entitled to recover. The fieri facias, in the case above recited, was laid in the year 1806, so that it was not even pretended that the act of 1810 had any bearing on the question made in the case. This case was carried up to the court of appeals, but went off, in that court, upon some other point. The decision of the county court was not disturbed, so that I think it cannot be denied that this is an authority on the very point. The judge who delivered the opinion of the court, was, at that time, one of the judges of the court of appeals, and afterwards made the chancellor of the state. He stood, deservedly, very high as a judge.

The next case which I will refer to, and the last, is the case of Ford v. Philpot, 5 Har. & J. 313, decided in 1821. In this case the question is made: "How far the interest which a mortgagor had in lands, mortgaged by him, was, before the acts of 1795 and 1810, liable to be attached, condemned, and sold, under a fieri facias." The same learned judge, Johnson, in delivering the opinion of the court, after stating that the mortgagor is considered the substantial owner of the property mortgaged, that the debt due is all the mortgagee and those claiming under him can demand, and that the legal estate is in the mortgagee merely to secure the payment of the debt, and, that effected, the mortgagor must be restored to his original condition, the unfettered owner; that there is no necessity to detail the extent of the interest of the mortgagor after the time limited for the payment of the debt has elapsed; he says, "It may suffice to say that, except no right of dower can arise (and for this exception no substantial reason can be given, and no longer exists,) on the mortgagor's interest, he is capable of transferring or vesting his interest at his own pleasure; nor can he be deprived of this capacity so long as the right of redemption exists." Again, in another part of the same opinion, he says, "It appears, in itself, but just, that the interest, which a mortgagor has in the property mortgaged by him, should be liable, as well at law as in equity, for his debts; and there appears no force in the objection, that it is not at law subject to a fieri facias because it is not tangible; for the right itself, whether legal or equitable, is not tangible; but the land is;" &c., as I have quoted from him in another part of this opinion. In closing his opinion, he further says, "that whatever interest Ford had, to the land, passed from him by the attachment, condemnation, and sale; and, of course, when his representatives filed the present bill, they had not the redeeming power vested in them." And now, lastly, may not the same thing be said of the equity of redemption, in this case, even if it should be thought I am incorrect as to the general question, which I think I have sustained, that an equity of redemption of lands, where the mortgagor is in possession, before foreclosure, may be affected by a fieri facias on a judgment obtained by a creditor.

The judgment, in the present case, was a magistrate's judgment, and the fieri facias issued thereon under the act of congress of 1812, § 15 (2 Stat. 755). That section is in these words: "That upon a fieri facias issuing out of the office of the clerk of the county of Washington, upon the judgment of a magistrate, the plaintiff, upon such fieri facias, shall be entitled to have his execution against the goods and chattels, lands and tenements, rights and credits of the defendant." The words of the attachment law are, "the lands, tenements, goods, chattels and credits"—so that upon a comparison of these two laws, the terms are almost identical; if any difference, the words of the act of congress are more comprehensive. I should really think that after the numerous

judicial decisions, both in the state court and United States court, in giving the proper construction to those terms, and so extending them as to include an equity of redemption in lands, expressly, there could be no need for me to say another word. It is true, the act of congress, so far as it directed the execution to be issued out of the office of the clerk of the county of Washington, has been repealed, but I think the justice of the peace who is now authorized to issue instead of the clerk, is authorized to issue the same kind of execution, and with the same comprehensive effect as to the subjects. In 8 East, 485, the judge, in delivering the opinion of the court, says: "But the inconvenience in the case put," (in case an equity of redemption could not be sold under a fieri facias,) "does not extend beyond the necessity which such a step would occasion of resorting to a different remedy, to be applied in another court, by a bill to be filed by a judgment creditor, in such other court, for the purpose of obtaining it. In a court of equity he might be let in to redeem such mortgage incumbrances as stood in the way of his common-law remedy by execution; or he might have a decree for the sale of the mortgage term itself, in satisfaction of his rights as an execution creditor. 3 Atk. 200, 739." So in 4 Johns. Ch. 692, Chancellor Kent says: "It may be laid down as a rule of equity, that an execution creditor at law has a right to come here and redeem an incumbrance upon a chattel interest, in like manner as a judgment creditor at law is entitled to redeem an incumbrance upon the real estate, and the party, so redeeming, will be entitled, in either case, to a preference according to his legal priority." I am, therefore, brought to this conclusion: That the complainant, Van Ness, by the judgment, fieri facias, and sale, and purchase under it, of the equity of redemption of Shields, of the unexpired part of the term, became the legal assignee thereof, and of all the equitable interests of Shields, as incident to and connected with, his leasehold interest in the land; and that he is entitled to his decree accordingly. I do not think the defendant, Hyatt, can reasonably object to want of notice. I think he had all the notice Van Ness was bound to give.

CRANCH, Chief Judge. It has been before observed, that "in no case had the courts of Maryland, before the 27th of February, 1801, ever decided that an equity of redemption could be seized and sold under a fieri facias." But, it has been suggested, that the course of legal decisions in Maryland will show that their courts have, in effect, held that such an interest was subject to a fieri facias; and the cases cited for that purpose, are those of Campbell v. Morris, decided in the general court of Maryland, and in the court of appeals in Maryland in 1797, and in the supreme court of the United States in 1815; Purl's Lessee v. Duvall, in the county court of Prince George's county, in Maryland, in 1820; and Ford v. Philpot, in the court of appeals of Maryland in 1821. The case of Campbell v. Morris, is reported in 3 Har. & McH. 557, as it appeared in the general court, and in the court of appeals. The general court, which, at that time, was supposed to be at least fully equal to the court of appeals in legal learning and talent, was clearly and decidedly of opinion that an equitable interest could not be attached; and the court of appeals, although they reversed the judgment of the general court, who quashed the returns of the writs of attachment, gave no reasons for the reversal; but from the argument of Mr. Shaaff, who was counsel of Mr. Campbell, the attaching creditor, and the letter from Judge Rumsey, the chief judge of the court of appeals, to Mr. Morris's counsel (see Pratt v. Law, 9 Cranch [13 U. S.] 476), it appears that the judges (excepting the chief judge himself,) thought the covenant for quiet enjoyment was a lease for years to the mortgagors, and gave them a legal estate which was attachable; and they gave no opinion upon the question whether an equity of redemption was liable to attachment. The authority of that case, therefore, is decidedly against the principle for which it was cited. In the case of Pratt v. Law, 9 Cranch [13 U. S.] 496, where the same question was raised upon the same attachment, the supreme court say: "Much ability has been exhibited in argument on the question whether an equitable interest, in lands and tenements, be the subject of attachment under the laws of Maryland. But we are of opinion that we are not now at liberty to enter into the consideration of that question. The decision of the court of appeals is final and conclusive on this point. The question was finally brought before them; and although it had not fixed the law, would have fixed the fate of these lands beyond reversal. Some doubt is entertained by one member of the court, whether the laws of Maryland go further than to authorize the condemnation of this interest to satisfy the judgment, so as to leave the plaintiff still under the necessity of applying to an equitable tribunal to effect a sale. But the majority are of opinion, that the attachment act, in making the interest tangible, makes it subject to the ordinary process of the law courts; and that, in vesting in the courts in which the condemnation takes place, the power to issue execution as in cases of other judgments, it has left with those courts so to fashion its process as to meet the exigency of each case. In this case the very special nature of the execution shows that it has been fashioned with great care and learning. We therefore hold the sale under this execution to be valid." Here it is evident that the doctrine of the liability of an equity of redemption to condemnation under attachment in Maryland, receives no additional sanction from the supreme court of the United States, who expressly disclaim the consideration of that question, considering it as settled, in regard to that case, by the court of appeals of Maryland. But if the case of Campbell v. Morris could be considered as having settled the law of Maryland upon that question, (which

I think it could not,) yet that was a case of attachment and condemnation; not a simple case of fieri facias under an ordinary judgment. The process of attachment was given for the purpose of enabling a creditor to get at property which he could not affect by the ordinary process of law, and it creates a lien from the time of service of it. It authorizes a condemnation of the property attached, and a fieri facias of the property condemned. The act of 1795, c. 56, authorizes an attachment of the lands, tenements, goods, chattels, and credits, of the debtor. The common writ of fieri facias commands the sheriff to make the money of the goods and chattels of the debtor; and until the statute of 5 Geo. II. c. 7, in the year 1732, lands in Maryland were never sold under a fieri facias. Previous to that statute. lands could only be extended by elegit, as they are now in Virginia. See Kilty's Notes on that statute, page 249. The statute 5 Geo. II. c 7, § 4, provides "that houses, lands, negroes, and other hereditaments and real estates in the plantations, belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands, of what nature or kind soever, owing by any such person to his majesty or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process, in any court of law or equity in any of the said plantations respectively, for seizing, extending, selling. or disposing of, any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties, and demands; and in like manner as personal estates, in any of the said plantations respectively, are seized, extended, sold or disposed of, for the satisfaction of debts." "Soon after this statute became known in the province, (says Mr. Kilty,) "the practice began of selling lands under writs of fieri facias, and the remedy by elegit ceased to be used." The writ of fieri facias was, therefore, in Maryland, extended to houses. lands, negroes, and other hereditaments and real estates; but there is no evidence that any other than legal estates could be seized and sold under a fieri facias, or that the common law of England, upon that subject, which had prevailed in Maryland before that statute, was thereby altered in that respect. The thing itself was to be sold, not a chose in action, nor an equitable conditional right to claim the thing. Under the attachment law, a chose in action might be attached, condemned, and perhaps sold, under a special fieri facias founded on the condemnation; but an equity of redemption is not provided for under that law; and if it were, it does not follow that it, any more than any other chose in action, could be sold under a fieri facias, without a previous attachment and condemnation." If, therefore, we were to admit that the court in the case of Campbell v. Morris, decided that an equity of redemption was liable to attachment, it does not follow that it can be sold under a fieri facias without attachment. But I do not by any means admit that case to be an authority for that point; because, as before observed, Mr. Campbell's counsel, Mr. Shaaff, contended that the covenant, on the part of Mr. Law, contained in the mortgage, that Morris, Nicholson, and Greenleaf, should remain in possession until default made in the condition, gave Morris and Nicholson a legal estate for years which could be condemned and sold; and the chief judge of the court of appeals states, expressly, that the judgment of the general court was reversed on that ground, and that the court gave no opinion upon the question whether an equitable interest was liable to attachment; so that the opinion of the general court, which was full and decided upon that point, stands unreversed.

The next case cited to prove that the course of legal decisions in Maryland will show that their courts have, in effect, held that such an interest was subject to a fieri facias, is Purl's Lessee v. Duvall, in Prince George's county court, reported in 5 Har. & J. 69–74, and decided in 1820, nineteen years since this District was separated from Maryland, and upon a transaction which originated long after that separation. The case appears to be this: Purl had contracted to purchase of Magruder one hundred acres of land, being part of a tract called "Magruder's Plains enlarged," and was probably put in possession without any legal title. The purchase-money not having been paid according to agreement, Magruder brought a suit at law against Purl, and at September term, 1806, obtained a judgment for seven hundred and twenty dollars, upon which, after two ca. sa.'s entered, "not called, by consent," and the payment of three hundred and forty dollars, a fieri facias was issued on the 7th of December, 1807, which was returned in April, 1808, "made to the amount of two hundred and fourteen dollars and seventy-two cents laid, as per schedule; for residue, not sold for want of buyers." Notley Maddox was then the sheriff. The schedule contained part of a tract or parcel of land called "Magruder's Plains," containing eighty-one acres. Nothing further was done until the 4th of June, 1810, when Magruder, having been, perhaps, advised that a mere equitable title could not be seized and sold under an ordinary writ of fieri facias, conveyed the legal title in fee to Purl, and thereupon on the 17th of September, in the same year, 1810, took out a venditioni exponas, commanding the sheriff to expose to sale the eighty-one acres of "Magruder's Plains," upon which he had levied the fieri facias in 1808. This venditioni exponas was directed to Notley Maddox, late sheriff, &c., (one Darnal having, in the mean time, been elected sheriff of the county,) and at April term, 1811, was returned "not sold for want of buyers." On the 23d of June, 1812, another writ of venditioni exponas was issued returnable to September term, 1812,

and directed "to the sheriff of the said county." This writ was returned "made," by Darnal, the then sheriff, who sold the land to Duvall. Purl, thereupon, brought his action of ejectment, and at the trial the defendant relied upon his title thus obtained by the sheriff's sale after the legal title had been thus conveyed to Purl by Magruder. Whereupon Purl prayed the court to direct the jury that the evidence so offered by the defendant was not sufficient to sustain the issue on his part; and that the title by him set up under the judgment and the proceedings under the same, the sale by the sheriff, and the deed executed by him to said defendant, is not a good and valid title in law. Which opinion the court refused to give, and directed the jury that the plaintiff, on the facts stated, if found to be true by the jury, was not entitled to recover. Purl appealed to the court of appeals. Mr. Stephen, the counsel of the appellee, said: "There are two questions in this case: (1) Whether an equitable interest in land taken in execution under a fieri facias, can be sold under a venditioni exponas, the legal title having been acquired in the mean time. (2) Whether, if the land was levied upon and advertised as 'Magruder's Plains,' and sold and conveyed as 'Magruder's Plains enlarged,' the defendant in the judgment and execution can avail himself of this objection in an action of ejectment?" Mr. Justice Dorsey, in delivering the opinion of the court of appeals, (after observing that the following points were made, namely: (1) That the return of the fieri facias was too uncertain as to the description of the land. (2) That the plaintiff's lessor, at the time the fieri facias was laid, had only an equitable interest in the land. (3) That Darnal had no power to sell the property which had been levied upon by his predecessor, Maddox,) said: "The court do not deem it necessary to give any opinion on the first and second points, because they are of opinion that Darnal had no authority to execute the writ of venditioni exponas." At the time of levying the fieri facias, Purl had only a bare equitable claim to the land, upon paying the purchase-money. The argument, drawn from the nature of a mortgagor's interest, does not apply to this case. Such a naked equity had never been adjudged, in Maryland, to be liable to be seized and sold under an ordinary writ of fieri facias. The counsel of Magruder seems to have been aware of this, for he did not venture upon a sale under the fieri facias until Magruder had conveyed the legal estate to Purl, by the deed of the 4th of June, 1810, more than two years after the execution was levied. That the conveyance of the legal estate to Purl, before the sale, was deemed a very important fact in the cause, appears by Mr. Stephen's statement of the questions which would arise in the argument; and there can be little doubt that it was the fact which mainly induced the county court to refuse the instruction to the jury, prayed by the plaintiff's counsel. This case, therefore, does not seem to me to afford any evidence that the course of legal decisions, in Maryland, will show that their courts have, in effect, held that such an interest, that is, an equitable interest, was subject to an ordinary fieri facias, even as late as 1808, much less before 1801.

The next and last case, cited for that purpose, is that of Ford v. Philpot, reported in 5 Har. & J. 315, and decided by the court of appeals in Maryland, in 1821. The case appears to be as follows: In 1754 certain lands were mortgaged by Ford to Larsh, or to some person under whom he claimed. Ford, the mortgagor, and those claiming under him, remained in possession until 1789, when Larsh obtained a judgment against him on his bond given for the money due on the mortgage, and after two non ests, took out an attachment under the act of 1715 (chapter 40), and attached the mortgaged lands then in possession of the mortgagor, which were condemned and sold under the fieri facias issued upon the judgment of condemnation, and bought by one Hughes, who purchased of Larsh all his right as mortgagee, and then sold the property to Philpot, the defendant. Ford, or those claiming in his right, brought his bill in the court of chancery in Maryland, where the chancellor decreed that he should be permitted to redeem by a certain day, upon paying up the mortgage money, and for certain improvements which had been put upon the land by Hughes or Philpot; and that if he did not so redeem, by the day, the bill should be dismissed. He refused to redeem on those terms; the bill was dismissed, and he appealed. This case, therefore, was upon an attachment and condemnation, in 1789. The plaintiff, Larsh, who obtained the original judgment against Ford, might have issued a fieri facias directly upon that judgment; and if an equity of redemption was, by law, liable to be seized and sold under an ordinary fieri facias, his remedy would have been as complete as if the right had been attached and condemned. But it seems his counsel did not think proper to risk it upon an ordinary fieri facias, and proceeded by way of attachment and condemnation; so that the case affords a strong presumption that the lawyers of that day were of opinion that an equity of redemption, even where the mortgagor remained in possession, was not liable to seizure and sale under an ordinary fieri facias; and Judge Johnson, of Maryland, who delivered the opinion of the court of appeals, after stating that the mortgagor is now considered as the owner of the property, against all the world, except the mortgagee, and liable to all the incidents of a legal estate, except dower, says: "The property mortgaged is substantially his, liable to the incumbrance of the debt. Subject to that responsibility, he can sell it, to meet any other claims or demands, to whom he pleases; and without his permission, and against his will, it may be withdrawn from him, in discharge of his debts, by a decree

and sale under the authority of a court of equity; and since the year 1810, it is expressly made responsible, at law, for his debts, as well as any other equitable interest a debtor may be entitled to. But was it susceptible of being taken under the attachment in the year 1789, and could it be disposed of under the fieri facias? If it be conceded, that, in England, the right of redemption cannot be taken in execution and sold by a fieri facias, that is, the equity of redemption in chattels real; and that, before the year 1810, in this state, a fieri facias, on mere common-law judgments, would not reach such property; yet it will not follow that it may not be approached, or made liable by attachment. There are no words or expressions in the attachment law of 1715 (chapter 40), confining its operation to such property as could be affected by fieri facias on ordinary, or common-law judgments. Its language is, 'to award an attachment against the goods, chattels, and credits.' By what process of law could the credits of a judgment debtor be affected? The writ of fieri facias could not meet them; and if they could be made responsible, the aid of a court of equity must be solicited; and when the act caused one interest to be affected at law, it is not presumed that any reason exists for excluding any other property, belonging to the debtor, from the same liability." Again, he says: "It appears, in itself, but just, that the interest which a mortgagor has in property mortgaged by him, should be liable, at law, as well as in equity, for his debts; and there appears no force in the observation, that it is not, at law, subject to a fieri facias, because it is not tangible; for the right itself, whether legal or equitable, is not tangible; but the land is; and, by the sale, the interest of the party, whether legal or equitable, may well pass; if a legal interest, and the party in possession will not give it up, the purchaser is driven to his ejectment; and if only equitable, to get possession, he must resort to a court of equity, when, if the sale, under the fieri facias, passed the right, he would not only obtain the possession, but the legal estate also. And as it appears by the judgment of the court of appeals, in the case of Campbell v. Morris, 3 Har. & McH. 555, that the equity of redemption may be sold under an attachment issued in virtue of the supplementary act; and as the original and the supplement are the same, as to the property to be affected, and as the court are not, in the slightest degree, disposed to question the propriety of the decision made in the case mentioned, they are drawn to the conclusion that whatever interest Ford had, to the land, passed from him by the attachment, condemnation, and sale, and, of course, when his representatives filed the present bill, they had not the redeeming power vested in them."

This case of Ford v. Philpot seems to have been decided upon the authority of Campbell v. Morris, in which case it is certain that the court of appeals did not decide the question whether an equity of redemption would pass by the attachment, condemnation, and sale; and it is equally certain that the general court of Maryland, at that time an abler court than the court of appeals, decided clearly that it would not. The court of appeals only decided that Morris had a legal estate which might be attached, condemned, and sold. But giving the utmost force and extent to the cases of Campbell v. Morris, Pratt v. Campbell, and Ford v. Philpot, which have been claimed for them, and they do not affect the question whether an equity of redemption can be seized and sold under an ordinary fieri facias upon a common-law judgment. Neither before nor since the 27th of February, 1801, has that question been decided by the Maryland courts, in the affirmative, so far as my information extends; while all the cases which I have seen, bearing, in any degree, upon it, look quite the other way. Thus in the case of Purl's Lessee v. Duvall, 5 Har. & J. 69, although the plaintiff caused his fieri facias, in December, 1807, to be levied upon the land in which his debtor had only an equitable interest, he would not risk a sale until the summer of 1812, when the debtor had acquired the legal estate. I have never heard any one contend that such a bare equity as Purl had at the time of the levying of that fieri facias, was liable to seizure and sale under a common execution upon a common-law judgment. The only use of subjecting an equitable interest to execution at law is to give the plaintiff a lien prior to other creditors and to enable him to appropriate to himself those equitable assets which a court of equity would decree to be divided pari passu among all the creditors. To affect equitable rights, a creditor ought to be obliged to come into a court of equity which will compel him to do equity while asking it for himself.

Upon the whole, with all the light thrown upon this question by the cases of Campbell v. Morris, Pratt v. Campbell, Purl's Lessee v. Duvall, and Ford v. Philpot, I am confirmed in the opinion, that by the fieri facias and sale under the judgment in the case of Van Ness v. Shields, Mr. Van Ness did not acquire the right of redemption of the mortgaged property in the bill mentioned, and that the bill ought to be dismissed with costs.

THRUSTON, Circuit Judge, concurred. MORSELL, circuit Judge, dissented.

Bill dismissed with costs.

Decree affirmed by the supreme court, March 2, 1839. 13 Pet. [38 U. S.] 294.

VAN NESS (ROCKVILLE & W. TURNPIKE-ROAD v.). See Case No. 11,986.

Case No. 16,868.

VAN NESS et ux. v. UNITED STATES et al.

[2 Cranch, C. C. 376.] [1]

Circuit Court, District of Columbia. April Term, 1823.[2]

INJUNCTION — DRAINAGE LAW — CORPORATION OF WASHINGTON—SALE OF LOTS.

1. Under the act of congress of the 7th of May, 1822 [3 Stat. 691], authorizing the corporation of Washington to drain the low grounds, &c., and the representative of the former proprietor to institute a bill in equity, in the nature of a petition of right, against the United States this court cannot grant an injunction to prevent the execution of the act.

2. By that act, the power to sell the lots is absolutely vested in the corporation of Washington, and the court has only authority to decide what proportion, if any, of the money arising from the sale the complainants may be entitled to.

3. The court has no authority under the act, to require the corporation of Washington to give security for the payment of a moiety of the proceeds of sale to the complainants.

Bill in equity, in the nature of a petition of right, filed under the authority given by the 6th, 7th, 8th, and 9th sections of the act of congress of the 7th of May, 1822, c. 96 (3 Stat. 691), entitled "An act to authorize and empower the corporation of the city of Washington, in the District of Columbia, to drain the low grounds on and near the public reservations, and to improve and ornament certain parts of such reservations."

By the 6th section it is enacted, "that it shall be lawful for the legal representative of any former proprietor of the land directed to be disposed of by this act, or persons lawfully claiming title under them, and they are hereby permitted and authorized at any time within one year after the passing of this act, to institute a bill in equity, in the nature of a petition of right, against the United States, in the circuit court of the United States for the District of Columbia, in which they may set forth the grounds of their claim to the land in question.

Section 7. That a copy of said bill shall be served on the attorney-general of the United States, and it shall be his duty to prepare and put in the proper pleas and answer, and make all proper defence thereto, in behalf of the United States.

Section 8. That the said suit shall be conducted according to the rules of a court of equity. And the said court shall have full power and authority to hear and determine upon the claim of the plaintiff or plaintiffs, and what proportion, if any, of the money arising from the sale of the land hereby directed to be sold, the parties may be entitled to.

Section 9. That the plaintiff, or plaintiffs, or the attorney-general of the United States shall be entitled to an appeal to the supreme court of the United States, whose decision shall be conclusive between the parties; and should no appeal be taken, the judgment or decree of the said circuit court shall, in like manner, be final and conclusive."

The 2d section of the act, authorized the corporation of Washington to cause certain grounds in the city, designated as "Public Reservations, Nos. 10, 11, and 12," to be divided into building lots, and to sell the right of the United States in those lots, and with the proceeds of sale to make certain improvements mentioned in the act.

The bill was filed by John P. Van Ness, and Marcia, his wife, who was the sole heir at law of David Burns, who was the proprietor of the land in question, when the city was laid out. They contended, that under the original deeds of trust, these public reservations were to be always held by the United States for public purposes, and not to be sold as building lots for private use; and that if converted into building lots, the original proprietors were entitled to one half of them, for the same reason that they were entitled to the moiety of the lots originally designated as building lots, to be alternately selected by the public and the original proprietor; and for this purpose they prayed that the corporation of Washington, which was made a defendant to the bill, might be enjoined from selling, until the building lots should be so selected and allotted. See the case as reported in 4 Pet. [29 U. S.] 232.

The case was argued by Mr. Hay, for the complainants, and by Mr. Jones for the United States, and the corporation of Washington, upon the motion for an injunction.

Mr. Hay referred to the original agreement with the proprietors of the land and the deed of trust, which were executed to Beall and Gantt; the act of cession by the state of Maryland; the acts of congress of May 6, 1796 [1 Stat. 462]; April 18, 1798 [Id. 551]; January 12, 1809, § 8 [2 Stat. 513]; February 24, 1817 [3 Stat. 346]; the minutes of the proceedings of the commissioners in the case of Samuel Davidson in 1794, and the opinion of Mr. Brackenridge.

Mr. Jones, for the defendants, relied upon the terms of the deeds of trust, whereby the reserved squares were to be held in trust "for the use of the United States."

CRANCH, Chief Judge, delivered the opinion of the Court (THRUSTON, Circuit Judge, absent).

This is a bill in equity, in the nature of a petition of right, filed by virtue of the leave for that purpose given by the act of congress of the 7th of May, 1822, c. 96, § 6 (3 Stat. 691). It prays an injunction to prevent the corporation of Washington from selling the lots which by the said act the corporation is authorized to lay off and sell. The ground, upon which the injunction is requested, is, that by such sale under the authority of the Up-

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

[2] [Affirmed in 4 Pet. (29 U. S.) 232.]

ed States, they would forfeit their right in the land, and it would revert to the complainants, who would thereby become entitled to the whole land itself. The complainants, however, state that they are not disposed to insist on their strict right to the whole land, but are willing to be placed in the like condition as their ancestor would have been in, if the same land had been laid out into building lots in the year 1792, immediately after the execution of the deed of trust. They are willing to take every alternate lot. It will be perceived that the complainants seek to prevent the completion of the act which is the ground of their claim; so that if the court should perpetually enjoin the sale of the lots, their claim must entirely fail. It must be evident, therefore, that the complainants have not yet a ground to claim an injunction. It is also evident, that as their title must be founded on the sale, the sale can do them no injury. If they should become legally entitled to the land they may maintain their ejectments against the purchasers. If the complainants claim under the act of congress, they cannot deny its validity. They must take only what that act gives them.

The court is of opinion that, by that act, the power to sell the lots is absolutely given to the corporation; and that it makes no provision for suspending the sales, even if the court, upon a bill, in the nature of a petition of right, filed under that act, should be of opinion that the complainants have a good claim to the land.

The court is also of opinion that the power and authority given, by the act, to this court to hear and determine upon the claim of the complainants, is given merely for the purpose of enabling the court to determine what proportion, if any, of the money arising from the sale of the land, the complainants may be entitled to. The objects, contemplated by the act, are of a public nature, and highly important in regard to the health of the city. The act gives no power to the court, in any event, to prevent the accomplishment of those objects. We cannot, upon a bill filed under the act, authorize a proceeding which shall suspend its execution. In regard to the motion last made by the complainant's counsel, that an injunction should be awarded until security should be given by the corporation to pay one moiety of the proceeds of the sales of the lots, in case the court should decree a portion thereof to the complainants,—

The court is of opinion, that, upon a bill filed under the leave given by the act, it has no authority to require such security. We consider our authority, in a case in which we have cognizance only by virtue of the act, limited to the powers given by the act itself; and we are not sure that the United States are not bound, in good faith, by the act to guaranty the payment of the money which the court may award. The United States have made the corporation their agent to carry into effect the objects of the act; and have reposed in it a confidence which the court cannot presume it will abuse. The motion of the complainant's counsel, for an injunction, is therefore overruled.

The court, at a subsequent term, dismissed the bill, and upon appeal to the supreme court, the decree of this court was affirmed, in January, 1830. 4 Pet. [29 U. S.] 232.

Case No. 16,869.

VAN NESS v. VAN NESS.

[1 Hayw. & H. 251.] [1]

Circuit Court, District of Columbia. Dec. 29, 1846.

HUSBAND AND WIFE—EVIDENCE OF MARRIAGE—DECLARATIONS AND ADMISSIONS.

1. *Held*, that the admissions and acknowledgments of the parties to a pretended marriage, alleged to have taken place in Pennsylvania, but not solemnized as required by the statutes of that state, are not sufficient, under the decisions of the courts of that state, to establish the fact of a valid marriage between the parties, when only made in the presence of each other, and not in the presence of a third party, and the court instructed the jury to bring in a verdict accordingly.

2. A verdict of eleven jurors of the panel of twelve to that effect was accepted and ordered to be recorded by the court.

Robert J. Brent and Henry May, for plaintiff.

James M. Carlisle, Joseph H. Bradley, R. S. Coxe, and Henry D. Gilpin, for defendant.

The plaintiff [Mary Ann Van Ness] claimed that she was the widow of the late John P. Van Ness and entitled to preference in the administration of his estate, and that the letters of administration granted to Cornelius P. Van Ness, the brother of the deceased, be revoked, and the administration of the estate be granted to her. That she was married to the said John P. Van Ness August 6th, 1845, by an alderman in Philadelphia, Penn. The administrator, Cornelius P. Van Ness, in his answer says that the true name of the plaintiff is Mary Ann Connor, and that she is not the widow of said John P. Van Ness. It was adduced in evidence on the trial that Connor, the husband of the plaintiff, left Washington about seventeen years ago, since which time he has not been heard from, and that the plaintiff had heard many years ago that he was dead.

The following issue was brought up from the orphans' court, Causin, Judge.

August 20, 1846.

"Whether Mary A. Van Ness be the widow of John P. Van Ness or not."

November 1, 1846.

A motion was made by Mr. Brent that Nov. 9th be set for trial of this case.

Mr. Carlisle objected, because the petitioner had given notice that she intended to take

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

evidence in Philadelphia, the purport of which they were ignorant of, and consequently must object to the fixing of any day till this evidence was taken.

THE COURT refused to grant the motion.

November 18, 1846.

Mr. Brent opened the case in behalf of the plaintiff.

After alluding to several disadvantages under which his client labored, he gave a sketch of how General Van Ness became possessed of his property, and alluded to the fact that he had left no will. The real issue was who should be the administrator. He gave a sketch of Mrs. Van Ness' life. While she kept a boarding house in this city she became known to General Van Ness, and that he was infatuated with her, and that she erred, and that an offspring was born of these parties; yet she had importuned him for the reparation due her. That he would prove that he had recognized her as his wife. He then alluded to the marriage having taken place in Philadelphia on the 6th of August, 1845.

Mr. Carlisle opened for the defence. He pronounced the case a most extraordinary one. He charged perjury, not only to the party claiming, but as also calculated to bring perjury upon the soul of another. On the 7th of March last General Van Ness died.

December 12, 1846.

The case was closed on the part of the defence.

Mr. Brent, on the part of the plaintiff, called Samuel Stettinius, when, after his being sworn, his testimony was objected to on the part of the defence as not being in rebuttal.

In the argument Messrs. May and Brent both declared that, by the evidence of this witness, they could prove certain circumstances which would establish the genuineness of one of the letters whose genuineness was disputed by the defence.

THE COURT sustained the objection of the defence.

December 16, 1846.

The following question was put to a witness:

Do you know General Van Ness' reputation for chastity?

Mr. Carlisle remonstrated against opening the tomb and bringing forth for the amusement of the public the foibles and failings of the dead.

Mr. Brent replied, and argued that this uttering of eulogies upon the dead and dealing out damnation to the living, was more unjust.

THE COURT, after consultation, ruled the evidence to be inadmissible.

December 21, 1846.

On the closing of the testimony, Mr. Bradley asked for the following instructions: "That even if the jury shall believe the whole evidence given on the part of the petitioner to be true, still there is no evidence from which the jury can lawfully infer that a marriage did ever in fact take place between her, the said petitioner, and John P. Van Ness."

He first contended that they were not married by the law of Pennsylvania (Hantz v. Sealy, 6 Bin. 405), and that cohabitation and repute are necessary. That the opinions of the aldermen that the statute was obsolete, and was not to be set up against the decision of the supreme court of that state, yet that they fully sustained the case in 6 Bin. That a man and woman riding out in a hack, and return and say they have been married, is not evidence of a marriage; that acknowledgments of the parties made out of the presence and hearing of others was not evidence of a marriage which affects third parties. He cited Church v. Hubbart, 2 Cranch [6 U. S.] 237; Dalrymple v. Dalrymple, 2 Hagg. Consist. 54; Brush v. Wilkins, 4 Johns. Ch. 520; Mostyn v. Fabrigas, Cowp. 161; 1 Greenl. Ev. § 107, as to who should determine what was the law in relation to marriage in Pennsylvania, and that the aldermen were not instructed in the law as required in those cases, and therefore their evidence of what established a marriage was not sufficient. That the evidence of Mr. Gilpin, who said he knew of no other law than the statute, and the decisions of the supreme court of the state contradicted the aldermen, and was entitled to a preference. He, therefore, said the only evidence of the law of Pennsylvania before the court was the statutes and the decisions of the supreme court of that state. The statutes, it was not pretended, had been complied with; and the decisions of the court required an acknowledgment by both parties in the presence of another party.

Mr. Brent followed in opposition to the prayer, and reviewed the whole law relative to the matter, adducing many new authorities for the purpose of showing that there had been sufficient evidence for a jury to pass upon, and for them to say whether a marriage had taken place or not.

December 29, 1846.

THE COURT decided to give the instructions in the following words: "Upon the whole evidence aforesaid, if the same shall be believed by the jury to be true, there is no evidence from which the jury can find that the said petitioner was lawfully married to the said John P. Van Ness."

Judge MORSELL delivered his opinion upon the case, and announced the decision of the court. Judge DUNLOP also gave his opinion at length, setting forth the reasons from which he concurred in the opinion delivered by Judge MORSELL. Chief Judge CRANCH did not sit, as he was unwell.

Mr. Brent filed twelve bills of exceptions to the instructions, and asked the privilege of addressing the jury upon the evidence of the case.

THE COURT denied there was any evidence before the jury, and refused to hear further argument upon the testimony.

One of the jurors asked leave to be absolved from rendering a verdict agreeable to the instructions of the court, as he stated that he could not conscientiously do so.

THE COURT said there was no evidence before the jury, and the responsibility rested with the court.

After some consultation, the foreman of the jury asked if eleven jurors could give a verdict.

THE COURT said they could not.

The juror was allowed to retire from the jury-box, and the remaining eleven jurors returned to the court a paper in the form of a verdict that, under the instructions, they find "that Mrs. Mary Ann Van Ness is not the widow of John P. Van Ness."

The verdict was recorded and the jury discharged.

The certificate of the finding of the jury was sent down to the orphans' court. The exceptions to the rulings of the circuit court did not accompany the certificate.

NOTE. This case was brought up by writ of error from the circuit court to the supreme court of the United States, and on motion to dismiss the case by the attorney for Cornelius P. Van Ness, administrator of John P. Van Ness, it was so ordered, Chief Justice Taney deciding that there was no final judgment, order or decree in the circuit court; that the certificate of the finding of the jury transmitted by the circuit court to the orphans' court was not such a final judgment, &c., as is included within the statute of February 27, 1801 [2 Stat. 103]. See 6 How. [47 U. S.] 62.

VAN NEST (MERRIAM v.). See Case No. 9,462.

VAN NEST (SEARLES v.). See Case No. 12,587.

VAN NORMAN v. HOLMAN. See Case No. 291.

VAN NORTHWICK v. STERLING. See Case No. 16,388.

VAN NOSTRAND (MINON v.). See Case No. 9,641.

Case No. 16,870.

Ex parte VAN ORDEN.

[3 Blatchf. 166; [1] 12 N. Y. Leg. Obs. 161.]

Circuit Court, S. D. New York. May 1, 1854.

FUGITIVE SLAVE LAW—POWER AND DUTIES OF COMMISSIONER—CERTIORARI.

1. A commissioner appointed by this court is, in the execution of the duties of his office under the act of September 18th, 1850 (9 Stat. 462), commonly called the "Fugitive Slave Act," in no legal sense a magistrate inferior to this court.

2. This court has no power to issue a writ of certiorari to such a commissioner, to review proceedings before him under that act.

[Cited in Re Macdonnell, Case No. 8,772. Cited in brief in Ex parte Norvell, 20 D. C. 348.]

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

This was a motion for a writ of certiorari, to be issued to a commissioner appointed by this court, commanding him to return to this court the record or minutes of proceedings before him in this case, which was an application to the commissioner by the master of an apprentice residing in the state of New Jersey, for a warrant for the arrest of the apprentice as a fugitive from service or labor, with a view to his extradition. The commisisoner, on the hearing before him, decided that the acts of congress of February 12th, 1793, and September 18th, 1850 (1 Stat. 302, and 9 Stat. 462), in respect to the arrest of fugitives from labor, and their delivery up to the persons to whom they owe service, did not apply to the case of a white person bound to service as an apprentice, and therefore denied the application. For the purpose of having that determination reviewed, this application for a writ of certiorari was made.

S. W. Roosevelt and R. B. Roosevelt, for the motion.

Washington Q. Morton, opposed.

BETTS, District Judge. The ground upon which this motion is rested by the counsel for the applicant is, that this court, being empowered by law to issue a writ of certiorari, can employ it to the same purpose and extent that courts of superior jurisdiction can at common law; and that, a commissioner appointed by this court being a judicial officer of inferior jurisdiction, it is within the province of the court, by means of a writ of certiorari, to call before it and rectify any error in his proceedings.

There are two fundamental errors in this proposition:—First. A commissioner, in the execution of the duties of his office, under the act of September 18th, 1850 (9 Stat. 462), is, in no legal sense, a magistrate inferior to the circuit court. No provision is made in that act, or in any other, subjecting his proceedings to the control or review of this court, nor are his functions declared to be subordinate to the authority of any other tribunal. The court, in making the appointment of commissioners, fulfils an agency imposed on it by congress, and no more acquires thereby a supervisory authority over him, or his proceedings in his office, than the president or the senate has over judges appointed by them. He is not even an officer of the court. Second. No authority is given to the courts of the United States, in express terms, to issue a writ of certiorari. It is implied in "the power to issue writs of scire facias, habeas corpus, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Act Sept. 24, 1789, § 14; 1 Stat. 81, 82. The power is not inherent in the court. It is imparted by the statutory provision, and must be exercised under the qualifications indicated by the law; and, of course, the writ can only be awarded as auxiliary to

the exercise of a judicial authority over the case or subject matter to which it is applied.

The writ lies, at common law, from chancery or the king's bench, only to inferior courts or magistrates, to transfer a given subject matter to the cognizance of a superior judicature. Fitzh. Nat. Brev. 145, 242. The case may not be so removed, when it cannot be proceeded in after removal. Dr. Sards' Case, 1 Salk. 145.

The circuit court has power, by writ of error or appeal, to review and correct the judgment of a district court; yet it cannot issue a certiorari to a district court, without direct authorization by statute. Patterson v. U. S., 2 Wheat. [15 U. S.] 221.

The power granted to the courts of the United States to issue writs of certiorari rests upon the same implication as that to award writs of mandamus. Yet it is not within their competency to issue a mandamus to any magistrate, under the provisions of the judiciary act, other than to those within the District of Columbia. McIntire v. Wood, 7 Cranch [11 U. S.] 504; McCluny v. Silliman, 6 Wheat. [19 U. S.] 598; Kendall v. U. S., 12 Pet. [37 U. S.] 524. No power having been delegated by congress to the circuit court to award a certiorari to magistrates or other officers, for the object and to the end proposed by this application, the relief asked for cannot be granted, even if the case would afford a proper occasion for the writ at common law.

It is, however, open to serious question whether, after proceedings are wholly determined before a magistrate, the party defeated in those proceedings could have relief at common law by a writ of certiorari. The case would be no longer pending, and the superior court, if it were, by virtue of the writ, substituted in place of the magistrate, could hardly be supposed to have authority to revive the litigation, and thus create an occasion for giving a proper decision. The writ would not be used to call in a full exhibition of the documents and proceedings before the magistrate, but to invest the higher court with the cause itself, and enable it to reverse the former decision, or recall a concluded litigation in the manner of instituting a new one, and thus enable itself to act in the case as if it were commenced there or brought up by a writ of error or appeal. This is not a common law province of the writ of certiorari, especially when the decision of the magistrate has no further effect upon a party than to declare him non-suited, or that he has made out no legal ground for the proceedings he set on foot.

Without discussing the case from this point of view, I am clearly of the opinion, that this court has no jurisdiction, in the matter presented by this application, on which it can order a writ of certiorari to be issued. The motion is accordingly denied.

VAN PELT (BULLOCK v.). See Case No. 2,131.

Case No. 16,870a.

VAN PELT v. The OHIO.

[Betts' Scr. Bk. 180.]

District Court, S. D. New York. Oct. 17, 1850.

MARITIME LIENS—STATE STATUTES—MATERIALS AND LABOR USED IN CONSTRUCTION.

[To create a lien, under the New York statutes, for materials or labor used in the construction of a vessel, it must appear that, at the time the materials were furnished or labor performed, it was not on the personal or individual credit of another, but that in fact the credit was given to the ship. Appending that credit to the owner, master, agent, or consignee is giving it to the ship.]

[Cited in Udell v. The Ohio, Cases Nos. 14,321a and 14,322.]

This was a procedure to test the liability of the owner of the Ohio to pay for timber supplied to the builders of the vessel. The libellant [Jacob J. Van Pelt] alleges: That he is a lumber merchant of this city, and he contracted a debt with the owners or agents of the Ohio for timbers and materials used on the construction of that boat to the amount and value of $1,786.26, of which a part has been paid, leaving a balance due of $1,611.10. That, at the time of such supply, Bishop and Simonson were the owners or agents of the Ohio, having been the builders thereof. The answer denies that Bishop and Simonson are such owners, and the respondents allege that Geo. Law, M. O. Roberts, P. M. Wetmore, R. C. Wetmore and Edwin Crosswell were the owners of the Ohio, and Bishop and Simonson only ship builders, who had at the time of the debt two other steamboats in process of construction, viz. the "State of Maine" and the "Red Jacket," and that the timber sold by the libellant was used for all these boats indiscriminately, and not for the Ohio exclusively. The defense also proved that the Ohio was to be paid for by monthly instalments equal to the labor and materials put upon her during the month, that at the day of the launch one of the respondents was on board as agent and superintendent.

THE COURT (JUDSON, District Judge), after recapitulating the main facts pro and con, said that, taking all the facts and circumstances, the presumption is that all the timber furnished except one lot of $175 was sold to Bishop and Simonson on their individual credit, and not on the credit of the Ohio; that the bill constituted a debt against Bishop and Simonson on their individual responsibility, and not as owners or agents of the Ohio. In order to constitute a lien within the meaning of the statute of the state of New York, it should appear that at the time the materials were furnished, or labor performed, it was not on the personal or individual responsibility of another, but that in fact the credit was given to the ship. Appending that credit to the owner, master, agent or consignee, is giving it to the ship,

and the liability will continue to remain attached to the ship until the debt shall be paid in full, but in a case where it is apparent from the evidence and from all the surrounding circumstances that the original credit was to an individual then the idea of a lien under the statutes is excluded. The essential element in the evidence to bring this case within the statute, and create the lien, is wanting, and the judgment of the court is that the libel be dismissed.

VANRANST (UNITED STATES v.). See Case No. 16,608.

Case No. 16,871.

VAN REIMSDYK v. KANE et al.

[1 Gall. 371.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1812.

INSOLVENCY LAWS—DISCHARGE OF DEBTOR—FOREIGN DEBTS—CONFLICT OF LAWS—RIGHTS AND REMEDIES—PARTIES IN EQUITY—PARTNERSHIP.

1. The discharge of a citizen from his debts, under the insolvent act of Rhode Island, is no discharge of a contract, which was made and to be executed in a foreign country.

[Cited in Le Roy v. Crowninshield, Case No. 8,269.]

[Cited in brief in McDougall v. Page, 55 Vt. 189; Pratt v. Chase, 44 N. Y. 598.]

2. The law of the place, where a contract is made, is to govern as to the validity, nature, and construction of the contract; but the remedy on such contract is to be pursued according to the law of the place where the suit is brought.

[Cited in Gill v. Jacobs, Case No. 5,426; Lee v. Gamble, Id. 8,189; Burrows v. Hannegan, Id. 2,205; Woodhull v. Wagner, Id. 17,975; Fitch v. Remer, Id. 4,836; Pope v. Swiss Lloyd Ins. Co., 4 Fed. 155.]

[See Babcock v. Weston, Case No. 703.]

[Cited in Brown v. Bicknell, 1 Pin. 229; Dyer v. Hunt, 5 N. H. 405; Emery v. Burbank, 163 Mass. 326, 39 N. E. 1026; Gilman v. Cutts, 23 N. H. 382; Houghton v. Page, 2 N. H. 46; Hunt v. Jones, 12 R. I. 267; Lowther v. Lawrence, Wright, 186; McAllister v. Smith, 17 Ill. 335; Nelson v. Fotterall, 7 Leigh, 210; Sneed v. Ewing, 5 J. J. Marsh. 483.]

3. Every person interested in the subject-matter should in general be made a party to a bill in equity. But no one need be made a party, against whom, if brought to a hearing, there can be no decree. Therefore a certificated insolvent or bankrupt, if discharged from the particular contract on which relief is sought, need not be made a party.

[Cited in Lawrence v. Rokes, 53 Me. 117.]

4. A bill to charge the executors of a deceased partner with a partnership debt, where the other partner survives, must expressly charge an insolvency of the survivor.

[Cited in Troy Iron & Nail Factory v. Winslow, Case No. 14,199.]

[Cited in Riper v. Poppenhausen, 43 N. Y. 74.]

The plaintiff is an inhabitant of Batavia in the island of Java, and the bill is brought to recover against [Oliver Kane and another] the executors of [John Innes] Clarke the amount of a bill of exchange drawn in behalf of the owners of the ship Patterson, by Benjamin Monroe, their agent at Batavia, on a mercantile house in Amsterdam for 21,488 guilders. The bill of exchange was dated 3 Nov., 1806, payable at nine months sight, was presented and protested for non-acceptance, 30 December, 1807, and was presented and protested for non-payment, 4 Oct., 1808. The bill charged in substance, that Clarke and the firm of Monroe, Snow & Monroe (of which firm Benjamin Monroe was one), were owners of the Patterson, and that the bill was duly drawn by their authorized agent for their use; that on the 25th of March, 1809, Monroe, Snow & Monroe, being insolvent, were duly discharged from all their debts under the insolvent act of Rhode Island, that afterwards Clarke died, leaving Monroe, Snow & Monroe living, and yet alive, and that the executors had assets in their hands sufficient to pay all the debts of Clarke, including this debt. The bill stated also, that the whole property of Monroe, Snow & Monroe was duly assigned to assignees under the insolvent act, and that a small sum came to their hands, which was wholly insufficient to discharge this debt. The bill contained other charges not necessary to be mentioned in this stage of the cause. The answer of the executors admitted assets, and that Clarke, Monroe, Snow & Monroe were owners of the Patterson, and that Monroe, Snow & Monroe were discharged under the insolvent act of Rhode Island. But it did not admit, that the bill of exchange was drawn by an authorized agent, but admitted that the proceeds thereof came to the use of the owners. It did not admit that the discharge of Monroe, Snow & Monroe was a valid bar at law to a recovery on the bill of exchange, nor that they were now insolvent or unable to pay their debts. The deposition of James Monroe, Samuel Snow, and Benjamin Monroe (the drawer of the bill), who composed the firm of Monroe, Snow & Monroe, were taken in behalf of the complainant in the cause; and upon objections being taken to their competency as witnesses, STORY, Circuit Justice, admitted the depositions of James Monroe and Samuel Snow, and rejected that of Benjamin Monroe, the drawer. A preliminary objection, however, being taken to the want of proper parties in the cause, the argument was chiefly confined to that objection.

Mr. Bridgham and Thomas Burgess, for complainant, contended that it was not necessary to make Monroe, Snow & Monroe, or their assignees, parties to the bill. 1. Because the insolvency of the firm, and subsequent discharge, was a valid bar to an action at law and in equity against them. 2. Supposing that not correct, yet if in fact insolvent, there was no necessity of making them parties, and they cited 1 P. Wms. 683;

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

1 Har. Ch. Prac. 36; Mitf. Eq. Pl. 311; 1 Chit. Pl. 37.

Searle & Burrill, for respondents, contended, that Monroe, Snow & Monroe, and their assignees, ought to have been made parties to the bill. That the discharge did not operate a bar to the present cause of action, and if it did, yet the other partner had a right to their assistance in taking the account, and the benefit of the funds in the hands of the assignees ought to go in discharge of the respondents, and they cited 1 Har. Ch. Prac. 76, c. 3, § 1; Mitf. Eq. Pl. 39, 144, 220; Brown, Ch. 225; 2 Vent. 348; 2 Ch. Cas. 92; 1 Vern. 140; 3 Atk. 406; Finch, 15; Com. Dig. "Chancery" (3 V. 2); 1 Com. Cont. 327. At all events the assignees ought to have been made parties.

STORY, Circuit Justice. The first question seems to be, whether the discharge of the firm of Monroe, Snow & Monroe under the insolvent act of Rhode Island is a complete discharge of them from this debt. The language of the insolvent act itself (1756) is, that a discharge under it shall be a perfect discharge "of and from all debts, duties, co tracts, and demands, of every nature and kind whatsoever, that shall be at that time outstanding against the debtor, debts due to the crown itself only excepted." And section 6 provides, that every creditor who shall not prove his debt before the commissioners within the time limited by the act, shall not be entitled to have any action or suit therefor "at any court within this colony," "and that this act being pleaded in bar, shall be sufficient to bar the same." By an act of the legislature of Rhode Island, the full benefit of this act was allowed to the firm of Monroe Snow & Monroe, and the only exception was of debts due to the state. It is admitted on all sides, that Monroe, Snow & Monroe have been duly discharged under the act from all debts, upon which it can operate as a bar. It will be recollected, that the contract in controversy was made at Batavia with the complainant, a resident merchant there, and an alien to the United States. He never was a citizen of, or resident within Rhode Island. The contract was to be executed at Amsterdam in Holland, and not in Rhode Island.

The broad question then is, whether a discharge under the insolvent laws of a state is a complete discharge of all debts and contracts, with whomsoever and wheresoever contracted, so that no action lies therefor in a court of the United States sitting within that state. The rule is well settled, that the law of the place, where a contract is made, is to govern, as to the nature, validity, and construction of such contract; and that being valid in such state, it is to be considered as equally valid, and to be enforced everywhere, with the exception of cases in which the contract is immoral or unjust, or in which the enforcing it in a state will be injurious to the rights, the interest, or the convenience of such state or its citizens. This doctrine is explicitly avowed in Huberus de Conflictu Legum (2 tom. lib. 1, tit. 3), and has become incorporated into the code of national law in all civilized countries (Smith v. Smith, 2 Johns. 235; Thompson v. Ketcham, 4 Johns. 285; Van Raugh v. Van Arsdaln, 3 Caines, 154; Smith v. Buchanan, 1 East, 6; Potter v. Brown, 5 East, 124; Pedder v. MacMaster, 8 Term R. 609; Quin v. Keefe, 2 H. Bl. 553; 1 Emer. Traite des Assur. c. 4, § 8; Dig. lib. 6, "De Evictionibus"; Casaregis Disc. 179, per. tot. Id. § 57; Casaregis Disc. 43, § 19; Decis. Rot. Genuæ, 38; Straccha, 147; Casar. Disc. 130, §§ 28, 33, 34). It would seem to follow from this doctrine, that if a contract be void by the law of the place where it is made, it is void everywhere (Hub. ubi supra), and that what is a discharge of a contract in the place where it is made, shall be of equal avail in every other place (Hub. ubi supra; 5 East, 124; Burrows v. Jemino, 2 Strange, 733; 2 H. Bl. 553; Melan v. Fitzjames, 1 Bos. & P. 138). To the last position there is an exception, when the contract is to be executed in a place different from that where it is made; for the law of the place of the execution will in such cases apply. Hub. ubi supra; Van Schaick v. Edward, 2 Johns. Cas. 355; Baker v. Wheaton, 5 Mass. 509; Thompson v. Ketcham, 4 Johns. 285; Smith v. Smith, 2 Johns. 235; Robinson v. Bland, 1 W. Bl. 258; s. c., 2 Burrows, 1077. But as to the form of the action or the remedy by which a contract is to be enforced, a different rule prevails, and it seems on all sides conceded, that the recovery must be sought, and the remedy pursued, not according to the lex loci contractus, but according to the lex fori. Hub. ubi supra; Casaregis Disc. 179; Id. Disc. 130, § 33; Nash v. Tupper, 1 Caines, 402; Ruggles v. Keeler, 3 Johns. 268; Pearsall v. Dwight, 2 Mass. 84; Smith v. Spinola, 2 Johns. 198. The only question, which seems to have arisen, is, whether a bar, good by the law of the place where the suit is brought, and not where the contract originated, and conversely, a bar good by the law of the place where the contract was made, and not where the suit was brought, should fall within the rule as to the validity or as to the remedy of the contract. The current of authority is certainly in favor of the latter construction, where the bar has been a prescription or statute of limitations; and yet strong reasons have been urged, with what force I will not pretend to say, that every bar which goes to the merits of the action, and makes an end of it, should fall within the rule, that declares a discharge good in the place of the contract, equally good in every other place; and a bar of the statute of limitations is as much a discharge of the contract, as a bar of bankruptcy. Both are positive regulations, which prohibit a future action, and no more. In each the original cause of action may be revived by a new promise; and yet the au-

thorities show, that a discharge under the statute of bankruptcy of the country is a complete bar to the action on a contract made in that country in every other judicial forum. Ballantine v. Golding, cited 8 Term R. 609; s. c., cited 1 East, 6; Potter v. Brown, 5 East, 124; 1 Dall. [Pa.] 188; Id. 229; 2 Johns. 235. However, it is not necessary to consider, which of the opinions ought to prevail; and it will be time enough to meet this important question when it comes directly in judgment.

In order to clear the way for a more exact consideration of the question at bar, it may also be necessary to state, that every state has within its own sovereignty an authority to bind its citizens every where, so long as they continue their allegiance. Unless, therefore, it be restrained by constitutional prohibitions, it may act upon the contracts made between its own citizens in every country, and consequently may discharge them by general laws. But such is not the operation of jurisdiction in contracts made by a citizen with a foreigner, in a foreign country. If in such case the legislature by positive laws nullify such contracts, it is certain that they cannot be enforced within its own tribunals, but elsewhere they remain with the original validity, which they had by the lex loci contractus. But if a statute be general, without a direct application to foreign contracts, the rule approved by Casaregis seems proper to be adopted, that its construction shall not be extended to such contracts. "Ratio est, quia statutum intelligit semper disponere de contractibus factis intra et non extra territorium suum." Casar. Disc. 130, §§ 14–16, 20, 22.

According to the principles then, which have been stated, if this had been a contract between two citizens or residents of the state of Rhode Island, or a contract made or to be executed in Rhode Island, the discharge under the insolvent law of that state would be a good bar. Ballantine v. Golding, cited 8 Term R. 609; Cook, Bankr. Law, 515; 1 East, 6; Baker v. Wheaton, 5 Mass. 509; Potter v. Brown, 5 East, 124; Proctor v. Moore, 1 Mass. 198. Ought it to be a bar, when the contract was made in a foreign country, to be executed in a foreign country, and between parties, one of whom was not subjected to the jurisdiction of Rhode Island? The circumstance, that the contract was made by an agent, will not vary the case, for the law of the place of the contract still prevails, although it be made through an agent acting under authority, or it acquire its validity only from a subsequent ratification. Casar. Disc. 178, §§ 63, 80. It has been decided, that where the contract is in one state, the discharge in another, and the suit brought in a third state, the action is not barred. Smith v. Smith, 2 Johns. 235. So where the contract is made in the state where the suit is brought, a like discharge has been held no bar. Pedder v. MacMasters, 8 Term R. 609; Quin v. Keefe, 2 H. Bl. 553; Smith v. Buchanan, 1 East, 6; Van Raugh v. Van Arsdaln, 3 Caines, 154. Sitting therefore in Massachusetts or New Hampshire, I should have no difficulty, upon these authorities, to hold the present discharge no bar to a suit at law. But it is contended, that a different rule must prevail in the state courts of Rhode Island, and if so, then also in the courts of the United States, sitting within the same state.

I will consider this question in both respects, and first, as to the state courts of Rhode Island. No authority has been shown, that decides that no action upon a foreign contract could have been maintained in the state courts. It is a mere inference from the language of the act, which absolves the debtor from "all debts, &c. of every nature and kind whatsoever." But if the rule of Casaregis be correct, that by the true construction of a general statute, it ought not to be extended to extra-territorial contracts, unless expressly so declared, the question recurs with all its force, because it will not be pretended, that the legislature of Rhode Island have made such a positive provision. The general rule is, that a discharge of a contract according to the lex loci contractus is good every where. The rule is founded upon public convenience, and the comity of nations. It would seem to follow from the same principle, that a discharge under the municipal laws of a foreign state should not affect the validity of such a contract. I have not been able to find any case exactly in point. The case of Lynch v. McKenny before Mr. Justice Aston, cited in 2 H. Bl. 554, at first view would seem to have an important bearing; but it is very loosely stated, and the ground of the decision seems to have been, that the bankrupt laws of England were adopted in Ireland, and that the debt might have been proved under the commission in England. In Van Raugh v. Van Arsdaln, 3 Caines, 154, Livingston, J., declared, that he was of opinion, that a cessio bonorum under the laws of a state, where the debtor had his permanent domicil, ought to operate as a discharge from his creditors in every part of the world. I entertain the most entire respect for that opinion of the learned judge, the result, as he declares it to have been, of much reflection and research. I can only regret, that he did not express the reasons of that opinion at large, which would have saved me much labor and investigation. In the case, however, in which it was delivered, he differed from the rest of the court, and the final decision of the case was against him. The case of Miller v. Hall, 1 Dall. [Pa.] 229, must have proceeded upon the ground, that the contract was executed in Maryland; in any other view it would be inconsistent with the other authorities which have been cited. In Barber v. Minturn, 1 Day, 136, the point seems to have been before the court, but it does not appear how far it affected the judg-

ment of the court below; and in the appellate court the affirmance seems to have proceeded on other grounds.

These are all the cases, which I have met with on the subject, and I may be permitted to affirm, without the imputation of rashness, that the question does not seem to have been distinctly decided in any court in England or in the United States. It remains therefore to be settled upon principle, and I cannot but presume, that the judicial tribunals of Rhode Island, in all cases where a different rule were not prescribed by their own legislature, would adopt the jus gentium as to the construction and validity of foreign contracts sought to be enforced by their process. If therefore the words of the act of insolvency do not necessarily extend (as I think they do not) to foreign contracts, I can entertain no doubt, that they would adjudge therein according to that equity which the usage of nations had settled and applied. I hold it to be a legitimate inference from the doctrines already established, that a contract made in a foreign country, and to be governed and discharged by its laws, cannot be discharged by a mere positive regulation of another country, to which the parties have not bound themselves to submit. I hold with Emerigon (Des Assurances, 1 tom. c. 4, § 8), "Pour tout ce qui concerne l'ordre judiciare, on doit suivre l'usage du lieu ou l'on plaide. Pour ce qui est de la decision du fonds, on doit suivre en regle generale les loix du lieu ou le contrat a été passée. 'Ex consuetudine ejus regionis in quâ negotium gestum est.'" A discharge under an insolvent act goes "au fonds," to the merits, and not "a l'ordre judiciare," to the process or remedy.

How far, since the constitution of the United States, any state can have a right to pass an insolvent law, having the effect of a general statute of bankruptcy, inasmuch as no state can pass "a law impairing the obligation of contracts;" and the United States are authorized "to establish uniform laws on the subject of bankruptcies throughout the United States;" and if a state have such authority, how far it can constitutionally discharge the debts due to citizens of other states, are questions of great magnitude, on which learned men have differed, and I have formed no decided opinion. But admitting the right to exist, and to be exercised in the fullest extent, it will deserve further consideration, whether the courts of the United States are bound to enforce against foreigners or citizens of other states, rightfully suing therein, the full effect of a bar of this nature. It is true, that the judiciary act of 24th September, 1789, c. 20, § 34 [1 Stat. 92], has provided, that except where the constitution, treaties or statutes of the United States shall otherwise provide, the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. But the laws of the states are to be regarded only as rules of decision, and not as exclusive or peremptory injunctions. If a state were to declare, that no action should lie upon a contract entered into by a citizen thereof with a foreigner or a citzen of another state, under any circumstances whatsoever; or if a state were to declare that interest reserved upon such a contract, if good according to the law of the place of that contract, should be void, it would, I think, be difficult to admit, that such laws would be of paramount authority in the courts of the United States. A more striking case would be a policy of insurance, on which the right to recovery should be perfect by the law of the state where it was made, upon the merits, and yet which by the law of the state where the suit was brought, would be void, or receive a different construction from local ordinances. There must then be some limitation to the operation of this clause, and I apprehend such a limitation must arise whenever the subject matter of the suit is extraterritorial. In controversies between citizens of a state, as to rights derived under that state, and in controversies respecting territorial interests, in which, by the law of nations, the lex rei sitæ governs, there can be little doubt, that the regulations of the statute must apply. But in controversies affecting citizens of other states, and in no degree arising from local regulations, as for instance, foreign contracts of a commercial nature, I think that it can hardly be maintained, that the laws of a state, to which they have no reference, however narrow, injudicious and inconvenient they may be, are to be the exclusive guides for judicial decision. Such a construction would defeat nearly all the objects for which the constitution has provided a national court. Until I should be instructed by the higher court, that I was bound to pronounce in such cases, contrary to the acknowledged principles of national comity, and to acknowledge mere municipal rules as the law of the court, I should have little hesitation in affirming, that a discharge under the insolvent law of Rhode Island was not a discharge of the contract in the present suit; and that it is not a case, in which the law of the state is to be exclusively regarded, as the rule of decision. I have not dwelt upon the inconveniences of a contrary construction, though I hardly know a case, in which the argument ab inconvenienti could more pointedly apply. It would enable the state legislatures by local regulations, to dry up the sources of the federal jurisdiction, and annihilate public as well as private credit; it would set the citizens of the different states in array against each other, and enable a fraudulent debtor to retreat into another state, and there by a formal surrender of his property and a settled residence, to set at defiance the claims of all his absent and honest creditors. If the cause rested upon this single ground, I should be happy to give the parties an opportunity to settle this important question in the highest tribunal. But it is contended,

that whether the discharge of Monroe, Snow, & Monroe be or be not a complete bar, they and their assignees ought to have been made parties to the present suit. Let us consider this point. It is a general rule, that every person interested in the subject matter should be made a party to the bill. Mitf. Eq. Pl. 145; Coop. Pl. Ch. 33. Therefore, where there is a joint, or joint and several contract, it is laid down that the plaintiff must bring each of the debtors before the court. The reasons assigned for the rule are, that the debtors are entitled to the assistance of each other, in taking the account, and to mutual contribution upon excess of payment beyond their respective shares. But where the reasons cease, the rule ceases also, and therefore, if the demand be admitted, and there can be no effectual contribution from the other parties, it is not allowed to prevail. Madox v. Jackson, 3 Atk. 406. And in cases of joint and several contracts. the rule itself has not stood without contradiction. Collins v. Griffith, 2 P. Wms. 313; s. c., 2 Eq. Cas. Abr. 188, pl. 2. The rule has been relaxed, where the parties before the court were the only solvent persons, and admitted the debt (3 Atk. 406; 2 Dickens, 738); where the absent party was beyond the process of the court (Pre. Ch. 83; Darwent v. Walton, 2 Atk. 510); and where he stood in the situation of a mere surety; (3 Atk. 406); though it might be otherwise, if he were a co-surety (Angerstein v. Clark, 2 Dickens, 738). It is also a general rule, operating by way of exception on the former, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. Therefore, on a bill by creditors or purchasers against the assignees of a bankrupt, it seems now settled that the bankrupt himself need not be made a party, though it was formerly otherwise. 2 Vern. 32; 3 P. Wms. 311, note I; Collet v. Wollaston, 3 Brown, Ch. 228.

Let us now apply these rules to the present case. The bill is brought to charge the executors of a deceased partner, having assets, with a joint debt, which at law survived against the firm of Monroe, Snow & Monroe. The ground of equitable interference is, that the surviving partners are certificated insolvents; and whatever may have been the doubts as to this branch of chancery jurisdiction in former times, it has been gradually settled, and is now placed beyond all controversy. Lane v. Williams, 2 Vern. 292; Heath v. Percival, 1 P. Wms. 682; Simpson v. Vaughan, 2 Atk. 31; Bishop v. Church, 2 Ves. Sr. 101, 371; Daniel v. Cross, 3 Ves. 277; Thomas v. Frazer. Id. 399; Burn v. Burn, Id. 573; Stephenson v. Chiswell, Id. 566. In cases where a suit is brought against executors on other grounds, it seems clear, that the rule, that all surviving co-obligors should be parties, in general prevails. 2 Vent. 348; 3 Atk. 406. Shall it be permitted to prevail, where no relief can be given against the co-obligors? Shall a certificated bankrupt, who is a surviving partner, be joined with the executors, although no remedy can be effectually had in the suit against him? No authority has been adduced exactly in point. The case of Ashurst v. Eyre, 2 Atk. 51, was supposed at first to support the affirmative; but it is very clear, upon a further examination of that case, as corrected in 3 Atk. 341, that no such question could have occurred, as the parties appear all to have been solvent. There is obviously a mistake in what is imputed to Lord Hardwicke in speaking of this case in 3 Atk. 406. In no case, where relief has been sought against the representatives of a deceased partner, on the ground of bankruptcy of the surviving partner, have I been able to discover, that the bankrupt himself or his assignees have been made parties. On the contrary, if the reports can be relied on as evidence, the bill has been uniformly against the representatives alone. This very silence in cases so strenuously and ably argued, affords a strong presumption of the practice and the law of the court. There seems, indeed, good reason why they should not be made parties, because the bankrupt may plead his certificate in bar without further answer, and the assignees are bound to apply the property in their hands, according to the course of distribution prescribed by the law and the court, among the creditors who prove their debts under the commission. They have, therefore, no interest in the case stated in the bill, and do not fall within the principle of the rule as to parties. If, indeed, it appeared that there was a surplus in the hands of the assignees beyond the sum necessary for payment of all other debts, perhaps equity would interpose, and in some shape require an application to that fund in aid of the executors. As to the objection, that the executors in this way would be deprived of all assistance in taking the account, and of contribution, it may be answered that they may file a cross bill, and avail themselves of all legal evidence in their defence, and the right of contribution does not concern the plaintiff. It is res inter alios acta. I am therefore well satisfied, upon the reason of the thing and the practice, that if the certificate of Monroe, Snow & Monroe had been a valid discharge, neither they nor their assignees need have been made parties. But it is not necessary absolutely to decide this point, because there is another view of the subject, which is fatal to the bill in its present shape. In order to maintain the jurisdiction of this court, it is necessary that the bill should charge an absolute discharge or insolvency of Monroe, Snow & Monroe. I am of opinion that no such discharge is shown; and in the bill, there is no allegation that they were at the filing of the bill actually insolvent. Nothing can be more clear, than that if they were liable at law, and able to pay, the present bill could not be sustained. It is perfectly well settled, that equity will not lend its aid to reach assets in the hands of executors, when a com-

plete, adequate, and effectual remedy exists at law against surviving solvent partners. Hoare v. Contencin, 1 Brown, Ch. 27. The bill therefore does not contain an allegation, which is now material, and the answer denies the present insolvency. Whether, if the bill did charge such insolvency, and it were admitted or proved, it would become necessary and proper to make the insolvents or their assignees parties to the suit, I give no opinion. If the parties raise the question, it will deserve and receive the deliberate consideration of the court.

After the judge had intimated his opinion, the plaintiff's counsel moved for leave to amend their bill, and also to make new parties, if it should be deemed advisable, and the cause was continued for this purpose to the next term.

Leave to amend.

[See Case No. 16,872.]

Affirmed in principle in supreme court (9 Cranch [13 U. S.] 158), but sent back on another point. Harrison v. Story, 5 Cranch [9 U. S.] 289; Le Roy v. Crowninshield [Case No. 8,269]; 2 Kent, Comm. (5th Ed.) 394, note; Harvey v. Richards [Case No. 6,184]; 2 Kent, Comm. 458–460, and the very learned notes: Story, Confl. Laws, §§ 281, 335, note 4; Id. § 558, note 2. See Babcock v. Weston [Case No. 703].

Case No. 16,872.

VAN REIMSDYK v. KANE et al.

[1 Gall. 630.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1813.

EQUITY—BILL AGAINST EXECUTORS OF DECEASED PARTNER — PARTNERSHIP BILL OF EXCHANGE — GUARANTY—STATUTE OF FRAUDS—AUTHORITY OF PARTNER—COMPETENCY OF WITNESSES—DECREE.

1. Equity will enforce against the executors of a deceased partner, or joint contractor, payment of a bill of exchange, where the survivors are insolvent.

See Jenkins v. De Groot, 1 Caines, Cas. 122; Hamersley v. Lambert, 2 Johns. Ch. 508; Gow, Partn. 358, 359.

2. If one partner, in a voyage on joint account, be authorized by the others to take up money on the credit of the whole concern, and draw bills therefor on a house at Amsterdam, and the partner take up money and draw a bill for the same, directing it to be charged to the account of all the partners, but it is signed by himself only, it seems such bill is binding on all the partners. See Greenl. Ev. §§ 112, 177, and cases cited. At least equity will enforce payment thereof against all the partners in favor of the payee of the bill, who has trusted the money on the faith of the joint credit.

[Cited in Wallace v. Agry, Case No. 17,096; Winship v. Bank, 5 Pet. (30 U. S.) 574.]

3. In equity, such a bill, drawn under such circumstances, would be deemed to have been guaranteed as to acceptance and payment, by all the partners.

4. The statute of frauds does not apply to such a case; for the guaranty is not for the payment of the debt of another, but of the debt of the guarantors.

5. If no original authority to draw were given, but subsequently the whole transaction was ratified by all the partners, such ratification would be equi-pollent with an original authority.

[Cited in brief in Woodward v. Cowing, 41 Me. 11.]

6. In general, in a bill in equity, the answer of one co-defendant is no evidence against another. But this rule does not apply to the case, where the defendants are all partners in the same transaction; for in such case, the answer or confession of either is evidence against the others. Field v Holland, 6 Cranch [10 U. S.] 8, 24, S. P. See [Clark v. Van Reimsdyk] 9 Cranch [13 U. S.] 153, 156.

[Cited in brief in Bispham v. Patterson, Case No. 1,441.]

[Cited in brief in Bridge v. Gray, 14 Pick. 58. Cited in Grafton Bank v. Moore, 13 N. H. 101; Mann v. Locke, 11 N. H. 249; Martin v. Dryden, 1 Gilman, 209; McElroy v. Ludlum, 32 N. J. Eq. 831; Porter v. Bank of Rutland, 19 Vt. 416.]

7. One partner, who is jointly liable with the others, is a good witness against them in a bill in equity.

8. In a bill in equity to obtain satisfaction of a joint debt out of the estate of a deceased partner, on account of the insolvency of the survivors, no decree need be had against the survivors, although they may be liable to pay the debt, their insolvency being apparent.

This was a bill in equity, the object of which was, to obtain satisfaction out of the separate estate of John Innes Clarke, Esq., deceased, of a debt alleged to be due from said Clarke, and Messrs. James Monroe, Samuel Snow, and Benjamin Monroe, who survived the said Clarke, but had become insolvents under the Rhode Island act. The bill charged, that on the 28th of February, 1805, Mr. Clarke, and the said Messrs. Monroe, Snow & Monroe (who then were partners in trade under the firm of Monroe, Snow & Monroe) were joint owners of the ship Patterson, Clarke owning one half, and the firm of Monroe, Snow & Monroe the other half. That they fitted her out on a voyage from Providence, R. I., to Batavia, in the East Indies, and appointed the said Benjamin Monroe supercargo. That the ship carried out on said voyage certain goods on their joint account, and also certain funds in freight, to be invested in a return cargo, of the profits of which the ship owners were to receive forty-five per cent. in lieu of freight, and were to pay the supercargo's commission. That for said voyage the said Benjamin Monroe received instructions from the freighters of said funds, in what manner to invest the same, and also parol instructions from the ship owners, to manage and conduct the affairs of said voyage in such manner, as he should think most for the interest of the ship owners; and authorizing him, in case he should be deficient of funds of the ship owners, to complete the lading of said ship at Batavia, to take up money for that purpose on the joint account of said owners; and in case he should think it best or judge it necessary, to draw bills of exchange therefor on Messrs. Daniel Crommelin & Sons in Amster-

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

dam. That the said voyage was performed, and the vessel safely arrived, with a full cargo, at Boston, without any money having been taken up, or bills drawn under the authority aforesaid. That in March, 1806, the said ship owners fitted out the said ship on a second voyage to Batavia, with a quantity of wine and other merchandize on board, on their joint account, and also with funds on freight, as in the preceding voyage, and appointed the said Benjamin Monroe supercargo, with instructions and authority as in the preceding voyage. That the ship, on said second voyage, duly arrived at Batavia, where the outward cargo, except thirty pipes of wine, was sold, and her return cargo taken on board. That the said wine was left at Batavia for sale, and the supercargo, to complete his cargo in conformity to his instructions and authority, on the 3d of November, 1806, contracted for, took up and received from the complainant, for the joint account of the said ship owners, the sum of 21,488 guilders, equal to $8,595.20, and invested the same money for their joint account in the return cargo, and drew a bill of exchange, in favor of the complainant, on Messrs. Daniel Crommelin & Sons, for the same money, as follows, viz. "Batavia, November 3d, 1806. Exchange for 21,488 guilders. At nine months after sight of this my first of exchange, second of the same tenor and date unpaid, pay to the order of the Hon. William Vincent Helvetius Van Reimsdyk, twenty-one thousand four hundred and eighty-eight guilders, value received, and charge the same, with or without further advice, to account of John Innes Clarke, Esquire, and Messrs. Monroe, Snow & Monroe, merchants, Providence, Rhode Island, North-America. Your obedient servant, Benjamin Monroe. To Messrs. Daniel Crommelin & Sons, merchants, Amsterdam." That the said Benjamin Monroe informed said ship owners and said Crommelin & Sons, by letter, of said draft. That said ship safely arrived, with her cargo, at said Boston, from her second voyage, in March, 1807; and the said supercargo, on his arrival, exhibited his accounts of the voyage, and of the taking up of said money and draft of said bill, to said ship owners, and that they, with a full and perfect knowledge of all the facts, received their portion of the cargo, including that purchased with the money so taken up, as aforesaid, and divided the same, or the proceeds thereof, according to their respective interests in said ship, without making any objections to the conduct of the said supercargo in taking up said money, or drawing said bill, or making arrangements for the payment of said bill. That in October, 1807, the said ship owners fitted out said ship on a third voyage to Batavia, in the same manner in all respects as in the preceding voyages, the said Benjamin Monroe still continuing supercargo as before. That soon after the ship sailed on said voyage, to wit, in June, 1807, the firm of Messrs. Monroe, Snow & Monroe became insolvent. That on the 25th of the same June, Messrs. Monroe, Snow & Monroe transferred to said Clarke their interest in said ship and her accruing freight and return cargo, for certain considerations altogether disconnected from their concerns as joint ship owners. That on the said ship's return from her third voyage, said Clarke took possession of her, received the whole freight and owners' share of the return cargo, including the whole proceeds of the said thirty pipes of wine left on the former voyage, and as a creditor of the said firm attached and obtained by process of law all the commissions of said Benjamin Monroe, as supercargo of said ship, and appropriated the whole property aforesaid to his own use, as a creditor of said firm. That said Clarke died on the 17th of September, 1808, leaving the defendants, Oliver Kane and Ephraim Bowen, and his wife Lydia Clarke, since dead, the executors of his last will, which was duly proved. That the said Clarke left assets greatly exceeding all his debts, &c. including the present demand. That Messrs. Monroe, Snow & Monroe were duly discharged as insolvents under the insolvent act of Rhode Island, on the 11th of April, 1809. That their estate, under said act, was assigned to certain assignees named in the bill, who received under the assignment the sum of $1,471, and no more. That on the 30th of December, 1807, the said bill of exchange was presented to Messrs. D. Crommelin & Sons for acceptance, who refused, and thereupon the same bill was duly protested, and due notice thereof given to the said ship owners; and afterwards the same bill was presented for payment, and refused, and protested for nonpayment, and yet remains unpaid; and that the said ship owners never, at any time since the drawing of said bill, had any funds whatsoever in the hands of said D. Crommelin & Sons. And the bill finally charged, that Monroe, Snow & Monroe ever since had been, and still were bankrupts and insolvents. The bill then concluded with a prayer for discovery and relief. The bill was originally brought solely against the executors of Mr. Clarke; but at a former hearing, upon the suggestions of the court, the bill was amended by making the insolvents and their assignees parties [Case No. 16,871]; and the said Benjamin Monroe having deceased since the last term, a bill of revivor had been filed against his administratrix, who had appeared and duly answered thereto.

Mr. Bridgham and T. Burgess, for plaintiff.
Searle & Burrill, for executors.

STORY, Circuit Justice. The cause has now been argued upon the bill and answers and proofs of the parties, and the court is to pronounce its decision on the facts and on the law. And I am entirely satisfied, that all the material allegations of the bill are fully proved. Indeed the only fact, which seems strenuously

denied, is the original authority, supposed to have been given to Mr. Benjamin Monroe, to contract the debt and give the bill of exchange stated in the plaintiff's bill.

It is argued by the counsel for the executors, that independent of the testimony of Messrs. Monroe, Snow & Monroe, there is no evidence to prove the existence of such an authority; and that neither their answers, nor their depositions, are competent evidence to affect Mr. Clarke or his executors. As to the answers of Messrs. Monroe, Snow & Monroe, I admit that the answer of one defendant cannot, in general, be read against another co-defendant; otherwise, such co-defendant would be deprived of an opportunity of cross-examination. 3 P. Wms. 311, note H. But this rule is liable to exceptions; and, therefore, wherever the confession of any party would be good evidence against another, in such case his answer, a fortiori, may be read against the latter. Peake, Ev. 55. In cases of partnership, the confession of one partner, in relation to a partnership concern, is in general admissible in an action against the other. Peake, Ev. 55; Gilb. Ev. 51, 57. It is not evidence to prove the partnership itself; but that being once admitted or proved aliunde, the confession is then let in for all collateral purposes. It is admissible to take a case out of the statute of limitations (Whitcomb v. Whiting, 2 Doug. 652; Jackson v. Fairbank, 2 H. Bl. 340). and to establish not merely the amount, but the existence of a joint demand even when made after a dissolution of the partnership (Wood v. Braddick, 1 Taunt. 104). In Grant v. Jackson, Peake, 203, Lord Kenyon held the answer of a bankrupt partner, made before his discharge under the commission, to be good evidence against the others; although he expressed his doubts, whether, if it had been made after his discharge, it would have been admissible. His lordship said, the answer was not evidence for all purposes; it could not be received to prove the partnership; but that established, the answer of one may bind all.

In the case at bar, it is admitted on all sides, that the several voyages stated in the bill were for the joint account and benefit of Mr. Clarke, and Messrs. Monroe, Snow & Monroe. In these several adventures, they must be considered as engaging in a limited partnership, or joint concern. Whatever, therefore, in relation to the transactions of that concern, is admitted by one party, is evidence against all. If, at the time of giving their answer, Messrs. Monroe, Snow & Monroe were not discharged from the plaintiff's demand (as I still think they were not), the case would fall directly within the authority of Grant v. Jackson. If they were then discharged, notwithstanding the doubt of Lord Kenyon, I still consider their answer as admissible evidence. The good sense of the rule, as to the admissions of partners (and an answer is no more than an admission, though a very solemn one), is well expressed by Mansfield, C. J., in Wood v. Braddick, and fully supports the doctrine which I now hold.

But, admitting the answers of Messrs. Monroe, Snow & Monroe not to be admissible evidence, I should be glad to know, what is the legal exception to the competency of Messrs. S. Snow and J. Monroe, as witnesses in favor of the plaintiff. The general rule is, that where any defendant in a bill is not concerned in interest, either side may examine him as a witness; so where no material evidence is against him, and no decree can be had against him. Where a defendant is a party in interest, he cannot be heard as a witness in support of that interest. But if his evidence be sought for the purpose of charging himself, and in contradiction to his interest, there is no legal objection to his competency, if he chooses to testify. It is another question whether he can be compelled so to do. But, as a plaintiff in equity has a right to examine a defendant, as a witness, no objection lies in the mouth of the adverse party, unless such defendant be legally incompetent. Dixon v. Parker, 2 Ves. Sr. 220. In the present case, no decree is sought against Messrs. Monroe and Snow. If the fact of insolvency created a legal bar, they are no longer parties in interest, and no decree can be had against them. They would then be within the first part of the rule. If the act did not create a legal bar, they are called to charge themselves in connexion with Mr. Clarke, and so far from having an interest to support the plaintiff's bill, their interest lies the other way. "Quacunque via data est," they are clearly competent witnesses for the plaintiff; however otherwise it might have been, if they had been examined by the executors to defeat the bill.

It is quite immaterial to the plaintiff, whether the cause stand upon the answers or the depositions of Messrs. Monroe and Snow. In either case, the existence of an original authority in Mr. Benjamin Monroe, to draw the present bill of exchange in behalf of the ship owners is completely proved. I go, however, yet further; and consider, that independent of the answers and depositions of Messrs. Monroe and Snow, there is sufficient evidence attached to the answer of the executors, to relieve the cause from all difficulty on this point. Taking the letter of Mr. Benjamin Monroe, addressed to the ship owners on the day of the date of the bill of exchange (which informed them of the object, occasion and account, on which it was drawn, and the manner, in which the proceeds received thereon were invested on joint account), the subsequent accounts rendered by him to the ship owners, and settled with them, which contained a charge of the same bill; the receipt and division by the ship owners of the investment of such proceeds, not only without objection, but apparently with perfect satisfaction at his proceedings; I say, taking all these facts in connexion, I think it difficult to resist the impression, that Mr. B. Monroe's conduct was understood by all parties, as clearly within the scope of his original instructions. It matters not whether these were verbal or written instructions; they are equally to be regarded as binding upon the parties. If the facts (which

I have referred to) do not establish this original authority (as I think they do), they indisputably establish the fact of a complete and unlimited ratification of the proceedings. And, in such a case, a subsequent ratification will be to all intents and purposes equivalent to an original authority. The contract, if unauthorized, was not void; but voidable only at the election of the parties. The principles of eternal justice require, that no man should be permitted to build his fortune on the ruins of violated faith. If he will knowingly take the fruits of an unauthorized enterprise, undertaken for his benefit, and on his account, he must take them with their burthen. "Qui sentit commodum, sentire debet et onus." In my judgment, so far as this point goes, it is a matter of pure indifference to the plaintiff's right, whether the exchange was drawn under an original authority from the ship owners, or was subsequently ratified by them. On all the grounds, however, which I have stated, I am of opinion, that the fact of authority in Mr. B. Monroe, to draw the exchange in question, is placed beyond the reach of legal doubt.

An objection to the plaintiff's right of recovery of rather a more technical nature is, that the bill of exchange is drawn by Mr. Benjamin Monroe in his own name, and not in the name of the joint owners; and therefore no remedy lies against the latter, under any circumstances, in favor of the plaintiff, because his title cannot reach beyond the parties to the bill. It is admitted in the answer of the executors, and indeed is demonstrated by the whole evidence, that the money, for which the bill was given, was taken up and actually applied for the joint account and benefit of all the concern. Under such circumstances, the objection is grossly inequitable, and I shall feel great consolation, if sitting in a court of equity, I can get rid of a mere technical nicety, and dispense justice according to the substantial merits of the cause.

The bill of exchange does not, in my judgment, purport to be drawn by Mr. Benjamin Monroe on his own private account; it is manifestly drawn on account of Messrs. Clarke, and Monroe, Snow & Monroe, and is to be charged to their account. That it was not drawn technically in the name of these parties, was probably owing to a mere mistake or ignorance of the legal distinction. It was drawn for moneys advanced to the concern, and was to be paid and charged on their account. In what character had Mr. Benjamin Monroe a right to draw on the joint funds? Certainly in no other character, than as a partner, or as an agent. When, therefore, he undertook to charge the joint funds on the face of the bill, every person, who became a party to it, must have considered him as acting, not on his own private account, but on account of the joint concern; not merely as incurring a personal responsibility, but as pledging the joint funds either under an authority vested in him as a partner or as an agent. It might be indiscreet to trust to his mere personal representation of his having such an authority; but if it actually existed, the other partners or joint principals must be in conscience and in equity bound by his acts to all persons, who trusted him on their account in faith of such authority. Mal. Lex Merc. 272. And if such authority did not exist, a subsequent ratification would enure to the full benefit of all the parties, who had advanced moneys, or acted on the faith of his stipulations. In this view, it is not very material to the present cause, what would be the mere legal construction in an action at law, as to what persons are parties to the bill, because the joint owners must be deemed to have contracted with the holder of the bill, that the drawer had a right to draw, and that they would supply funds to discharge it at maturity. In equity, therefore, upon the footing of such contract, I feel no difficulty in reaching all the parties, who were beneficially interested. I do not mean, however, to decide that even at law, this bill would be deemed the separate draft of Mr. Benjamin Monroe. Perhaps, under all the circumstances, it might be questionable, if, on the face of the instrument, it might not be susceptible of being construed a partnership draft. The decision on this point may perhaps be distinguished. See Thomas v. Bishop, Cas. t. Hardw. 1, 2 Strange, 955; Chitty (4th Ed.) pp. 40, 104; Mal. Lex Merc. 272. But even admitting the bill to be deemed the separate draft of Mr. Benjamin Monroe, there is another view of this case, in which the plaintiff's right to recover is conclusively established, and that is, that under the circumstances, the authority confided to Mr. Monroe must be deemed to have entitled him to draw in his own name on the joint funds, and to have guaranteed to the holder an acceptance and payment by the drawee. Suppose the joint owners had given written instructions to Mr. Benjamin Monroe as follows: "You are authorized to take up $20,000 on credit on our account; draw in your own name on Messrs. Daniel Crommelin & Sons, at Amsterdam, on our account, for that sum, or any less sum, and we engage that the drawee shall there accept and pay the same;" and such instruction had been shown to the plaintiff, who had advanced the money upon the faith thereof; I suppose, that no person would doubt, that he would have a perfect remedy at law against the owners. If the instructions were to draw on themselves payable to Messrs. Crommelin & Sons, I should have little doubt, upon the footing of Pillans v. Van Mierop, 3 Burrows, 1663, and Pierson v. Dunlop, Cowp. 573, notwithstanding the recent discussions in Johnson v. Collings, 1 East, 98, and Clarke v. Cock, 4 East, 57, in holding them bound as acceptors. But in a court of equity, where the real nature of the contract is disclosed, and a remedy is sought upon the whole merits, there could be no difficulty in giving the plaintiff, under either of the supposed in-

structions, a complete relief against all the owners: for they must be held to be in effect the substantial acceptors or guarantors of the bill.

Now, saving that the authority in the present case is verbal and not written, I cannot distinguish the supposed from the real transactions; and that, in point of law, there is no difference between a written and a verbal authority, as to this point, is abundantly clear. Anon., 12 Mod. 564; Chit. Bills (4th Ed.) p. 35, etc.

It has been objected, that if the bill is to be considered as drawn by Mr. Benjamin Monroe, in his own name, in pursuance of an authority so confided to him, it is then an agreement by the joint owners to pay the debt of Mr. Monroe, and so within the statute of frauds. If the statute of frauds could apply to a foreign contract, made and to be executed in a foreign country (and I would ask if it can so apply?) there is no foundation for the suggestion. It is clear, that the debt would not be the debt of a third person, but the debt of the parties undertaking to pay it. It might be contended with much greater plausibility, that a verbal acceptance of a bill of exchange was within the statute. The same answer may be given to the same objection, which has been urged against the legal efficacy of the subsequent ratification.

On the whole, I am entirely satisfied, that the plaintiff has a clear equitable title against the executors in this suit; and I am glad, that as a foreigner, he is not deprived of his remedy, from an objection, which has no foundation in commutative justice, and is probably never dreamed of beyond the narrow walks of the common law.

The next consideration is, what ought to be the decree of the court? The executors contend, that it ought to be a decree against all the parties, according to their respective interests in the voyage, or at all events that Mr. Clarke's estate ought not to be charged beyond the moiety actually received by him.

No decree is sought by the plaintiff against Messrs. Monroe, Snow & Monroe. The ground of equitable jurisdiction is their absolute insolvency. They have become insolvent under the act of the state, and from that arises a pregnant presumption of a continuing insolvency, which must remain until removed by opposing proof. None such is produced; and the other evidence in the cause, so far as it goes, fortifies the legal presumption. There is no reason, therefore, why the court should make a decree, which the whole evidence shows must be vain and ineffectual; and I do not think, that the authorities require it. Lane v. Williams, 2 Vern. 292; Heath v. Percival, 1 P. Wms. 682; Bishop v. Church, 2 Ves. Sr. 101.

As to the other ground, that Mr. Clarke's estate ought not to be charged beyond the property received by him, I should be glad to have seen an authority to support such a discrimination. The ground of relief in cases of this nature is, that the joint contract is in equity deemed a joint and several contract, so that each party is liable to the whole; and that, though at law the remedy is against the survivor only, yet the estate of the deceased is pledged to indemnify the creditor against any deficiency. 2 Vern. 292; 2 Ves. Sr. 101, 371; 3 Ves. 277, 399, 573, 566. The whole amount of the bill remaining unpaid, and the surviving parties being utterly unable to pay it, Mr. Clarke's estate must therefore be charged with the whole.

I decree, that the plaintiff recover, against the executors of Mr. Clarke, the principal sum mentioned in the bill, ten per cent. damages for non-payment, and interest on these two sums from the time of non-payment to the time of rendering this decree, amounting to $11,526.14, in the whole.

Affirmed in principle by supreme court of United States, but sent back on another point. [Clarke v. Van Riemsdyk] 9 Cranch [13 U. S.] 158.

Case No. 16,873.

VAN RENSSELLAER v. KELLY.

[2 Hask. 87.] [1]

Circuit Court, D. Maine. Sept., 1876.

JUDGMENT—RELEASE PROCURED BY FALSE REPRESENTATIONS—REVIVAL—LACHES.

1. The release of a judgment procured by false representations of the debtor's interest in real estate may be avoided and the judgment may be revived upon the discovery of the fraud, and the exercise of reasonable diligence to discover it and to revive the judgment, if the amount received in satisfaction of it be tendered back to the debtor.

2. Laches will not be imputed to the judgment creditor for not knowing the contents of papers showing the fraud and on file in the probate office, in the estate of the person who fraudulently concealed the title; nor from hearing rumors touching the actual ownership of the property, when, upon inquiry of both parties to the fraud, no information was obtained and the records of deeds gave none; nor from the delay of nearly a year after the fraud was discovered in making the tender to the debtor's executor; nor from a further delay of nearly eight months in bringing suit.

Debt [by Stephen Van Renssellaer, executor of Charles A. Heckscher, against Benj. Kelly, Jr., executor of Benjamin Kelly] on a judgment, submitted to the court without a jury. Plea, release of the judgment. Replication, release obtained by fraud. Issue taken.

Hanno W. Gage and Sewall C. Strout, for plaintiff.

Bion Bradbury, for defendant.

FOX, District Judge. This is an action of debt on a judgment recovered in 1858, by the plaintiff's testator against Benjamin Kelly and others, in the supreme judicial court of Maine. On the 5th of October,

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

1867, in consideration of $173.86, twenty per cent of the judgment, paid by Kelly to Joseph Williamson as attorney for the plaintiff's testator, this judgment was discharged by a formal release under seal. The plaintiff now seeks to revive this judgment, because the release discharging it was obtained by fraud and fraudulent representations made by Kelly to Williamson. Mr. Williamson testifies that Kelly told him that he had no property; that his real estate had been forfeited to Robert White; that White had a warranty deed of it and that he, Kelly, had no interest in it; that trusting to these representations he was induced to accept the amount paid by Kelly, and to execute the release that he had given. There is nothing to contradict the statements of Mr. Williamson, and the court therefore finds that such representations were made by Kelly, and that Williamson relied and acted upon them. Mr. Williamson, before giving the release, inquired of White as to the property, and he says that White corroborated Kelly's representations and claimed that his, White's, title, was absolute, thus by his falsehood assisting Kelly in deceiving his creditors, clearly indicating the fraudulent designs of both parties in respect to Kelly's real estate. It is argued that this was an old transaction of long standing; that White had held an absolute title to the property since 1857; and that Kelly did not believe that after so long a time he could enforce obligations for a reconveyance of it, given by White at that time. The court is unable to adopt this conclusion. It is said that large sums were paid by Kelly's family on account of the property, which went to discharge White's claims and enable Kelly to obtain a reconveyance; but the evidence does not support any such position.

Another ground of defense is, that the plaintiff has been guilty of laches in not sooner giving notice to the defendant or his testator that he had discovered that a fraud had been practiced upon him in obtaining the release of the judgment. It is said that in March, 1868, the probate records of Waldo county disclosed Kelly's claim to this property, and that a deed of release was then given by White to Kelly, all of which Mr. Williamson could have ascertained upon inquiry, and that facts were brought to his knowledge at that time which should have put him on inquiry and investigation, and that he is therefore chargeable with all the knowledge and information he could have acquired if the inquiry had been made.

Upon this branch of the case, Mr. Williamson's testimony is, that about a year after the release had been given he heard rumors that Kelly owned the property and that it was not forfeited, but that he had no actual knowledge about it; that he then wrote Kelly a letter respecting it, but got no reply; that he inquired of J. P. White, the executor of Robert White, but he was reticent and would give no information about it; that he examined the records of deeds from time to time, but there was no record of a conveyance of the property; that he could learn nothing further about the property until after Kelly's death in 1873, when by accident, on examining the inventory of his estate, he found this real estate included as a part of Kelly's property. The court is of opinion that upon these facts there was no failure or neglect on the part of Williamson. Acting upon the rumor that Kelly had some interest in the property, he applied to both White and Kelly, but without success. He examined the records of deeds, but could learn nothing there of any transfer; and it was hardly to be expected that in March, the probate records respecting White's estate would disclose a petition of Kelly's so contradictory of his positive statements to Williamson made in October previous. No authority is here cited to establish the point, that a stranger to White's estate is to be held chargeable with a knowledge of all that the probate records may disclose in relation to the property of other parties. Williamson states that some time after the inventory of Kelly's estate was returned to the probate court, Sept. 5, 1873, he examined it, and then made further inquiries, and for the first time then ascertained about the reconveyance of the property by White's administrator to Kelly. On the 11th of August, 1874, he tendered to the executor the amount paid on the execution with interest, and notified him that he claimed to avoid the release on the ground of fraud, and to collect the full amount of the judgment. On the 7th of April, 1875, the present suit was commenced.

Under the laws of Maine an executor cannot be required to defend such a suit, commenced within one year after his appointment; and for this reason the delay in instituting the present suit was justifiable; and while it would have been prudent to have made a tender and have given notice of the intention of the party to avoid the release at an earlier moment than was done, the court does not feel justified in denying the party a remedy for the fraud thus practiced upon him. No injury has resulted to the estate of Kelly from the delay, so far as appears in the case. Judgment for plaintiff.

Case No. 16,874.

In re VAN RIPER et al.

[6 N. B. R. 573.] [1]

District Court, W. D. Wisconsin. 1873.

BANKRUPTCY—DISCHARGE OF BANKRUPT—VALUE OF ESTATE—EVIDENCE.

Bankrupts made application for their discharge and took the testimony of the assignee, who swore that at the time he took possession

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of the estate it was worth fourteen thousand dollars, which was more than fifty per cent. of the debts of said bankrupts, as set forth in their schedule. The evidence further shows that the assignee offered the real estate at public sale, but was unable to obtain a bid upon it for the reason that it was heavily encumbered, and was at that time advertised for sale under a mortgage foreclosure suit. The assignee collected some twelve thousand two hundred dollars. Unsecured claims to the amount of fourteen thousand dollars have been proved, of which six thousand five hundred dollars were contracted prior to January 1, 1869, and seven thousand five hundred dollars subsequent to that date. On the part of the bankrupts it was claimed that a discharge should be granted from all their debts, for the reason that they had shown that at the time their estate passed into the hands of the assignee it was worth fifty per cent. of the claims proved. *Held*, that the word "assets" must be construed to mean money received by the assignee, and that the bankrupts are only entitled to receive a discharge from their debts contracted prior to January 1, 1869.

[Cited in Re Taggert, Case No. 13,725; Re Waggoner, 5 Fed. 917.]

By J. DAVIDSON BURNS, Register:

I, the undersigned register, do hereby certify that in the course of proceedings before me, at the hearing on the petition of said bankrupts [G. Van Riper and J. J. Van Riper] for their discharge, the said bankrupts appeared before me, and took and subscribed the oath required by section twenty-nine of the bankrupt act, and that no appearance was entered by any creditor in opposition to the application for discharge. That upon motion of Messrs. Atwell & Tryon, attorneys for the said bankrupts, the assignee of the said bankrupts' estate was sworn and examined before me; he testified that at the time he took possession of the said estate, consisting of real and personal property, it was, in his judgment, worth the sum of fourteen thousand dollars, whether above encumbrances or not, is not stated; this sum is more than fifty per centum of the whole of the debts of the said bankrupts, as set forth by them in their schedules annexed to their petition for adjudication. From a report heretofore made by the said assignee, it appears that he offered the real estate at public sale, but was unable to obtain a bid therefor, for the reason that it was heavily encumbered by mortgage, and was at the same time advertised for sale under and by virtue of a decree in chancery, in a suit brought to foreclose the equity of redemption in said mortgage; that at the foreclosure sale the property was sold for less than the amount due on the mortgage, and that he, the assignee, never received anything for the real estate. In his said deposition the assignee states that he considers the real estate was worth twelve thousand dollars of the above sum of fourteen thousand dollars, at the time he was appointed assignee. The assignee further reports that he has realized the gross sum of two thousand two hundred and thirteen dollars and fourteen cents from the sale of personal property and collection of accounts belonging to the joint estate of the bankrupts, and the sum of fifty dollars from the individual estate of Jacob J. Van Riper; this is all he received. He may collect a few hundred more, but this is contingent upon a suit which he has brought to recover certain property which he claims belongs to the estate of the bankrupts. Unsecured claims amounting to fourteen thousand three hundred and eighty-two dollars and thirty-three cents have been proved and allowed against the joint estate of said bankrupts (upon all of which they are liable as principal debtors), and a dividend of ten per cent. has been declared and paid thereon. Of said claims, six thousand seven hundred and thirty-nine dollars and sixty-two cents were contracted prior to January 1, 1869, and the sum of seven thousand six hundred and forty-two dollars and seventy-one cents subsequent to that date. A claim of four hundred and seventy dollars and forty-four cents has also been proved and allowed against the individual estate of Jacob J. Van Riper. No dividend has been declared on this claim. The written assent of creditors, contemplated by the provisions of section 33 of the bankrupt act [of 1867 (14 Stat. 533)], has never been filed by the bankrupts.

The said bankrupts, by their said attorneys, claimed that they were entitled to a full discharge from all their debts, for the reason that, by the said deposition of the said assignee, it is shown that at the time their estate or "assets" passed into the hands of the assignee the said estate or "assets" (or the value thereof) were "equal to" fifty per centum of the claims subsequently proved, upon which they were liable as principal debtors, and which claims or debts were contracted subsequent to the first day of January, 1869; that if, upon an appraisal of the estate or "assets," their value is found to be "equal to" fifty per centum of debts proved, then, by virtue of the amendments of July 27, 1868, and July 14, 1870, of section 33 of the bankrupt act, whereby, among other changes, the words "equal to" were substituted for the word "pay" contained in the original act, the court should grant a full discharge without requiring the assent of a majority of creditors to be filed. The determination of this point rests entirely upon the construction to be placed on the word "assets," as used in said section 33; whether it is to be taken in its most comprehensive sense, meaning the entire estate and effects, or the appraised value thereof, as they come to the hands of the assignee, or the proceeds or money received upon a sale of such estate and effects. If, as claimed by the bankrupts, it means the whole estate and effects, of whatsoever nature, before being reduced to money, then I think the position assumed by them is correct, and that a full discharge should be granted. Their "assets," in such case, were "equal to" fifty per centum of claims proved, and the bankrupts have complied with the requirements

of section 33 as amended. But it seems to me that their definition of the word "assets" is one that cannot be maintained. What sum the estate or "assets" may be appraised at, is by no means a true criterion of their value, or rather what they are "equal to;" there may be as many differing opinions as to the value of a given piece of property, as the number of individuals whose judgment is sought. The true test as to value, when that value is to be used to pay creditors, is the amount the property will bring upon a sale by the assignee, in accordance with the requirements of the law and general orders; what it produces in money with which to pay dividends to creditors and costs of proceedings, money being the only thing with which such payments can be made. The supreme court of the United States have placed an interpretation upon the word "assets," as used in reference to the granting of a discharge to bankrupts, which shows clearly that they hold the meaning to be money received. Section 29 provides that if "no assets" have come to the hands of the assignee, the bankrupt may apply for a discharge, &c. Form No. 35, of forms promulgated by the supreme court, is headed "Assignee's Returns Where There Are No Assets," and consists of a certificate by the assignee that "he has neither received nor paid any moneys on account of the estate." In the following cases the same meaning has been applied to the term "no assets": In re Hughes [Case No. 6,841]; In re Dodge [Id. 3,947]; In re Solis [Id. 13,165]. In the cases cited, the assignees had in their possession certain notes, accounts and claims against others, in favor of the bankrupts, upon which no money had been received; although it was thought something would eventually be realized therefrom, it was held that there were no assets in the hands of the assignee, at the time of the application for discharge. Taking this to be the true interpretation, it therefore follows that, at the time the assignee in the case now presented testifies that the "assets" were worth fourteen thousand dollars, he would, had the bankrupts then applied for a discharge (assuming sufficient time had elapsed therefor), have been required to make "assignee's return where there are no assets," i. e., that he had neither received (assets) nor paid any money (assets), &c., &c., notwithstanding the fact that he held property which in his judgment was worth the sum of fourteen thousand dollars. As shown by the report of the assignee, this property when sold brought the sum of two thousand two hundred and thirty-two dollars and fourteen cents, being considerably less than fifty per centum of claims proved. In Re Freiderick [Id. 5,092] an application was made for the appointment of appraisers to ascertain the value of "assets" of the bankrupt, it being claimed by him that the value of said "assets" or estate was "equal to" fifty per centum of provable claims. The application was denied by the court, and it was held that "the plain and obvious meaning of 'assets' in this section (33) was the proceeds of the debtor's property which are applicable to the payment of his debts." And, further, that since the amendment the section is to be construed as if it read, "The proceeds of the bankrupt's property in the hands of the assignee, and subject to be divided among his creditors, must be equal to fifty per centum," &c. This same construction was repeated in Re Graham [Id. 5,661]. Blatchford, J., in Re Webb [Id. 17,314], concurs in the decision in Re Freiderick [supra]. In Re Kahley [Case No. 7,594] a sum exceeding fifty per centum of debts proven, was received by the assignee from bankrupt's estate, but, after payment of costs and expenses of proceedings in bankruptcy, the dividend to creditors was not "equal to" fifty per centum of such debts. Discharge was granted to the bankrupt, it being held that the question of discharge should be governed by the gross amount or sum received by the assignee (when equal to fifty per centum of claims proven), and not by the percentage of dividend to creditors. While the court dissents from the views expressed in Re Freiderick, the decision certainly does not go to the length claimed by the bankrupts in Re Van Riper.

It is held that, by the amendment of section 33, the word "assets" should now receive its ordinary signification, which is as comprehensive as "estate" or "effects"; that the right to a discharge should be based upon the "gross value" of the bankrupt's "assets." I understand the words "gross value," as here used, to signify the gross amount or sum of money received upon a sale of the bankrupt's estate and effects, for upon page 192 the judge says, "The clear intention of the amendment, to my mind, was to relieve the bankrupt of the costs and expenses of the proceedings. If his estate realized a sum equal to fifty per centum of claims proven, he should be discharged, whether it was paid to creditors, or absorbed by costs and expenses." And on page 193, in section 47, it is stated "that if sufficient 'assets' for the payment of fees," &c., showing that it (the word "assets") may be used, and is used, as meaning the estate, applicable alike to the payment of debts and expenses. Unless money can be realized from the "estate," "effects," or "assets," then there is nothing belonging to the bankrupt's estate, whether called estate or assets, applicable to the payment of fees. I do not understand the decision in Re Kahley to go further than to assert the rule that the question of discharge shall be determined by the gross amount of money realized, without regard to the disposition that may be made of such amount.

Upon a careful examination of the whole question, and of the proceedings in the above bankruptcy, I am led to the conclusion that the said bankrupts, George Van Riper and Jacob J. Van Riper, are not entitled to a discharge from all their debts, and therefore

certify and report, that they have in all things conformed to their duty under the bankrupt act, respecting their debts contracted prior to the first day of January, A. D. eighteen hundred and sixty-nine, and that they are entitled, under the provisions of said act, to receive a discharge from their debts contracted prior to said first day of January, and which existed on the sixth day of June, A. D. eighteen hundred and seventy. In re Seay [Case No. 12,597].

WITHEY, District Judge. The rulings of the register are approved. I fully concur in the opinions expressed, and direct decrees to be entered in conformity thereto.

VAN SANDS (DAVIS v.). See Case No. 3,655.

Case No. 16,875.

VAN SANTWOOD et al. v. The JOHN B. COLE.

[4 N. Y. Leg. Obs. 373.]

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

ADMIRALTY JURISDICTION—FEDERAL COURTS—CONTRACTS OF AFFREIGHTMENT—RIVER TRANSPORTATION.

1. A contract of affreightment for the carriage of merchandise from one port or place to another, within the ebb and flow of tide, on a navigable river, is subject to admiralty and maritime jurisdiction of the courts of the United States; and it is immaterial whether the vessel or boat, by means of which the service is to be performed, is propelled by its own motive power, or is towed by another vessel.

2. Thus a suit in the admiralty may be maintained for the nonperformance of a contract for the transportation of flour from the city of Albany to the city of New York, on the Hudson river, in a boat designed for the navigation of the Erie Canal, and usually employed in that business.

[This was a libel by Van Santwood & Redfield against the boat John B. Cole; Miller, claimant.]

Mr. Dodge, for libellants.

Spencer & Kernan, for claimant.

CONKLING, District Judge. This suit is founded on a bill of lading bearing date November 28th, 1845, at Albany. By it, S. Brower, the master of the boat John B. Cole, acknowledged to have received on board his boat, in good order, 650 bbls. of flour, which he promised to deliver, in the like good order, to the libellants in New York. This boat was designed for the navigation of the Erie Canal, and, prior to the date of the bill of lading, had usually, and, as far as appears, uniformly, been employed in that business. She was of about sixty tons burthen, and was of the description of boats known on the Erie Canal under the denomination of "line boats." It was shown by the evidence not to be an uncommon practice for boats of this description, after arriving at Albany with cargoes designed for New York, to be taken in tow, and thus, with their cargoes, carried to New York by one of the several steamboats employed in towing barges and boats for hire to and fro on the Hudson; and it was in this manner that the Cole performed her voyage to New York in the present instance. Whether, in fact, contracts of affreightment are ever entered into by the owners of line boats for the carriage of flour or other articles from points on the Erie Canal to New York, and thus embracing river as well as canal navigation, does not appear. In this case, a large proportion of the flour on board the Cole had been brought by her to Albany, and then, without being unladen, and along with an additional hundred barrels there taken on board, became the subject of the independent contract on which this suit is founded. After the arrival of the Cole in New York, a delay of two days occurred before her cargo could be discharged, and during this period a storm arose, and (in consequence, as the libellants allege, "of her insufficiency, or the want of due and proper care, or other fault of the master and the persons having charge of her") she became partially filled with water, and the flour was thereby much damaged, and the libellants were obliged to incur extraordinary expense in securing it. It is for the recovery of the damages thus sustained that this suit is instituted. A day or two after the occurrence of the accident, the boat was taken to Jersey City, where she remained until spring, when she returned to the Erie Canal, whither she was followed by the libellants, who reside in New York, and was arrested in Schenectady.

The first question presented for decision arises upon the exception taken by the claimant to the jurisdiction of the court. The extent of the admiralty jurisdiction of the courts of the United States, it is well known, has been the subject of much earnest discussion, and of great diversity of opinion. It depends upon the construction to be given to that clause of the constitution which extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." It is unnecessary to review the controversies to which this clause has given rise, or even to advert to the grounds on which they have been maintained. The first thorough examination which the subject underwent was by the late Mr. Justice Story, in the celebrated case of De Lovio v. Boit [Case No. 3,776], decided in 1815, and reported in 2 Gall. In a most elaborate, able, and learned opinion, he maintained that national policy as well as judicial logic required the clause of the constitution to be so construed as to embrace all maritime contracts, torts, and injuries. And under the head of "maritime contracts" (with which alone we are at present concerned) he included "all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulation) which relate to the navigation, business, or commerce of the sea." Among contracts of this description, he expressly enumerates contracts of affreightment. The doctrines of this case were zealously and ably con-

troverted and strenuously resisted by several of the judges of the supreme court, and especially by Mr. Justice Johnson. But there is reason to believe that they met, even at the time of their promulgation, with the assent of a majority of the members of that court. They have never been repudiated, but, on the contrary, in all the cases depending upon them which have since been decided in the supreme court, they have been substantially adhered to. And in the rules of admiralty practice which have lately been adopted by the court, and published in 3 How. [44 U. S.], they may be considered as in effect affirmed. It is well settled, also, that navigable waters in which the tide ebbs and flows stand upon the same footing with respect to the admiralty jurisdiction over contracts as the high seas; and in the case of Peyroux v. Howard, 7 Pet. [32 U. S.] 324, it was adjudged that rivers in which the tide occasions a regular rise and fall of the water, although the current may not be turned back, are to that extent tide waters. The libel in this case does not, as it ought strictly to have done, allege that the Hudson is a river of this description. But in the case just cited it was also held that the court might take judicial notice of the notorious geographical fact of the ebb and flow of the tide in a navigable river, and the fact of such ebb and flow in the Hudson was moreover tacitly admitted on the trial.

This, then, being the case of a contract for the transportation on tide water of an important article of commerce, would seem, at the first blush, clearly to fall within the admiralty jurisdiction. It becomes necessary, therefore, now to consider the objections to the jurisdiction of the court as presented by the counsel for the claimant. These objections are founded upon the supposed peculiarity of the case, and refer exclusively to the particular character of the boat in question. It is denied that this is a maritime contract, because the boat employed in its execution was a canal boat; and also because she was unprovided with any independent means of propulsion. It does not follow, it was argued, because a service is performed on the sea, or on waters within the ebb and flow of the tide, that it is therefore a maritime service. Something more is requisite. The contract must relate to maritime affairs,—to the business of navigation, trade, or commerce. Now, certainly, no one at all acquainted with the subject will deny this. The admiralty jurisdiction as to contracts depends, not upon the locality, but upon the subject-matter of the contract. This is a settled principle. The only difficulty concerning it consists in its application to cases as they arise. This is sometimes a very serious and embarrassing difficulty. It was strongly felt and acknowledged by Judge Hopkinson in the case of Thackarey v. The Farmer [Case No. 13,852]. This case was much relied on by the counsel for the claimant, and, on that account, requires notice. It was a suit in rem for the recovery of wages alleged to be due to the libellants, as mariners, for services performed on the high seas. In point of fact, the services consisted in bringing wood for fuel across the Delaware river to Philadelphia, from Cooper's creek, in New Jersey, about two miles above the city. The question was whether the case was cognizable in the admiralty. After adverting to the great and increasing frequency of applications for admiralty process to recover wages for services performed on board the river craft, in which little regard was paid "to the character of the use or employment of the vessel,"—"the common river boats, of every size, having become ships or vessels navigating the high seas; their daily trips from shore to shore, voyages on the high seas; and the loading and unloading of wood and similar articles for the market, brought from places within a few miles of the city, for daily wages, being denominated marine services and maritime contracts,"—the learned judge, yielding to what he considered the necessity of the case, undertakes to ascertain and lay down some principle to serve as a future guide in his court as to the limits of the admiralty jurisdiction over cases of the like nature with that before him. He expressly states, however, that he "did not expect to be able to draw a clear line, which will decide the place of every case that may occur, to be within or without the admiralty jurisdiction," and he in reality contents himself with establishing and endeavoring to illustrate and define the principles to which I have already adverted, and which, since the date of this decision, have become familiar, viz., that tide waters are to be considered as the sea; that the admiralty jurisdiction touching contracts, depends upon their subject-matter; and that it embraces those contracts only which are essentially maritime. The services rendered by the libellants in the case before him, consisting, as already stated, in bringing wood across the Delaware for consumption as fuel, he did not consider to be of this character, and so decided. But I do not find a single argument or illustration in the whole course of his elaborate opinion tending to prove that he would have entertained a doubt of his jurisdiction over a case like the present. On the contrary, he refers to cases occurring on the Delaware, identical in principle with this, so far as the nature and objects of the contract are concerned, in which he had exercised jurisdiction without scruple, and still considered it to be unquestionable. Some of these cases are reported in the volume which contains the case on which I have been commenting. It is true that the Cole had been constructed for the purpose of canal transportation, and, though her tonnage was equal to that of many sloops employed in the coasting trade, she was not well adapted to maritime navigation. But having, in this instance, been employed in this manner, as the instrument by which a contract in itself strictly maritime in its nature was to be executed, I know of no authority or principle to warrant

me in holding her exempt from admiralty process, by reason of her general character as a line boat on the Erie Canal. If her subjection to this jurisdiction has been inconvenient to the owner, it is an inconvenience which he has incurred by voluntarily using his boat in a business which falls within the scope of the admiralty jurisdiction. In urging this ground of exemption, the counsel dwelt with much emphasis upon the inconveniences and embarrassments which he apprehended would result from the assertion of this form of jurisdiction over boats of this description, on account of the intimate connection there was between the business of canal and of river transportation; and hypothetical cases were adduced of contracts for the transportation of merchandise, without transshipment, from certain places on the canal to certain places on the Hudson; and it was asked whether the admiralty jurisdiction was to be extended to these cases also. In order to determine the question of jurisdiction in all cases arising ex contractu, 'he true inquiry, as already stated, is whether the contract is substantially maritime. Thus, if the voyage in which the service has been rendered, or stipulated to be rendered, was performed substantially on the sea or on tide waters, it is immaterial that its commencement or termination happened to have been at some place beyond the reach of the tide. And, on the other hand, if the voyage was substantially on inland waters above the ebb and flow of tide, the fact that the vessel entered tide waters at one terminus of her voyage is insufficient to confer jurisdiction. The Jefferson, 10 Wheat. [23 U. S.] 428; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The Orleans v. Phœbus, 11 Pet. [36 U. S.] 175. It may be admitted, therefore, that cases may occur like those supposed, of a mixed and ambiguous character, in which the question of jurisdiction would be attended with doubt and difficulty. Whether such contracts are in fact ever entered into, I am not informed. It is at least easy to avoid them, and, if found to be inconvenient in practice they would doubtless be abandoned. The present case, however, involves no such embarrassment. The stipulated service was to be performed on tide waters alone. But it is sufficient to say that arguments drawn ab inconvenienti ought to have no influence on the judgment of a judicial tribunal upon a question like this, otherwise clear. Courts are no more at liberty to decline the exercise of powers with which they are really invested, than they are to assume those which do not belong to them.

With respect to the remaining objection to the jurisdiction of the court, touching the manner in which the Cole was moved forward on her voyage, it is, as far as I am aware, wholly novel, and I think it is no less untenable. The allegation is that motion having been communicated to this boat by the power of traction, and by means of another self-moving vessel, she was not, in the eye of the maritime law, a ship or vessel subject to the admiralty lien; and it was argued that the lien attached, if at all, to the vessel by which she was towed. The objection admits of a ready answer. The proposition that the Cole is not a vessel, is a mere assumption, to which it is believed no judicial tribunal, or elementary writer upon maritime law, has ever afforded the least countenance. In the celebrated case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, it was insisted that steamboats were not vessels, because they were not propelled by wind and sails. But the objection was summarily repudiated by the court, on the ground that the law "does not look to the principle by which vessels are moved." In the case of Thackarey v. The Farmer, already cited, and so much relied on by the counsel for the claimant, Judge Hopkinson expressly states that the admiralty jurisdiction does not "depend on the manner in which the vessel is equipped, with or without sails; nor upon the power by which she may be propelled, by sails, by oars, or by steam." In the bill of lading, the Cole is spoken of and treated as a vessel. Its language is, "Shipped by M. Barnes, Agt., on board boat J. Cole, Capt. S. Brower." To give effect to the distinction insisted on; to treat the Cole, not as a ship, but, in the language of the claimant's counsel, as a mere "store room,"—would be inconsistent with the nature of the contract, and at variance with its terms.

As to the suggestion that the suit ought to have been against the towing vessel, it is difficult to believe that it could have been well considered. The suit is founded upon a contract, and is brought to recover damages for its nonperformance. But the owners of the tow-boat, as such, were not parties to this contract, and are not therefore responsible for its fulfillment. They entered into no engagement to convey the flour in question to New York, but to tow the Cole, without reference to her cargo. This engagement they were bound to perform. But the contract having been made by them, not with the owners of the flour, but with the owner of the Cole, he alone would have been entitled to claim damages in case of their delinquency. Whether in that case he could have resorted to the admiralty for redress, is a question which it is unnecessary to discuss. In point of fact, however, the contract was fulfilled by the exact performance of the stipulated service, and the damages claimed accrued afterwards, from causes wholly independent of the towing service.

My judgment, therefore, is that the admiralty jurisdiction of the court extends to this case; and I have been led into a formal examination of the question, not because I have, at any time, entertained any serious doubt upon the subject, but rather out of respect to the opposite convictions so confidently stated, and doubtless no less sincerely entertained, by the distinguished and able coun-

sel for the claimant, and for the purpose of more effectually correcting similar misapprehensions, should they be entertained by others.

Case No. 16,876.

VAN SCHAACK et al. v. NORTHERN TRANSP. CO.

[3 Biss. 394; 5 Chi. Leg. News, 181; 4 Leg. Op. 537; 7 Am. Law Rev. 565.] [1]

Circuit Court, N. D. Illinois. Dec. Term, 1872.

LIMITATION BY CARRIER OF COMMON LAW LIABILITY.

1. A common carrier may, by special contract, limit his common law liability in case of fire.

2. For this purpose it is sufficient that bills of lading containing such exemption be delivered to the agent or person bringing the goods, or placed in a box from which they were accustomed to obtain bills of lading for shipments from time to time made.

3. In such case the burden is upon the plaintiffs to show that they were not barred by the bill of lading.

On the 21st day of September, 1871, Donald Kennedy, the agent of the plaintiffs, shipped from Boston to Chicago, one hundred and sixty cases of drugs called "Medical Discovery." They were shipped by the Northern Transportation Company, defendant, and arrived in Chicago, the port of destination, where the plaintiffs resided and did business at that time, on the afternoon of Saturday, the 7th of October, 1871, by the steamer Milwaukee, belonging to the Northern Transportation Company. The goods were landed and placed in the warehouse of the defendant, on the dock, shortly after the arrival of the steamer at the wharf, and there remained until Monday morning, the 9th of October, 1871, when they were consumed in the great fire in Chicago. This was an action on the case against the defendant, as a common carrier.

Clarkson & Van Schaack, for plaintiffs.
Waite & Clarke, for defendant.

DRUMMOND, Circuit Judge. I shall decide the case on the ground that there was a bill of lading which was a contract between the parties, exempting the defendant from loss by fire. There is considerable difficulty in relation to the question of notice, whether or not the plaintiffs had a reasonable time after the notice was given, if given, to remove the goods from their place of deposit after they were landed. It is not necessary to decide the case on that ground; but I think that the weight of evidence is that there was a contract between these parties, which constituted the measure of responsibility on the part of the carrier in relation to the transit of the goods.

When the courts say that it is competent for the carrier to relieve himself from his common law liability, and that it cannot be done by mere inference—that it must satisfactorily appear that the carrier has done so with the consent of the consignor—it is not meant that a court must not consider testimony according to its legal effect and according to the fair inferences deducible from what appears in the case in relation to this question, namely: whether there was a contract between the parties by which the carrier was to be exempt from his common law liability.

In this case the testimony bearing upon this question of the bill of lading is contained in the deposition of Benjamin K. Little, who testifies as follows: "On the 21st day of September, 1871, one hundred and sixty boxes of merchandise called 'Kennedy's Medical Discovery, were shipped by said company from Boston to Chicago, consigned to said Van Schaack, Stevenson & Reid. They were shipped by and at the request of Donald Kennedy, on application at the office of the company. At the time of said shipment duplicate bills of lading of said merchandise, under which said property was shipped, were made out. Said bills of lading were either delivered to said Kennedy or to his teamster who brought the goods at the time of the contract for shipment, or were at the time of said contract for shipment directed to D. Kennedy, and placed in a box in the office of said company, at No. 7 State street, as aforesaid, to which box the said Kennedy and his said teamster had access, and from which, in all cases of shipment of goods, they were accustomed to obtain bills of lading when the same were not handed to them personally. Said Kennedy had for years very frequently shipped goods from Boston to the west by said Northern Transportation Company, through the office at which I was employed, as aforesaid, and had been accustomed to obtain the bills of lading as above stated. Said duplicate bills of lading were either made by me personally in the performance of my duty as such clerk, or by my assistant under my immediate supervision and examination. The making of bills of lading of the company and shipments of goods are my duty."

One of the plaintiffs was examined as a witness, and testified that no bill of lading was ever received by the plaintiffs; that after the goods were ordered, all they received was an invoice containing a memorandum that they had been shipped by the Northern Transportation Company; therefore it may be assumed that there is no evidence which, fairly considered, tends to establish that the plaintiffs themselves ever received this bill of lading.

Now this is the testimony in relation to the contract, which, it is alleged, was made between the parties as to the shipment and transit of these goods which were destroyed by fire; and the question is, looking at the testimony fairly, and drawing the infer-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 7 Am. Law Rev. 565, contains only a partial report.]

ences which can be justly drawn from the testimony, whether it is not a necessary conclusion that there was a contract made in relation to the transit of this property, and I think that there was.

Now there is often great difficulty, undoubtedly, in the application of this rule which allows a carrier to restrict his common law liability simply by making out a bill of lading and delivering it to the consignor or to his agent, and inferring thereby that the common carrier is exempt from liability; and while I am not prepared to say that the mere existence of such a state of facts would warrant the conclusion that a contract was made by the consignor, still we are to look at what is established, and see what it was within the power of the party to prove—see if the inference is not fairly to be drawn from the testimony which is presented. Now, this witness annexed to his deposition a copy of the bill of lading, which contains a clause of exemption from the common law liability in case of loss by fire, and without saying that all the various conditions that were contained in this bill of lading necessarily bound the consignor, still it is fairly inferable, I think, that this defendant was in the habit of transporting property shipped by Mr. Kennedy on a bill of lading which contained this exemption, and that this bill of lading came into the possession of Mr. Kennedy, and was received and acquiesced in by him as the measure of responsibility on the part of the defendant in the transit of those goods—at any rate so far as the exemption from loss in case of accidental fire is concerned. The bills of lading were made out there. They were either given to Mr. Kennedy himself, to his teamster who delivered the goods, or were placed in a box where they were in the habit of placing bills of lading when they were not personally delivered to Mr. Kennedy, and where he was in the habit of receiving them, and for years he had been accustomed to ship goods to the west by this line.

Now, what is the necessary conclusion from this testimony in the absence of all countervailing testimony? It is that this bill of lading was delivered, and received by Mr. Kennedy with this exemption clause in it. This was on the 21st of September, 1871. The evidence shows that property was shipped under the precise form of this bill of lading that has been introduced, at least during that season. Now, is it not fairly inferable that Mr. Kennedy understood that the goods were to be shipped, the carrier being relieved from his common law liability in that respect? It is, as I think. If it were not so it was competent for the plaintiffs, and was their duty under the state of case which is made by this deposition, to rebut the inferences which necessarily grew out of the statement of facts made by Mr. Little. They had no right, I think, to rest upon the doctrine that it was necessary for the defendant to rebut, or to prove that the contract was delivered to Mr. Kennedy. [The plaintiffs have not done so. Kennedy was their own agent; he was the party that shipped the goods. If he did not receive the bill of lading, or if he was not bound by this contract in any way, it was competent for them to show it; and, I think, they were bound to do it. I decide the question, therefore, without reference to the question as to whether there was a reasonable time on the part of the plaintiffs to receive and take away the goods.] [2]

Of course it is a hard case; but courts are full of hard cases and it is simply a question as to who shall bear this loss; and it seems to me, under all the circumstances of the case, that the plaintiffs must bear it, and not the defendant. The issue and judgment, therefore, will be for the defendant.

NOTE. The liability cannot, however, be limited by merely showing a usage to give bills of lading containing certain exemptions. Illinois Cent. R. Co. v. Smyser, 38 Ill. 355. Nor by mere notice, even though brought home to the shipper. Nevins v. Bay State Steamboat Co., 4 Bosw. 225; Rawson v. Pennsylvania R. Co., 2 Abb. Prac. (N. S.) 220; Prentice v. Decker, 49 Barb. 21; Belger v. Dinsmore, 34 How. Prac. 421. Where the contract excepted losses by fire, carrier held not liable for such loss. Parsons v. Monteath, 13 Barb. 353; Dorr v. New Jersey Steam-Nav. Co., 4 Sandf. 136; Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith, 115. That a common carrier may limit his liabilities by contract, see York Co. v. Illinois Cent. R. Co., 3 Wall. [70 U. S.] 107; Merriman v. The May Queen [Case No. 9,481]; Seller v. The Pacific, 1 Or. 409; Illinois Cent. R. Co. v. Morrison, 19 Ill. 136; Western Transp. Co. v. Newhall, 24 Ill. 466; Bingham v. Rogers, 6 Watts & S. 495; Lee v. Marsh, 43 Barb. 102; Price v. Hartshorn, 44 Barb. 655. A person receiving a printed notice limiting the carrier's liability is chargeable with knowledge of its contents. Hopkins v. Westcott [Case No. 6,692]. And a receipt containing clauses of limitation is binding, if accepted with full knowledge of its contents. Adams Exp. Co. v. Haynes, 42 Ill. 89. Simple delivery of such receipt not conclusive. Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88; Prentice v. Decker, 49 Barb. 21. The right of common carriers to restrict their common law liability has recently been elaborately reviewed by the United States supreme court in New York Cent. R. Co. v. Lockwood [17 Wall. (84 U. S.) 357] October Term, 1873, and numerous authorities in both the state and federal courts are there cited and commented on.

VANSICKLE (UNITED STATES v.). See Case No. 16,609.

VAN SLYKE (UNITED STATES v.). See Case No. 16,610.

[2] [From 5 Chi. Leg. News, 181.]

Case No. 16,876a.

VAN STRATTON v. BORBOCK et al.

[23 Betts, D. C. MS. 59.]

District Court, S. D. New York. Sept. Term, 1857.

ATTACHMENT — ISSUANCE OF WRIT — RULES OF COURT—ARRESTS ON ADMIRALTY PROCESS.

[1. Under rule 28 of the district court, providing that "process cannot issue against goods, choses in action, or moneys in the hands of third persons, except by order of the judge," a writ of foreign attachment in aid of a libel in personam in admiralty to recover less than $500, issued without direct sanction of the court, is irregular, and must be discharged.]

[2. Rule 28 is not rescinded by Sup. Ct. Rule 7, prohibiting employment of the writ in aid of demands exceeding $500 without authority of the judge, as by Sup. Ct. Rule 46 no repeal by implication is to arise where there is no conflict between the regulation of the subordinate and superior courts.]

[3. Since the promulgation of the supreme court rules of 1850, abolishing arrests on admiralty process where by the state laws imprisonment for debt has been abolished, a warrant of arrest sued out without the special order of the judge is nugatory and void.]

[This was a libel by Cornelius Van Stratton against James B. Borbock, Samuel C. Joy, and others. Motion to vacate attachment.]

Mr. Mudgett, for libelants.

F. B. Cutting, for respondents.

BETTS, District Judge. The libel was filed to recover $361.59 for labor and materials supplied by the libellant to the brig Sutton, of which the respondent Samuel C. Joy was master, and the other respondents joint owners with him. It prays that a warrant in due form of law may issue to the marshal commanding him to cite or admonish the respondents to be forthcoming before the court to be named in the warrant, to answer the libel; and further commanding him, if the respondents cannot be found within the district, to attach their goods and chattels, and for warrant thereof, the goods and effects of the respondents in the hands of their garnishees, according to the course of courts of admiralty and the rules and practice of this court in civil causes of admiralty and maritime jurisdiction. Upon this libel a warrant was taken from the clerk's office commanding the marshal "to take and arrest the respondents if they shall be found in the district, and them safely keep so as to have their bodies before the court, &c., to answer said libel, &c.," and, if the respondents cannot be found, to attach their goods and chattels to the amount sued for, and, if such property cannot be found, to attach their credits and effects to the amount sued for in the hands of the New York & New Haven Railroad Company, the garnishees. One of the respondents applied to the court, after notice to the proctor of the libellant, to discharge the above attachment because it was issued without any previous order of the court authorizing the proceeding. The libellant upholds the correctness of his practice on the ground that, the matter in demand being less than $500, no preliminary order of the judge was required, and insists that this court, in March term, 1856, held that a mandate of the judge was unnecessary when the debt upon which the foreign attachment was sought for did not exceed $500. The case referred to—Gregory v. The White Oak [unreported]—turned upon a different point, and no suggestion was made by the court on its decision, sanctioning the arrest of property in any case without an express order of a judge of the court. The warrant employed in that case was directly in contravention of a rule of the supreme court (rule 7), and it was incidentally remarked that the practice could not be justified under a rule of this court of a different tenor. Rule 17 of the district court, which is cited as authorizing the clerk to award a warrant against property without any order of the judge, when the sum demanded is less than $500, relates only to process against the person of a respondent. It does not allude to the arrest of his property. That proceeding comes under the provisions of rules 25, 26, 27, and most especially rule 28. The latter rule cannot be considered abrogated by the slender implication deduced from the supreme court rule 7. On the contrary, the supreme court, in its code of rules, expressly declare that in cases not provided for by its system the district and circuit courts are to regulate the practice of their courts respectively in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty. Sup. Ct. Rule 46. A positive direction in rule 28 of the district court that "process cannot issue against goods, choses in action or moneys in the hands of third persons, except by order of the judge and upon due process of the claim first made" cannot be deemed rescinded by the special prohibition in Sup. Ct. Rule 7 to employing the writ in demands exceeding $500 without such authority, against the positive expression of the sense of the supreme court in rule 46, that no repeal by implication is to arise when there is no conflict between the regulations of the subordinate and superior courts. Palpably, then, rule 28 of this court prescribes a regulation which explicitly meets and controls this case, and, not falling within the scope of the 7th rule of the supreme court, became the law of practice in the present proceeding. The libellant was not accordingly entitled to process of attachment against the property arrested, without the express sanction of the judge, and the warrant in this case was irregularly or improvidently issued, and must be discharged.

The specific motion is to vacate the attachment because it was issued without the mandate of the judge, but the papers disclose another error in the proceeding equally fatal to their validity. The court adverts to that

point here because it is one of moment, and one upon which it would appear a very loose and inaccurate practice has for a time prevailed in suing out and pursuing writs of foreign attachment in aid of actions in personam in admiralty. According to the long-established practice of this court, a writ of foreign attachment for the purpose of obtaining the personal appearance of a party is made part of and auxiliary to the process issued upon the libel against the party who is to be brought into court. Betts, Adm. 28; Dist. Ct. Rules 13. The main process was a capias or attachment in personam, according to the fundamental practice of the English admiralty. Clerke, Praxis Adm. tits. 1, 3, 20. When the defendant could not be arrested, the warrant of attachment against his personal effects, appended to that against his person, came into operation and was executed upon them or his debts or choses in action. Id. tits. 28, 32; 2 Sir L. Jenk. 775. Warrants of arrest against the person were continued in use in this district under its stated rules, and in the admiralty courts of the United States, under rule 2 of the supreme court (Gardner v. Isaacson [Case No. 5,230]), until the rules of the supreme court of December, 1850 (10 How. [51 U. S.] iv., v.), abolished the arrest of the party on admiralty process in all cases where by the laws of the state in which the court is held imprisonment for debt has been or shall be hereafter abolished upon similar or analogous process issuing from a state court. The ordinary process of capias in actions for the recovery of money would be erroneous and unavailing in the state court without the mandate of a judge endorsed thereon directing the defendant to be held to bail. 1 Bunnell, Prac. 88, 89; Sess. Laws N. Y. 1831, p. 396; 1 Stat. 321, 410. This legislation of congress, connected with the exercise of its special powers by the supreme court in 1850 in regard to process authorizing the bodily arrest and detention of parties in actions for the recovery of money takes from the libellants, all authority to employ a warrant of arrest without the special order of the judge, and the one sued out by the libel in this case and objected to on this motion, must be held nugatory and void. Several years since it was declared by this court that the warrant of arrest was no longer a proper process to employ in connection with a warrant of foreign attachment, since the adoption of the rule of the supreme court of December term, 1850. The proceeding was allowed to stand in that particular case because the rule, although nominally adopted by the court in December, 1850, was not promulgated until after that action was instituted, and especially because the arrest of the defendant under the warrant against his person was ordered by the judge on the writ. Nelson v. Bell [Case No. 10,101a].

The motion in this case must prevail, and an order be entered setting aside the proceedings on the attachment.

Case No. 16,877.

VAN SYCKEL v. The THOMAS EWING.

[Crabbe, 405; 3 Law Rep. 449; 5 Pa. Law J. 231; 3 Pa. Law J. Rep. 301.] [1]

District Court, E. D. Pennsylvania. Nov. 27, 1840.[2]

AFFREIGHTMENT — LOSS OF CARGO — STRANDING — JETTISON — PERILS OF THE SEA.

1. Where a vessel arrived off Mobile towards evening, there being indications of bad weather during the night, and the captain, unable to obtain a pilot, determined to follow a pilot-boat up the bay, and in so doing the vessel ran aground; such grounding cannot be imputed to the fault or misconduct of the captain.

2. A vessel being aground, the captain ordered the deck-load, consisting of casks of brandy, to be thrown overboard; it was found impossible, however, to throw the casks over whole, and their heads were knocked out to allow the liquor to escape through the scuppers. *Held*, that such a state of facts would not sustain a charge of want of skill or of misconduct against the captain; and that the brandy was lost by "peril of the sea."

[Cited in Knox v. The Ninetta, Case No. 7,912.]

This was a libel on a bill of lading. It appeared that, on the 4th March, 1840, the libellant [Elijah Van Syckel] shipped sundry casks of brandy and other liquors on board the Thomas Ewing, John W. Ireland, master, consigned to Ogden & Brother at Mobile, eighty-eight casks being loaded on deck; that on the 4th April, 1840, the schooner arrived at the mouth of Mobile Bay; that the weather was then threatening, and the captain being unable to obtain a pilot, determined to follow a pilot-boat up the bay, the persons on board such boat having told him, on learning his draught of water, that he might do so in safety; that, so going up the bay, the schooner grounded in a very dangerous position; that the captain ordered the deck-load to be thrown overboard, and it being impossible to throw the casks over whole, they were staved; that the vessel then was much easier; that on the next day the captain hired lighters to take the rest of the casks to Mobile, where they were delivered to the consignees on payment of freight and $593.64, the amount of salvage, average, &c. And on this state of the facts the consignor libelled the schooner for his damages.

Mr. Hood, for libellant.

It lies on the respondent to justify the destruction of the cargo. 1 Saund. Pl. & Ev. 330, 331. But the destruction cannot be justified in this case. The Rebecca [Case No. 11,619]; 3 Kent, Comm. (1837) 318; Laws of Wisbury, art. 21, 8; Laws of Oleron, 8 Abb. 378, 379; Marshal, Ins. 466; Poth. Obl. 62; 2 Phil. Ins. 176.

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[1] [Reported by William H. Crabbe, Esq. 3 Law Rep. 449, contains only a partial report.]

[2] [Affirmed by circuit court. Case unreported.]

G. M. Wharton, for respondent.

The loss in this case happened from a peril of the sea. It is said that the captain should have taken a pilot, and not being able to do so should have waited, but he would have done so in the face of a threatening storm and at the risk of his cargo.

HOPKINSON, District Judge. The libellant in this case complains, that on the 4th of March, 1840, at Philadelphia, under a certain contract or bill of lading, he shipped in good order and condition, on board the schooner Thomas Ewing, whereof John W. Ireland was then master, ten hogsheads of rum, twenty casks of fourth proof brandy, fifty barrels of rum, and one hundred and sixty barrels of first proof brandy, whereof eighty-eight barrels of the first proof brandy were laden on the deck of the said schooner, to be delivered in like good order and condition at the port of Mobile, the dangers of the sea only excepted, unto Ogden and Brother, or their assigns, they paying freight, &c. That on the 6th of April the vessel arrived at Mobile, that the consignees offered to pay the freight according to the stipulations of the bill of lading, that all the goods were delivered except the eighty-eight barrels of brandy laden on the deck of the schooner, which were never delivered, but that the said eighty-eight barrels of brandy were wantonly, illegally, and contrary to the contract aforesaid, stove in on the said deck, and totally destroyed without any sufficient and legal cause, on the 4th and 5th days of April, 1840, during the continuance of the said voyage. It is further stated that by the misconduct and want of skill and attention of the said John W. Ireland, in attempting to proceed up Mobile Bay without a pilot on board, and by other misconduct and neglect of the said John W. Ireland, the said schooner grounded on the west bank of Mobile bar, on the evening of the 4th of April, 1840, by means of which misconduct and neglect the libellant was subjected to pay as salvage and charges incident thereto, on that part of his goods not destroyed by the said John W. Ireland, and shipped in the hold of the schooner, $593.64. The claim of the libellant is for the amount or value of the eighty-eight barrels of brandy destroyed and totally lost, and for the salvage and charges paid by him on that part of his goods which was safely delivered. The answer of the respondent, put in on behalf of the owners of the schooner, alleges that the schooner proceeded on her voyage on the 5th of March last past, and arrived at Mobile on the 6th of April following; that during her voyage, viz.: on the 4th day of the said April, the vessel grounded on the bar of Mobile Bay, owing to the difficulty of the navigation and the state of the weather, and to the impossibility of procuring a pilot for the immediate use of the said schooner, at the same time the master thereof following the advice and direction of the pilot who was aboard one of the vessels in advance of the said schooner. The respondent avers that the said grounding of the schooner arose from and was caused by the dangers of the sea, and not in any degree by the misconduct, want of skill or attention of the said master, or by any neglect on his part; that for the purpose of lightening the vessel, and in order to save her from bilging, she striking very hard, the deck-load was thrown overboard; the heads of some of the casks being stove in; that no part of the cargo but the deck-load was injured; that this was done in order to the general safety and preservation of the vessel and cargo, and conduced to that end. The answer then proceeds to aver that having failed in all the attempts to start the schooner from her position in the mud, certain fishing smacks were employed to unload the cargo and take it to Mobile, and that the vessel being thus lightened was got off and proceeded to Mobile; that the average and salvage paid for this service were adjusted and settled by proceedings in the admiralty court at Mobile, to which the consignees of the brandy of the libellant were parties and assented; and that they received all the goods contained in the bill of lading, except the barrels thrown overboard; that they paid the freight and also their proportion of the average and salvage.

No objection has been taken on the part of the respondent to the jurisdiction of the court, nor to the proceeding in rem against the body of the vessel for compensation for the injury and loss complained of. I shall, therefore, give no opinion upon those points. The questions to be decided are questions of fact, and the issue is so taken in the bill and answer. By the contract, or bill of lading, the respondent undertook and bound himself to deliver the goods therein mentioned at Mobile, in the like good order and condition in which he received them, "the dangers of the sea only excepted." Has he performed this contract? Was the loss complained of caused by dangers of the sea, or were the said eighty-eight barrels of brandy, as the libel alleges, wantonly, illegally, and contrary to the contract aforesaid, stove, broken and destroyed, without any sufficient or legal cause. Witnesses have been examined by both parties upon this issue of fact. On the part of the libellant, George Dudley has testified, that he was a passenger and consignee of part of the goods on board the schooner, that he was on deck when she went aground, about 8 o'clock on the evening of the 3d of April. The captain proposed lightening the cargo; there was a quantity of barrels of brandy on deck. The captain and mate concluded on throwing them overboard. I understand this witness to say that this was after the schooner had been three or four hours aground. They threw the brandy overboard by staving in the heads of the barrels. This was on the west bank of Mobile bar, and about three or four hun-

dred yards from the lighthouse. The wind was not immoderately high when the schooner went aground; there was a considerable surf and breakers; captain was much alarmed when the vessel went aground; he had not any pilot on board. There was only one officer on board. The captain did not, as deponent recollects, consult him as to staving the brandy. There was a more convenient way proposed of getting rid of the brandy, and that was by the means they adopted of staving in the heads. I would here observe that the witness does not state by whom this way of getting rid of the brandy was proposed, and he says they, that is, the captain and mate, adopted it; it would rather seem that the proposition came from others. The witness left the schooner the next morning, the weather being moderate but foggy, and neither vessel nor cargo having suffered, except that part thrown overboard. He says that the place where they went aground is above the place where vessels usually take in pilots. He thinks the wind was blowing on shore when the vessel went aground and the brandy was thrown overboard. There was a pilot-boat, but hardly near enough to speak at the time he went aground. Samuel Smith was not in the vessel, and says nothing as to the accident or causes of the loss. Charles W. Ogden, one of the consignees at Mobile, gives no information as to the accident or cause of the loss, but he says it is customary for vessels bound to Mobile, to take in pilots before they enter the bay: he says without exception. The narrows are formed by Dauphin Island and other land. The bar extends outside, and crossing it is difficult navigation. This is all the testimony on the part of the libellant—and but one of the witnesses, George Dudley, testifies anything upon the question we are now inquiring about, that is, the cause and manner of the loss.

On the part of the respondent, several witnesses have been examined. The first was Joseph Woods, but he only speaks of proceedings at Mobile after the arrival of the vessel there. Erastus Large was on board the schooner on the voyage in question, as a seaman. He testifies, that after a passage of twenty-four days they got sight of the light-house at Mobile point, saw a pilot-boat in the afternoon, made toward her, the boat steered out, spoke a ship, and put a pilot on board of her. The boat then steered for our schooner. We spoke her when we got near enough, and asked for a pilot; they said they had none. Then we could not get a pilot. They said, follow them and they would take us in. As the water looked very bad, like squally and rough weather, it was thought best by the captain and mate to go by their directions, and steer after the boat. This was just before sunset. They steered after the boat by their directions as nigh as we could. Before we got in it came on so dark that they could not see the boat only by a light they put out. About 8 o'clock they struck the bottom; hailed the pilot-boat, but she did not come to them. They lay there on the bar until Sunday morning at 10 o'clock. She thumped pretty hard the first night, after that she did not thump hard for more than once in a while. The witness then details the efforts that were made, by carrying the anchor out, &c., to heave the schooner off, doing all they could until 12 o'clock on Friday night. There was a considerable sea on her, and she thumped pretty heavy. It was thought by the captain, and, he believes, the mate, to throw her deck-load overboard, to keep her from beating to pieces. This lightened the vessel and she did not thump so hard. The next morning they took their clothes and some provisions ashore to the light-house. They had previously hung a signal at half mast. He speaks of the employment of the fishing boats to take part of the cargo out, and get the schooner off. The vessel was considered by the officers to be in a dangerous situation, when they threw the deck-load overboard, and the witness thought so himself. They did not think she would ever get off, when they went to the light-house and tried to get help. On his cross-examination, he says that at the time they saw the pilot boat there was a light wind on the land, the weather looked thick and squally, but there was no squall. The sea was very moderate then. When the brandy was thrown overboard, there was a light breeze towards the shore, and the tide was making out at about five miles an hour. They fired guns after they struck for an hour or two. It was a rifle or musket. Henry Jordan was a seaman on board the schooner. He says, that when they neared the light-house at Mobile, the weather was very thick, looking cloudy, it had the appearance of bad weather, had a fair wind going up the bay, towards the light-house. In the afternoon of Friday saw a pilot boat, hoisted the pilot jack and made towards the boat, she had just put a pilot on board a ship; she hailed us, we asked if they had a pilot on board, they answered "no", we asked if there were any other boats out, they said they believed not, our captain asked if we could follow them in, they asked how much water we drew, the captain told them, they said "yes, keep after the boat," and we did so as near as possible. The witness then speaks of their running aground, of their efforts to get her off, that she began to beat very heavy on the bottom, it was calm but a very heavy surf, found they could do no good by heaving on the anchor. A light breeze came off the shore, hoisted their sails to take advantage of it, the schooner was still beating on the beach further up, was beating on the bottom worse, the captain sent for the witness and another man in the cabin, and asked us what we thought about throwing off the deck-load. Witness told the captain that

he and the mate ought to know best about it, but that I did not think the vessel would stand long whole. We accordingly went on deck, still beating on the bottom worse. A short time after the mate ordered us to throw the deck-load overboard. We accordingly cut the lashings and threw over what lumber was in the road, then we tried to heave overboard a barrel of liquor, just whole as it was, we found we could not do it, and accordingly went to work staving the heads in and cutting the hoops, at last we cleared the deck; the hawser was then easier, at daylight they hoisted signals, fired through the night from a musket, went to the shore in the boat, taking Mr. Dudley, the passenger, employed the fisherman to take out the cargo and get the schooner off. On the cross-examination this witness says, it was ten or a dozen miles below the lighthouse they first saw the pilot boat, the lighthouse was not then in sight that he knows of.

On this evidence we are to decide whether the loss complained of, was caused "by perils of the sea," or was the consequence of unskilfulness, negligence, inattention or fault of the master; whether, in the language of the libel, the goods in question were destroyed contrary to the contract of the bill of lading, wantonly, illegally, and without any sufficient and legal cause. The counsel for the libellant has with great industry collected and cited numerous cases to explain what are properly perils of the sea, and what it was the duty of the captain to do before he proceeded to the extremity of casting part of his cargo overboard. The law upon these points is well settled, and must be conceded to the libellant as he claims it. Our inquiry is of the facts—that is whether the captain did conform himself to that which the law required of him in the circumstances and situation in which he was placed. The libellant has taken two leading exceptions to his conduct and proceedings: 1. His attempting to come up the bay without a pilot. 2. His breaking the barrels of brandy, instead of throwing them overboard, and taking the chance of recovering all or some of them by their floating on shore. Some other objections have been stated, but they are either of little importance or included in those mentioned.

The schooner, Thomas Ewing, had a valuable cargo on board, about $50,000; she had three seamen before the mast, with the captain, mate and cook, to navigate her. She arrived at or near the entrance of Mobile bay on the afternoon of the 3d of April; the distance from Mobile is not accurately ascertained by the witnesses, but I collect from their testimony that it is about forty-five miles. She came to this point in the afternoon, the navigation of the bay was known to be difficult and I should presume, impracticable, without extreme danger, at night, unless under the command of a pilot or some guidance that might be reasonably depended upon. The master of the schooner having a pilot boat in sight, hailed her and endeavored to get a pilot from her. But it appears she had but one on board, and he was engaged for a ship then entering the bay. The master of the schooner being thus disappointed, asked if there were any more pilots out, from which we must suppose that it was his intention to wait for one, if by waiting there was a probability of obtaining one. He was answered in the negative. The question then presents itself, what was it his duty to do in the actual situation in which he was placed, a pilot could not then be had, and there was no prospect of his getting one until the next day. Night was coming on, and although the weather was not bad, nor even then squally, yet the two seamen testify that the appearances were such as to warrant a belief of approaching bad weather. Large says, the water looked very bad, like squally and rough weather. This was just before sunset. H. Jordan says, the weather was very thick, looking cloudy, it had the appearance of bad weather, and the wind was fair for going up the bay, the pilot was going up the bay, and either on the suggestion of the master of the schooner, or of the persons on board the boat, it was determined to follow her up the bay. Was this a wise and judicious determination, such as a prudent and skilful navigator would make, or is the master chargeable with misconduct, want of skill, and inattention to the interests committed to his charge, and his duties as the master of this vessel, in so determining? He had but one other choice, which was to beat out again to sea, for the wind was setting up the bay, and take his chance there for the weather through the night, and until he should be able to procure a pilot, which was altogether uncertain. We must not forget that no person on board the schooner made any objection then to the course adopted by the captain, nor has any witness here said it was injudicious, and the mate expressly approved of it. The persons on board the pilot boat, who may be presumed to have been acquainted with the navigation of the bay, recommended it, and told the master of the schooner to follow them and they would take him in. This was done after the master had informed them of the draught of water of the schooner. It is clearly in evidence that the schooner did follow the pilot boat, steering by the directions they received from her as nigh as they could. The night was dark, at times they could see where the boat was only by their light. If the schooner had taken the other alternative and gone to sea, and any disaster had happened to her, it would have been more difficult to defend the master against the charges of unskilfulness, inattention, or imprudence. It is my opinion that in determining to follow the pilot up the bay, he adopted the most safe and judicious course in his power, under all the circumstances in which he was placed, and, of consequence, any accident or loss

which occurred in the execution of that proceeding, cannot be imputed to the misconduct or fault of the master of the schooner.

This brings us to the second ground of complaint, for it is undeniable that the master was not only bound to the exercise of skill and attention before the accident, but that after it occurred it was incumbent upon him to use the same skill and attention to prevent any loss of the cargo, or to make it as little as possible. About eight o'clock in the evening, the schooner being under full sail, with a fair wind, and following the pilot boat as nearly as they could, ran upon a bar of mud. The pilot boat was immediately hailed, but did not come to their relief. Every effort seems to have been made by carrying out the anchor and heaving upon it, &c., to get her off, but in vain; she lay thumping on this bar heavily, there being a considerable sea and surf running upon her. It was thought, says Large, by the captain and mate necessary to throw her deck-load overboard, to keep her from beating to pieces. It was done; it lightened her, and she did not thump so hard. Jordan also details the efforts made to get the schooner off, which seem to have been all that judgment and skill could devise; she beat, he says, very heavy on the bottom; it was calm, but there was a very heavy surf. The captain sent for the witness and another man into the cabin, and asked us what we thought about throwing off the deck-load. Witness said he did not think the vessel would stand long whole, and the deck-load was thrown overboard. To the necessity of this measure for the safety of the vessel and all the rest of the cargo, we have the opinion of the captain, the mate, and two out of three of the seamen—can we judge of it better than these persons who were present at the scene, and whose vocation enabled them to estimate the danger and the necessity of the remedy? The event justified the proceeding, the vessel was lightened, the thumping became less, and she was finally got off without injury to herself or the rest of the cargo. As to the means of getting rid of the deck-load, can we say it was a wanton and illegal sacrifice of the property, and that the barrels should have been thrown overboard, and not broken up on the deck of the vessel? She was not strongly manned, and some of her crew were necessarily employed in various services. When the order was given to throw the deck-load overboard, it does not seem that the manner of doing it was expressly directed. The men who undertook it, to whom the order was given, began by cutting away the lashings and throwing over the lumber that was in their way. They then tried to heave overboard a barrel of liquor, just whole as it was, but found they could not do it, and then they went to work staving the heads and cutting the hoops. I understand, although it is not expressly said, that the order to throw off the deck-load was given to the two men that had been consulted in the cabin. We have no direct evidence of the height of the schooner's side from the deck, but I presume it is not unreasonable to suppose it was from two to three feet. A barrel of brandy is no inconsiderable weight, and I can well believe that these men could not throw eighty-eight barrels over the side of the vessel, incommoded as they must have been by the rising and falling of the vessel as she thumped upon the beach. I do not see that the charge of negligence, want of skill or misconduct can be maintained on this part of the case.

I am of opinion on the whole case, that there was nothing in the immediate destruction and loss of the property of the libellant, nor in the conduct and proceedings of the master of the schooner antecedent to the disaster, which can be imputed to him as a fault, misconduct, or want of skill and attention in the performance of his duty, but that the loss happened by "perils of the sea," within the meaning of the contract contained in the bill of lading. The average and adjustment made at Mobile, although not binding on us, shows that the same view was taken of the case both by the court of admiralty and the consignees of the the libellant, who were parties to and acquiesced in that adjustment and settlement. Let the libel be dismissed with costs.

On the 4th December, 1840, an appeal from this decree was taken to the circuit court of the United States for the Third circuit, and on the 28th October, 1841, the decree of the district court was affirmed with costs.

[Vide The Juniata Patton [Case No. 7,584]; The Rocket [Id. 11,975].[3]

VANSYCKLE v. The THOMAS EWING. See Case No. 16,877.

Case No. 16,878.

VANTINE v. The LAKE.

[2 Wall. Jr. 52;[1] 14 Law Rep. 669; 1 Phila. 327; 9 Leg. Int. 47.]

Circuit Court, E. D. Pennsylvania. Oct., 1850.

COLLISION—WHARF—DAMAGES—COSTS OF REPAIR.

1. A vessel which moors alongside of another at a wharf or elsewhere, becomes responsible to the other, for all injuries resulting from her proximity, which human skill or precaution could have guarded against.

[Quoted in Mills v. The Nathaniel Holmes, Case No. 9,613. Cited in The John Tucker, Id. 7,431; The Energy, Id. 4,485; Meyers v. The America, 38 Fed. 257. Quoted in Humphrey v. Charles Warner Co., 45 Fed. 272.]

2. The schooner L., on entering a dock at high-tide, was directed by her consignees to be moored to an adjoining wharf of which they were lessees, outside of the M. J., a smaller vessel. There was not in the dock during part of

[3] [From 3 Pa. Law J. Rep. 301.]

[1] [Reported by John William Wallace, Jr., Esq.]

the ebb, enough water for the L., though there was sufficient for the M. J.; of which fact the consignees, but not the master of the L., were aware. No objection was made at the time from the M. J., nor any caution given. On the tide receding, the L., on this account, and from the bottom of the dock being banked up in the middle from accidental causes (with which the consignees were also acquainted), careened over on the M. J., crushing her timbers, and causing her to fill and sink. As soon as the danger was perceived, a measure of prevention was suggested by the M. J., but rejected as useless. *Held*, that the L. was bound to know the depth of water in the dock, or at any rate was responsible for the directions of the consignees, who had full knowledge; and that she had not taken proper precaution before or after the injury. The L. condemned in damages.

[Cited in Philadelphia & Havre De Grace Steam Tow-Boat Co. v. Philadelphia, W. & B. R. Co., Case No. 11,085; The John Tucker, Id. 7,431; The Energy, Id. 4,485; Call v. The Addie Schlaefer, 37 Fed. 384; Meyers v. The America, 38 Fed. 257.]

[Cited in brief in McGrew v. Stone, 53 Pa. St. 440.]

3. Besides the costs of repairs in this case, charges for wharfage while repairing; for the time of one of the owners, and of the crew in raising and clearing out the injured vessel; and for the loss of profits to the vessel while sunk, and during the time she was being repaired, allowed by the court in the assessment of damages.

[Cited in Sheppard v. Philadelphia Butchers' Ice Co., Case No. 12,757; The Joseph Nixon v. The George Lysle, 2 Fed. 262; The Belgenland, 36 Fed. 506; Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. 601.]

The libellants were owners of the Mary Jane, a small oyster boat of twenty-seven tons, which was fastened to a wharf on the Delaware. While she was discharging her cargo, the respondents' vessel, the Lake, a much larger vessel (one hundred and twenty-five tons), was hauled into the same dock, and the dock being full, was fastened outside her, to the same wharf. The Lake came into the dock with the high tide, when the water was amply sufficient, but on the ebb, there being not enough water to keep her afloat, she settled in the mud, and careened over. The deficiency of water was so great that she was aground for about five hours in each tide; and as the tide first receded, the Lake being the larger vessel, and fastened to the same wharf with the Mary Jane, held her suspended between herself and the wharf, till the timbers of the Mary Jane were crushed in, when she filled and sank to the bottom; from which she was raised at considerable expense and loss. The libel was for damages accordingly. It appeared from the respondents' answer, that the Lake took her position in her berth by the orders of her consignees, who were the lessees of the wharf, with the precautions usual in such cases; that the libellants took no exception to the manner of fastening the Lake, and gave them no caution or warning, whereby her master could know that she would be aground at all; that her master was altogether ignorant of the state of the dock, and presumed from the orders he received from the consignees, and from the acquiescence of the master and crew of the Mary Jane, that the dock was sufficiently deep at all times of the tide to keep the Lake from listing. As soon as the crew of the Mary Jane perceived the injury that was about to take place, they informed the master of the Lake, and suggested as the only means of saving the Mary Jane, "to take a purchase from the mast-head of the Lake to the wharf on the south, so that she might be eased off by the flare of her side." This the captain of the Lake refused to do, saying "that it would be of no use." Other means were employed, which proved inefficient. The proximate cause of the Lake's careening was, the banking up of the bottom of the dock at its middle, in consequence of two heavy vessels having formerly rested there; and the consignees of the Lake were aware of this fact, and knew that the water was insufficient for a vessel of her draught.

Mr. Emlen, for libellants.

There has been no act of God in this case, and the damage has arisen altogether from an act of the Lake, which occurred from want of due vigilance in her ordinary and proper business. It was her duty to know what water she drew, and what water she would have in the dock which she was entering. An inquiry from any body about, or a thrust with a pole, would have told her that the water was shallow. Her consignees owned the wharf, and of course did know. Their knowledge is her knowledge. It was no part of the Mary Jane's duty, to keep all or any other vessels apprized of the depth of the city docks. She was minding her own business, and had a right to suppose that the other vessel was minding hers, and a right to suppose nothing about it. Even if the Mary Jane had been improperly moored, still being moored, it was the Lake's duty to keep clear of her, or else so to moor herself as to avoid all injury. This is a well settled rule of the admiralty, with regard to "vessels at anchor." The Girolamo, 3 Hagg. Adm. 173; The Batavier, 10 Jur. 19. The English courts go further on this subject than the present case requires. They did so in The Volcano, quoted, Pritch. Adm. Dig. 129, note, as being in 3 Notes of Cas. 210. In that case the Helena, a brig of one hundred and sixteen tons, came to anchor in Mahomet's Bay, on the coast of Spain. The steamer Volcano ran for shelter from a gale into the same bay, where she took up an anchorage, two cables' length from the Helena, on her starboard bow, with her small bower anchor (weighing but sixteen cwt.) and a chain cable only an inch and a quarter thick. About midnight a hurricane arose, and caused the Volcano to drift; the anchor broke, and though another was dropped, The Volcano, by a sudden sheer, drifted athwart hawse of the brig; and having again come in collision with her, the brig

ultimately went down. It was held, in a cause of damage, in respect of such collision, instituted by the owner of the brig, that there was a want of proper precaution in the position which the Volcano originally took up, and in not letting out more cable and a second anchor.

Messrs. Barnes & Donnegan, for respondents.

Admitting that it was the Lake's duty to know the depth of the water, it is conceded that in point of fact she did not know it: and the question is, can the Mary Jane, having been, herself, to all appearance grossly negligent, recover damages for this want of knowledge? The Mary Jane had been in dock three days before the Lake came there. The tide had been in and out several times during this term. She knew exactly its depth. She sees a large vessel moor beside her, with ropes across; and can readily anticipate the result when the tide goes out. In this state of things and with this certainty of damage, no man aboard the Mary Jane once unseals his lips to suggest a doubt, or to stop the Lake. Damage occurs through a pure accident, which one word, or half one word, from the Mary Jane, would have prevented. What right has she to sue for damages?

GRIER, Circuit Justice [after stating the facts as above]. It cannot be pretended that the injury from this collision was caused by any fault of the libellants' vessel, or that her master or crew were in any way to blame for the result, unless we admit what the answer assumes, that they were bound to know the depth of water necessary to float the Lake, and to give her notice to keep farther off, because the dock was not deep enough to float her at low tide. But I think this assumption is entirely without foundation. The Mary Jane was fast to the wharf, and her master and crew attending to their own business in unloading her cargo. They were bound to know whether the depth of water was sufficient for their own vessel; and the master of the Lake was bound to know how much water his own vessel drew, and whether the dock would float her. Moreover, she drew into the wharf by the orders of the consignees, who were lessees of the wharf, and who did know that the water was insufficient for the draught of the Lake, and who did know that the bottom of the dock had been banked up in the middle, which is alleged to be the proximate cause of the Lake's careening over on the Mary Jane. The master of the Lake, then, was bound to know whether the dock would float his vessel, and not only so, the consignee, under whose order he acted (and who pro hac vice acted as his pilot), did in fact know the state of the bottom, and the depth of the water in the dock, for the fact is brought to light by the very person who gave the direction. Now the answer does not allege that there was any vis major, or inevitable accident which caused the injury, nor indeed was there any. But it is imputed as a culpable negligence in the libellants, that they did not give notice to the respondents, of a fact of which the libellants were ignorant, and not bound to know, and which those who ordered the respondents' vessel to take that position actually did know. Without insisting on the fact that the master of the Lake refused to use the only probable means of saving the Mary Jane, when informed of her situation, it seems to me, that he was to blame in not taking proper precautions both before and after he was aware of the injury likely to accrue to the libellants' vessel from the position in which he moored the Lake; and he has failed to make out a case of unavoidable accident or vis major, which no human skill or precaution could guard against. The case of the Volcano [3 Notes of Cas. 210; Pritch. Adm. Dig. 129, in note] [2] cited at the bar resembles the present in some respects. [The Helena, a brig of 116 tons, came to anchor in Mahomet's Bay, on the coast of Spain. The steamer Volcano ran for shelter from a gale into the same bay, where she took up an anchorage, two cables' length from the Helena, on her starboard bow, with her small bower anchor (weighing but 16 cwt.) and a chain cable only an inch and a quarter thick. About midnight a hurricane arose, and caused the Volcano to drift; the anchor broke, and, though another was dropped, the Volcano, by a sudden sheer, drifted athwart the hawse of the brig; and having again come in collision with her, the brig ultimately went down. It was held, in a cause of damage, in respect of such collision, instituted by the owner of the brig, that there was a want of proper precaution in the position which the Volcano originally took up, and in not letting out more cable and a second anchor.] [2] The precautions taken by the Volcano were amply sufficient, but for the hurricane which her commander had not foreseen, or probably could not foresee; but not having taken proper precautions against any hurricane which might possibly arise, he was held liable. Here the state of facts which caused the respondents' to come into collision with the libellants' vessel, was actually known to the person who pro hac vice was the commander, or under whose directions the Lake was moored; but no precaution was taken to avoid the collision which afterwards took place. Moreover, there was a refusal by the master of the Lake to use the only probable means of avoiding the injury, while yet in his power to have done so.

The libellants are entitled to a decree for the amount of damages incurred, to be assessed by the clerk, to whom the case is referred for that purpose.

[2] [From 14 Law Rep. 669.]

The clerk, having afterwards reported on the amount of damages sustained, exceptions to his report were filed, on the ground that he had allowed charges for wharfage for the Mary Jane while being repaired; for the time of one of her owners, and of her crew while raising and clearing her out; and for the loss of profits to the vessel while sunk, and during her repairs. But THE COURT, after argument, confirmed his report.

Case No. 16,879.

In re VAN TUYL.

[3 Ben. 237; 2 N. B. R. 579 (Quarto, 177); 1 Chi. Leg. News, 326.] [1]

District Court, S. D. New York. May 12, 1869.

EXAMINATION OF BANKRUPT'S WIFE—FAILURE TO ATTEND—DISCHARGE.

Where an order was made by a register requiring the attendance of a bankrupt's wife before him, to be examined in relation to the bankruptcy, which order was served on the bankrupt, but not on his wife, and she failed to attend: *Held*, that, unless the bankrupt should prove, to the satisfaction of the court, that he was unable to procure her attendance, the register would not be warranted in certifying conformity, and the bankrupt would not be entitled to his discharge.

During the proceedings in this case, the register, on the 4th of September, 1868, issued an order requiring the wife of the bankrupt to attend before him, and be examined in relation to the bankruptcy. She did not obey. The register thereupon certified to the court the questions, whether the order was properly granted, and whether, the order having been served upon the bankrupt, but not upon his wife, the bankrupt could obtain a discharge, in the absence of proof that he was unable to procure his wife's attendance.

[Opinion of I. DAYTON, Register:

[The twenty-sixth section of the bankrupt act provides that "for good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness." The undersigned considered that good cause for requiring the wife of the bankrupt in this case to attend to be examined as a witness, was shown by the answers given by the bankrupt on his examination, to the questions put to him on the part of the assignee and the examining creditors, and by the affidavit of B. F. Watson, made in this bankruptcy on the eleventh day of June, 1868. The wife of the bankrupt having been required to attend before the court to the end that she might be examined as a witness, and not attending at the time and place specified in the order, by the express provisions of the twenty-sixth section of the statute, the bankrupt is not entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure the attendance of his wife. In the opinion of the undersigned, the wife of the bankrupt is required to attend before the court to be examined as a witness, when the order is made and served upon the bankrupt, and the witness fee for the attendance of his wife paid to him. The bankrupt then becomes amenable to the penalty prescribed by this provision of the statute, and, if his wife fails to attend to be examined, the court must refuse a discharge, unless the bankrupt prove that he was unable to procure the attendance of his wife.] [2]

BLATCHFORD, District Judge. The order requiring the wife of the bankrupt to attend and be examined was properly granted. As the bankrupt was advised of the making of the order prior to the time specified in it for the attendance of his wife, and as she did not attend at the time and place specified in the order, the bankrupt is not entitled to a discharge, unless he shall prove, to the satisfaction of the court, that he was unable to procure the attendance of his wife. Until he does that, the register is not warranted in certifying conformity.

Case No. 16,880.

In re VAN TUYL.

[1 N. B. R. 636 (Quarto, 193); 1 Am. Law T. Rep. Bankr. 123.] [1]

District Court, S. D. New York. June 13, 1868.

EXAMINATION OF BANKRUPT — IRRELEVANT QUESTIONS.

A bankrupt having testified that he is not the owner of certain property, questions relating to the identity of the owner, duration, extent, and character of the ownership of that property, are irrelevant. Questions relating to the value of furniture and fixtures, and whether a certain person or persons do not own certain property, are, unless the bankrupt is in both instances the owner, irrelevant. All questions which on their face relate to property that does not belong to the bankrupt, are irrelevant.

The undersigned, register in bankruptcy, having in charge the proceedings in this bankruptcy, hereby certifies, that on the 5th day of June, 1868, on the application of James M. Tighe, the assignee of the estate and effects of the said bankrupt, the undersigned granted and issued an order requiring Andrew P. Van Tuyl, the bankrupt above named, to attend before the undersigned on the 8th day of June, 1868, at eleven o'clock in the forenoon, to submit to the examination required by the 27th section of the bankrupt act. That on the said 8th day of June,

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Chi. Leg. News, 326, contains only a partial report.]

[2] [From 2 N. B. R. 579 (Quarto, 177).]

[1] [Reprinted from 1 N. B. R. 636 (Quarto, 193), by permission. 1 Am. Law T. Rep. Bankr. 123, contains only a partial report.]

1868, the said Andrew P. Van Tuyl attended in person, and by Mr. Brown his counsel, before the undersigned, and the said assignee by Mr. Watson his counsel also attended; that the said Andrew P. Van Tuyl having taken the oath hereto annexed, the examination of the said Andrew P. Van Tuyl was proceeded with. That the said examination of the said Andrew P. Van Tuyl is hereto annexed, subscribed by the undersigned, and in the course of the said examination, the questions arose which are set forth in the said examination hereto annexed:

Andrew P. Van Tuyl, the bankrupt above named, being duly sworn and examined pursuant to the order of the court, deposes and says:

"Q. Where do you reside, and who owns the house? A. I reside at 160 Hewes street, Brooklyn. I do not own the house.

"Answer objected to as not responsive to the question. Question objected to.

"Q. Do you know who does own the house you live in? A. I think I do.

"(1) Q. Will you state who does own that house? A. No, sir, unless compelled to. Q. (By Mr. Watson.) Why not? A. Because I do not wish to involve others in my troubles.

"Mr. Watson, on behalf of the assignee, insists upon an answer, and Mr. Van Tuyl declines to answer as to who owns the house. Mr. Watson asks that the question may be certified to the court.

"(2) Q. Does your wife own the house you live in? A. I decline answering that question.

"Mr. Watson, on behalf of the assignee, insists upon an answer, and Mr. Van Tuyl declines to answer as to whether his wife owns the house. Mr. Watson asks that the question may be certified to the court.

"(3) Q. If you know, how long has the present proprietor owned the house you live in?

"Question objected to as to form.

"A. I decline answering that question.

"Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

"Q. Have you ever owned the house you now live in? A. No, sir. Q. How long have you lived in it? A. About two years. Q. Have you ever paid any rent for it, if so, to whom, and how much? A. I have never paid any rent for it.

"(4) Q. State, as near as you can, the value of that house?

Question objected to as irrelevant.

"A. I decline answering it, as irrelevant.

"Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

"(5) Q. State as nearly as you can the value of the furniture and fixtures in the house you live in?

"Question objected to, as to form and matter.

"A. I decline answering, as the question is irrelevant.

"Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

"Q. Have you ever owned any interest in the house you live in, or in the furniture and fixtures in that house? A. No, sir, except what has been set forth in my schedule. Q. What is your profession, business, or occupation? A. I am clerk for my brother, De Witt C. Van Tuyl. Q. In what business? State fully. A. Manufacturer and dealer in iron foundry materials at 273 Cherry street, New York. Q. Are you engaged in any real estate transactions; if so, how and in what capacity? Please state fully. A. I am not engaged in any real estate transactions. Q. Have you in any way been connected with real estate transactions, or business, either as agent or principal within the last year? A. Not that I remember of, except the land that was put into the schedule. Q. Have you, within that time, had anything to do with renting property? A. No, sir. Q. Do you keep, or have you recently kept, a carriage? A. I have not.

"(6) Q. Has any one in your family kept horses and a carriage recently?

"Question objected to.

"A. I decline to answer.

"Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

"(7) Q. Does your wife, or any member of your family, now keep horses and a carriage, which you are in the habit of using?

"Question objected to.

"A. I decline answering.

"Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

"Q. Have you any interest in any real estate, or have you disposed of any such interest within the last year, if so, what and to whom? A. I have no interest in any real estate, nor have I disposed of any within the last year, except what is specified in my schedule, that I know of. Q. State the full name of your wife, and of any adult child, if any you have. A. My wife's name is Elizabeth. I have no adult children.

"(8) Q. Is your wife possessed of any property, if so, what property? State fully.

"Question objected to.

"A. I decline answering.

"Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

"Q. Have you sold any property to any person, within the last year, which is now possessed by your wife? A. No.

"(9) Q. Is not your wife the reputed owner of real estate and personal property to the amount of forty or fifty thousand dollars?

"Question objected to.

"A. I decline to answer.

"Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

"(10) Q. Are you not now, and have you not recently been acting as the reputed agent of your wife in business transactions? A. I have not acted as my wife's agent in any transaction wherein I had any personal interest. Q. Question repeated.

"The bankrupt refuses to make any other answer.

"Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

"Q. In what business, or occupation, were you engaged at the time of incurring the indebtedness represented in your schedule, or a major part of it? A. I was engaged in the foundry material business. Q. Is it the same place, and the same business you are now employed in as clerk? A. Yes. Q. When did you dispose of that business, to whom, and for what price? A. My factory was burned and all the contents to the extent of all I was worth, and left me with these debts unsatisfied. This fire occurred in 1857. Q. Did you collect any insurance, if so, how much? Did you own the land, if so, when and to whom did you dispose of it? A. I did not collect any insurance. I did not own the land. Q. How long have you been clerk for your brother; at what salary; what is his name? A. I have been clerk for my brother since the 1st of January, 1867. My salary is twenty dollars a week. His name is De Witt C. Van Tuyl. Q. Does your brother take any personal part in the management of the business? A. He does. Q. Was the property spoken of as burned insured? if so, for how much, and in what companies; what became of the insurance money? A. It was insured in the Hamilton Insurance Company of New York, for two thousand dollars; in the Merchants' Insurance Company of Philadelphia, for two thousand dollars; and the Union Insurance Company of Athens, Pennsylvania, for fifteen hundred dollars; this is all, to the best of my recollection. The Hamilton insurance for two thousand dollars was assigned to Henry Young for the benefit of creditors. The other two companies failed, and have never paid anything. Q. Why do you not pay rent for the house you live in? A. The owner allows me the use of it without charge.

"(11) Q. Who do you refer to as the owner?

"Question objected to.

"A. I decline to answer.

"Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

"(12) Q. Do you refer to your wife as owner?

"Question objected to.

"A. I decline answering.

"Mr. Watson insists upon an answer, and asks that the question may be certified to the court.

"(13) Q. Is not your wife in the receipt of a large income, amounting to thousands of dollars annually, from rents, dividends and other sources?

"Question objected to.

"A. I decline answering.

"Mr. Watson insists upon an answer, and asks that the question may be certified to the court."

Adjourned to Thursday, June 11, 1868, at 11 a. m.

The foregoing examination taken, and proceedings had before me, 8th June, 1868.

ISAAC DAYTON, Register.

Mr. Watson, for assignee.

Mr. Brown, for bankrupt.

BLATCHFORD, District Judge. The bankrupt having stated that he does not own the house he lives in, questions 1, 2, 3, 4, 11 and 12 are irrelevant. Question 5 is irrelevant, unless the bankrupt owns the furniture and fixtures named in it. Questions 6 and 7 are irrelevant, unless the bankrupt owns or has kept the horses and carriage referred to. Questions 8, 9, 10, and 13 on their face relate to property which is not the property of the bankrupt, and are, therefore, irrelevant. The clerk will certify this decision to the register, Isaac Dayton, Esq.

[See Cases Nos. 16,881 and 16,879.]

Case No. 16,881.

In re VAN TUYL.

[2 N. B. R. 70 (Quarto, 25).] [1]

District Court, S. D. New York. Aug. 25, 1868.

BANKRUPTCY—BANKRUPT'S WIFE AS WITNESS—REFUSAL TO TESTIFY—EXAMINATION.

1. The wife of a bankrupt is not bound to appear and be examined, unless she is paid the usual and proper witness fees. The penalty for disobedience of the wife to attend and be examined is visited upon the bankrupt by refusing him a discharge.

2. Where the examination of a bankrupt under a previous order had been abruptly terminated by non-attendance of assignee's counsel, and an order for new examination was taken by assignee, under which the bankrupt refused to testify: *Held*, that the bankrupt was wrong in refusing to testify.

[For a prior proceeding, see Case No. 16,880.]

The undersigned register in bankruptcy, having in charge the proceedings in this bankruptcy, hereby certifies that on the 11th day of June, 1868, at eleven o'clock in the forenoon, the day and hour to which the foregoing examination in this bankruptcy of Andrew P. Van Tuyl, the said bankrupt, was adjourned at the office of the undersigned above mentioned, the undersigned was attended by the said Andrew P. Van Tuyl in person and by his counsel, and that James M. Tighe, the assignee of the estate and effects of the said bankrupt, by whom the said examination of the said bankrupt had been prosecuted, did not attend. And that the counsel for the said assignee having been sent for, and still not attending, the said Andrew P. Van Tuyl and his counsel left the office of the undersigned. The undersigned further certifies that on the 13th day of June, 1868, on the affidavit of B. F. Watson, hereto annexed, the

[1] [Reprinted by permission.]

undersigned granted and issued an order requiring Elizabeth Van Tuyl, the wife of the said Andrew P. Van Tuyl, to appear before the undersigned on the 17th day of June, 1868, at eleven o'clock in the forenoon, at the office of the undersigned, then and there to be examined in relation to the bankruptcy of the said Andrew P. Van Tuyl, according to the provisions of an act of congress known as the "Bankrupt Act [of 1867 (14 Stat. 517)]," which said order is hereto annexed. The undersigned further certifies that on the said 13th day of June, 1868, on the application of James M. Tighe, the assignee aforesaid, the undersigned granted and issued an order requiring the said Andrew P. Van Tuyl, the bankrupt aforesaid, to attend before the undersigned at his office aforesaid on the 17th day of June, 1868, at twelve o'clock m., to submit to the examination required by the twenty-sixth section of the bankrupt act of March 2d, 1867, which said order is hereto annexed. The undersigned further certifies that on the said 17th day of June, 1868, at eleven o'clock in the forenoon, the said James M. Tighe, the assignee aforesaid, by Mr. Watson, his counsel, attended before the undersigned, and filed with the undersigned the affidavit of service on Elizabeth Van Tuyl, wife of the said Andrew P. Van Tuyl, of the order aforesaid, requiring the said Elizabeth Van Tuyl to attend before the undersigned on this day at eleven o'clock in the forenoon, to be examined as above recited, which affidavit is endorsed on said order. And the undersigned certifies that said Elizabeth Van Tuyl did not appear or attend before the undersigned as required by said order. The undersigned further certifies that on the said 17th day of June, 1868, at twelve o'clock noon, the said Andrew P. Van Tuyl in person, and by Mr. Brown, his counsel, attended before the undersigned; that the said James M. Tighe, the assignee aforesaid, by Mr. Watson, his counsel, also attended before the undersigned; that the said Andrew P. Van Tuyl, the said bankrupt, refused to submit to the examination required by the twenty-sixth section of the bankrupt act, insisting that the examination under the order of the 5th of June, 1868, having been discontinued, it was not competent for the assignee to require him to submit to any new or further examination. The question aforesaid, whether the said Elizabeth Van Tuyl, the wife of the bankrupt as aforesaid, was bound to appear and be examined pursuant to the requirement of the order aforesaid above set forth, and the question, whether the said Andrew P. Van Tuyl was bound to attend and submit to an examination as required by the said order of the 13th day of June, 1868, are, at the request of the parties, hereby certified to the court. Isaac Dayton, Register.

Opinion of the register: The statute does not distinctly provide enforcing by compulsory process the attendance of the wife of the bankrupt, to the end that she may be examined as a witness The penalty for her disobedience of the order to be examined is visited upon the bankrupt by denying him a discharge, unless he prove to the satisfaction of the court that he was unable to procure the attendance of his wife. Other witnesses and the bankrupt himself, may, by warrant to the marshal, or by attachment for contempt, be compelled to attend to be examined. And as the wife is to be "examined as a witness," and if such process can be had against her, it can only be upon proof of service of the order to be examined, and of the payment or tender to her of the fees for travel and attendance, to which any other witness is entitled. It does not appear, by the affidavit of service of the order to be examined upon Mrs. Van Tuyl, that any fees were paid or tendered. The register is, therefore, of the opinion that, as between her and the assignee requiring her examination, she was not bound to attend before the register to be examined. Whether the bankrupt will be entitled to his discharge, notwithstanding his wife's disobedience of the order to be examined, is a question which can arise only on the return of the order to show cause why the bankrupt should not be discharged from his debts. With respect to the question whether the bankrupt ought to have submitted to an examination on the 17th day of June, 1868, the register is of the opinion that the bankrupt ought to have submitted to such examination. The right to examine the bankrupt, conferred by the twentieth section of the statute, is not to be abused, and when it appears that an order for the examination of the bankrupt is taken out merely for the purpose of harrassing the bankrupt, the court will, without doubt, sustain the bankrupt in refusing to submit to the examination. But such a purpose on the part of the assignee cannot be inferred from the circumstances of the present case. The examination under the previous order had been abruptly terminated by the accidental nonattendance of the assignee's counsel. The bankrupt did not manifest any unwillingness that the examination under that order should be resumed. As his examination had not been completed, the assignee was obliged to take out a new order. Under that new order, the bankrupt could very properly refuse to answer questions which he had already answered upon his examination under the previous order, but he had not the right peremptorily to refuse to submit to be examined at all.

BLATCHFORD, District Judge. Mrs. Van Tuyl was not bound to attend and be examined, as she was not paid the proper and usual witness fees. The bankrupt was wrong in refusing to submit to an examination under the order of June 13th.

[For a subsequent proceeding, see Case No. 16,879.]

VAN VOORST (ELLIOT v.). See Case No. 4,390.

Case No. 16,882.

VAN WINKLE v. The HENRY MORRISON.

[23 How. Prac. 371.] [1]

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

MARITIME LIENS—STATE STATUTES—HARBOR TUG—DEPARTURE FROM STATE.

1. Where a vessel is contemplated to be used about the harbor of New York as a tugboat, the lien of a material man for supplies cannot be defeated, under the statute of New York,—2 Rev. St. (5th Ed.) p. —,—by the owners departing with her while lying at the dock, out of the state, secretly or without the knowledge of the material man, and not in the way of her business. The material man had the right to suppose the vessel would not so depart.

2. Where the owner of the rem, who has purchased the supplies himself, sets up the departure to avoid the lien, the court rigidly scrutinizes the circumstances of the alleged departure, and is not inclined to uphold such an inequitable defence.

[This was a libel by Albert Van Winkle against the steamboat Henry Morrison (Jackson, claimant) to enforce a claim for supplies.]

D. McMahon, for libellant.

W. J. Haskett, for claimant.

INGERSOLL, District Judge. The libel in this case is libel to recover for supplies furnished and work done to the steamboat while she was building. She, at the time, was a domestic vessel, and the recovery, if there is one, must therefore be by virtue of the state statute. The state law gives a lien for supplies and work of this kind, but provides that it shall not continue a lien after the vessel has left the state; and it is claimed that the libellant has no lien here, because the vessel left the state and went to Newark, N. J. There is no third party in this case. It is the owner of the vessel, who was also the owner when the supplies were furnished, that sets up this defence. He admits that the supplies were furnished, but attempts to prevent the collection of the debt by setting up this claim. It appears to me that the statute was intended for the protection of third persons, and was required for that purpose. Here, however, no third person intervenes to claim the protection of the law. It is not, however, necessary to decide the case upon this point. It might be claimed that here was a running account, and that some of the articles were furnished after the boat went to Newark. But neither is it necessary to decide the case upon this point. I have looked at the case to see if the vessel did leave the state, within the meaning of the law. It is not every leaving of the state which will be effectual to destroy a lien,—as if she only left it on a trial trip, or if, while lying at the dock, she be secretly taken out of the state, the lien will still subsist. Under what circumstances, then, did this vessel leave? She was nearly completed, and her owner was expecting to employ her in the harbor of New York, and, taking her for this purpose, he secretly, and without the knowledge of the libellant, ran her over to Newark, and now sets up that leaving the state as a defence. It certainly is a most inequitable one, and, if the rules of law were such that it could be sufficient, every one would admit that they ought to be altered. There is no third party in the case; it is the owner himself who induced the libellant to do the work for him, has got the supplies and got the vessel, and in one single instance, unknown to the libellant, has taken her to Newark. He took her for the purpose of running in this harbor,—the libellant not dreaming that he was going to do anything else,—ran her over to Newark, brought her back and got more work done on her, not amounting to $50, and now sets up as a defense, to the first part of the claim, that the vessel has left the state; and to the last part, that it is not of amount enough to bring it within the statute. I think that, under the circumstances, her going out of the state does not come within the reason of the statute. It was a private going out of the state, not in her ordinary business, and I do not think that the libellant is deprived of his lien by it any more than if her owner had taken her while lying at the dock uncompleted, and gone over to Newark with her. And I should hesitate long before I allowed such a defence to defeat such a claim. Decree for libellant, with a reference.

[1] [Reported by Nathan Howard, Jr., Esq.]

Case No. 16,883.

VAN WINKLE v. JARVIS et al.

[3 Ben. 573.] [1]

District Court, E. D. New York. Dec., 1869.

OPENING DEFAULT—ATTACHMENT.

Process being issued, with an attachment clause, the marshal attached property of the respondents, but afterwards discharged it from custody, without any order of court, and served the process upon them personally. On the return of the process, a default was taken against them, which they moved to open. The libellant insisted that, as a condition of opening the default, they should be required to give security, as on a discharge of property attached: *Held*, that, under the circumstances of the case, the condition was a reasonable one, and that the default would be opened, without costs, on the respondents executing such a stipulation.

[This was a libel by Samuel Van Winkle against T. W. Jarvis and others.]

Beebe, Donohue & Cooke, for libellant.

Mitchell & Seymour, for respondents.

BENEDICT, District Judge. This is a motion to open a default, taken against the defendants, for failure to appear and answer, on return of the process. The default appears to be regular, and the libellant now asks that, if it is to be opened, and the de-

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

fendants are to be allowed to come in and defend, it be upon the condition that they give security, as upon a release of an attachment of property seized under the attachment clause of the process. This condition is demanded, upon the ground that, by the action of the defendants, the libellants have been improperly deprived of the right to require such security.

It appears that, upon the filing of the libel, the process was issued, with the usual attachment clause, and that, in point of fact, the marshal, before serving the defendants, did, by virtue of the process, attach certain property belonging to them, which property, it also appears, was thereafter, without the order of the court, released from custody by the marshal, and the defendants then personally served. It also appears, from the papers before me, that the defendants are residents of Brooklyn, and so appear in the directory, but it is no where stated that they were within reach of the process, or possible to be found, up to the time of the attachment of their property. Nor is any explanation of the release of the property attempted. For aught that appears, the defendants might have intentionally kept beyond the reach of the process, until after their property was seized, and then obtained its discharge by some importunity.

The marshal having, in point of fact, and, as it must be presumed, in good faith, attached the property of the defendants, as being defendants impossible to find, could not properly, without the order of the court, release the property. He had the right, and was, indeed, bound, to take all necessary time and pains to satisfy himself as to his ability to find the defendants, before attaching their property, but, having once made an attachment, it properly belonged to the court to say whether the attachment was justified, or not. No explanation whatever being given by the defendants, in regard to the release of the property, and the defendants showing themselves able to give security, without inconvenience, I am of the opinion that, under the circumstances of the case, the libellants may properly ask, as a condition of opening a regular default, to be put in the same position which they would have been, had the property not been released.

Let the default be opened, without costs, upon the defendants filing the usual stipulation given upon the discharge of property attached in actions in personam.

VAN WINKLE v. The JENNY LIND. See Case No. 7,287.

VAN WORMER (HAILES v.). See Case No. 5,904.

VAN ZANDT (DAVIS v.). See Case No. 3,656.

VAN ZANDT (JONES v.). See Cases Nos. 7,501–7,505.

Case No. 16,884.

VAN ZANDT v. MAXWELL.

[2 Blatchf. 421.] [1]

Circuit Court, S. D. New York. Sept., 1852.

REMOVAL OF CAUSES—CERTIORARI—FORFEITURES—INFORMERS.

1. A collector who withholds from an informer the proceeds of goods condemned as forfeited for a breach of the revenue laws, can, when sued for such proceeds, by such informer, in a state court, remove the action by certiorari into a circuit court of the United States, under section 3 of the act of March 2d, 1833 (4 Stat. 633).

[Cited in Eaton v. Calhoun, 15 Fed. 157.]

[Cited in McCormick v. Humphrey, 27 Ind. 150.]

2. Whether, when such an action is improperly removed, the plaintiff can, upon a motion, have it remitted to the state court, quere.

The plaintiff [William T. Van Zandt] brought an action in the superior court of the city of New York, to recover the sum of $1,750, part of the proceeds of merchandise imported from a foreign country into the port of New York, and condemned as forfeited to the United States for a breach of the revenue laws, and which sum the plaintiff claimed as due to him because he was the informer on whose information the goods were seized and condemned. The defendant [Hugh Maxwell], being at the time collector of the port, brought a certiorari, pursuant to the provisions of the third section of the act of congress of March 2d, 1833 (4 Stat. 633), upon which the cause and proceedings were removed into this court. The plaintiff now moved for a remittitur of the cause to the state court, for want of jurisdiction in this court over the subject-matter, insisting that the action was against the defendant in his private capacity, for withholding money due to the plaintiff, and was not founded on any act of the defendant in his official character as collector of the port.

Benjamin F. Butler, for plaintiff.

J. Prescott Hall, Dist. Atty., and William M. Evarts, for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The defence to this motion is, that the suit is brought against the defendant for acts done by him as collector, and is, by the act of congress, made subject to the jurisdiction of this court. An objection is also raised, on the part of the defendant, that the proceedings by the plaintiff are irregular, and that he cannot by motion apply to have the case remitted to the state court. We do not consider the point of practice raised by this latter objection, our opinion upon the merits being in favor of the position taken by the defendant.

The provisions of the third section of the

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

act of March 2d, 1833, which is applicable to the question before us are, "that in any case where suit or prosecution shall be commenced in a court of any state, against any officer of the United States or other person, for or on account of any act done under the revenue laws of the United States or under color thereof, or for or on account of any right, authority or title set up or claimed by such officer or other person under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution, at any time before trial, upon a petition to the circuit court," to have certain measures taken for removing the case to that court, and that then the said suit or prosecution "shall be deemed and taken to be moved to the said circuit court," &c.

We think that the act of the defendant which is the foundation of this suit was either an official one done by him in the character of collector, under the revenue laws, by deciding that the plaintiff was not a party entitled to share in the forfeiture claimed by him, or was, under the alternative in the statute, a right, authority or title set up by the defendant, under the revenue laws, to withhold from the plaintiff the distribution of the forfeiture and to dispose of it otherwise. The 90th section of the revenue act of March 2d, 1799 (1 Stat. 696), directs the amounts of sales (deducting charges) of all ships or vessels, goods, wares or merchandise condemned by virtue of that act, to be paid to the collector of the district in which the seizure or forfeiture has taken place. The 91st section (Id. 697) directs the disposition of forfeitures, fines and penalties by the collector, to be one-half to the use of the United States, to be paid into the treasury, the other moiety to be divided in equal proportions between the collector, the naval officer and the surveyor of the port, provided that when fines, penalties or forfeitures shall be recovered in pursuance of information given to the collector by any person other than the naval officer or surveyor of the district, the one-half of such moiety shall be given to such informer, and the remainder thereof shall be disposed of between the collector, naval officer and surveyor, in manner aforesaid.

It is obvious, upon the face of the statute, that the collector takes into his possession the moneys derived from forfeitures, and holds and disposes of them, in his official character alone. He acts under the law, or assumes to act under it, in determining the amount receivable by himself, the naval officer and the surveyor, and in making distribution thereof according to such determination, no less than in receiving the money from the clerk of the court, or depositing a moiety of it in the treasury to the credit of the United States. Neither the United States, nor the naval-officer, nor the surveyor would be legally concluded by the decision or act of the collector in respect to the division and disposition of forfeitures, and may hold him responsible for any misappropriation or any neglect of the requirements of the law. Still, his proceeding under the act of 1799 will have been official, and must be reviewed or tried according to the provisions of law applicable to official acts. The act of March 2d, 1833, goes still further, for it gives the character of official acts not only to things actually done by an officer of the United States under color of the revenue laws, but also to those done under a claim by him of a right or authority derived from those laws.

We think it a mistaken view of the position of the collector, to regard his official relation to the proceeds of a forfeiture as ended when they are placed in his hands. The statute imposes the further duty on him to make disposition of those proceeds in a particular manner, and, in executing that duty in one way or another, he acts under the authority of the revenue law, whether he adopts a right or a wrong interpretation of it. If he decides that an informer or an officer of a revenue cutter is entitled to share in the distribution, the naval-officer or the surveyor prejudiced by that decision cannot assert that the collector has proceeded in his individual capacity only, and can claim no protection for the act as an official one. The law has placed the fund under his control in his official character, and has required him to act as collector in the disposal of it. Most palpably he would, in such a case, be deemed to have acted under the revenue laws or under color thereof; or would be held to set up or claim a right or authority under those laws to have so acted. No less must he be regarded as acting upon his authority or right as collector, in determining whether the plaintiff was an informer and entitled to demand a share of the forfeiture received by the collector, within the meaning of the revenue laws.

Nor do we accede to the argument of the plaintiff's counsel, that the defendant cannot transfer this cause to this court for the reason that he is sought to be charged in it as a wrong-doer, in withholding moneys to which the plaintiff has a legal title. That doctrine would nullify the provisions of the act of 1833, because, in every case of prosecution against a collector or other revenue officer, the action seeks to charge such officer with a personal liability for acts asserted to have been done wrongfully and without authority of law. Especially is that so in respect to the collector, when he is sued to recover from him duties levied and exacted on the importation of goods; for, he is then always charged as a wrong-doer for having obtained and withheld moneys belonging to the plaintiff, and which he had no right to demand or detain.

The purpose of the act of 1833 was to place the jurisdiction over those questions between individuals and revenue officers, in

the circuit courts of the United States, to the exclusion of state courts, and we think the present case is one which falls directly within the purview of that statute. The motion is, accordingly, denied.

VAN ZANDT (UNITED STATES v.). See Case No. 16,611.

VAN ZANDT (WILLIAM v.). See Case No. 17,685.

VAPORISOR (UNITED STATES v.). See Case No. 10,537.

VARDEN (MOFFIT v.). See Case No. 9,689.

VARDEN (TAYLOE v.). See Case No. 13,771.

VARDEN (VOSS v.). See Case No. 17,016.

VARN (GOODING v.). See Case No. 5,539.

Case No. 16,885.

VARNER v. WEST.

[1 Woods, 493.] [1]

Circuit Court, S. D. Georgia. April Term, 1873.

FEDERAL JURISDICTION—OBJECTIONS—HOW PLEADED—DIVERSE CITIZENSHIP—PROMISSORY NOTE—DISHONOR.

1. When want of jurisdiction appears upon the face of the pleadings, the objection should be taken by demurrer; when it does not so appear, by plea.

2. The United States circuit court has jurisdiction of a suit brought against a citizen of the state in which the court is held, by a citizen of another state, upon a note payable to it or bearer, notwithstanding the note may have been indorsed to the plaintiff by payee, and although the declaration contains no averment that the payee could have sued.

3. After dishonor, a promissory note does not lose its character as such, nor cease to be a negotiable instrument. The only effect of the dishonor is to let in the defenses of the maker as against the payee.

Submitted on motion to dismiss because the declaration failed to show that the court had jurisdiction.

R. F. Lyon, for plaintiff.

Henry R. Jackson, for defendant.

WOODS, Circuit Judge. The declaration contains two counts. The first alleges in substance that on the 3d of November, 1860, the defendant made his promissory note of that date, whereby he promised to pay on January 1, 1862, to S. D. Durham or bearer, two thousand five hundred dollars; that afterwards, on the 17th day of August, 1869, the said Durham transferred and delivered the note by indorsement for value received to the plaintiff, who then became and still remains the legal owner and bearer thereof. Appended to this count is a copy of the note and of the indorsement, the latter of which is in these words: "I indorse the within note to Joseph W. Varner, of Arkansas, for value received, August 17, 1869. S. D. Durham." The second count, which was filed as an amendment to the declaration, and by leave of the court, recites the making of the note as in the first count, and then avers that "the said S. D. Durham, to whom or to the bearer thereof said note was made payable afterwards, to-wit, on the 17th day of August, A. D. 1869, transferred said promissory note in due course of trade, and for a valuable consideration, to plaintiff by delivery, who thereby became the legal owner and bearer thereof." To this declaration the defendant pleaded the general issue and other pleas in bar, and on the calling of the cause for trial, made the motion to dismiss the case because the jurisdiction of the court does not appear upon the face of the declaration.

We do not think that a motion to dismiss is the proper method by which to take advantage of the defect alleged to exist in this declaration. It is true that a court will at any stage dismiss a cause when it is made to appear that it has no jurisdiction; but the fact that jurisdiction does not appear on the face of the declaration is not conclusive evidence that the court has not jurisdiction. The plaintiff, by amendment of his declaration, might be able to show clearly that the court had jurisdiction. When want of jurisdiction appears on the face of the pleading, the objection should be taken by demurrer; when not, then by plea. If we should be of opinion that the declaration does not show the jurisdiction of the court, we would allow the plaintiff to amend and show the jurisdiction. We have, however, considered and will dispose of the question raised by this motion. The 11th section of the "act to establish the judicial courts of the United States," approved September 24, 1789 (1 Stat. 79), declares as follows: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." This makes it necessary to state on the record the citizenship of the payee of a negotiable note sued on by an indorsee. Turner v. Bank of North America, 4 Dall. [4 U. S.] 8; Rogers v. Linn [Case No. 12,015]. But where a note is payable to A. B. or bearer, the circuit court has jurisdiction to enforce payment in favor of a holder who is a citizen of another state, although it is not shown that A. B. is a citizen of another state; the prohibition of section 11 of the judiciary act not applying to such a note. Bullard v. Bell [Case No. 2,121]. Or as expressed in Smith v. Clapp, 15 Pet. [40 U. S.] 127, "an assignment of a note payable to bearer by delivery only, without indorsement, is not within the 11th section of the judiciary act, and it is not necessary to aver the citizenship of the assignor."

But it is insisted in this case that the dec-

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

laration shows that the note sued on, though payable to S. D. Durham or bearer, was in fact indorsed by Durham, the payee named in the note, and so indorsed, was delivered by him to the plaintiff, and that this fact brings the case within the prohibition of section 11 of the judiciary act. In reply to this we observe that the plaintiff in his second count declares upon the note, as bearer, and ignores the indorsement by Durham. We think the plaintiff under the circumstances might elect to treat the note either as transferred to him by indorsement or by mere delivery. In his second count he has elected to treat the note as transferred to him by delivery merely, and so treating it, it was not necessary to make any averment touching the citizenship of Durham, and the case does not fall within the prohibition of the 11th section of the judiciary act. In the case of Young v. Bryan, 6 Wheat. [19 U. S.] 146, it was held by Marshall, C. J., "that a suit may be brought in the circuit court by the indorsee against the indorser, whether a suit could be then brought against the drawer or not. In such a case the indorser does not claim through an assignment. It is a mere contract entered into by the indorser and indorsee, upon which the suit is brought." So in the case at bar, the holder and bearer of the note may rely upon the contract between himself and the maker of the note, or he may elect to derive his rights through the indorsement of the party named in the note as payee. The fact that the holder has two distinct titles to the note ought not to prejudice either of them. It was claimed in argument that the promise of the maker of a note payable to bearer was to pay the party who at the maturity of the note happened to be the bearer, and that after the note was dishonored by nonpayment, it ceased to be a promise to pay, and the holder had only a right to sue for damages as upon a contract broken. The authorities are adverse to this proposition. After dishonor, a promissory note or bill of exchange does not lose its character as such, nor does it cease to be a negotiable instrument. The only effect of the dishonor is to let in defenses of the maker as against the payee. Bailey, Bills, p. 166, c. 5, § 3. We are of opinion that the declaration as amended shows a case within the jurisdiction of this court, and that the motion to dismiss for want of jurisdiction, must be overruled.

Case No. 16,886.

VARNUM v. BELLAMY.

[4 McLean, 87.] [1]

Circuit Court, D. Indiana. May Term, 1846.

PROMISSORY NOTES — INDORSEMENT — CONSIDERATION—ATTORNEY FOR COLLECTION—RELEASE OF INDORSER — GIVING TIME.

1. W and B executed their note for eight hundred and ninety-nine and fifty-three hundredths dollars to the order of B, and negotiable at a chartered bank in Indiana. B indorsed it for the accommodation of the makers in blank, and they transferred it to V, in payment of a pre-existing debt due from them to him. *Held*, that in a suit by V against B on his indorsement, it was no defense to the suit that the indorsement was made without consideration, although V knew it when he received the note.

2. The pre-existing debt due to the holder of the note from the makers, was a good consideration for its transfer.

3. An attorney who receives a note for collection, can not, without special instructions, make any agreement which will bind his principal, by which the indorser could be released from his liability.

[Cited in brief in Moulton v. Bowker, 115 Mass. 36; Rounsaville v. Hazen, 33 Kan. 74, 5 Pac. 422.]

4. Forbearance to sue the makers of a negotiable note will not release the indorser, and unless an agreement for delay is such as will, for a time, tie up the creditor's right of action, it is nugatory.

5. The indulgence which will release an indorser of negotiable paper, must not only be given upon a good consideration, but it must be for some limited and definite time, within which the creditor's right of action is suspended.

6. The payment of a part of the debt, and accepting claims to be applied when collected in further payment, under a verbal agreement not to sue, constitute no legal consideration for the promise of forbearance.

At law.

Mr. Judah, for plaintiff.

Mr. Cooms, for defendant.

HUNTINGTON, District Judge. Assumpsit by Varnum, the holder, against Bellamy, the indorser, of a promissory note for eight hundred and ninety-nine dollars and fifty-three cents, dated Nov. 23rd, 1840, payable and negotiable ninety days from date, at the Fort Wayne Branch of the State Bank of Indiana. The note is made by Wright and Dubois, and payable to the order of Lyman G. Bellamy, who indorsed it in blank. Since the commencement of the suit, Bellamy has died, and the action is now against his administratrix, Caroline Bellamy. The declaration is in the usual form. The only pleas on file are the general issue, and plene administravit. As no proof has been introduced applicable to the last plea, that part of the case need not be again referred to.

The first ground of defense insisted on is, that the note in question was given solely as an accommodation note, to be discounted at the Fort Wayne Bank—that the indorsement was made with that understanding and without consideration, and that it was delivered to the plaintiff by the makers, in violation of that understanding, and thus diverted from its original purpose. This matter being in avoidance of the note, should have been specially pleaded, but no such plea is found among the papers. Inasmuch, however, as the question was considered on the trial and made the subject of an elaborate

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

written argument by defendant's counsel, as well as referred to in the testimony, I have apprehended that perhaps such a plea had been filed and mislaid. I will, therefore, briefly consider the question as if such an issue had been made. The note in question is in the usual form of notes offered for discount in bank, with the addition of the words "with current rate of exchange." The following is an exact copy: "$899.53. Fort Wayne, Nov. 23rd, 1840. Ninety days after date, we promise to pay to the order of L. G. Bellamy, eight hundred ninety-nine and fifty-three hundredths dollars, negotiable and payable at the Branch Bank at Fort Wayne, with current rate of exchange. Wright & Dubois." It will be perceived, that under the statute which governed it at that time (Rev. St. 1838, p. 119), this paper being made payable, etc., at a chartered bank, was placed on the footing of inland bills of exchange. The statute of 1843, has made some change in the law in this particular, which it is not now necessary to examine. This, then, being the character of the instrument, it is invested with all the attributes of commercial paper, and governed by the law merchant. It appears, from the testimony, that the note was delivered to the plaintiff, by the makers, before it became due, in payment of a pre-existing debt of that amount—that the plaintiff, or some one for him, placed it in bank for discount—that the bank refused to discount it—that when it fell due, it was regularly protested, for non-payment, of which Bellamy had notice, and that it was withdrawn from the bank by the plaintiff, and placed in the hands of Thomas Johnson, an attorney of Fort Wayne, for collection. It seems that where a third person becomes the holder of a bill or note, negotiable by the law merchant, which had been obtained without consideration, if it can be proved that he had notice of the transaction between the original parties, and gave no value for the note or bill, he would be affected by every thing which would affect the first holder. Munson v. Cheesborough, 6 Blackf. 17. This, however, is not such a case. The pre-existing debt, due from the makers to the plaintiff, was a good consideration for the transfer. It is a case in which the indorser lent his name and credit to the makers for their benefit, and in which the plaintiff is a bona fide holder for value, and though the latter took the note with a full knowledge that the indorsement was made without consideration, it is not a circumstance which can relieve the indorser from liability. Niles v. Porter, 6 Blackf. 44, and cases there cited of Smith v. Knox, 3 Esp. 46; Charles v. Marsden, 1 Taunt. 224; Adams v. Gregg, 2 Starkie, 531. "These decisions (says the supreme court of Indiana, in the case first cited) are founded on the policy of the law in favor of commerce, which forbids a person to give credit and circulation to negotiable paper by his name, and then object to a fair holder for a valuable consideration, that his signature was without consideration." The same principle which applies to the acceptor of a bill, applies to the indorser of a promissory note for the accommodation of the maker. Smith v. Becket, 13 East, 187; Brown v. Mott, 7 Johns. 361. There is another circumstance in this case, however, which repels the pretense that this note was not executed and indorsed for the very purpose to which it was applied. The plaintiff was, and still is a resident of New York. The note in question contains a promise, not usual certainly in notes intended solely as accommodation paper for discount, to cover the exchange between Fort Wayne and New York.

The second ground of defense is, that Johnson, the attorney of the plaintiff, when he received the note for collection, entered into an agreement with the makers to receive from them certain claims which they held upon other persons, which, when collected, were to be applied upon this note; that Johnson was to have five per cent. for collecting them; and that they were to pay also a small amount of money, which was to be applied on the note; and that, in consideration thereof, Johnson agreed not to bring suit, and did retain the note in his hands for about the period of two years after it fell due. The only evidence in the cause (except the proof of protest, etc.) is furnished by the depositions of Dubois, one of the makers of the note. It seems that he has been examined on three several occasions, and the last time was cross-examined by the plaintiff's counsel. The witness evidently shows a strong bias in favor of the indorser, and there are some discrepancies in his statement, not compatible with the utmost candor. It seems, from his last deposition, that some time after the note fell due, and was protested for non-payment, it was placed in the hands of Thomas Johnson, an attorney of Fort Wayne, Indiana, where the makers and indorser resided, for collection; that when called on for payment, the witness, one of the makers, told the attorney that they were unable to pay it, but that if he would take a small amount of money, and some claims which they held against other persons, they would turn them out, and allow Johnson five per cent. for collecting them—the money so to be paid, and the claims, when collected, to be applied in payment of the note. It seems that Johnson acquiesced in the proposition; that a small sum of money was paid, and that claims to a considerable amount were placed in his hands. The witness says, also, that "the understanding was, that he (Johnson, the attorney,) was not to sue on the note," and that he retained it in his possession without suit for some two years.

There are two questions which arise upon this state of facts. The first is, was the attorney authorized to make such an arrangement as he did make? It is said, in the case of Miller v. Edmonston, decided by the supreme court of Indiana, November 2d, 1846, but not yet reported [8 Blackf. 291], that "when a demand is placed in the hands of an attorney at law for collection, without any special instructions, the authority conferred upon, and the duty assumed by him, is to use due diligence to collect the debt by suit or otherwise; he has no authority to compromise with the debtor, and can not bind his principal by any arrangement short of an actual collection of the debt." In this case it does not appear that Johnson, the attorney, had any "special instructions" authorizing him to make such an agreement. It is true the witness swears that Johnson told him "he was authorized to take claims on the note," but he no where states that Johnson informed him that he had authority to extend the time of payment. The agreement, therefore, was nugatory, unless sanctioned by the principal. Whether it was competent for the defendant to prove the declarations of the attorney, in reference to his authority, it is unnecessary to decide.

The other question is, was the forbearing to sue the makers of the note, as above stated, such an indulgence as will release the indorser? I think that it was not, even supposing the agreement to have been made upon sufficient authority. "The agreement for delay must be such an one as for a time will tie up the creditor's right of action." Braman v. Howk, 1 Blackf. 392, and note 2. The indulgence which will release an indorser, must not only be given upon a good consideration, but it must be for some limited and definite time, within which the creditor's right of action is suspended. Chit. Bills (9th Am. Ed.) 446. In this case, both these requisites are wanting. The payment of a part of the debt, after the whole became due, and the transfer of claims, to be applied when collected, in further payment of the note, constituted no legal consideration for the promise of forbearance. Berry v. Bates, 2 Blackf. 118. No time was fixed within which the attorney agreed "not to sue." It was a mere verbal promise, founded upon no sufficient consideration, and might at any time have been disregarded.

These views do not in any manner conflict with the principle laid down in the case of Bank of U. S. v. Hatch [Case No. 918], afterward reviewed by the supreme court of the United States (6 Pet. [31 U. S.] 250). Judgment for plaintiff de bonis testatoris.

VARNUM (BURTON v.). See Case No. 2,220.

Case No. 16,887.

VARNUM et al. v. CAMPBELL et al.

[1 McLean, 313.] [1]

Circuit Court, D. Indiana. May Term, 1838.

PLEADING AT LAW—ACTION AGAINST PARTNERSHIP—EVIDENCE.

1. If two pleas are filed substantially the same, the court, on motion, will order the last one to be stricken out, as improperly incumbering the record.

[Cited in Wilkinson v. Pomeroy, Case No. 17,674.]

2. The names of the firm must be proved, but where some evidence has been given on the point, the court will leave the evidence with the jury.

[This was an action by Varnum, Fuller & Co. against William H. Campbell and J. S. Campbell on a promissory note.]

McLEAN, Circuit Justice. This action was brought on a promissory note executed in New York. The defendants pleaded non-assumpsit, and J. S. Campbell filed a separate plea, which averred that he did not sign the note.

The plaintiffs' counsel moved to reject the plea on the grounds: (1) Because it could be of no avail except as denying the execution of the note, and that cannot be done unless the plea were sworn to; (2) because the plea is by one defendant, and the other by both; (3) the plea amounts to the general issue.

The last objection is sufficient. It is in fact the general issue, as to one of the defendants, which had been pleaded by them both. The court will not suffer the record to be incumbered by a repetition of pleas, which raise no ground of defence that may not be set up under pleas previously filed. It is clearly improper after defendants have pleaded jointly, for one of them to file a special plea. Defendants cannot plead jointly and severally in the same action.

The jury being sworn, the plaintiffs proved that they were partners and residents of New York, and gave some evidence of their given names. They also proved that the defendants were partners, and that the note offered in evidence, was in the hand writing of William H. Campbell, one of the defendants. The defendants offered to prove a dissolution of their partnership, without specifying the time, or that notice was given to the plaintiffs or the public; which was overruled by the court. And the court instructed the jury, at the request of the defendants' counsel, that the firm of the plaintiffs must be proved; but as there had been some evidence on this point, they left it to the jury, and refused to instruct them the evidence was insufficient to prove the partnership.

Verdict for the plaintiffs and judgment.

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

Case No. 16,888.

VARNUM v. DANFORD.

[Cited in Oliver's Forms (Ed. 1828) 343. Nowhere reported. Opinion not now accessible.]

Case No. 16,889.

VARNUM v. MAURO.

[2 Cranch, C. C. 425.] [1]

Circuit Court, District of Columbia. Oct. Term, 1823.

PROMISSORY NOTES — PARTIAL FAILURE OF CONSIDERATION.

A partial failure of consideration is no defence to an action by the payee against the maker of a promissory note.

Assumpsit against the maker of two promissory notes, payable to the plaintiff's intestate, James M. Varnum, amounting to $440.

The defendant, in order to show that the notes were given without consideration and under a mistake and misrepresentation of the value supposed and intended to have been passed to the defendant therefor, offered to prove that certain persons had connected themselves in special partnership and association for carrying on certain mercantile adventures in a certain ship called the James Monroe; that among the fundamental articles and terms of such partnership and association, it was mutually stipulated and agreed between the original partners, that no partner should in any manner sell or dispose of his interest or aliquot share in the said company and concern; that notwithstanding the said stipulation and agreement among the said partners, one of them undertook to sell his interest and aliquot share in the said concern to the said James M. Varnum; who afterwards bargained with the defendant for the same interest and aliquot share at the price of $440, for which the defendant gave the notes in question, being then ignorant of the said stipulation and agreement of the said partners; that afterwards when the defendant applied to be recognized and admitted as one of the partners in the said company and association, he was rejected as such by the company, who refused to admit or recognize the interest of any assignee; that the company proceeded to conduct its concerns in all matters relating to the business of the said association without permitting the defendant to participate at all in the capital of the concern or in the conduct of its business, in which two thirds of its capital was sunk by misconduct or negligence; and that the defendant has never received any written assignment of the said interest or aliquot share, nor has he ever been allowed by the company any dividend, either of the profit or the capital.

To the admission of this evidence the plaintiff objected, and THE COURT (nem. con.) sustained the objection; being of opinion that the facts, if proved, would be no defence in this action.

The defendant took a bill of exceptions, but did not prosecute a writ of error.

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

Case No. 16,890.

VARNUM et al. v. MILFORD et al.

[2 McLean, 74.] [1]

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

PROMISSORY NOTES—DISCHARGE OF SURETY—PAYMENT BY SURETY—EQUITABLE RELIEF.

1. If the holder of a bill, for a valuable consideration, give time to the maker of the note, he thereby discharges the surety.

[See Bank of U. S. v. Lee, Case No. 921; Same v. Hatch, Id. 918.]

2. The surety has a right to pay the note and to be substituted to all the rights of the holder, and any act of his which suspends this recourse by the surety, releases him.

3. By the laws of Indiana the surety, by giving notice to the holder, can compel him to proceed against the principal.

4. In some cases, independently of any statutory provision, the surety, by a bill in chancery, may compel the holder of the note to use active diligence.

At law.

Fletcher & Butler, for plaintiffs.

Mr. Stevens, for defendants.

HOLMAN, District Judge. This action is founded on two promissory notes, which the declaration alledges were made by the defendants, whereby they jointly and severally promised to pay to the plaintiffs [Varnum, Fuller & Co.] the sums of money specified in said notes. The defendant, Robert Milford, pleads that M. H. & M. M. Milford executed said notes as principal, and that he, the said Robert Milford, executed them as surety, and that after the said notes became due and payable according to the tenor and effect thereof, to wit—on the 18th of July, 1837, in consideration that the said M. H. & M. M. Milford had agreed with the said plaintiffs, to assign them, the said plaintiffs, the amount of said notes (after deducting a credit on the largest of said notes of $184 15) out of a certain judgment they, the said M. H. & M. M. Milford, were to obtain the following September, against one William Worthington, they, the said plaintiffs, without the consent of this defendant, did agree to, and with the said M. H. & M. M. Milford, to give them time upon said notes, and not to bring suit on said notes until after the then next ensuing September term of the circuit court; and that, in pursuance of said agreement, the said plaintiffs, without the consent of this defendant, did give the said M. H. & M. M. Milford time upon said notes, until after the said September term of said court, nor did said plaintiffs sue on said notes until long afterwards, to wit:

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

until the commencement of this suit, which, agreeably to the date of the writ, was the first of October, 1839.

To this plea the plaintiffs have demurred, generally; and the question presented for the consideration of the court, is, whether the facts stated in this plea constitute a legal bar to the action against this defendant. It has become a well settled principle that in actions at law, on simple contract at least, the extending of the time of payment, by a valid contract with the principal, without the consent of the surety, operates as a release of the surety, and may be pleaded by him in bar of an action for the demand. For if a creditor does any act injurious to the surety, or inconsistent with his rights, or omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases, the surety will be discharged; and the surety has a right, either by a bill in equity, or, by a written notice under the laws of this state, to compel the creditor to sue the principal as soon as the debt becomes due; or he may pay the debt himself when it is due, and immediately sue the principal. These are rights that are inseparably connected with his contract, and which cannot be impaired without his consent. And if the creditor, by a new and valid agreement with the principal, abridges these rights, by giving further time of payment, he absolves the surety from his obligation, and must look to the principal alone for his demand. This defence had its origin in equity, but is now admitted in actions at law. See 1 Madd. 234; Rees v. Berrington, 2 Ves. Jr. 540; 1 Story, Eq. Jur. 320, 321; Bank of U. S. v. Hatch, 6 Pet. [31 U. S.] 250. And in the case of People v. Jansen, 7 Johns. 332, it was held that there was nothing in the nature of a defence by a surety to make it peculiarly a subject of equity jurisdiction; and that whatever would exonerate a surety in one court would exonerate him in the other. See, also, 1 Blackf. 394; 2 Johns. Ch. 554; 3 Starkie, Ev. 1389, 1390; Pain v. Packard, 13 Johns. 174. The same doctrine is recognized in the case of Sprigg v. Bank of Mount Pleasant, 10 Pet. [35 U. S.] 257. Although in that case, the contract being under seal, and oyer being had of the obligation, and the defendant having executed the bond as principal, the court held that he was estopped from averring that he was only a surety. But the court admit that when the action is on a promissory note the case is different, and expressly recognize the doctrine of the case of Pain v. Packard, supra, which was a suit upon a promissory note, and the surety was admitted to plead a special request, made to the plaintiff, to prosecute the principal, and alledging a loss of the debt by reason of his neglect to prosecute. The agreement which will avail the surety as a defence to the action, must be founded on a valid consideration. A mere agreement by the holder of a bill, with the drawer, for a delay, without any consideration for it, and without any consent of the indorser, will not discharge the latter after his responsibility has been fixed. M'Lemore v. Powell, 12 Wheat. [25 U. S.] 554; Clark v. Devlin, 3 Bos. & P. 363; Davey v. Prendergrass, 5 Barn. & Ald. 187.

In the case before the court, the plea alledges that the defendant was only a surety, and that the plaintiffs, without the consent of the defendant, agreed with the principals, that in consideration that they, the principals, would assign to the plaintiffs the amount due the plaintiffs, out of a judgment that the principals expected to obtain in a short time, that they would give time on said note and not bring suit until after the next court; and that in consequence of said agreement time was given accordingly. The consideration here alledged was a good and valid one. The assignment of the judgment was a proper subject of contract, and the agreement to assign it was a subject of value and presents a valid consideration for the time given to the principals, and rendered the agreement, to postpone the bringing of suit on the notes until after the next court, obligatory on the plaintiffs. Their right of action, for the time being, was suspended, and, agreeably to the uniform tenor of the cases on this subject, the defendant was released from his liability. It is, therefore, the opinion of the court that the plea is good.

Case No. 16,891.

VARNUM et al. v. MILFORD et al.

[4 McLean, 93.] [1]

Circuit Court, D. Indiana. May Term, 1846.

JUDGMENT—ASSIGNMENT AS SECURITY—PRINCIPAL AND AGENT—EXECUTION SALES.

1. A judgment being assigned of five thousand dollars to secure debts of a much smaller amount, the court will direct the debts to be paid out of the first proceeds of the land sold under the judgment.

2. This appears to be necessary to pay the debts, it not appearing that there is any property out of which the whole amount of the judgment can be made.

3. An agent who has full notice, is sufficient to charge the principal with notice.

[Cited in Goodenough v. Warren, Case No. 5,534.]

[Cited in Cox v. Reynolds, 7 Ind. 262.]

4. An individual purchasing property on judicial sales, under the above judgment, will be compelled to pay the money to the persons for whose security the judgment was assigned.

Ingram & Jones, for plaintiffs.

Mr. Baird, for defendants.

McLEAN, Circuit Justice. The defendants assigned to the plaintiffs a judgment against Worthington, on the 13th October, 1838, in Warren county, Indiana, for upward of five thousand dollars, to pay certain sums due to the plaintiffs, who are citizens of New York.

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

And this bill is filed to compel the payments of the sums received by the defendants on the judgment after the assignment. The sums intended to be secured by the assignment, were to Varnum & Co. one thousand six hundred eighty dollars and forty-one cents; Richard Kingland & Co. six hundred seventy-six dollars and thirty-two cents; J. C. Baldwin & Co. one hundred thirty-five dollars and seventeen cents. The assignment was made by Milton H. Milford, of so much of the judgment as would pay the plaintiffs' claims. Execution was issued in Warren county, and sales were made to the amount of six hundred forty-six dollars and seventy-nine cents, which was receipted for by Milton H. Milford, in behalf of the plaintiffs, and the deed was made by his order to his father, Robert Milford. Other sales of real estate were made in different counties of the state, and the moneys were paid over to the plaintiffs, and receipted for by them.

It is insisted by the defendants that, as the judgment assigned, exceeded the amount due to the plaintiffs, they were not entitled to the first moneys received under it. That the assignors were entitled to the first receipts on the sales, until the amount of the judgment was reduced to a sum sufficient to cover the amount of the complainants' demand. There is no such condition in the assignment. The judgment was given to pay the debts due the complainants, and it is fair to suppose that the intention of the parties was, to pay the complainants their amount out of the first moneys realized from it. The assignors were trustees for the plaintiffs. It does not appear that the defendants in the judgment have sufficient property in the state, or out of it, to discharge the judgment; and if the complainants were to be postponed, as contended for, the security under the assignment might be of no value. It is contended that Robert Milford, who received the deed for the land in Warren county, had no notice to affect his liability. His son, who acted as his agent, and made the original assignment of the judgment to the plaintiffs, had full notice. Having acted in the matter, no special notice was necessary at the time he made the purchase for his father. He must be held responsible to the plaintiffs for the purchase money. The assignment of the judgment, by which the plaintiffs gave time, released Robert Milford, as indorser on the notes held by the plaintiffs. As all the moneys received under the judgment, were paid over to the complainants, except for the sales of lands in Warren county, conveyed to Robert Milford, the court will dismiss the bill as to the other defendant, and decree that he shall pay to the complainants six hundred ninety-eight dollars and fifty cents, and costs; and that this sum be distributed among the complainants pro rata; and that execution issue, as on a judgment at law.

VARNUM (POWLING v.). See Case No. 11,364.

Case No. 16,892.

VARNUM v. RUNION et al.

[1 McLean, 413.] [3]

Circuit Court, D. Indiana. May Term, 1839.

POWER OF ATTORNEY TO CONFESS JUDGMENT — WAIVER.

1. A power of attorney which authorizes an attorney to confess a judgment, in a certain suit, naming the parties, then pending in the circuit court of the United States, authorizes the judgment to be entered, though the process has not been served on the party.

2. The power is a substantial waiver of the service of the process.

[Cited in brief in Keith v. Kellogg, 97 Ill. 148.]

[This was an action by Joseph B. Varnum against Runion, Pharis and Bond.]

Mr. —— appeared for the plaintiff and moved for judgment against one of the defendants on default, and presented a power of attorney by Runion and Bond, authorizing him to confess a judgment. The writ had not been served on Bond; but the power of attorney bears date subsequent to the commencement of the suit, and refers to it, and authorizes the attorney to confess a judgment in the case then pending. This the court considered, as authorizing the confession of the judgment against Bond, though he had not been served with process. There is no express waiver of process, but there is, substantially, a waiver of the service of the process. A judgment was entered against one of the defendants by default; and against the other two, under the power of attorney, by confession.

VARRENE (VON GLAHN v.). See Case No. 16,994.

VASSAULT (MEEKS v.). See Case No. 9,393.

VASSE (BAKER v.). See Case No. 784.

Case No. 16,893.

VASSE v. COMEGYS et al.

[4 Wash. C. C. 570.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1825.[2]

BANKRUPTCY—PROPERTY PASSING TO ASSIGNEES—SPANISH SPOLIATION CLAIMS.

The defendant, an assignee under a commission of bankruptcy issued against the plaintiff, received from the treasury of the United States the sum now sued for, being so much money awarded by the commissioners under the treaty of the 22d of February, 1819 [8 Stat. 252], between Spain and the United States, for spoliations made and embraced in the provisions of that treaty, upon the property of the plaintiff,

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

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

[2] [Reversed in 1 Pet. (26 U. S.) 193.]

who obtained his certificate the 28th of May, 1802. *Held*, 1. That the award of the commissioners that the moneys should be paid to the assignees, is not binding on the plaintiff, or a bar to this action. 2. The claim on Spain was not assignable under the bankrupt law of the United States, and did not pass by the assignment to the defendant, and that the plaintiff is entitled to recover as for money received to his use.

[Cited in Dutilh v. Coursault, Case No. 4,206; Re Gallagher, Id. 5,192; Re McKenna, 9 Fed. 32.]

[Disapproved in Belcher v. Burnett, 126 Mass. 231. Cited in Kane v. Clough, 36 Mich. 439. Cited in brief in Maitland v. Newton, 3 Leigh (Va.) 716. Disapproved in Leonard v. Nye, 125 Mass. 458.]

The jury found a verdict for the plaintiff, subject to the opinion of the court upon the facts stated in the following case agreed: The counsel for the parties agree to the following case, which, if required by either, may be turned into a special verdict, subject to the opinion of the court. That the plaintiff, Ambrose Vasse, previously to the year 1802, was an underwriter on various vessels and cargoes, the property of citizens of the United States, which were captured and carried into ports of Spain and her dependencies, and abandonments were made thereof to the said Vasse by the owners, and he paid the losses arising therefrom prior to the year 1802. The said Ambrose Vasse became embarrassed in his affairs, and his creditors proceeded against him as a bankrupt, under the act of congress of the United States, for establishing an uniform system of bankruptcy throughout the United States. An assignment was made accordingly to Jacob Shoemaker, who is since deceased, and the defendants, Cornelius Comegys and Andrew Petit; who proceeded to take upon themselves the duties of assignees, and have continued to discharge the same. The certificate of discharge of the said Ambrose Vasse bears date the 28th of May, 1802. In the year 1824, the sum of $8846.14 was received by the defendants from the treasury of the United States, being the sum awarded by the commissioners sitting at Washington, under the treaty of amity, settlement, and limits between the United States of America, and his Catholic majesty the king of Spain, dated the 22d day of February, 1819, on account of the captures and losses aforesaid. On the 9th day of December, 1823, the said Ambrose Vasse filed a bill in equity in the circuit court of the District of Columbia, claiming the sum awarded by the commissioners, and a settlement of the accounts of the assignees. The said Ambrose Vasse made a return of his effects to the commissioners of bankruptcy, November 21, 1825. The claim upon Spain for spoliations was not in the schedule, but claims on France and Great Britain were.

WASHINGTON, Circuit Justice. Two questions have been raised in this case. The first is, whether the right of the plaintiff is concluded by the award of the commissioners acting under the treaty with Spain of the 22d of February, 1819; in pursuance of which award the money in dispute was paid over to the defendants. If not so concluded, then the second question is, did the claim of the plaintiff to the sum so awarded pass by the assignment of the commissioners to the assignees?

1. It is to be preliminarily observed, that the case does not state in whose favour the award of the commissioners was made, or who were the parties that presented themselves before the commissioners as the claimants of this money. All the court can know is, that the money was paid to the defendants by the treasury of the United States. The case stated is in strict conformity with the evidence given to the jury. But in the view which I shall take of this case, I deem it immaterial who were the claimants, or in whose favour the award or sentence was given, if given in favour of any particular person or persons. The treaty prescribed the duties and the jurisdiction of the board of commissioners, and of course it was essentially the guide of that tribunal, as it must be of this. I admit at once, that the decisions of that board upon every subject within the scope of its authority, and to the utmost extent of its jurisdiction, are binding and conclusive upon this and upon every other judicial body. It was constituted by a treaty, and its decisions are entitled to the same sanctity as those of tribunals constituted by the constitution, or by the ordinary acts of legislation; beyond this they can have no binding force. What then were the duties of those commissioners, and what the extent of their jurisdiction? By the eleventh section of the treaty, they are to receive, examine, and decide upon the amount and validity of all the claims which the United States had consented by the ninth article to renounce, as well on the part of the government as of citizens of the United States; these were: 1. Claims on account of prizes made by French privateers, and condemned by French consuls, within the jurisdiction of Spain. 2. Claims of citizens of the United States on the Spanish government, arising from the unlawful seizure at sea, and in the ports and territories of Spain, or her colonies. And lastly, claims, of which statements soliciting the interposition of the United States had been presented to the department of state, &c. since the date of the convention of 1802, &c. The extent then of the jurisdiction of this board, was to decide upon the amount and validity of the claims which might be presented to it, on account of the enumerated losses and injuries. It had no cognizance of any other claims; and their inquiries and decisions were strictly confined to the validity and amount of such as they had cognizance of. They had no authority to decide, and we presume, that, in no instance did they decide, upon the rights of conflicting claims, or of hostile claimants. They did not possess the ordinary means for

engaging in investigations of that nature; nor was it consistent with the objects of the treaty, or the interest of the claimants, that such questions should be litigated before a tribunal so constituted. It necessarily belongs to the ordinary tribunals of the country, to decide, who is entitled to the money thus awarded by the commissioners to be paid to the United States; because they alone possess the means of examining and settling the innumerable questions to which such controversies may give rise.

The case of Campbell v. Mullett, 2 Swanst. 551, which was much relied upon by the defendant's counsel; does not, in my apprehension, conflict, in the slightest degree, with these sentiments. The treaty of 1794 [8 Stat. 116] between the United States and Great Britain, gave to the commissioners the same jurisdiction as that bestowed by the treaty under consideration. They were to receive, examine, and decide upon the validity and amount of certain claims, and they decided in favour of the two partners, who were American citizens, and against the claim of the other partner, who was a French subject. But then the claimants were not hostile to each other. They did not severally claim the same subject, nor did the loss of the unsuccessful claimant add to the gain of the other two. The opinion of the court was, that the award of the commissioners in admitting two of the claims, and in disallowing the third, was conclusive; and most unquestionably it was so, because the validity, or invalidity of those claims, was one of the subjects over which they had jurisdiction. But even if the jurisdiction of the board of commissioners, in the present case, had extended to the decision of conflicting claims, it is by no means to be admitted that their award would be conclusive in this suit; unless it appeared that the plaintiff was before the commissioners to submit his claim to their examination and decision. For although the decision of the board in favour of the assignees, the defendants, would be so far conclusive as to protect the treasury of the United States against a double payment; yet, if the money ought, in point of law, to have been paid, not to the assignees, but to the plaintiff, it was so much money received by the former to the use of the latter, and would be recoverable in this form of action. The principle here laid down was decided by this court at the last term, in the case of Mayer v. Foulkrod [Case No. 9,341].

2. The next, and the most important question is, did the claim of the plaintiff to the sum in controversy pass by the assignment of the commissioners to the assignees? A multitude of decided cases were referred to by the counsel on each side, which it has not been thought necessary by the court particularly to examine, as I am of opinion, that the solution of the proposed question must essentially rest upon the true construction of the bankrupt law of the United States; the spirit and policy of which, to be collected from the various enactments, will be found to differ in many respects from those of the British bankrupt system. By the fifth section of the bankrupt law of the United States [of 1800 (2 Stat. 19)] the commissioners are to take possession of all the real and personal estate of every nature to which the bankrupt may be entitled in law or equity, in any manner whatsoever, and are to cause the same to be inventoried and appraised, and are also to take possession of all deeds, books of account, papers and writings belonging to the bankrupt. The next section directs the commissioners to assign and deliver over all the bankrupt's estate and effects aforesaid, with all the evidences and muniments thereof. The thirteenth section authorises the commissioners to assign all the debts due to the bankrupt, or to any other person for his benefit; which shall vest the property and right thereof in the assignees, as fully as if such bond, judgment, contract, or claim, had originally belonged, or been made to the assignees. The fourteenth section provides a mode by which the commissioners may discover any property, goods, chattels, or debts of the bankrupt, in possession of any other person than the bankrupt, or which are due to him. These are all the sections which relate to the assignment of the bankrupt's property by the commissioners, and to the subjects on which it is to operate; and we find that those are described to be, estates, real and personal, to which the bankrupt is entitled in law or equity; muniments of title, debts, property, effects, goods and chattels; the commissioners have no authority to assign any thing which cannot fairly be classed under one of these heads. But can a contingent interest, a mere possibility, be said, with any propriety, or with the slightest intention to the technical meaning of the term, to form a part of the estate, of the effects, the goods and chattels, the property or the debts of the bankrupt? Most clearly it cannot: it is not assignable by the bankrupt himself; and how then can it pass under the general assignment of the commissioners? The bankrupt does not pass it, nor can any other person pass it for his benefit. He has no present or certain future interest in it, no claim to it, and no means to obtain it; the thing may exist, and be the subject of property, but a right to it, or even a claim of right, does not. But the eighteenth section of the bankrupt law has been strongly pressed upon the court by the defendant's counsel, for the purpose of showing, that possibilities do pass by the assignment of the commissioners; this section declares, that, "if the bankrupt shall not, within a certain period, surrender himself, &c. and upon his examination disclose all his effects and estate, real and personal, and how, when, and on what consideration he has disposed of any part of his goods, wares, merchandise, moneys, or other

effects and estate, and of all books, papers and writings relating thereto, of which he was possessed, or to which he was entitled, or interested in, or held in trust for him, at any time before, or after issuing the commission, or whereby such bankrupt or his family then hath, or may have, or expect any profit, possibility of profit, benefit or advantage whatever, and shall not upon such examination execute in due form of law such conveyance, assurance, and assignment of his estate whatsoever and wheresoever, as shall be directed by the commissioners to vest the same in the assignees in trust for his creditors, and deliver up to the commissioners all such of his goods, wares, merchandise, money, effects, and estate, and all books, papers, and writings relating thereto in his possession, or power, &c. he shall, upon conviction of any wilful default, be adjudged a fraudulent bankrupt. It is very obvious that this section makes no provision in relation to the assignment by the commissioners; that subject having been fully disposed of by the preceding enactments. This section had manifestly two objects in view. The first was to compel the bankrupt to make a full discovery of all his property, in possession or in expectancy, and even of contingent interest and possibilities; since they would belong to his creditors, and be legally assignable by the commissioners under the fiftieth section, in case the contingency should happen, or the right otherwise vest in the bankrupt before the certificate was granted and allowed. But unless this discovery were made by the only person, perhaps, competent to make it, the creditors might be defrauded of their right to property standing in this predicament, and which might vest prior to the certificate, but unknown to the commissioners. The second object of this section was to compel the bankrupt himself to make such conveyances and assignments as the commissioners might direct; but conveyances and assignments of what,—not of possibilities, contingent interests, and expectancies; for then, would they pass to the commissioners or assignees, although the estate should vest by the happening of the contingency subsequent to the certificate, contrary to the policy of the fiftieth section; but "of his estate whatsoever and wheresoever." He is also to deliver to the commissioners certain papers and writings: but of what description; not such as concern contingent interest and possibilities, but "such as relate to such of his goods, wares, merchandise, money, effects and estate as he may have in his power and possession." Thus, it appears, that whenever the assignment by the commissioners, or by the bankrupt, is spoken of, the subjects are estates, effects, interest, property, debts and the like; and it is only on reference to a discovery, that possibilities and contingent interests are included, the reason for which I have already endeavoured to explain. I am aware that the first section of the statute of 5 Geo. II. c. 30 (from which the above eighteenth section of our bankrupt law was no doubt copied), has received a different construction by the judges of England, from that which I have considered the correct one. But Mr. Eden, in his late work on the English Bankrupt Laws, assigns a reason for this, which, whether a defensible one or not, does not apply to the bankrupt law of the United States. The broad and comprehensive expressions in the statute of Elizabeth, giving to the commissioners power "over all such interests in lands, &c. as the bankrupt may lawfully depart withal," are not to be found in our act, and it was for this reason, amongst others, that this court ventured, in the case of Krumbhaar v. Burt [Case No. 7,944], to dissent from the authority of Higden v. Williamson, 3 P. Wms. 132, which was mainly founded upon that provision. So likewise, the declaration in the statute of James, and which is copied into the late consolidation act of 6 Geo. IV. c. 16, "that the act shall be construed beneficially for creditors," is omitted in the bankrupt act of the United States. In his observations upon the first section of the statute of 5 Geo. II. c. 30, Mr. Eden admits that this section vests no power in the commissioners over the bankrupt's property, and gives no direction as to what they are to assign, but merely inflicts a penalty on the bankrupt for not disclosing his effects; and that the expressions used in it, "whereby he may expect any profit, possibility of profit, benefit or advantage whatever," go no further than to furnish an argument, by implication, of the intent of the legislature, in those provisions which respect the assignment by the commissioners. It is further the opinion of this learned author, that notwithstanding the above expressions are omitted in the late statute, passed in the present reign; still, from the general tenor and purport of the bankrupt act, from the provisions before mentioned, copied from the statute of James, and from the extensive words by which the powers are given to the commissioner to deal with and assign the bankrupt's property, the construction of the statute would be as extensive as if those expressions had been retained.

I have referred more fully to the sentiments of this writer than the subject may seem to have required, for the purpose of showing that the American courts ought to follow the decisions of those of England with great caution, in the construction of an act differing in so many essential particulars from the statute on which those decisions have been founded. I can find no encouragement in the act of the United States to give it a construction so liberal as to extend the power of the commissioners to the assignment of possibilities. But what is this which the defendants' counsel contend passed under the general assignment of the commissioners to the assignees? It is even less

than a possibility, because, in the latter, there is a contingent interest, which, upon the happening of a certain event, may become real and indefeasible in the claimant, which will be protected by all those legal sanctions which give stability and value to property. If we were to give a name to the former, I should call it a mere expectancy; but an expectancy without hope, because without right; even a contingent one, and without contract or obligation to support, and without a remedy, upon any known event, to enforce it. It depends upon the mere pleasure of an independent government which acknowledges no law but its own will, and which sets at defiance all remedy but that of force; the result of which can be known only to the great Omnipotent. By the illegal capture, and the carrying infra præsidia of the property insured by the plaintiff, or by the consular condemnations in Spain, the property was de facto lost to the owners; although these acts would not have been sufficient in the courts of England or of the United States, to falsify a warranty of neutrality. What then did the owners, or the underwriters obtain under the treaty? Not restitution; not damages in nature of compensation for the illegal captures complained of, for these claims could be made only against the captors; and yet it must be admitted that none such could be maintained in the ordinary tribunals either of Spain or of the United States. It would be going quite too far, in my opinion, to designate the claims for which this treaty provides compensation, by the name of contingent interests. Their discharge is nothing more than donations bestowed upon the injured parties from a sense of justice, or from considerations of state policy, by the voluntary grant of a sovereign power, and paid out of the national treasury to the claimant. The compensation thus bestowed is a new acquisition, and by no means the satisfaction of a pre-existing right, or binding obligation. That Spain was under an obligation to discharge those claims, is unquestionable; and it is equally so, that a parent is under an obligation to provide for his offspring. But these are both imperfect obligations, which vest in those who would claim their performance no transmissible interest or property whatever. Nay further, the hope of succession of an heir apparent (and how more like a certain interest is that than the present?) will not pass to the assignees, even in England, unless the estate should vest before the certificate is allowed. Carleton v. Leighton, 3 Mer. 671.

My opinion, in short is, that upon the true construction of the bankrupt law of the United States, possibilities did not pass under the assignment of the commissioners, and that the claim under consideration is not one of those possibilities which would pass to the assignees under the most liberal construction of the English bankrupt laws; consequently, that the plaintiff is entitled to judgment.

This case was removed by writ of error to the supreme court, and the judgment of the circuit court was reversed. 1 Pet. [26 U. S.] 193.

[See Cases Nos. 16,894 and 16,895.]

As to assignments under the bankrupt law, see 2 Maule & S. 165; 2 Prest. Abst. 95; Sugd. Powers, 187; 17 Ves. 388, 460; 3 Barn. & Ald. 557.

Case No. 16,894.

VASSE v. COMEGYSS et al.

[2 Cranch, C. C. 564.] [1]

Circuit Court, District of Columbia. May 3, 1825.

EQUITY JURISDICTION—PARTIES—SUITS AGAINST PUBLIC OFFICERS.

1. Unless some party defendant, against whom an effectual decree can be made, be found within the District of Columbia, the circuit court of that District, as a court of equity, has no jurisdiction of the cause.

2. Officers of the United States holding the public money, as money of the United States, are only accountable to the United States, and are not liable at the suit of an individual, on account of having such money in their hands.

3. Where is the treasury of the United States?

Bill in equity, filed March 12th, 1824. It states that the complainant, Vasse, in 1802, became bankrupt; and the defendants, Cornelius Comegyss and Andrew Petitt, of Philadelphia, are his assignees; and that Samuel Mifflin, of Philadelphia, is their agent, and the agent of certain underwriters of Philadelphia, of whom the complainant, Vasse, was one; and that Samuel Jaudon, of Washington city, in the District of Columbia, is the agent of Mifflin, to receive certain moneys which have been, or it is expected will be awarded to those underwriters, by the commissioners under the late treaty with Spain, for indemnification for certain spoliations upon the commerce of citizens of the United States by French cruisers, and carried into Spanish ports. These losses happened before the complainant became bankrupt, and he had to pay them in consequence of condemnation as prize in the courts of Spain. The bill states the claims which are made before those commissioners in his name, and for losses which he had sustained, and which had been allowed by the commissioners. It states that the complainant at the time of his bankruptcy gave up property and claims to a greater amount than the amount of his debts; but he never gave up or assigned his contingent, possible chance of indemnification by the Spanish government for those losses; nor had he at that time any hope of such indemnification. He states that his assignees had never rendered an account to any person, although they have received large sums. That he may, in a certain event, be entitled to receive out of his estate 5 per cent., but cannot get any account from the assignees, &c. He

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

prays that they may render an account of their trust before the auditor of this court. That Mifflin and Jaudon may state what amount they claim under the Spanish treaty on the complainant's account, and for whose use they claim it, and that all the defendants may be enjoined from receiving the same, and the treasurer of the United States from paying it, and for general relief.

BY THE COURT. The injunction, which was granted by one of the judges in vacation, extended only to the defendant Jaudon and his agents, he being the only defendant within the jurisdiction of the court; the treasurer, Mr. Tucker, not having been made a defendant, although the bill prayed that he might be enjoined. Publication having been made against the absent defendants who have not appeared, and the defendant, Jaudon, not having answered, the bill is taken for confessed against all the defendants, and set for decree.

The first question is, has this court jurisdiction as to any of the defendants against whom it can make a final decree? The fund out of which the claims are to be paid, are in the treasury of the United States. Where is that? The treasurer resides at Washington, and the head of the department; but is the money there? Can the fund be said to be within the jurisdiction of the court? We think not. The officers of the United States holding the public money, as the money of the United States, are not accountable to anybody but the United States, and are not liable, at the suit of an individual, on account of having such money in their hands.

The defendants, Comegyss and Petitt and Mifflin, against whom only an effectual decree could be made, are not within the jurisdiction of the court. Jaudon alone is within the jurisdiction, but there is no allegation which will authorize a final decree against him. The allegation that he is the agent of Mifflin, the agent of the assignees, is not a sufficient foundation for a decree against those assignees upon the merits of the case. We think, therefore, that the bill ought to be dismissed.

THE COURT (nem. con.) ordered the bill to be dismissed.

[See Cases Nos. 16,893 and 16,895.]

Case No. 16,895.

VASSE v. MIFFLIN.

[4 Wash. C. C. 519.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1825.

PRODUCTION OF PAPERS—SUFFICIENCY OF NOTICE—SECONDARY EVIDENCE—COPIES—JURISDICTION OF FEDERAL COURTS.

1. Notice to the opposite party to produce at the trial all letters in his possession relating to moneys received by him under the award of the commissioners, under the Florida treaty, is sufficiently specific, as they are described by their subject matter.

[Cited in U. S. v. Babcock, Case No. 14,484; Gregory v. Chicago, M. & St. P. R. Co., 10 Fed. 531.]

2. If to such notice, the party answer on oath that he has not a particular letter in his possession, and, after diligent search, could find none such, it is sufficient to prevent the offering of secondary proof of its contents. The party cannot be asked or compelled to answer whether he ever had such a letter in his possession.

3. A copy of a letter from the witness himself, defendant's agent, to the plaintiff's agent, acknowledged by him to be a true copy, cannot be read in evidence. The original, if produced, could not; as the facts contained in it would be more properly proved by the witness who wrote the letter.

4. A citizen of the District of Columbia cannot maintain an action in the circuit courts of the United States.

[Cited in Cissel v. McDonald, Case No. 2,729; Darst v. City of Peoria, 13 Fed. 564.]

This was an action brought to recover about $10,000, which had been received by Mr. Webster, the attorney of the defendant, under the Florida treaty, for spoliations committed by Spanish cruizers upon sundry vessels which the plaintiff had underwritten, and the losses on which he had paid prior to his bankruptcy in 1800. The defendant was the agent of sundry claimants under that treaty, and, amongst others, of the assignees under the commission against the plaintiff. The question intended to be contested was, whether this claim passed under the commission and assignment.

The following points of evidence were ruled upon the plaintiff's opening: 1. Mr. Jaudon, the defendant's agent, employed to attend the commissioners under the treaty, and to prepare the business for them so far as concerned the claims committed to the defendant's care, stated, that he saw Mr. Webster write a letter to the defendant, and was proceeding to state the contents of it; which was objected to by defendant's counsel. The plaintiff then read a notice to the defendant to produce, at the trial, all letters, papers and books in his possession, relating to moneys received by him under the award of the commissioners acting under the Florida treaty. This notice was again objected to as being too general. But THE COURT decided that it was sufficiently specific, the letters called for being described by their subject matter, which the plaintiff might not have had the means of describing by their dates. The defendant then swore that he had searched for the letter alluded to by the witness, and could not find it. He was then asked by the plaintiff's counsel, if he had never received such a letter? THE COURT decided this question to be improper. The plaintiff had no right to examine the defendant as a witness. All the defendant had to do was to purge himself, by swearing that he had not such letter in his possession, or had diligently searched for and could find none such. THE

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

COURT refused to let secondary evidence of the contents of the letter be given. The witness was then shown the copy of a letter from himself to Mr. Lee, the plaintiff's agent, respecting the award of the commissioner, and asked if it was a copy, and being answered that it was, the counsel offered to read it. The objection to this, made by the defendant's counsel, was sustained by the court. If the original letter were here, still the contents as to the facts stated in it, would be inferior to the evidence of the witness himself, who is here to be examined respecting them. But as the original was addressed to, and must be supposed to be in possession, or under the control of the plaintiff, a copy is inadmissible as evidence.

Evidence being given that the plaintiff resided in, and was a citizen of the District of Columbia, and not of Virginia, as stated in the declaration, THE COURT informed the plaintiff's counsel that he could not maintain his action in this court. He accordingly consented to suffer a nonsuit.

C. J. Ingersoll, for plaintiff.

J. R. Ingersoll, for defendant.

[See Cases Nos. 16,893 and 16,894.]

Case No. 16,896.

VASSE v. SMITH.

[2 Cranch, C. C. 31.] [1]

Circuit Court, District of Columbia. Nov. Term, 1811.[2]

DEPOSITIONS—REDUCTION TO WRITING—CERTIFICATE.

1. The magistrate who, in taking a deposition under the act of congress [1 Stat. 88], reduces to writing the testimony of the witness, need not state that it was written in the presence of the witness; but if reduced to writing by the witness himself, it must be done in the presence of the magistrate; and that fact may be proved aliunde.

[Cited in Re Thomas, 35 Fed. 823.]

2. The authority of the magistrate need not be proved otherwise than by his own certificate.

Mr. Taylor, for defendant, objected to a deposition taken under the act of congress on the part of the plaintiff, that the judge who took it did not certify that the testimony which was reduced to writing by him, was written in the presence of the witness.

THE COURT (THRUSTON, Circuit Judge, absent,) overruled the objection.

The defendant's counsel also objected that it did not appear, otherwise than by his own certificate, that Mr. Nevison, who took the deposition, was recorder of Norfolk, and a judge of a court, &c.

THE COURT overruled this objection also.

E. J. Lee and C. Lee, for plaintiff, objected to a deposition taken on the part of the defendant, that the magistrate did not certify, that the testimony of the witness was reduced to writing by the witness in the presence of the magistrate, although it was certified to have been reduced to writing by the witness and subscribed by him in the presence of the magistrate.

THE COURT, upon reading the certificate, thought the inference strong that it was written in presence of the magistrate, but permitted the magistrate to be sworn to prove the fact.

For the other points decided in this cause, see 6 Cranch [10 U. S.] 226, in the supreme court of the United States, where the above decree was reversed.

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

[2] [Reversed in 6 Cranch (10 U. S.) 226.]

VATTIER (HINDE v.). See Case No. 6,512.

VATTIER (PIATT v.). See Case No. 11,117.

Case No. 16,897.

VAUGHAN v. CENTRAL PAC. R. CO.

[4 Sawy. 280; [1] 3 Ban. & A. 27; 14 Pac. Law Rep. 274.]

Circuit Court, D. California. Aug. 20, 1877.

INJUNCTION—PATENTS—REMEDIES FOR INFRINGEMENT—REMEDY AT LAW, WHEN EXCLUSIVE—BILL OF DISCOVERY—RAILWAY BRAKES—PROFITS—DEMURRER—COLORABLE ALLEGATIONS.

1. The infringement of a patent will not be injoined after the expiration of the term for which the patent issued.

[Cited in Atwood v. Portland Co., 10 Fed. 284; Brick v. Staten Island R. Co., 25 Fed. 554.]

2. In a proper case the patentee has an election of remedies for an infringement of his patent: 1. By an action at law for the actual damages sustained; and, 2. Where profits have accrued from the sale or use of the invention, by a suit in equity for an account of the actual profits realized.

3. If the invention is such, that in the nature of things there can be no profits in any just legal sense of the term, and the limit of the injury for the use of the invention must necessarily be the value of the license fee, the patentee has a full, speedy, complete and adequate remedy at law, and a court of equity will not sustain a bill for an account.

[Cited in Brick v. Staten Island R. Co., 25 Fed. 554.]

4. In a bill of discovery purely, in aid of an action at law, it must be alleged that the facts sought to be discovered are material to the complainant's case, and that the discovery of them by defendant is indispensable as proofs.

5. Where a patent is for an improvement in the mode of operating brakes for railway carriages, the only injury sustained by the infringement in the use of the invention, is the loss of the value of the license fee for the number of brakes used; and for this injury an action at law furnishes a full, complete and adequate remedy.

6. In such case there can be nothing tangible or appreciable in the nature of profits in any proper legal sense, realized by an infringer, and a suit in equity for an account cannot be maintained.

7. A mere colorable, general allegation of profits accrued from the use of an invention, will not be sufficient to sustain a bill in equity for an account, and where, from the nature of the

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

invention alleged, it can be seen by the court from the bill that there cannot possibly be any profits of a character to justify charging the defendant as trustee, a demurrer will be sustained and the bill dismissed without putting the parties to the expense of proofs and a hearing.

[Cited in Knox v. Great Western Quicksilver Min. Co., Case No 7,907.]

Demurrer [by Daniel W. Vaughan] to bill in equity.

E. W. McGraw, for complainant.

M. A. Wheaton, for defendant.

SAWYER, Circuit Judge. This is a bill in equity seeking an account and recovery of the gains and profits resulting to the defendant from the use of an "improvement in the mode of operating brakes for cars, or railway carriages," patented by the plaintiff's assignor, whose patent defendant is alleged to have infringed. The term of the extended patent expired October 4, 1870, and the infringement complained of occurred before that date.

The defendant demurs to the bill on the ground, mainly, that, upon the facts alleged, the complainant has a plain, adequate and complete remedy at law, and, therefore, that the bill does not present a case for equitable cognizance. The bill not having been filed for several years after the expiration of the patent, presents no ground for an injunction, and none is sought. As a bill for an injunction, therefore, it affords no ground for equitable relief.

The bill alleges, generally, that defendant used the patented improvement, "but how many such brakes for railroad cars defendant so used and operated * * * your orator is ignorant and cannot set forth; but your orator avers, that defendant so used and operated, or permitted to be used or operated, a large number thereof," and that "it derived and realized large profits," etc., but to what amount your orator is ignorant and cannot set forth; "and he prays that the defendant may be required to make disclosure and discovery of the full amount thereof." He further prays that defendant be decreed to account for and pay over all gains, profits, etc.

It seems to be the recognized view of the courts that there may be cases, such as where the infringer makes a profit by the sale or use of the invention, wherein the patentee may have an election of remedies for an infringement of his patent, viz.: by an action at law to recover the damages sustained, in which the actual damages may be trebled, in the discretion of the court; or, by a suit in equity for an account and recovery of the profits made by the infringer from the sale or use of the invention. Cowing v. Rumsey [Case No. 3,296]; Packet Co. v. Sickles, 19 Wall. [86 U. S.] 917; Burdell v. Denig, 92 U. S. 720. It would seem from these authorities, that the equity jurisdiction in the latter case rests on the ground of a trust, the patentee being entitled to the profits resulting from the sale or use of his invention, the infringer is converted into a trustee for the patentee, as regards the profits thus made, and of which he would otherwise be deprived.

But in order to maintain a suit in equity for an account of profits, there must be actual profits resulting to the infringer susceptible of computation or estimation, of which the patentee could be deprived, and with which the infringer can be charged as trustee. If from the character of the invention there can be nothing in the nature of profits of which the patentee can be deprived, there is no basis for charging the infringer with receiving profits for his benefit, and nothing for which he can be called upon to account.

As the defendant's counsel well observes, if one should invent and patent a more comfortable bed than any heretofore existing, and another should infringe the patent by using it, the use of the bed might well be more agreeable, and afford greater comfort and satisfaction to the infringer than any other; yet it would be absurd to say that he derived any pecuniary profits from its mere use with which he could be charged as the trustee of the holder of the patent; or that there is any basis of profits in the legal sense of the term for which he could be called upon in a court of equity to account. It would be impossible to predicate profits in any just sense upon such an infringement. It could furnish no element for the basis of an account. The same is true of many inventions. To my mind it seems clear that the invention now in question is of this class. The patent is for an "improvement in the mode of operating brakes for cars, or railway carriages." It is not even for an entire brake, but only an element in a brake. The infringement is by the use of it on defendant's road. In order to use it at all the infringer must have a road, with rolling stock, and all the expensive equipments and paraphernalia of a road, including cars and other portions of the brake. How is it possible to separate this comparatively almost infinitesimal part of the whole from the combined elements necessary to construct, equip and operate a railroad, and say that so much of the profits resulting from the whole, if any profits there are, shall be attributed to the very small element embodied in this improvement? By what rule or measure shall it be determined, what advantage in money results to the infringer from its use? There is no loss to the patentee beyond the mere value of his license. And even in that particular there is no loss in any other sense than that he fails to get what he never had and never could have unless he gets it from the defendant. He could not have used the invention himself upon the defendant's road, and he could not have sold it to anybody else to use, and thereby have derived any profit from the sale; for nobody but the defendant could use it on defendant's road, and the use by defendant on its road could not possibly have interfered in

any way to prevent the complainant from selling his invention for use on any other road. Unless defendant had used these brakes they would not have been used at all, or sold for use anywhere else. The complainant would have been no better off if defendant had not used his invention, and he is in no worse condition by their use than he would have been had his invention not been used. It is for his interest, then, that the defendant should use as many as possible, provided he is paid the value of the license for their use; and if defendant does use them, there is no loss whatever resulting from a possible sale to, or use by, other parties, and no loss beyond the money value of the license to which he is entitled.

From the nature of the invention and its use, the only possible measure of damages, and the only sum for which the defendant is liable is the value of the license upon the number of brakes used embracing the invention, except that the damages may be trebled in the discretion of the court. This view is expressly recognized by the supreme court in Seymour v. McCormick, 16 How. [57 U. S.] 489, where, on discussing the rule of compensation for the infringement of patents, it is said, "one who invents some improvement in the machinery of a mill could not claim that the profits of the whole mill should be the measure of damages for the use of his improvement. And when the profits of the patentee consist neither in the exclusive use of the thing invented or discovered, nor in the monopoly of making it for others to use, it is evident that this rule could not apply. The case of Stimpson's patent for a turn-out in a railroad may be cited as an example. It was the interest of the patentee that all railroads should use his invention, provided they paid him the price of his license. He could not make his profit by selling it as a complete and separate machine. An infringer of such a patent could not be liable to damage to the amount of the profits of his railroad, nor could the actual damages to the patentee be measured by any known ratio of the profits of the road. The only actual damage which the patentee has suffered in such a case is the non-payment of the price which he has put on his license, with interest, and no more." Stimpson's patent turn-out for railroads referred to by the court is entirely analogous to the invention now in question. So in the case of Sanders v. Logan [Case No. 12,295], arising upon a patent for "an improvement in winnowing machines." Mr. Justice Grier says: "The invention claimed is for an improvement in the machinery of grist-mills, and the only injury to plaintiff's rights consists, not in using his invention, for it is his interest that all mills should adopt and use it, provided he is paid the price of the license. Such price or value of a license is the true measure of the 'actual damages' suffered, and of the remedy which the patentee can obtain, or has a right to claim in equity. * * * When the measure of damages is a certain sum, and does not require an account of profits, the peculiar jurisdiction of a chancellor is not needed for that purpose." Sanders v. Logan [supra]. And in Livingston v. Jones [Case No. 8,414], the same learned judge says: "If the inventor's profits consist neither in the exclusive use of the thing invented, nor in the monopoly of making it for others to use, but in having a general use of it by all who are willing to pay him the price of his license, then the non-payment of the license fee by the infringer is the only wrong done to the patentee. The only cases in which the measure of the patentee's damages is the amount of the infringer's profit, are where the invention is of some new machine, or a new form of any kind of known machine, which, as a distinct species of machine or manufacture, is more valuable, or can be put in the market cheaper, so as to supersede or exclude other machines or manufactures of the same genus; and where the profit of the patentee consists in a complete monopoly of the right to make and vend the new machine, or manufacture as a unit, and in the exclusion of all competition. In such a case, the only measure of damage in a court of equity is the amount of profits made by the infringer, and it is in such cases that the injured party should seek his remedy in a court of chancery, where he can have a decree for an account, and an injunction to protect his monopoly. But it is plain that a patentee whose invention is only valuable because used by all who pay a license fee, and who suffers no other wrong than the detention of such fee, has fixed his own measure of compensation, and needs none of the remedies which it is the duty of the chancellor to give for his protection. An injunction would do him no good; an account is not wanted, and the only remedy to which he is entitled being a judgment for a given sum of money, with interest, a court of law is the proper resort, where also he may recover a penalty to the extent of treble damages, if the judge sees fit to inflict it."

The case made by the bill is emphatically one of the kind referred to in the cases cited. There is no element in it upon which to base an account of profits. The only injury, as said by Mr. Justice Grier, is not in the use of the invention, but in refusing to pay the value of the license for its use. If a license fee is established, that is the measure of the injury fixed by the patentee himself. If not, then its value must be found from other evidence, and in both cases, and especially in the latter, the question as well as the novelty of the invention and the question of infringement is peculiarly one for determination by a jury. There is nothing requiring the aid of a chancellor.

As a bill for an account of profits, then, it fails to show a case for equitable cognizance. As no case for an account is presented, of course there is no need of a discovery in aid of an account.

So, also, the bill fails to present a case for

discovery as an independent ground of equitable jurisdiction. A bill purely of discovery in aid of the jurisdiction of a court of law must allege that the facts are material to the plaintiff's case, and that the discovery of them by the defendant is indispensable as proof; for, if the facts lie within the knowledge of witnesses, who may be called in a court of law, that furnishes sufficient ground for a court of equity to refuse aid. In such a case there is no need of discovery. Gelston v. Hoyt, 1 Johns. Ch. 547; Seymour v. Seymour, 4 Johns. Ch. 409; Story, Eq. Jur. §§ 74, 690, 1493b. In this bill there are none of these essential allegations; and it is apparent that none could be truthfully made, for the sole defendant is a corporation—an ideal, non-sentient being, that can have no knowledge, and can only answer under its seal; while all the facts are necessarily within the knowledge of living individuals, the officers and employees of the corporation, who must, from the nature of the case, furnish the information; and all are competent witnesses who can be called upon to testify and furnish the information in a court of law as fully and effectually as in a court of equity. If the complainant had commenced an action at law to recover the license fee, or the value of a license for the number of brakes used, I apprehend the bill would not be entertained upon the facts of this case, by any court of equity, for the mere purpose of discovery in aid of such action.

If the views expressed are sound, then the plaintiff has a "plain, adequate and complete remedy at law" in an action for damages, the full measure of which is the value of a license for the use of his improvement. This remedy is as plain, easy, practical, prompt, and effectual as any that can be afforded in equity. As the actual damages may be trebled, it is in this respect a better remedy. And where such a remedy is afforded at law, the statute expressly provides that a suit in equity shall not be maintained in the courts of the United States. Rev. St. § 723. It is claimed, however, that there is an allegation in the bill that profits have accrued, and that this is sufficient on demurrer. Nevins v. Johnson [Case No. 10,136] is cited in support of the bill. The demurrer was overruled in that case, but the court said, in the course of the opinion: "It (the jurisdiction) must rest upon the case made by the defendants on the merits, for the court afterward to determine whether the jurisdiction will be exercised in equity or only by a suit at law." In that case, there was some possibility that profits as such might accrue from the use of the invention. But in this case it is plain, from the nature of the invention set out in the bill, that it can furnish no element for estimating any actual profits accruing from the use of the invention; and that the measure of the plaintiff's recovery must, from necessity, be the license fee or value of the license for its use. The use to which a brake is put, and its relation to the car, or the railroad and its operation, is, at this day, matter of common knowledge, and of which the court can take notice as such, especially in connection with the description of its use and operation given in the bill. Brown v. Piper, 91 U. S. 42, 43. Should the case go to a hearing, and it should turn out, upon the evidence, that there was no case for equitable cognizance, the court would dismiss the bill. Lewis v. Cocks, 23 Wall. [90 U. S.] 469; Hipp v. Babin, 19 How. [60 U. S.] 278. In the former case, the court says: "In the present case, the objection was not made by demurrer, plea or answer, nor was it suggested by counsel; nevertheless, if it clearly exists, it is the duty of the court sua sponte to recognize it and give it effect. It is the universal practice of courts of equity to dismiss the bill, if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury." So in this case a mere action for damages brought in a court of equity would deprive the defendant of this constitutional right to a trial by jury. It is just as apparent now, from the allegations of the bill, that the remedy must be confined to the value of the license which may as well be recovered at law as in equity, as it can be after going to the expense of taking testimony and of a hearing in equity. The general allegation of profits accrued in any practical sense is manifestly merely colorable, which cannot in the nature of things be sustained, and, doubtless, for the purpose of withdrawing the case from a jury and giving jurisdiction to a court of equity. This being so, I can see no reason for not dismissing the bill at this stage of the proceedings, as it must be to the advantage of all parties to take this course.

Since this case was submitted, the district judge, holding the circuit court in the district of Tennessee, sustained a similar bill, as a bill for an account and discovery, in the case of Vaughan v. East Tennessee, V. & G. R. Co. [Case No. 16,898]. The plaintiff is the same, and it is understood that the bills in the two cases are precisely identical, with the exception of their having been filed against different defendants. The decision in that case is doubtless correct, if the bill presents a proper case for an account and discovery. The learned judge seems to have assumed, without discussion, that the bill does present a proper case for an account and discovery—the very point which, in this case, has been most strenuously combated by the defendant. If I am correct in the views already expressed, the premises upon which the conclusion of the learned judge rests fail; otherwise, he is right, and I am wrong. The supreme court must authoritatively determine the question.

Let the demurrer be sustained, and the bill dismissed.

Case No. 16,898.

VAUGHAN v. EAST TENNESSEE, V. & G. R. CO.

[2 Ban. & A. 537; 1 Flip. 621; 11 O. G. 789; 9 Chi. Leg. News, 255; 2 Cin. Law Bul. 39.] [1]

Circuit Court, E. D. Tennessee. Feb. Term, 1877.

PATENTS — EQUITY JURISDICTION — DAMAGES FOR INFRINGEMENT—LIMITATIONS.

1. A bill in equity for a discovery and account of profits arising from the infringement of a patent, will be maintained, although the patent expired before the bill was filed.

[Criticised in Vaughan v. Central Pac. R. Co., Case No. 16,897. Cited in Atwood v. Portland Co., 10 Fed. 284.]

2. An infringer of a patent, who has made profits from such infringement, is chargeable, as trustee, for the use of the real owner.

3. The general rule, that a bill in equity will not be maintained where a party has a remedy by an action at law, is not applicable to patent cases where the bill prays for a discovery and account of profits.

[Criticised in Vaughan v. Central Pac. R. Co., Case No. 16,897.]

4. A bill for a discovery will lie against a corporation, although, in order to compel a discovery under oath, the officers of the corporation must be made parties.

5. Acts of limitation will be construed to operate prospectively only, unless the contrary intention clearly appears.

[Cited in Hayden v. Oriental Mills, 15 Fed. 607.]

[Bill to recover damages for infringement. It alleged an unlawful use of patented brakes on railroad cars of defendant, but as the number of brakes so used were not known to complainant [Daniel W. Vaughan], he prayed for a discovery, and asked for an account for gains made from the use of such brakes. Defendant demurred: 1st—Because, as alleged, complainant had an unembarrassed remedy at law. 2d—That the claim was barred by the statute of limitations.] [2]

A. Caldwell, for complainant.

J. Baxter, for defendant.

BROWN, District Judge. Did the first ground of demurrer—viz., that complainant has a complete remedy at law—depend wholly upon the question whether the bill could be sustained after the expiration of the patent, upon the sole ground of infringement, I should feel compelled, in view of the change made in the patent laws by the Revised Statutes, to sustain the objection. By the 55th section of the act of July, 1870 [16 Stat. 206], which was itself a re-enactment of a like provision contained in the act of 1836 [5 Stat. 117], it is enacted that "all actions, suits, controversies, and cases arising under the patent laws of the United States shall be originally cognizable as well in equity as at law by the circuit court of the United States," etc. And as it to apply beyond any question the equitable jurisdiction of such courts to cases where the patent has expired, there is added at the end of the section a proviso that "all actions shall be brought during the term for which the letters patent shall be granted, or within six years after the expiration thereof." In Nevins v. Johnson [Case No. 10,136], this section was construed as conferring jurisdiction in equity upon the circuit court, irrespective of the right of the plaintiff to an injunction, or of his demand for one. The bill in this case, like the one under consideration, was filed after the plaintiff's patent had expired, and prayed for a discovery and an account, but not for an injunction, and was sustained apparently upon the ground that the section gave complete jurisdiction in equity as well as law.

Although the question was not directly passed upon whether such suit would lie, irrespective of the prayer for a discovery and account, the doctrine here laid down seems to have passed unchallenged until the enactment of the Revised Statutes.

In the revision, the section above quoted was incorporated into sections 629, 711, and 4,921. The first of these confers upon the circuit courts original jurisdiction (9th) "of all suits at law or in equity arising under the patent or copyright laws of the United States." The second makes such jurisdiction exclusive of the courts of the several states. The third provides that "the several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity," and further reiterates in substance the language of section 55 of the act of 1870, but, by a singular omission, leaving out all reference to the final limitation clause above quoted. There is an obvious distinction between the words used in the act of 1870, that "all actions, etc., arising under the patent laws. etc., shall be originally cognizable as well in equity as at law," and the words above quoted from the Revised Statutes, that "the circuit courts shall have original jurisdiction, etc., of all suits at law and in equity arising under the patent laws," etc.

The first evidently contemplated an exception, in favor of patent suits, to the general rule that a bill in equity will not be maintained where there is a complete and adequate remedy at law. The latter vests the jurisdiction subject to this general principle. Not only is a bill in equity to recover damages for an infringement of an expired patent obnoxious to this principle, but also to the express language of section 723, which inhibits suits in equity where such remedy may be had at law.

But I think the bill in this case may be sustained upon the prayer for a discovery and account. Admitting to the fullest extent the rule that a bill will not lie to settle an account upon one side only, it is subject to two important exceptions: First, where a discovery is prayed.

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by William Searcy Flippin, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 2 Ban. & A. 537, and the statement is from 1 Flip. 621.]

[2] [From 1 Flip. 621.]

1 Story, Eq. Jur. 458. Second, where the nature of the account is such it cannot be readily investigated in a court of law. 1 Story, Eq. Jur. §§ 452, 455; Corporation of Carlisle v. Wilson, 13 Ves. 278; Fowle v. Lawrason, 5 Pet. [30 U. S.] 495.

In this last case it is said "In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted." A party who has earned profits by the infringement of a patent is chargeable as trustee for the use of the real owner, and is so denominated in several cases. Birdsall v. Coolidge [93 U. S. 64].

Bills in equity for the infringement of patents have been repeatedly sustained upon these grounds. In Sickles v. Gloucester Manuf'g Co. [Case No. 12,841], the patent expired after suit commenced, but before the hearing, and it was contended that courts of equity entertain jurisdiction of patent and copyright cases only for the purposes of injunction; that the equity for an account is strictly incident to an injunction, and that therefore, if an injunction for any reason cannot be decreed, an account cannot be given, but the plaintiff must resort to a court of law. While admitting this proposition as a correct statement of the general rule, as settled in England, Mr. Justice Grier observes, "the bill needs only to pray a discovery for the purpose of account, and it will be sustained for the account only. See 2 Eden, Inj. (by Waterman) 245."

"The proposition, it is said, cannot be maintained, that a court of equity will not interfere to direct an account when indebitatus assumpsit will lie at law. Nor is the converse of the proposition true, that equity will decree an account in all cases where an action for money had and received, or indebitatus assumpsit, may be brought."

"But whenever the subject-matter cannot be as well investigated in those actions, a court of equity exercises a sound discretion in decreeing an account;" citing Corporation of Carlisle v. Wilson, 13 Ves. 276.

In the subsequent case of Sanders v. Logan [Case No. 12,295], the same judge expressed a doubt whether a court of equity had jurisdiction when the bill exhibited a case where neither an account nor injunction were proper remedies, but only a decree for a certain sum of money, with interest, as fixed actual damage. The opinion apparently contains a negative pregnant, that, if the bill prays for an account, the jurisdiction may be sustained. The case of Imlay v. Norwich & W. R. Co. [Case No. 7,012] was similar to that of Sickles v. Gloucester Manuf'g Co. [supra], and the circuit court of Connecticut quoted and followed the ruling in that case in Perry v. Corning [Case No. 11,003]. The bill contained no special allegation that a discovery was necessary, and had no special interrogatories annexed to it, but contained the usual general prayer for an answer and an account of profits. A demurrer was interposed because it did not pray either for a discovery or an injunction, but the court held that under the 93d rule it should be considered as a bill for a discovery and account, and the jurisdiction was sustained See, also, Hill v. Whitcomb [Case No. 6,502]; Hoffheins v. Brandt [Id. 6,575].

We are cited to no authority, sustaining the proposition that a bill for a discovery will not lie against a corporation, although in order to compel a discovery on oath, the officers of the corporation must be made parties, otherwise the answer is put in under the common seal. 2 Story, Eq. Jur. § 1501; 1 Daniells, Ch. Prac. 144; Story, Eq. Pl. § 235; Ang. & A. Corp. § 676. While there are few cases adjudicating directly that a bill of discovery may be maintained against a corporation, such bills are frequently filed, and the absence of any decision that they will not lie leads strongly to the inference that the practice generally accepted is correct. Bevans v. Turnpike, 10 Barr [10 Pa. St.] 174.

Admitting to its fullest extent that a bill for an account cannot be sustained in every case where an action of assumpsit will lie, we do not think it follows that such a bill may not be filed where this action will also lie, in cases where the accounting is such that it cannot readily be had before a jury. An account of the profits made by the infringement of a patent requiring, as it usually does, a careful investigation of defendant's books, and inquiries into collateral matters, is eminently of this description.

The bar of the statute of limitations is not available as a defence here. Granting that the limitation imposed by the act of 1870 was repealed by the adoption of the Revised Statutes (section 5596), which repeals all prior acts, "any portion of which is embraced in any section of said revision," we think the action in this case is saved by sections 5597 and 5599, the former of which provides that the repeal of prior acts shall not affect any right accrued before the repeal, but all rights under the repealed acts shall continue and may be enforced in the same manner as if said repeal had not been made. It is believed to be a general rule, that acts of limitation will be construed to operate prospectively only, unless the contrary intention clearly appears. Harrison v. Metz, 17 Mich. 377; Watkins v. Haight, 18 Johns. 138; Murray v. Gibson, 15 How. [56 U. S.] 421. In this view it is unnecessary to discuss the mooted question, whether, in the absence of federal legislation, an action for the infringement of a patent is barred by the state statute, or is subject to no limitation at all. An order will be entered overruling the demurrer.

[For another case involving this patent, see Case No. 16,897.]

Case No. 16,899.

VAUGHAN et al. v. NORTHROP.

[5 Cranch, C. C. 496.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.[2]

FOREIGN ADMINISTRATORS—ASSETS WITHIN JURISDICTION—ACCOUNTING.

1. An administrator appointed in Kentucky, who has received, in the District of Columbia, money belonging to the estate of his intestate, cannot by a bill in equity be compelled to account for and distribute the same to the next of kin, citizens of, and residing in Virginia, although the administrator should be found in the District of Columbia.

2. Quære, whether a foreign administrator can be sued, as such, and held to account in the District of Columbia, for assets there received.

The bill in equity in this cause, stated that the plaintiffs, [James Moody Vaughan and others,] all of Virginia, are the lawful and only children of Catharine Moody, deceased, who intermarried with their father, and who was the only child, next of kin, and heir of James Moody, who, in 1802, died intestate in Fayette county in Kentucky; and that the plaintiffs are his only next of kin and legal heirs and distributees, and that he left no widow. That the defendant Henry Northrop, obtained letters of administration of his estate in Kentucky, and received assets more than sufficient to pay all his debts and funeral expenses, &c. and particularly, that he received, in the District of Columbia, at least $5,200 from the United States, under the act of congress of July 5, 1832 (4 St. 563), for military services of the said James Moody, in the Revolutionary War, in the naval or military service of the state of Virginia, and that the plaintiffs, by the said act of congress, are entitled to receive the same, as next of kin to the said James Moody, but the said defendant Northrop refuses to account to the plaintiffs for the same; and confederating with Benjamin Moody, and twenty-one others, defendants, (naming them,) all of Kentucky, and two of Maryland, (also naming them,) denies that the plaintiffs are, but affirms that the defendants (except Northrop) are, the next of kin of the said James Moody, and that he has accounted with them therefor, and the plaintiffs charge that the claim of the defendants is fraudulent and against conscience, and pray that an account may be taken of the personal estate of the said James Moody, which came, or ought to have come to the hands and possession of the defendant Northrop, as administrator, and of the debts, funeral expenses, &c., and that the residue, after paying all legal charges and just debts, may be ascertained and distributed among all the plaintiffs as next of kin of the said intestate. The defendant Northrop, in his answer, excepts to the jurisdiction of the court, and prays that his exception may avail him as if he had demurred to the same; and the cause was heard as upon demurrer, and argued by R. S. Coxe, for the defendant, and R. J. Brent, for the plaintiffs. Mr. Coxe, for the defendant, contended that a foreign administrator cannot be compelled to account here. Neither the laws of Kentucky, nor the laws of the District of Columbia, can be carried into effect here against a Kentucky administrator. He has given his bond to account there, and there only. The act of congress of the 24th June, 1812, § 11 (2 Stat. 755), which enables administrators appointed in the states and territories of the United States to sue here, does not oblige foreign administrators to account here; and no suit can be maintained against them here as administrators. Chancellor Kent has decided that the courts of New York cannot hold jurisdiction against a foreign executor or administrator. Morrell v. Dickey, 1 Johns. Ch. 153; Doolittle v. Lewis, 7 Johns. Ch. 45; Sears v. Fenwick, 1 Cranch [5 U. S.] 259; Champlin v. Tilley, 3 Day, 303; Story, Confl. Laws, 422, §§ 513, 514.

R. J. Brent, for plaintiffs.

The administrator is liable in Kentucky, for assets received there only. He is liable to account here for assets received here. Bryan v. McGee, Coxe, Dig. 16, § 54; Id. [Case No. 2,066]; Penn v. Lord Baltimore, referred to in Carroll v. Lee, 3 Gill & J. 509; Freeman v. Fairlie, 3 Mer. 24, 45; 8 Com. Dig.; Sandilands v. Innes, 3 Sim. 263; Story, Confl. Laws, 515; Story, Eq. Jur. 505, 507; 4 Ves. 73. A trustee is liable to account wherever found. Massie v. Watts, 6 Cranch [10 U. S.] 148. The act of congress of the 27th of February, 1801 (2 Stat. 103), gives this court jurisdiction in all cases where either of the parties is found here.

Mr. Coxe, in reply.

This court has not jurisdiction of every case in which one of the parties is found here; but it is necessary to the jurisdiction of this court that one of the parties should be found here. It is a limitation, not an extension, of the jurisdiction. The India cases do not apply. Where there are bona notabilia in divers dioceses, administration must be obtained from the provincial prerogative court, but they are all under one allegiance, and one jurisdiction. Godol. 71; Trecothick v. Austin [Case No. 14,164]. The money must be remitted to Kentucky, to be administered there. Pratt v. Northam [Id. 11,376]; Harvey v. Richards [Id. 6,184].

THE COURT (nem. con.) was of opinion, that as the defendant's intestate died in Kentucky, and the defendant's letters of administration were granted in Kentucky; as the complainants resided in Virginia, and all the defendants in Kentucky, this court had not, or if it had, ought not to assume jurisdic-

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

[2] [Affirmed in 15 Pet. (40 U. S.) 1.]

tion in this case, although the administrator received the money here in 1833, and was found here in 1837.

Bill dismissed, with costs.

[Upon being taken to the supreme court on appeal, the decree of this court was affirmed, with costs. 15 Pet. (40 U. S.) 1.]

Case No. 16,900.

VAUGHAN v. SIX HUNDRED AND THIRTY CASKS OF SHERRY WINE et al.

[7 Ben. 506.] [1]

District Court, S. D. New York. Dec., 1874.

BILL OF LADING — EXCESSIVE LEAKAGE — NEGLIGENCE—JOINDER OF ACTIONS.

1. A quantity of sherry wine was brought from Cadiz to New York, under bills of lading which contained the words "shipped in good order and well conditioned," to be "delivered in like good order and well conditioned, dangers of the seas excepted," and also the words, "weight and contents unknown, and not accountable for average leakage and breakage." The casks were delivered to consignees to whom the bills of lading had been transferred, but they refused to pay the freight. The master of the vessel filed a libel against the goods and the consignees, to recover the freight. It appeared, that when the casks were discharged, part of them were entirely empty, and others partially empty and leaking, and that the casks were "inferior and shaky" casks. No evidence was offered as to the condition of the casks when shipped. An exception was taken to the libel because it joined a cause of action in rem with one in personam: *Held*, that, as the cause of action arose out of a contract which, if the respondents were liable on it, also bound the property, and as the respondents claimed the property, there was no reason for not joining the causes of action.

[Cited in The J. F. Warner, 22 Fed. 343; The Director, 26 Fed. 711; Joice v. Canal-Boats Nos. 1758 & 1892, 32 Fed. 554; The Baracoa, 44 Fed. 103.]

2. There was no evidence to show that the casks delivered empty and partly empty were not empty and partly empty when shipped.

[Cited in Miller v. Hannibal & St. J. R. Co., 90 N. Y. 435.]

3. There was no evidence that the leakage of the casks was greater than "average."

4. To resist successfully the claim of the vessel for freight, it must be shown affirmatively that the loss resulted from negligence on her part.

[Cited in Hus v. Kempf, Case No. 6,943; The Tommy, 16 Fed. 603; The Querini Stamphalia, 19 Fed. 124.]

5. Such negligence had not been shown, and the libellant was entitled to the freight.

C. D. Adams, for libelant.

W. R. Beebe, for claimants and respondents.

BLATCHFORD, District Judge. The libellant, as master of the bark Hudson, brings this libel against a quantity of sherry wine and its consignees to recover freight and primage amounting to $866.25 in gold, for transporting said wine, 630 quarter casks, in said vessel from Cadiz to New York, in April, 1873, under bills of lading which were transferred to the respondents. The bills of lading describe the goods as "quarter casks of sherry wine," and contain the words, "shipped in good order and well conditioned," so many casks of sherry wine, and the words, "to be delivered in the like good order and well conditioned," dangers of the seas excepted. On the bills of lading are stamped the words, "weight and contents unknown, and not accountable for average leakage and breakage." The libel alleges that the casks of sherry wine were "to be delivered, the dangers of the seas excepted, in like good order as they were received;" that "the said sherry wine was delivered in like good order and condition, and the same was duly received and entered by the said consignees in the custom house of the port of New York, and were ordered into the bonded warehouse, to be held for the payment of the duties thereon, where the same now are;" and that the consignees, the respondents, have not paid the $866.25.

The answer excepts to the libel, because it joins a cause of action against the property, in rem, with one against the respondents, in personam. This exception is overruled. The cause of action arises out of a contract which, if the respondents are liable on it, also binds the property, and the respondents claim the property. There is no good reason for not joining the causes of action.

The answer (which is put in by the respondents as such, and as claimants of the wine) alleges that the wine was delivered at New York in a damaged condition; that only a part of the same was delivered; that such loss and damage was not caused by any of the exceptions in the bill of lading, but from some cause which the ship was bound in law to provide against; that the damage was more than the amount of freight; that the damage ought to be recouped from the freight; and that there is nothing due to the libellant or to the vessel.

At the trial, it was admitted that the 630 casks, without reference to what was in them, were delivered from the ship at New York, and were taken to the bonded warehouse of the United States there, and there placed in the custody of the officers of the customs. A witness for the libellants testified: "I discharged the 630 casks; they were not in very good order; part of them were wholly empty; part of them were partly empty; almost all of them required coopering; they came out in very bad order; a portion of the casks were leaking; I considered them to be inferior casks; they looked like shaky casks; they were in the between decks; I looked at them in the between decks; they were leaking then in the between decks; the wine was running over the between decks." It was also shown that one of the claimants and respondents, when called upon, on behalf of the libellants, to pay the freight and primage, soon after the casks were delivered, declined to pay it, stating, as a ground of refusal, alleged damage to the cargo. No testimony was put in by the defence.

The allegation of the answer, that the wine

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

was delivered at New York in a damaged condition, that is, that such as was delivered was damaged, is not supported by any evidence. The only question is as to whether any loss of wine is shown for which the ship is responsible. The casks were, all of them, delivered by the ship. The ship had no knowledge or information as to the quantity of the contents of the casks when they were laden, nor is there any evidence as to such quantity. A bill of lading for so many casks of wine by no means implies that the casks are full of wine. Part of the casks were wholly empty when unladen. But there is nothing to show that those particular casks may not have been wholly empty when laden. Part of the casks were partly empty when unladen. But there is nothing to show that those particular casks may not have been partly empty when laden. The evidence is, that the casks were in bad order when unladen; that most of them required coopering; that a portion of them were leaking in the vessel; and that the wine which had so leaked out was running over the between decks.

Under the bills of lading the ship is not responsible for "average leakage." There is no evidence in this case that the leakage was greater than average leakage. Such a clause in the bill of lading does not cover leakage from negligence in the vessel, in the stowing or handling of the casks. But it is for the shipper who resists payment of the freight to show such negligence. Dedekam v. Vose [Case No. 3,729]; The David & Caroline [Id. 3,593]; The Delhi [Id. 3,770]. The statement in the bill of lading, that the casks were "in good order and well conditioned," extends only to their apparent external condition, excluding any implication as to their intrinsic soundness and sufficiency. Clark v. Barnwell, 12 How. [53 U. S.] 272, 283; The Columbo [Case No. 3,040]; The Olbers [Id. 10,477]. It is therefore open to the vessel to show the defectiveness of the casks. The evidence is that the casks were "inferior" casks and "shaky" casks. This would seem to be sufficient to account for the leakage. But, on the ground that, under these bills of lading, negligence on the part of the vessel must be affirmatively shown by the owners of the wine, in order to resist successfully the claim by the vessel for the freight money, and that such negligence has not been shown, I direct a decree for the libellants for $866.25 gold, with interest and costs.

Case No. 16,901.

VAUGHAN v. SOUTH & NORTH ALABAMA R. CO.

[Cited in Sayles v. Richmond, F. & P. R. Co., Case No. 12,424. Nowhere reported; opinion not now accessible.]

Case No. 16,902.

VAUGHAN v. WALLACE.

[Cited in Sayles v. Richmond, F. & P. R. Co., Case No. 12,424. Nowhere reported; opinion not now accessible.]

Case No. 16,903.

VAUGHAN v. WILLIAMS.

[3 McLean, 530; 3 West. Law J. 65; 8 Law Rep. 375.] [1]

Circuit Court, D. Indiana. May Term, 1845.

CONSTITUTIONAL LAW—ORDINANCE OF 1787—FUGITIVE SLAVES—RESCUE—FORFEITURE OF PROPERTY IN SLAVES.

1. The provision in the constitution of the United States, and in the act of congress of 1793 [1 Stat. 302], in regard to the surrender of a fugitive from labor, is binding on the state of Indiana, and its citizens, the same as on the other states.

2. A repugnancy between the compact in the ordinance of 1787, and the constitution, necessarily repeals the ordinance.

3. Indiana, by coming into the Union under the constitution, consents to this, and the other party to the compact consents by receiving the state into the Union. This is the common consent required by the ordinance to annul it in part or wholly.

4. Full effect must be given to the constitution and law of congress.

5. The laws of Missouri sanctioning slavery must be respected, and rights under them enforced.

6. Courts are not to discuss slavery in the abstract, or the policy of slave laws.

7. An individual is liable to the penalty for a rescue, if he be present and encourage it.

[Cited in Weimer v. Sloane, Case No. 17,363.]

8. It is not necessary that he should put forth his hand to do the act.

[Cited in Weimer v. Sloane, Case No. 17,363.]

9. An owner of slaves, who takes them to the state of Illinois, and keeps them at labor six months, and then removes them to Missouri, forfeits his right to them as slaves.

[Cited in Anderson v. Poindexter, 6 Ohio St. 629.]

At law.

O. H. Smith and Mr. Wick, for plaintiff.

Quarles, Stevens & Bradley, for defendant.

McLEAN, Circuit Justice. The plaintiff, a citizen of Missouri, brought his action against the defendant, for rescuing from his possession certain slaves of the plaintiff, and fugitives from his service, whom he found and arrested in the state of Indiana. The defendant demurred to the declaration. As the principal ground of the demurrer it was insisted, that the fourth article of the constitution of the United States, in regard to the delivery of fugitives from labor, and the act of congress on the same subject, do not apply where the claim is made by a citizen of a new state, not within the territorial limits of the Union at the adoption of the constitution. And that a citizen of Indiana is not bound by such provisions. That the sixth article of the ordinance of 1787, which remains in full force in Indiana, requires a fugitive from labor to be delivered up only when "claimed in any one of the original states." And that as the alleged slaves es-

[1] [Reported by Hon. John McLean, Circuit Justice. 8 Law Rep. 375, contains only a partial report.]

caped from the state of Missouri, where the plaintiff still resides, neither the act of congress nor the constitution can apply to the case.

This question, I believe, for the first time is brought directly before the circuit court of the United States. It is admitted that the common law imposes no obligation on a sovereignty or its citizens, to surrender a fugitive slave, who escapes from the jurisdiction where he is held in slavery. The rights of the master cease, on common law principles, when the slave, by whatever means, shall escape beyond the operation of the local laws. And this is also the principle of national law. Unless under a treaty or by reciprocal legislation, a slave is free and cannot be reclaimed, when he enters a country where slavery is not sanctioned. And this would have been the case among the states of this Union, had not the constitution and act of congress provided otherwise. But it is supposed that the sixth article of the compact of the ordinance above referred to places Indiana, and also Missouri, on a different footing, in this respect, from the old states. It is true that this compact, or any part of it, cannot be annulled, without the common consent of the parties bound by it. And it is assumed that the people of Indiana, never having assented to any change in the compact, are not bound to surrender a fugitive slave, except when claimed in one of the original states. When the people of Indiana came into the Union as a state, they were as much bound by the constitution of the United States, as the people of any other state. And any and every part of the ordinance which conflicts with the constitution of the Union, so far as the state of Indiana is concerned, was consequently annulled. The common consent required to annul such part of the ordinance is found in the formation of a constitution, and consent to come into the Union, by the people of Indiana, and the acceptance of the constitution and recognition of the state by congress. If it be admitted that while Indiana remained a territory, under the ordinance, there was no obligation to deliver up a fugitive from labor, except when claimed by a citizen of "one of the original states," it by no means follows that her obligation, as a state, is the same. On this subject the constitution acts upon a state and not on a territory. In every instance where the federal constitution imposes a duty on a state or the people of a state, it acts equally upon all the states. The argument that the articles of compact in the ordinance are paramount to the constitution, is unsustainable. The constitution is the fundamental law of Indiana and Missouri, the same as it is the fundamental law of Massachusetts and Virginia. This no one can doubt, who does not consider the ordinance of higher obligation than the constitution of the United States. Where any repugnancy exists between these instruments, the ordinance must yield by the consent expressed by the people of Indiana, and the people of the other states in congress assembled.

In this argument, the question of slavery has been discussed, and the impolicy of the provision in the constitution requiring fugitives from labor to be surrendered. With this subject, in the abstract, this court has nothing to do. It is argued that slavery had its origin in usurpation and injustice, and is continued in violation of the natural rights of man, as declared in our Declaration of Independence; but these are topics which this court will not discuss. We look to the law, and only to the law.

Whatever opinion may now be entertained as to the policy of introducing the above provision into the constitution, at the time of its introduction it was deemed a matter of the highest import. The fruits of the Revolution trembled in the balance, whilst this and kindred subjects were discussed in the convention; and they were settled only by a spirit of compromise and of mutual concession. But if in this and other respects the constitution is less perfect than the parties, on either side, would have it, we are not the less bound by its provisions. If an alteration in the instrument be desirable, let it be made, or attempted to be made, in the mode provided. But while it remains the fundamental law of the Union, no good citizen will disregard its provisions. It was not deemed a perfect instrument, perhaps, in every respect, by a considerable proportion of those who formed it; but it was the best that could be adopted under the circumstances. It has saved us from anarchy and ruin. It has given us a national character, and a proud standing among the great nations of the earth. Under its protection, our commerce has flourished among the several states, and been extended to every sea. It laid the foundation of the prosperity and glory of our country. Whatever defects there may be in the instrument, no one can fail to see that its beneficial results exceed the power of human computation. The demurrer is overruled, and the plea of the general issue being filed, the cause was referred to the jury.

Charge. Gentlemen of the Jury—From the evidence it appears, that the plaintiff purchased Sam, Mariah, and their child, from one Hendrick, in Missouri, 26th April, 1836, for the sum of eleven hundred dollars, five hundred dollars being paid down. He took the slaves into possession, and they remained with him until April, 1837, when they absconded. These persons formerly belonged to Tipton, a citizen of Kentucky, who, with the slaves, in October, 1835, removed to Illinois. He settled on military land, built a house, cleared ground, and made other improvements, declaring to different persons his intention to become a citizen of the state. Sam and Mariah were both employed in laboring in the fields and in the house, until April, 1836, when they were removed by Tipton to Missouri. Before this was done, there was much conversation in the neighborhood as to the right of the colored persons to their freedom. Tipton started with them before day-light, in the morning, being under some apprehension that they might, if discovered, be rescued. He sold them, in Missouri, to the person of whom the plain-

tiff purchased. Tipton continued to reside in Illinois two years, and, on several occasions, exercised the right of suffrage. In the spring of 1844, the plaintiff heard that the slaves were residing in Indiana, Hamilton county. Taking certain persons along with him, to prove his purchase of the servants, and to identify them, he went to Indiana. Under the statute of that state, he procured a warrant to arrest the fugitives, and a constable to execute the process, and some two or three other individuals, to render any assistance that might be necessary. They proceeded to the cabin occupied by the colored persons, in the morning, before daylight. Admission was refused them. They pried the door from its hinges, and threw down the chimney, when the inmates surrendered, acknowledging the plaintiff to be their master. Time was given to send for a neighbor, who, Sam alleged, was indebted to him fifty dollars. That neighbor arrived, and in a short time others, who expressed a strong interest in behalf of the slaves, and that they should not be taken from the neighborhood. The plaintiff alleged that he had no desire to take the fugitives by force, that they should have a fair trial, and if held to be free, he should be content. He agreed to pay Sam for his improvements, and other property. Some difference of opinion was expressed as to the justice before whom the fugitives should be taken; but the plaintiff finally decided that he would take them to Noblesville, a village some miles distant. They set out for that place, the company continually increasing, until they arrived at Mr. Anthony's farm, where they stopped for breakfast. The plaintiff was averse to this, but yielded, of necessity. After some two or three hours' delay, the company, being greatly increased, set out again for Noblesville. A wagon from Mr. Anthony was procured, to convey the fugitives. They moved on at a very slow pace for a few miles, until they arrived at the forks of the road,—one road leading to Noblesville, and the other to Westfield. Here the company increased to about one hundred and fifty. There was great division of opinion which route should be taken. Mr. Bales addressed the assemblage, urging a submission to law, and saying, "If the decision shall be against us, under our statute, we have a right to an appeal." This pacified a majority, and there seemed to be a general acquiescence in the advice given. But there were some who refused to acquiesce, and among them was the individual who drove the wagon. Receiving some encouragement from persons in the crowd, he drove his horses on the Westfield road. The plaintiff and one or two others attempted to stop the wagon, but they were unable to do so; a shout was raised, and the wagon was driven rapidly. The fugitives escaped, and have not since been seen by the plaintiff. Owen Williams, the defendant, was in the company, at the cabin, at Anthony's, and at the cross-roads. He took an active agency in the proceedings, in behalf of the slaves, but was not seen near the wagon at the time it was driven off, nor was he heard to encourage the driver. These are the facts, substantially, as proved in the case. The subject is one of great delicacy and importance. Rights are involved, sanctioned by the laws of Missouri, which we are bound to respect; and these rights are asserted under the constitution of the United States and the law of congress.

The second section of the fourth article of the constitution provides, "that no person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on the claim of the party to whom such labor may be due." The act of the 12th February, 1793, after pointing out the steps necessary to enforce the claimant's rights, in the fourth section provides, "that any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, &c., when so arrested, &c., shall forfeit and pay the sum of five hundred dollars, for the benefit of such claimant," &c. To recover this penalty, this action has been brought. The plaintiff has proved that he purchased and paid for the slaves in question in the state of Missouri, and in justice to him it is proper to remark, that in the prosecution of his claim in this state, he has taken no step which the law did not sanction. He proceeded under the law of Indiana, which, from the decisions of the supreme court of the United States, he was not bound to do. He has shown great moderation and kindness towards the persons claimed as his slaves, in agreeing to pay them for their property and in other respects. And at no time did he evince any other disposition than to have his claim examined by a legal tribunal. That he acted throughout in good faith, believing that his rights were sustainable, there can be no doubt. It seems that the defendant, Owen Williams, from shortly after the arrest up to the time of the escape of the colored persons, took an active agency in the movements of the company. He did not drive the wagon in which the fugitives were conveyed, nor is there any evidence that by word or action he contributed to the rescue, at the time it took place. But if he countenanced and encouraged from time to time, the movements of the crowd which resulted in the rescue, or being present, sanctioned it in any form, he is liable to the above penalty. A man cannot incite others to the commission of an illegal act, and escape the consequences by the plea, that he did not put forth his hand in the consummation of the act. Every one of the one hundred and fifty persons who were present at the forks of the road, and who encouraged the rescue, is responsible to the plaintiff. The combination was unlawful, as its object was to defeat a le-

gal investigation of an asserted right. There is no security for life or property, except in a faithful administration of the laws. That citizens, whether opposed to slavery or not, in principle, should feel and express a solicitude, in a case like the one under consideration, that there should be a full and fair investigation, is natural and commendable. But the course of the law must not be obstructed. No citizen or number of citizens can interpose physical force and defeat legal rights, without incurring a high offence against society. The advice of Mr. Bales was honorable to him, and his example in giving it is entitled to commendation.

But there is another point in the case which is clear of all difficulty, if you believe the evidence, and which may supersede the examination of any other part of the cause; and that is, were not the colored persons entitled to their liberty? Having been brought to the state of Illinois, which prohibits slavery, by their master, from the state of Kentucky, and kept at labor for six months, under a declaration of the master that he intended to become a citizen of that state, and who actually exercised the rights of a citizen by voting, there can be no doubt that the slaves were, thereby, entitled to their freedom. This conforms to decisions repeatedly made by the supreme court of Missouri. Such rulings are of the very highest authority in a case like the present. And it is believed that there is no decision to the contrary. The question has been decided by the highest court of the state, where the right of the claimant to be effective must be sanctioned, and that decision is against him. It is clear that the plaintiff had no knowledge whatever of the removal and employment of the slaves in Illinois, by their former master. The price he paid for them and every act in the case show, that he was wholly ignorant of this. A gross fraud was practised on him by the person of whom he purchased the slaves, and against him or Tipton he may have recourse.

A question is made whether the title to the plaintiff is not good, if the colored persons voluntarily returned into slavery. This question does not arise in the case, as there is no evidence that they went voluntarily to Missouri. But on the contrary, from the manner in which they were removed from Illinois, there can be no doubt that they were forcibly abducted by Tipton. And it appears that they sought the earliest opportunity to escape from their new master. As the claim to the services of these persons is not sustained, if you believe the evidence, which is not contradicted, you will find for the defendant, however improper his conduct may have been. If the fugitives were free, he is not subject to the penalty claimed of him.

The jury in a few minutes returned a verdict for the defendant.

VAUGHAN, The D. W. See Case No. 4,222.

VAUGHAN, The MARY J. See Case No. 9,217.

VAUGHAN, The MARY JANE. See Case No. 9,216.

VAUGHN (LAMB v.). See Case No. 8,023.

VAUGHN (MIZNER v.). See Case No. 9,678.

VAUGHT (BLOOMER v.). See Case No. 1,560.

VAUX (BRUDENELL v.). See Case No. 2,049.

Case No. 16,904.

VEACOCK v. McCALL.

[Gilp. 329.] [1]

District Court, E. D. Pennsylvania. June 14, 1832.

SEAMEN'S WAGES — SHIPPING ARTICLES — PAROL EVIDENCE—DISCHARGE IN FOREIGN PORT.

1. Where the shipping articles specify the wages of the mate of a vessel, he cannot give parol evidence of an agreement to allow him other compensation.

[Cited in Page v. Sheffield, Case No. 10,667.]

2. Where the discharge of a seaman at a foreign port, before the termination of the voyage, is involuntary on his part, and without reasonable cause, he does not forfeit his wages, but is entitled to payment up to the time of the arrival of the vessel at the last port of delivery.

On the 26th April, 1831, the libellant [James Veacock] signed a contract to perform a voyage from Philadelphia to Canton and back, as first mate on board the ship Atlantic, at the monthly wages of thirty-five dollars. On the same day the ship sailed, and arrived again at Philadelphia on the 26th March, 1832. While they lay at Canton, a serious difference arose between the libellant and the respondent [Edward McCall], which terminated in the discharge of the former, and he returned in another vessel to the United States, where he arrived on the same day with the Atlantic. On the 14th April, he brought the present suit, to recover the wages claimed to be due.

In the answer the respondent had alleged that the libellant was discharged from the vessel at Canton, for good and sufficient cause; but on the hearing this allegation was withdrawn, and it was agreed that the discharge was to stand, as having been made against the consent of the libellant, and without good cause.

The libellant, in addition to the contract contained in the shipping articles for wages at the rate of thirty-five dollars a month, and which was not controverted by the respondent, offered parol testimony of an agreement by the respondent to allow him "three tons privilege in the vessel," which was valued at the sum of forty-five dollars a ton, amounting to one hundred and thirty-five dollars.

Mr. Dunlap, for respondent.

This evidence is objected to. The articles contain the whole contract between the parties, and the attempt now made is to vary

[1] [Reported by Henry D. Gilpin, Esq.]

that contract. It is an endeavour to prove that the libellant is entitled to a higher compensation than that stated in the articles. They are the written and solemn evidence of the contract. They are, besides, specially required by the act of congress, under severe penalties. The object of the law is to prevent these verbal arrangements, and to ascertain in a solemn form, before the voyage begins, the rights and duties of all parties, owners, master, officers and seamen. The decisions of the courts of admiralty and common law have uniformly sustained this principle. 1 Story, Laws, 102 [1 Stat. 131]; Abb. Shipp. 434, 441; Bartlett v. Wyman, 14 Johns. 260; Johnson v. Dalton, 1 Cow. 543; White v. Wilson, 2 Bos. & P. 116; The Isabella, 2 C. Rob. Adm. 241; Elsworth v. Woolmore, 5 Esp. 84.

Mr. Kittera, for libellant.

The rule now adopted as to the admission of parol evidence, where there is a written contract, is that it shall not be received to contradict, but it may be to explain it, by showing what passed between the parties at the time it was made. It is not necessary that the contract of seamen should be in writing. One contract which he makes may be in writing, another may be by parol. This evidence does not relate to wages, but to compensation of a peculiar and additional nature; it is well settled that courts of admiralty will protect such agreements though not stated in the articles. Willard v. Dorr [Case No. 17,680]; The Minerva, 1 Hagg. Adm. 347; The George Home, 1 Hagg. Adm. 377.

HOPKINSON, District Judge, rejected the evidence.

Decree: That the libellant, James Veacock, recover and have paid to him the sum of one hundred and ninety-five dollars, being the full amount of his wages for the whole voyage out and home, after deducting therefrom the moneys paid to him or to his order.

Case No. 16,905.

VEATCH v. HARBAUGH.

[1 Cranch, C. C. 402.] [1]

Circuit Court, District of Columbia. June Term, 1807.

PRACTICE—FILING PLEADINGS—CONTINUANCE.

The plaintiff will not be permitted to file his replication, after the rule-day, and in term time, but upon condition of a continuance of the cause to the next term.

This suit was brought to July term, 1803. A rule was laid on the plaintiff to reply by the last rule-day. A replication was filed without consent, on the second day of this court and not on the rule-day.

Mr. Vanhorn, for plaintiff.

Mr. Morsell, for defendant.

THE COURT refused to receive the replication but upon the terms of a continuance to the opposite party.

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

VEAZIE (WADLEIGH v.). See Case No. 17,031.

Case No. 16,906.

VEAZIE v. WILLIAMS.

[3 Story, 54.] [1]

Circuit Court, D. Maine. Oct. Term, 1843.

PLEADINGS AND PROOF—EQUITY PROCEDURE—RELEASE—HOW AVAILED OF.

Where the bill alleged, that the plaintiff was purchaser of certain mill privileges from the defendant, which were sold at auction by H. as agent of the defendant, and that by-bidders were fraudulently employed, who greatly enhanced the price by false bids, and the defendant insisted in argument, that a release of all liability in the premises, given by the plaintiff to H., his agent, but which was not referred to in the bill, and was not set up in the answer as a bar or defence, was a release, by relation, of the defendant as principal—it was *held*, that the question as to the legal operation of the release did not properly arise upon the bill and answer, as it stood, and that to raise the question, a supplemental bill, with proper averments, as to the release, should be filed, to enable the defendant to make full answer.

Bill in equity. The bill sets forth in substance, that on the first day of January, 1836, Nathaniel L. Williams of Boston, and Stephen Williams of Roxbury, in the state of Massachusetts, merchants, were the owners of two certain mill privileges, situated on Old Town Falls, in the town of Orono, in said state of Maine. And the said Nathaniel and Stephen, at the Penobscot Exchange, in said Bangor, on said first day of January, offered the said two mill privileges for sale, at public auction, to the highest bidder, and then employed one Henry A. Head, to act in their behalf as auctioneer, and instructed the said Head, by themselves, or their agent, to put the said two privileges up for sale, beginning with the sum of $14,500, for the lowest bid or minimum price. And the said Nathaniel and Stephen, did further announce and prescribe as the conditions of sale, ten per cent. of the purchase money to be paid down, twenty per cent. more when the deed should be given, and the remainder in equal payments of one and two years. And the plaintiff [Samuel Veazie] complaining, says, that relying upon the good faith of the said Nathaniel and Stephen in the premises, and in the good faith and honest and fair dealing of the said Head, in making the said sale, did attend the said sale, and did bid at the auction in and by one Samuel J. Foster, his agent. And the sum of $14,500, the minimum price, having been bid for said two mill privileges, the said Head continued to announce that a still higher sum was offered by some other bidder, and the said Foster supposing that a higher bid had, in fact, been made, did make a still higher bid,

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

and the said Head pretending he had received a still higher offer from some other bidder at said auction, the said Foster offered a still higher sum, until at length the same privileges were stricken off to said Foster for the plaintiff, for the sum of forty thousand dollars, and the plaintiff then supposing the bidding aforesaid had been actually made in good faith, paid down the sum of four thousand dollars, being the ten per cent. of the purchase money, and the further sum of eight thousand dollars on the delivery of the deed, and gave his promissory note for the further sum of fourteen thousand dollars, payable in one year, with interest, which note the plaintiff has since paid, and also gave his further note of fourteen thousand dollars, payable in two years, with interest, on which last note he has paid the interest up to Jan. 1, A. D. 1840. And the said Nathaniel and Stephen, thereupon made and executed a good and sufficient deed of said two mill privileges to the plaintiff, for the consideration aforesaid of forty thousand dollars, so paid and secured to be paid. And the plaintiff, at the same time, made and executed to said Nathaniel and Stephen, a deed of mortgage of said two privileges, as collateral security for the payment of said two notes of fourteen thousand dollars each, and one other note for nineteen hundred dollars, part of the eight thousand dollars aforesaid. And the plaintiff further alleges and says, that there was, in fact, no real bid at said auction and sale aforesaid for a larger sum than sixteen or eighteen thousand dollars, by or for any real purchaser or person, there intending to purchase; but that said Head, by sham and pretended bids as for some person unknown to the plaintiff, run up the said Foster, by successive pretended bids of one hundred dollars at a time above the bids of said Foster, from the said sum of sixteen thousand dollars, or some such amount, to the enormous amount of forty thousand dollars; whereas the plaintiff charges and says, that in truth there was no real bid by any person intending to purchase, or in behalf of any bona fide intended purchaser whatever, of a greater sum than sixteen thousand dollars as aforesaid, excepting only the bids of said Foster, in behalf of the plaintiff. And the said Nathaniel and Stephen, by reason of the aforesaid management, and proceeding of said auctioneer in the employment of said Nathaniel and Stephen, and by means of his sham and pretended bids at said sale, have received of and from the plaintiff a large sum of money, to wit: the sum of eighteen thousand dollars and upwards, which in equity and good conscience, they ought not to have received, and the plaintiff has been greatly deceived and defrauded. And although the plaintiff having, since the first day of January, A. D. 1840, first discovered the fraud practised upon him, and having thereupon notified the said Nathaniel and Stephen, of the wrongful doings and proceedings of the said Head in the premises, had well hoped that the said Nathaniel and Stephen would not have attempted to take advantage thereof, but would have cancelled the deeds aforesaid, and refunded the money so wrongfully obtained of the plaintiff; yet the said Nathaniel and Stephen, not only have refused to cancel and rescind the deeds aforesaid, and to repay to the plaintiff the purchase money or any parts thereof so received by said Nathaniel and Stephen wrongfully and unjustly; but have sued out of the clerk's office of the circuit court for the First circuit, a writ of attachment, returnable to the circuit court, then next to be held at Portland, within and for the Maine district, on the first day of May last past, and caused the goods and estates of the plaintiff to be attached, and him to be served with notice according to law, which said suit was duly entered when and where said writ was returnable, and is now pending before said court as a court of law, in which said suit the said Nathaniel and Stephen have declared upon said last mentioned note of fourteen thousand dollars, and are seeking to prosecute the same to final judgment and execution, and thereby to enforce payment of the note aforesaid from the plaintiff. All which actings and doings of the said Nathaniel and Stephen are contrary to equity and good conscience, and tend to the manifest wrong and injury of the plaintiff in the premises. The bill prays, that the said Nathaniel L. Williams and Stephen Williams, may be enjoined from further prosecuting their said suit at law against the plaintiff, brought for the recovery of the amount of said note, and that they may be ordered to deliver up said note to the plaintiff, and that the sale aforesaid may be rescinded and annulled, and that the said Nathaniel and Stephen may be ordered to pay back to the plaintiff all such sums as they have received by reason of the premises from the plaintiff, with all due damages and interest, and for further relief.

The defendants, Nathaniel L. Williams and Stephen Williams, in their answer admit, that they were owners of the said mill privilege, at Old Town Falls, as set forth in the bill, and that, believing that from their local situation, they would command a ready sale at a large price, they employed one J. Bright, who resided at the city of Bangor, not far distant from the said property, to advertise the same for sale at public auction, on the said first day of January, eighteen hundred and thirty-six. That a few days before the said day when the said sale was advertised to take place, the respondents not being able to go to Bangor and make the necessary arrangements for the sale, employed and deputed one Stephen H. Williams, the son of the said respondent, Stephen Williams, to go to Bangor, and employ an auctioneer, and make all necessary arrangements for the sale. But the respondents deny that then or at any other time, they instructed the said Stephen H. Williams or the said Bright, or any other person, or in any way intimated or suggested to them, or either of them, or to any other person, that there should

be any by-bidding, or any fictitious bid at the said auction sale, or any other practice whatsoever at the said auction sale, inconsistent with entire fairness and good faith, or that at any time before the said sale took place, the said Stephen H. Williams or the said Bright, or the auctioneer employed, as hereinafter mentioned, or any other person whomsoever, received from these respondents, or either of them, to the knowledge or belief of either of them, any authority, instruction, intimation, or suggestion, to run the said property up by fictitious bids, at the said auction, or to do, or cause to be done, any thing fraudulent or unfair, or inconsistent with entire and perfect good faith.

The respondents admit, that they did affix a minimum price, of fourteen thousand five hundred dollars, to the said property, as is stated in the said bill, intending to protect the same from being sacrificed and sold for much less than its true value, but aver that they did not instruct their agent, or any other person, to keep the same secret, and though they have no personal knowledge thereof, yet they believe and admit, that it was well known at the said auction sale, that such minimum price had been prescribed and fixed by the vendors of said property; but they are informed and believe it to be true, that no bid was made at the said sale by any agent of the respondents, in consequence of the fixing of the said minimum price; bids far exceeding that amount being immediately made by those desiring and intending to purchase, so that no agent of the respondents had any occasion to bid thereon, to prevent the same from being sold for less than the said minimum price. And the respondents further admit, that the other conditions of sale were, ten per cent. of the purchase money to be paid down, twenty per cent. more when the deed should be delivered, and the remainder was to be paid in two equal instalments, at the end of one and two years from the sale. That they are informed, and believe it to be true, that the said Stephen H. Williams, being empowered and commissioned by the respondents as aforesaid, proceeded to Bangor aforesaid, and having made inquiry after a suitable auctioneer, was recommended to employ one Henry A. Head, a person who was said to be duly licensed and empowered to act in that capacity, under the laws of the state of Maine, and to be a skilful man, and much employed in the sale of lands; and thereupon the said Stephen H. Williams, supposing and believing him to be an honest man and a good auctioneer, did employ him to act as auctioneer in making sale of the said property at the said auction. And the respondents are informed and verily believe it to be true, that the said Stephen H. Williams did not authorize or request the said Head or make any suggestion or intimation to him, that he the said Head should or might pretend, that he had received any bid, which he did not in fact receive, or should or might do any act or thing which would be contrary to the most perfect good faith, or in any way inconsistent with the just rights of bidders or purchasers, at an open and fair auction sale; but on the contrary thereof, the respondents are informed, and verily believe, and do aver, that the said Head was employed by the said Stephen H. Williams, as a public officer empowered by the laws of Maine to make auction sales, and with the full belief that the same would be conducted by him in all respects as his duty as such public officer required; and they are further informed and believe it to be true, that the said Head was not authorized or requested by the said Stephen H. Williams, or in any way empowered to bid up to the said minimum price for the said property, or to make any bid whatsoever thereon, on account of your respondents. And the respondents further say, that they were not present at the said sale, and have no personal knowledge thereof; but to the best and utmost of the knowledge and belief of each of them respectively, they deny, that there was no real bid at the said auction sale for a larger sum than sixteen or eighteen thousand dollars, or any such sum, by or for any real purchaser or person there intending to purchase; or that the said Head, by sham and pretended bids, run up the said Foster (in the said bill mentioned as the agent of the said complainant) by successive pretended bids of one hundred dollars at a time, above the bids by the said Foster, from the sum of sixteen thousand dollars, or any such amount, to the sum of forty thousand dollars; or that in truth there was no real bid by any person intending to purchase in behalf of any intended bona fide purchaser of a greater sum than sixteen thousand dollars, or any such sum. That after the said sale had taken place, the said Veazie did represent to the respondents, that the said Foster had acted as his agent in bidding off the said property at the said auction, and exhibited very great anxiety to have the conveyance of the said property made; and the respondents are informed, and believe it to be true, that there was at the time of the said sale, a great competition for the purchase of the said property, not only on account of its own intrinsic value, but also on account of its local position in respect to other property belonging to different persons; and that the said Veazie, before the said sale, authorized the said Foster to bid as high as forty thousand dollars for his account; and that the said Veazie, immediately after the said sale, manifested great eagerness to have the bargain closed, and much anxiety lest the respondents should be induced by an offer of a larger sum than forty thousand dollars by some other person, to refuse to complete the same. But the respondents, acting in entire good faith, and without any fraud, concealment, or misrepresentation, proceeded to execute the contract aforesaid, and did execute and deliver to the said Veazie, a good and sufficient deed of the said property, and received from the said Veazie the money payments in the said conditions of sale mentioned, and a further portion of the purchase money, amount-

ing to the sum of two thousand dollars, which the said Veazie voluntarily paid in cash, and the notes of the said Veazie, payable in one and two years respectively, for the residue of the said purchase money, secured by a mortgage upon the said property; and the said Veazie having paid one of the said notes, the respondents were content to allow the other to remain unpaid, though at maturity, the said Veazie continuing to pay annual interest on the same up to the first day of January, eighteen hundred and forty, when he made the last payment; though the said Veazie never gave to your respondents, nor to either of them, to the knowledge or belief of either of them, any information or notice, that he deemed the said sale invalid, for any reason, or would not pay the said remaining note, until on or about the fourteenth day of January, A. D. eighteen hundred and forty-one; and the respondents then caused a suit to be instituted on the said note, which is the same suit mentioned in the said bill of complaint.

And the respondents, further answering, say, that since the said sale was made, and before the filing of the said bill, more than five years and six months had elapsed. That, in the mean time, not only have your respondents lost the benefit of much evidence, which they verily believe they might have obtained, as to the occurrences at the said sale, but there has been a very great change and depreciation in the value of real property, of all kinds, in that part of the said district of Maine, where the said property is situated, and in an especial manner has there been such change and depreciation in the value of the said property, sold to the said Veazie, as aforesaid. That owing to a large increase in the number of mills in that vicinity, the growing scarcity of timber, and the concentration of timber lands into a few hands, together with the financial difficulties by which the country has been oppressed, mill seats, on that part of the Penobscot river, and especially those in question, have been greatly depreciated in value, and are now intrinsically worth very much less than when the said sale was made; and these respondents are informed and believe, that changes have been made in the said property, by building on, and otherwise altering the same.

The respondents are not informed at what time, in particular, the said Veazie pretends to have first discovered the pretended fraud in the said bill, alleged to have been practiced at the said sale, but the respondents verily believe, that whatsoever was done at the said sale, material to the interests or right of the said Veazie, might have been known to him at any time, if the same were not actually known to him, as to which the respondents have no knowledge or information, and they pray that proof of due diligence may be required of the said Veazie. The respondents verily believe, that since the changes aforesaid have taken place in the condition and value of the said property, the said Veazie would gladly annul the said bargain, and have the said property restored to your respondents, in its altered and depreciated state, and compel your respondents to repay to him so much of the price thereof as he has paid to them, and so much money as he has seen fit, for his own purposes, and pursuant to his own views and plans, to expend on the said property; but your respondents pray the judgment of this honorable court, whether, after the lapse of so much time, and after such great changes have taken place in the condition and value of the said property, this honorable court will set aside the said contract, more especially as the said respondents deny, to the best and utmost of their knowledge, information and belief, that the alleged fraud, stated and charged in the said bill, was in fact practised, or that the respondents, or either of them, to the knowledge or belief of the other of them, have or has ever concealed from the said Veazie, or attempted to conceal from him, or used any means whatsoever to conceal from him any matter or thing, done, said, or transacted at the said sale, or having any connection therewith; and the respondents further say, that they are informed, and believe it to be true, that, previous to the said sale being made, the said Head made some inquiries of the said Stephen H. Williams, the agent of your complainants, as to his compensation, to which the said Stephen H. Williams answered, he would pay him what was customary, and this was the only contract, agreement, or understanding with the said Head, in regard to his compensation. That just before the said sale began, the said Head said in a laughing way, that he should be willing to take for his services, what the property should bring over the said minimum price; but the said Stephen H. Williams understanding the remark as not seriously intended, made no reply; and these respondents verily believe that said remark was meant as a jest, for they are informed, and believe it to be true, that the said Head never after recurred to it. And the respondents are informed, and believe it to be true, that the said Stephen H. Williams paid to the said Head, the sum of two hundred dollars as a compensation for his services as auctioneer in selling the said property; that the said payment was made after the said sale had been effected, and the sum paid was deemed reasonable by the said Stephen H. Williams, and was not disapproved by these respondents, when the same came to their knowledge, and that there was no contract, agreement, or understanding, to the knowledge or belief of the respondents, that the said Head was to receive nothing for his services, if no sale were effected, nor any other contract, agreement, or understanding than the one above mentioned.

The following agreement of facts also appeared in the case: "In the above entitled cause, it is agreed, that before the said bill was filed by the complainant against the defendants, the counsel of the complainant call-

ed on the witness, Head, who has been examined in this cause, and requested the said Head to state to him the facts and circumstances of the sale at auction, which is the subject of this suit, and upon a suggestion by the said Head, that it might involve him in some pecuniary responsibility, the counsel of the complainant assured the said Head, that the complainant would give him a release of all claims on his part. That afterwards, and before the said bill was filed, the said Head was summoned to give a deposition in perpetuam, before two magistrates, at Bangor, in the said district; and the complainant and his counsel, and also a gentleman of the bar, who appeared in behalf of the said respondents, being present, the release, a true copy whereof is hereto annexed, and which may be used instead of the original, was drawn by one of the said magistrates, and executed and delivered to the said Head, by the said complainant. That the gentleman who then and there acted as counsel for the said respondents, has not acted for them in this suit in equity,—Messrs. Curtis, of Boston, and Mr. Charles S. Daveis, of Portland, having conducted the defence of this suit,—and neither they nor the respondents, had any knowledge of this release, until after the publication of the evidence in this suit, when finding an allusion to it in the testimony of the said Head, they took measures to, and did procure a copy thereof. And it is further agreed, that the said release, and the above facts and circumstances may be referred to, and made use of in this cause, with the same effect as if the same had been put in issue by a cross bill, and admitted by the answer, and this agreement is to be made a part of the said case, and to be filed therein. Know all men by these presents, that I, Samuel Veazie, of Bangor, in the county of Penobscot and state of Maine, Esquire, in consideration of one dollar to me paid by Henry H. Head and Nehemiah O. Pillsbury, both of said Bangor, auctioneers, and late co-partners in the auction business, under the firm and style of Head & Pillsbury, the receipt whereof I do hereby acknowledge, do hereby release and discharge said Head & Pillsbury, jointly and severally, from all damages by me sustained, or supposed to be sustained, and from all action, or causes of actions, to me accrued, or accruing, in consequence of any misfeasance, non-feasance, or malfeasance, or any illegal management, by them done, performed, or suffered, at the sale at auction of Nathaniel L. Williams and Stephen Williams' real estate, situated in Old Town, in said county of Penobscot, on or near Old Town Falls, so called, which was sold at auction, in or near January 1st, 1835, by the said Head & Pillsbury, as auctioneers, hereby also releasing the said Head & Pillsbury from any claim for damage, by or in consequence of any of their proceedings, relating to said sale of said property. In witness whereof, I have hereto set my hand and seal, this twenty-first day of July, A. D. 1841. Samuel Veazie."

Mr. Rogers, for plaintiff.

B. R. Curtis (with whom was C. P. Curtis), for defendants.

B. R. Curtis, for defendants, contended, as a preliminary point, decisive of the whole cause, that the release to Head, the auctioneer, connected with the agreement of the parties, amounted to a virtual extinguishment of all right of action against the defendants, since a discharge of Head from all responsibility was a discharge of his principals also, who were only liable for his torts by relation; and if they were compellable to pay damages to the plaintiff, or the relief sought by the bill was obtained, they would have an action over against Head, so that it would defeat the indemnity intended by the release.

Mr. Rogers insisted, that this was contrary to the intent of the parties in the release, which was to discharge Head, personally, from all liability, but to retain the entire right against the defendants, in the same manner as if the release had not been given.

STORY, Circuit Justice. In my judgment, there are intrinsic difficulties in proceeding further in this case, upon this point, in the present posture of the record. The release is not referred to in the bill; nor any attempt there made by any allegation to show, that its general terms are not to be understood, in their fullest sense, as a complete release and a full indemnity to Head. Neither is the release set up as a defence or bar in the answer, so as to put it in issue, much less, so as to enable the court to say, that it ought not to be interpreted in the most ample manner in favor of Head, and consequently in favor of the defendants. The agreement indeed does bring it before the court, but incidentally, and not directly as a matter in issue. And indeed, upon the language of the agreement, nothing more would seem to be put in issue than the mere fact of its existence. It is plain, therefore, that the plaintiff cannot avail himself, in this state of the proceedings, of the point, on which he relies, viz. that the release was not intended to relieve the defendants, but only to relieve Head from personal responsibility; and that, notwithstanding the terms of the release, upon its actual intent, as understood by the parties at the time, the defendants were not discharged truly. What may be the actual operation of the release in the present case, as to the defendants, I do not presume now to decide. But certainly the question, whether it is not a virtual discharge of the defendants by operation of law, is a question of grave importance, and of no inconsiderable difficulty. At least, I can only say, that I feel that there is great weight in the argument of the defendants' counsel on this point.

To bring the whole question properly before the court, in a manner, which will enable us to understand and thoroughly to sift

it, it seems to me that it will be necessary for the plaintiff to file a supplemental bill to bring the release directly before the court, with suitable averments as to its object and intent, so that the defendants may put in a full answer thereto, and proofs on the point may be introduced on both sides. In the mean time, and until the supplemental proceedings are had, it will be right to suspend the further hearing of the cause.

Upon this instruction of the court, Mr. Rogers for the plaintiff, (with whom was Mr. Preble,) moved for leave to file a supplemental bill, and that in the mean time the further hearing of the case be suspended. [See Case No. 16,907.]

Case No. 16,907.

VEAZIE v. WILLIAMS et al.

[3 Story, 611;[1] 13 Hunt, Mer. Mag. 356.]

Circuit Court, D. Maine. May Term, 1845.[2]

AUCTION SALES — FALSE BIDDING — PURCHASE BY AUCTIONEER—LACHES—RELEASE — SURETIES—COSTS.

1. Where certain mill privileges belonging to the defendants were sold at auction by H, as their agent, to the plaintiff, and, after the lapse of five years, when the property had greatly deteriorated, the plaintiff brought the present bill in equity, charging that H had, by sham bids, fraudulently enhanced the price far beyond the real value of the property; but not charging the defendants with knowledge and connivance with him, at the time of the sale,—it was *held*, that, as the false bidding by the auctioneer was unauthorized by the seller, it would not avoid the sale, although it would be a good ground of action against the auctioneer for damages; that H ought to have been made a party to the bill; and that the lapse of such a length of time was, under the circumstances, a bar to the present suit.

2. A release of all liability in the premises having been executed by the plaintiff to the auctioneer,—it was *held*, that it was a release of his principals, the defendants.

3. When, at an auction sale, all the bidders, except the purchaser, are by-bidders secretly employed by the seller, and the judgment of the purchaser is improperly influenced by their bids, the sale is a fraud, against which equity will relieve the purchaser. But when there are real bidders as well as sham bidders, and the last bid before the purchaser's is a real bid, and the judgment of the real bidders and the purchaser has not been blinded by the sham bidders, the sale is valid.

[Cited in Tufts v. Tufts, Case No. 14,233.]

[Cited in Towle v. Leavitt, 23 N. H. 371.]

4. A purchase by an auctioneer, for himself, at a sale made by him in behalf of his principal, is not void, but voidable by the principal; but third persons cannot question the sale.

5. A release of the party primarily liable is a release of all parties who are secondarily liable, at law, and especially in equity.

6. Lapse of time is a sufficient bar to a bill in equity to rescind a sale on account of fraud, where the plaintiff might have acquainted himself, at the time of the sale, with the facts, and especially if the circumstances be greatly changed, and the evidence be lost, or obscured.

[Cited in White v. Sutherland, 64 Ill. 188; Peabody v. Flint, 6 Allen, 57. Cited in brief in Chouteau Ins. Co. v. Floyd, 74 Mo. 289.]

7. It is the common practice not to allow costs to the prevailing party, where the district judge differs from the circuit judge.

[Cited in Goddard v. Coffin, Case No. 5,490; Burnham v. Rangeley, Id. 2,177.]

[Cited in Northern Railroad v. Concord Railroad, 50 N. H. 178.]

Bill in equity. The substance of the original bill and answer, will be found in [Case No. 16,906]. The plaintiff [Samuel Veazie] afterwards filed a supplemental bill, which stated in substance, that after the replication of the plaintiff had been filed, and after the time for taking testimony had expired, but before publication, the counsel of the defendants [Nathaniel L. Williams and Stephen Williams] applied to the counsel of the plaintiff to admit the execution and delivery of a release by and from the plaintiff to Henry A. Head, who, in the plaintiff's original bill, was alleged to have been the agent of these defendants, and for whose acts they were sought to be charged. That his said counsel, knowing that a release had been given by the plaintiff to the said Head, as is hereinafter stated, and if available to the defendants, could be introduced by the aid of a cross bill—to avoid the delay incident thereto, consented and agreed, that the release which was not then seen by the said counsel, but which the said counsel supposed truly to express the intention of the parties, might be referred to in the hearing of the said original bill, with the same effect as if it had been put in issue by a cross bill and admitted in the answer. And the plaintiff further shows, that the said release had been delivered to the said Head prior to his exhibiting his original bill, but the same was not set forth therein, because it was between other parties, and expressing the true intent and meaning of those parties, as the plaintiff, until the original bill was set down for a hearing, supposed it did, that it did not concern the defendants and could not in any manner affect the rights and equities of the parties of the said original bill, and that it was not discovered, until after publication had passed upon the testimony in the said case, that it could or did affect the rights of the plaintiff. And that the said release is not alleged in the said original bill to have been given, neither is it relied upon or set forth in the answers of these defendants, and is put in issue as new matter by the aforesaid agreement of counsel. That the defendants now insist that the said release is a legal satisfaction of the injury, whereof the plaintiff in his original bill complains, and that the same is, in law and equity, a discharge and release, which enures for the benefit of these defendants, of all the plaintiff's claims and equities in his original bill preferred against them. That the said Head paid him no consideration for the said release, and has made him no satisfaction for the

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

[2] [Reversed in 8 How. (49 U. S.) 134.]

loss and injury which he has sustained, as set forth in his original bill; and that the said release, whatever may be its terms, or the legal effect of it, as thus expressed, was not intended by the parties to it, to discharge, or in any way or manner to impair any claim, which the plaintiff had or might have against these defendants, growing out of their or the said Head's acts or doings in the premises, and that the said release, if in its terms it imports a different significance, is a fraud upon the plaintiff, and was so written by mistake. That the said release was not given in pursuance of any agreement or understanding between the plaintiff and the said Head; that he was informed by his counsel, that upon the counsel's application to the said Head for a disclosure of such facts as were within his knowledge respecting the matters set forth in the plaintiff's original bill, the said Head declined to make a disclosure upon the ground, that the plaintiff might sue him the said Head, and that he did not want a lawsuit with the plaintiff—that his counsel then assured the said Head that such was not the purpose of the plaintiff, but that he desired the proof, for the sole purpose of instituting proceedings in equity against these defendants, and that the plaintiff would give him an obligation which should release him from all suits against him on behalf of the plaintiff—that Head's liability to these defendants was at no time the subject of negotiation or conversation, and that no indemnity therefrom was at any time asked or offered or intended. And the plaintiff is advised, that the said release, according to the intent and meaning of the parties thereunto, was not intended to express an acknowledgment of satisfaction, or to intend any agreement, beyond a stipulation, that for any injuries which the plaintiff had sustained in the premises, his remedies should not be applied against the said Head—and that the said release should be so construed and reformed. And the plaintiff further shows, that the agreement, in pursuance of which the said release was executed, and the only agreement of which it was a consummation, was made between the counsel of the plaintiff and the said Head—and that the plaintiff had no conversation with the said Head about the said agreement or release, but that his counsel, in the presence of the magistrate before whom the said Head was called to give his deposition, and in the presence of the attorneys of these defendants, requested one of the said magistrates to write a release, or some agreement, the language of which request, the plaintiff could not now state and does not recollect, and the plaintiff signed, without inquiry, the paper so executed.

The defendants in their answer to the supplemental bill admit that the said original bill, and a replication to the joint and several answer of these defendants, were filed as it is stated in the said supplemental bill, and the parties did thereupon proceed to take their proofs in the said cause. That after the time for taking the testimony in the said cause had expired, and after publication thereof, the counsel of the defendants having discovered from the answer of one Head, who was examined as a witness in the said cause, to the sixth direct interrogatory proposed to him by the said plaintiff, that some release had been executed by the said Veazie to the said Head, touching the matters in controversy in the said cause, applied to the said Head and obtained a copy of such release. Each of the respondents declares that he had not, and to the best of the knowledge, information and belief of each of them, the other of them had not, nor had either of the solicitors or counsel of these respondents in the said cause any notice or knowledge of the said release, prior to the discovery thereof, in manner aforesaid. And these respondents further answering, admit that the counsel of these respondents did apply to the counsel of the said Veazie, and did request him, in behalf of the said Veazie, to agree that the said release might be put in the said cause, and availed of therein as if the same had been put in issue by a cross bill, and the said counsel of the said Veazie replied that he would so agree, provided certain facts, which were then and there stated in writing by the said Veazie's counsel, should be agreed to, and accompany the release, and thereupon the agreement was made and signed, which was filed in the said cause, and to which these respondents crave leave to refer. The respondents admit that the said release was not put in issue by the said original bill, but these respondents are wholly ignorant of the motives or reasons which prevented the said Veazie from putting the said release in issue; and the respondents admit that the said release was not put in issue by the answer of these respondents to the said original bill, inasmuch as the respondents were ignorant of the existence of the said release, at the time when their answer was filed. The respondents admit that they do now insist, that the said release is a bar to the said original bill; and that they, and each of them, are thereby discharged from all matters of complaint in the said original bill set forth. The respondents do not know and have never been informed, otherwise than as they are by the said supplemental bill, and cannot set forth what consideration, if any, was paid by the said Head to the said Veazie for the said release, but the respondents insist and humbly submit, that no consideration was necessary to the complete and perfect validity of the said release. And as to the intentions of the said parties, and their understanding that the said release would or would not have the legal effect of discharging these respondents from the pretended claims of the said Veazie, set forth in the said original bill, the respondents, answering, say that these respondents, and to the best of their knowledge and belief, the said Head also, have acted in good faith, as far as concerns the said release; that they nor either of them have or has practiced any fraud or imposition to procure the same, or to cause any terms or language to be used therein, which

the said Veazie did not intend to use; that no such fraud, or imposition, or want of good faith is charged or averred in the said supplemental bill; that the respondents are informed and believe, that the said release was signed by the said Veazie, and its language and terms agreed to by him, in the presence and under the advice of his counsel learned in the law, and were and are such as were selected by the person employed by both the said Veazie and Head to draw the said release, and the same were assented to by the said Veazie under no mistake of any fact whatsoever. And, therefore, the respondents do insist and submit to this honorable court, that it is not competent for the said Veazie to offer any proof whatever to control, or alter, or effect the legal import and effect of the said release, and they pray, that they may have the same benefit of this objection as if the same had been taken by way of a plea or demurrer to the said supplemental bill. And as to the intent of the said Veazie and Head, and as to the agreement between them, or the inducements which led thereto, or the objects designed to be effected by the said release, these respondents, not waiving their objection aforesaid, but insisting thereon, answering, say, that they have no knowledge thereof, but they have been informed by the said Head, and believe it to be true, that before the said release was given, the duly authorized attorney of the said Veazie had promised, that the said Veazie would give to the said Head a writing, holding him the said Head harmless from all claims and demands growing out of, or connected with the auction sale in the said original bill mentioned, and that the said release was subsequently given pursuant to and in execution of the said promise. But the respondents do not believe and do therefore deny, that the said Head had any understanding or expectation, that after a writing of indemnity so promised as aforesaid should be executed, he the said Head should still be liable to any action or claim for damages by the respondents, or that the said Head understood or expected, that any such construction or effect could or would be given to the said release, as would prevent the same from holding him harmless from the claims of these respondents, and as to the understanding or exceptions of the said Veazie, the respondents are not informed, except by the said supplemental bill, and cannot set forth the same. And as to so much of the said supplemental bill, as prays that the said release may be reformed or construed otherwise than according to its legal effect, the respondents insist and submit that the said supplemental bill does not show any right to have any particular change, or any change, made in the said release, and they may have the same benefit of this objection as if the same had been taken by way of plea or demurrer to the said supplemental bill.

The cause came on to be heard on the merits, and upon the evidence taken in support of the bill and answer.

Rogers & Webster, for plaintiff.

B. R. Curtis, for defendants.

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

STORY, Circuit Justice. This is a suit in equity, brought under circumstances somewhat peculiar and extraordinary. In January, 1836, Head, the auctioneer, sold the mill privileges in controversy, at public auction, on account of the defendants, who were the owners thereof, for the sum of $40,000, and the purchaser at the sale was the plaintiff, Mr. Veazie, through an agent (a Mr. Foster), who bid for him at the sale. According to the condition of the sale, $4,000 were paid down at the time, and 20 per cent. soon after, when the deed of conveyance was executed to Veazie, and the remaining purchase money was secured by two notes of $14,000 each, one payable in one year, and the other in two years from the date. The first note only was paid; but the last note is unpaid, but Veazie paid interest thereon up to January, 1840. Now the object of the bill is to set aside the original sale, and to have other relief consequent thereon, upon the ground of a fraud, alleged to have been perpetrated at the sale, not by the defendants, or by their authority or connivance, but by Head, the auctioneer, in making false bids at the sale, apparently for other bidders, against the plaintiff's agent, when, in point of fact, no real bid was made by any other bidder, after the bids had reached $20,000; and that, by these means, the property was bid off to the plaintiff at a sum far exceeding its real value, and indeed more than double its real value. The bill alleges, that the fraud was not discovered by the plaintiff until since January, 1840; and the bill was filed in July, 1841. The defendants, by their answers, deny all intention and knowledge of any fraud, and deny that they ever authorized any such biddings or underbiddings by the auctioneer. And their answers are completely established, on this point, by the entire evidence in the case; and, indeed, no fraud is imputed to the defendants personally, but solely to Head as their agent. It is material, also, to state, that Head was authorized by one Ira Wadleigh to bid for him at the sale, to the amount of $20,000, and farther, if Wadleigh should by a certain signal, certify to him so to do. In truth, Wadleigh and the plaintiff seem to have been the only real bidders at the sale, after the price had advanced beyond a moderate sum. At that time, Wadleigh and Veazie were engaged in a lawsuit with each other, respecting some other mill privileges, upon which the present might seem to have some bearing; and there was obviously a serious rivalry between them, each being desirous to become the purchaser at the sale. At one time during the sale, Wadleigh stepped up to the auctioneer, and used very expressive language to him, not to bid higher on his account, if he (the auc-

tioneer) was bidding for him. Of this fact there can be no doubt; but at what stage of the biddings this was done, whether at the time when the biddings had reached but $20,000, or when they had reached about $39,000, is a matter of controversy, and is, upon the evidence, involved in no inconsiderable doubt. The weight of the evidence, in our judgment, preponderates in favor of its being when the biddings were about $20,000, or at most not much greater. It is, however, perfectly clear, that the bidding beyond $39,000, was made by the auctioneer solely upon his own account, and was not authorized by Wadleigh.

In respect to the question, which lies at the bottom of the present suit, whether a purchaser, who purchases at a public auction, where underbidders are secretly employed to bid for the seller, by whose bids he is induced to bid higher, is bound by his purchase, the authorities are not in entire harmony. Lord Mansfield, in Bexwell v. Christie, Cowp. 395, carried the doctrine to a large extent, and held every such bidding a fraud upon the purchaser, and that the sale might be avoided therefor. Lord Kenyon in Howard v. Castle, 6 Term R. 642, affirmed the doctrine of Lord Mansfield, and asserted his reasoning to be founded "on the noblest principles of morality and justice, principles that are calculated to preserve honesty between man and man." On the other hand, Lord Loughborough, in Conolly v. Parsons, 3 Ves. 625, note, held the opposite doctrine; at least, as applicable to cases where there was no absolute, intentional fraud. He said: "I feel vast difficulty to compass the reasoning, that a person does not follow his own judgment, because other persons bid; that the judgment of one person is deluded and influenced by the bidding of others. It may weigh, if A. a skilful man, B. a cautious man, and C. a wealthy man, are in competition. But where it is publicly known, that persons are so employed to bid, it would be very foolish in any one to let himself be so influenced." He afterwards added: "It is not doubted at any sale, except where there is an express stipulation to sell without reserve, that there is somebody for the seller. The buyer goes to the sale with this knowledge, that he shall not get the article under a price the seller thinks to be a reasonable price." Lord Alvanley, in Bramley v. Alt, 3 Ves. 620, seems to have acted upon the same doctrine, where, although bidders are employed by the seller, yet there is a real bidder immediately before the purchaser. It appears to me, that there is room for some distinctions upon this subject, which, if they do not fully reconcile the cases, are, at all events, well adapted to subserve the purposes of private justice and convenience, as well as public policy. Where all the bidders at the sale, except the purchaser, are secretly employed by the seller, and yet are apparently real bidders, and the purchaser is misled thereby, and is induced to give a larger price in consequence of their supposed honesty and exercise of judgment, there the sale ought to be held a fraud upon the purchaser, because he has been intentionally deluded by them. But where there are real bidders, as well as secret bidders for the sellers, there, if the last bid before the purchaser's bid be a real bid, and no intentional deceit has been practised by what have been sometimes called decoy ducks, to mislead or surprise the judgment or discretion either of other real bidders or of the purchaser, there seems to be a solid ground to hold that the sale is valid, and for the very reasons stated by Lord Loughborough and Lord Alvanley. It seems to me, that Sir William Grant, in Smith v. Clarke, 12 Ves. 477, 482, has pointed out the true line of distinction in his comments upon the cases; and although he did not then express any positive opinion, it is sufficiently evident what his opinion was—an opinion entitled to very great weight, for he was among the ablest judges that ever graced the courts of equity of England. He there said: "After the case of Bramley v. Alt, and what Lord Rosslyn stated to be his strong and clear opinion in Conolly v. Parsons, it would be too much for me to say, this is in itself a fraud; unless I could say, every direction by a vendor to any person to bid in his behalf, is of itself such a fraud as to vitiate every agreement that takes place at an auction, at which that direction is given. In Bexwell v. Christie, very general and broad principles are laid down by the court of king's bench; beyond any, that the case immediately before the court required. The subsequent case, Howard v. Castle, proceeded upon the ground of plain and direct fraud; Lord Kenyon stating, that it appeared at the trial to be bottomed in fraud; that it was fraud from beginning to end. There was no real bidder; and there were several bidders for the vendors. Whenever I shall be able to state the same proposition of any case, I shall come to the same conclusion. But it is clear, Lord Kenyon had not always entertained the same opinion as to the doctrine in Bexwell v. Christie; for in Twining v. Morrice [2 Brown, Ch. 326] he states, with respect to bidders being employed for the vendors, that he does not say the doctrine in Bexwell v. Christie is wrong; but every body knows that such persons are constantly employed. In Bramley v. Alt, Lord Alvanley expresses his opinion, that it is perfectly legal for a man to state a price, below which he would not permit a sale; and his lordship observes that there is no difference between setting up the lot at a given price, and employing a person to prevent a sale under that price; if that is communicated. I do not mean to state a proposition so general, as that there can be no fraud through the medium of persons employed by the vendors. Lord Rosslyn appears, in Conolly v. Parsons, to doubt, whether there can be that species of fraud: whether, in any case, the purchaser

can be said to be defrauded merely by being drawn in through eagerness of zeal and competition with others. I do not go that length; for if the person is employed, not for the defensive precaution, with a view to prevent a sale at an under-value, but to take advantage of the eagerness of bidders to screw up the price, I am not ready to say, that it is such a transaction as can be justified in a court of equity. Neither do I say, that, if several bidders are employed by the vendor, that in such a case a court of equity would compel the purchaser to carry the agreement into execution; for that must be done merely to enhance the price. It is not necessary for the defensive purpose of protection against a sale at an under-value. I leave those cases to be determined upon those grounds, whenever they may occur. It is sufficient to say, this is not a case of that description. These plaintiffs had not a fraud in contemplation; and were not in a situation that made it peculiarly incumbent upon them to take care not to permit a sale at an under-value." Mr. Chancellor Kent, in his learned Commentaries (volume 2, 5th ed., pp. 538, 539), seems to me to have arrived at the true and just and satisfactory result. "It would seem" (says he) "to be the conclusion, from the latter cases, that the employment of a bidder by the owner would or would not be a fraud, according to circumstances tending to show innocence of intention, or a fraudulent design. If he was employed bona fide to prevent a sacrifice of the property under a given price, it would be a lawful transaction, and would not vitiate the sale. But if a number of bidders were employed by the owner, to enhance the price by a pretended competition, and the bidding by them was not real and sincere, but a mere artifice in combination with the owner, to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale. So it will be a void sale, if the purchaser prevails on the persons attending the sale to desist from bidding, by reason of suggestions by way of appeal to the sympathies of the company." See, also, Sugd. Vend. (10th Ed.) pp. 27–36, c. 1, § 2. But, be the general doctrine upon this subject, as it may, no case has fallen under my notice, in which it has been held, that the act of the auctioneer in receiving or making false bids, unknown and unauthorized by the seller, would avoid the sale. And upon principle, it is very difficult to see, why it should avoid the sale, since there is no fraud, connivance or aid given by the seller to the false bids. If the purchaser is misled by the false bids of the auctioneer to suppose them to be real, he may have an action against the auctioneer for the injury sustained thereby. But what has the innocent man to do with such a transaction—which he has, in no sense, sanctioned?

It is suggested, in the present case, that the defendants were actually informed, after the sale, that the auctioneer himself had bid one bid after the bid of $39,000, and that it was the duty of the defendants thereupon to have given notice of the fact to the plaintiff. But how is this made out? The auctioneer avowedly bid for himself, and upon his own account, and at his own risk; and the defendants were never informed that the auctioneer had been acting fraudulently at the sale, or was endeavoring to cheat the plaintiff—or that, in point of fact, the plaintiff was cheated. Nor were the defendants ever informed that the auctioneer was not fairly bidding for other bidders up to $39,000; or that any but the last bid of $500 was on his own account. It is true, that the auctioneer had no right to bid for himself at a sale made for the benefit of his principal; and if the purchase had been struck off for himself, by his being the last bid, he could not have enforced the contract against his principal; for no agent to sell, can, strictly speaking, be either a principal or an agent to buy. But then the sale is voidable only at the election of the principal, and is not utterly void. On the contrary, the principal may, if he chooses, upon notice of the fact, hold the auctioneer to his bid, as purchaser at the sale; and the auctioneer, when he purchases, purchases at his own risk and peril. But third persons have nothing to do with the matter. They can neither repudiate, nor question, nor confirm the sale. As to them, it is res inter alios acta. So that the bid by the auctioneer in this case being on his own account, and not by the authority of the defendants, it can in no measure affect them or their rights. On the other hand, there is no reason to suppose, that the plaintiff was thereby deluded into giving a price, which he deemed unreasonable. On the contrary, upon cooler examination after the excitement of the auction was over, he expressed himself well satisfied with the bargain; he was eager to complete the contract; and took extraordinary steps to intercept any attempts to defeat it. When the deed was some weeks afterwards given, he expressed no dissatisfaction, and a year afterwards he paid one of the notes without objection. So that it may be fairly said, that if he over estimated the value of the property at the time of the sale—it was not in consequence of any fraud or surprise upon his own judgment, but in consequence of his own excited feelings and sanguine schemes of future profit or collateral advantages. But, I repeat it, if he was deceived at the auction, it was the fault of the auctioneer, acting, not under the authority of the defendants, but acting for himself and at his own peril. Besides, the fact cannot be overlooked, that Head (the auctioneer) was the agent of Wadleigh and employed to bid for him. At what precise time he ceased so to bid for him, does not very distinctly appear; and so long as he continued to bid for Wadleigh, he bid for a real bidder. Now, as has been already suggested, there is some obscurity or discrepancy in the

evidence on this point; and, after such a lapse, this very circumstance ought to have some weight in a court of equity, called upon to exert itself actively in rescinding the contract of a sale. It has been very correctly stated, that, striking Head's testimony out of the case, as a witness for the plaintiff, and it would be extremely difficult to maintain the plaintiff's case. And yet Head's testimony comes to the court under circumstances of strong suspicion and doubt. He comes to proclaim his own gross fraud and abandonment of his duty in conducting the sale at auction. He comes also as a witness, released by the defendant to give him competency as a witness in the case; and he comes after several years have elapsed since the sale was made and his own agency ended.

In respect to the release given by the plaintiff to Head, in order to make him a competent witness, the case is not without its embarrassments. It appears to me, that Head, as the alleged principal perpetrator of the fraud, ought to have been made a party to the bill; he is, if not an indispensable party, at least a proper party; for, under some aspects of the case, he might have been held the party primarily liable to the plaintiff to indemnify him on account of the alleged fraud on his part; and at all events, he would have been liable even to the defendants if the sale were rescinded on account of his frauds. So that he ought to have been made a party in order to have given the defendants, the benefit of his being a party and privy to the very decree, and bound thereby. Whereas, as the case now stands, the decree, if made to rescind the sale, would not bind Head, either as a party or a privy; but he would be at full liberty to contest the whole matter anew. Now, it seems to me, that a court of equity ought not to tolerate such a mode of proceeding,—and at all events, it ought not to give its aid, under such circumstances, against an innocent principal, and thereby screen the fraudulent agent from responsibility to the party injured by the fraud. In cases of this sort, the ordinary habit of courts of equity is to require the guilty agent to be made a party. See Story, Eq. Pl. §§ 231, 232. And a fortiori such ought to be the rule where the agent is himself the party ultimately liable over for his own misconduct.

Then, again, as to the effect of the release itself. It purports, on its face, to release and discharge Head from all damages sustained by Veazie, or supposed to be sustained, and from all action or causes of action to Veazie accrued or accruing in consequence of any misfeasance, nonfeasance, or malfeasance, or any illegal management by Head, done, performed or suffered at the sale at auction of Nathaniel L. Williams and Stephen Williams's (the defendants) real estate situated in said town, &c., which was sold at auction on or near January 1, 1835, by Head, as auctioneer, thereby also releasing Head from any claim for damage by or in consequence of any of his proceedings relating to the said sale of the said property. Such is the exact substance of the release, omitting the name of Pillsbury, who was merely a formal party named therein. Now, it is said, that this is a mere personal release of Head, and in no manner discharges the defendants or was intended to discharge them from their liability for Head's misconduct. But, assuming such to have been the intention of the parties, one question is, whether, by law, it is capable of being carried into effect. No one can reasonably doubt, that the release speaks the real intentions of the parties, so far as it was to operate as a release of all claims against Head on the part of Veazie. The release was purely voluntary, and intended to make Head a competent witness for Veazie in this very cause—and, by freeing him from all liability to Veazie, to give to his testimony the full weight of a disinterested witness. But, how could this be, if, although not directly liable to Veazie, he would still be circuitously liable for all the damages occasioned by his misconduct to the defendants, if Veazie should succeed in the present suit against the defendants? To effectuate, therefore, the intentions of the parties, it would seem indispensable, that Veazie should not be able to make Head circuitously liable, through the defendants, for the very damages from which he directly released Head. But, waiving this consideration, what is the view, which, in point of law, belongs to transactions of this nature? I take it to be perfectly clear, in point of law, that a release of the party primarily liable is a release of all others, who are only secondarily liable. A release of the principal obligor will discharge the sureties, notwithstanding the agreement between the principal and the obligor is that the sureties shall not be discharged. So a release of the maker of a note by the holder will discharge all the indorsers thereon by mere operation of law, as the maker is the primary debtor. See Story, Prom. Notes, §§ 432, 424. So the release of the principal in a trespass will discharge all other persons by whose command it has been committed. And in all these cases it becomes wholly immaterial whether the parties intended such a collateral effect or not. But in a court of equity every consideration of this sort acquires a far more conclusive authority; for a court of equity will not enforce any claim against a party only secondarily liable, in favor of a plaintiff who has chosen to discharge the party primarily liable. That would be to aid a plaintiff in voluntarily discharging the principal in guilt, and then seeking redress against the innocent party, who has been the mere victim of that guilt. A court of equity will never suffer itself to be the minister of injustice. If the plaintiff has discharged the principal in a fraud, it will not enforce the supposed rights of the plaintiff against any person, who is only secondarily liable on account of that fraud. To this effect the case of Thompson v. Harrison, 2 Brown, Ch. 164, is directly in point, if, indeed, so obvious a principle in equity requires any authority to support it.

There is another view of this matter, which,

in a court of equity, ought not to be passed over. It is this, that the gravamen of the charge in the present bill, is not that the defendants have perpetrated a fraud personally on the plaintiff; but that Head has perpetrated it, and thereby injured him. If the plaintiff chooses to waive all his rights against Head, does he not thereby, by necessary implication, waive all the consequences of that wrong against all others, who might be consequentially liable to him therefor? Can he release the substance and yet retain the incidents? Surely a court of equity cannot be called upon to redress a grievance which has been already atoned for or discharged as to the primary actor in it, by giving relief against parties collaterally liable only. Suppose Veazie had recovered a judgment and satisfaction for this very fraud against Head, would the present suit be maintainable, upon satisfaction of that judgment, against the defendants? If not, what difference is there between a release and such a judgment and satisfaction?

But passing by these and other difficulties arising in the cause, let us come to the consideration of that which in my judgment constitutes a sufficient and conclusive bar to the present suit. It is the lapse of time and change of circumstances since the original sale, which is now sought to be rescinded, was made. The sale was made in January, 1836; the suit was brought in July, 1841, five years and a half after the sale. In the mean time, the property has undergone a great change in its value, not only in the estimate then formed of it by the parties (Veazie and Wadleigh) more immediately interested in purchasing it, but also of the public at large; so that it has been stated at the bar, that it would not now bring more than one quarter part of the sum for which it was sold at the auction. Now, during the whole intermediate period, Veazie has been in possession of it, and living near it, and has had the fullest opportunity of ascertaining its real value, and of ascertaining who, besides himself, were real bidders at the sale. He could not have been ignorant, that Wadleigh was a bidder, and he had the means within his reach of ascertaining how high his bid was, and who, of any persons known to be present, were other bidders. Nay, it does not appear, that he might not have obtained from Head himself, upon diligent inquiries, whether there were any other bidders, and, if there were, their names. Why, if the purchase was so much beyond the real value of the property, did he originally complete the bargain and take the conveyance? Why, when the transaction was recent, did he not scrutinize the whole proceedings? Why did he lie by for years without complaint or observation, if there was a gross over-valuation produced by fraud, and the property was bid off for a sum which was more than double its real value at that time? This fact ought to have put him on inquiry; and the persons present at the auction were not so numerous, but that he could then have had ample means to ascertain from them whether there were any real bids or not, beyond those of himself and Wadleigh. If he could find no other bidders upon such inquiry, the conclusion would be irresistible, that the pretended biddings were false and fraudulent. The difference between $20,000 and $40,000, in value, if the former was at that time the utmost value of the property, was a circumstance, which ought to have awakened serious, prompt, and energetic inquiry. The truth, however, seems to be, that Veazie was for a long time well satisfied with his purchase, and until the property had ceased to maintain a high marketable value; he did not, at an earlier period, deem the purchase a bad bargain, far less a fraudulent and deceptive sale. The disclosures of Head seem first to have led him to suppose an imposition to have been practised upon him, at the distance of five years after the sale. And how could his judgment or sagacity have been misled by any such imposition, if, during the intermediate time, or any considerable portion thereof, upon his own calm reflection, he had remained satisfied with the purchase? It is not for him now to say that he was misled by the auctioneer, if, in point of fact, after the hurry and excitement of the auction were over, he himself approved the purchase as one by which he was willing to abide. Besides, he now asks the defendants, who were innocent of the fraud, and who by his long silence must have been misled into a false confidence and security as to the validity of the sale, and his satisfaction therewith, now to take back the property, after a great change of circumstances, and when it must be a great sacrifice of their interest. If, while the facts were recent, Veazie had refused to complete the sale, or if, soon afterwards, he had insisted upon rescinding it, it would have been open to the defendants by suitable inquiries to have ascertained the real state of all the facts, and to have acted accordingly. But the lapse of time has not only altered the value of the property, but it has also obscured the evidence of the real nature of the transactions at the sale. What I proceed upon, therefore, is this: That after this lapse of time the court cannot put the parties in their original positions; that the defendants had no participation in the asserted fraud of Head; that Veazie sanctioned the sale by his long acquiescence as not beyond the fair value of the property; that he had as full means to know the real value of the property within a few months, or a year after the sale, as he has ever since had; that a great change of circumstances has since taken place; that Veazie was bound at an early period to elect, whether to stand by his purchase or not; and that he is not now at liberty to shift his own loss upon the defendants, or to make them responsible for the misdeeds of Head, to which they were not parties, and whom the plaintiff has been content to release from all responsibility. A court of equity should never be active in granting relief, where the circumstances are of such a na-

ture, as that it may thereby become the instrument of as much injustice as it seeks to redress.

Upon the whole my judgment is, that the bill ought to be dismissed with costs for the defendants. But the district judge is of a different opinion, and therefore, according to the common course in such cases, the bill is to be dismissed without costs to either party.

WARE, District Judge. I exceedingly regret that I cannot concur in the judgment of the circuit judge in this case. I am not insensible that it is in me assuming no inconsiderable responsibility to dissent from his opinion, after it has been deliberately made up; and I should have been willing to avoid it, if I could do so consistently with my ideas of official obligation. But having heard the case argued, and after the best consideration, that I have been able to give the subject, having come to a conclusion somewhat at variance with his, it seems due both to the parties and myself to express it. And this is intended to be done with all that deference, which is so justly due to the eminent learning and long experience of the presiding judge, and with as much brevity as is consistent with clearly expressing my views of the case. I shall also confine myself to a few points, on which the case appears to me essentially to turn. Without dwelling on the facts in proof, any farther than is necessary to make my views intelligible, I will proceed to state the grounds of my opinion.

In the first place, then, I consider the bids of Head the auctioneer, except so far as he was authorized by Wadleigh to bid for him, to be merely sham bidding, or as bidding for the owner, and that this authority was limited to about $20,000; it may be a little rising. The preponderance of the evidence I think clearly limits it to about that sum. Beyond that, there was no bidding, except by the plaintiff and Head. If, however, his authority was not limited there, but extended considerably farther, it is certain that he did continue to bid, after his authority to bid for Wadleigh was withdrawn. Taking this to be a fact, it appears to me, that the private bidding of the auctioneer for the owner was a fraud on the purchaser. When goods are offered for sale by auction, the plain and only meaning of the offer is, that they shall go to the highest bidder. There is an implied guarantee to every man who bids, that he shall have the property, if no one bids more. If the owner apprehends that his goods may be sacrificed at a price below their value, he may guard against that risk by putting them up at a minimum price; or he may direct the auctioneer not to receive a bid below a certain sum; or he may give notice that he reserves the right to make one or more bids himself. But if nothing of this kind is done, the only intelligible interpretation that can be given to the act, and it is language held out to all the world, is that he, who will give most, shall have the property. If the owner has his agent standing by and bidding for him, the real bidders are deceived, aliud simulatum, aliud actum. The purchaser is circumvented, and the price is enhanced by artifice. The bid which stands against him, he supposes to be a real offer by a competitor for the purchase; and whether it is so or not is the precise fact which he has a right to know. He raises the bid, and then finds that it was not an offer by any one intending to purchase, but that it was a mere pretence, a bid by the owner; that is, that it was no bid at all, but, when announced by the auctioneer, was a simple falsehood put into his mouth by the owner of the property or his agent, and this in a matter in which the owner of the property was bound to speak the truth, and act in good faith. This appears to me to be clearly a breach of that good faith, which ought to prevail in such transactions, and therefore a fraud.

It may not be easy to say universally what fraud is, because it is perpetually changing its forms and modes of action. It is, therefore, difficult if not impossible to confine it within the limits of any precise definition. If you attempt to embrace all its varieties of form and color in any one formula, it will immediately spring up under a new aspect and escape your definition. "Quo, teneam te, Proteu, nodo." And therefore when the prætor announced in his edict that he would relieve against fraud, he wisely forbore to say what fraud was, but simply said, "Quæ dolo malo facta esse dicentur" (Dig. 4, 3, 1). and that when the ordinary forms of law gave no specific remedy, he would interpose with his extraordinary jurisdiction. And though relief against fraud is one of the great branches of equity jurisdiction, these courts have prudently followed the example of the Roman prætor, and declined the hopeless attempt to restrain the changing Proteus within the limits of a definition, but have reserved to themselves the liberty to deal with him under whatever new form he may be brought before them. 1 Story, Eq. Jur. § 186. But the practice of owners, retaining a private agent to bid on their own goods at auction, will, it seems to me, come under any definition of fraud that has ever been attempted. For it is defined to be, "Quum aliud simulatum, et aliud agitur." We plainly have it here, for here is a pretence of a bid when there is no bid. If we take the more comprehensive definition, and describe rather than define it as, "Omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendam alterum adhibitam," it certainly comes within the meaning of every one of these words. There is the craft, the fallaciousness, and the artifice, to circumvent, to delude, and deceive. Upon principle, then, it appears to me, that if the false bidding had become known to the plaintiff immediately after the sale, he might have repudiated the contract It was immediately made known to the defendants, who studiously withheld the knowledge of it from the plaintiff. They adopted the act of their agent, and sought

then, as they do now, to avail themselves of its fruits. In such a case the maxim, "Omnis rati-habitio retrotrahitur," applies with equal force in law and in morals. The act, without ceasing to be that of the mandatary, becomes that of the principal.

The view, which I have taken of the nature and obligations of the contract entered into in a sale by auction, it appears to me, may be strengthened by an analogy of some force derived from the Roman law. The contract, of frequent occurrence under that law, "De in diem addictione," bears, in some respects, a close resemblance to our sales by auction. This was a contract by which the vendor bound himself to a sale of the thing for a stipulated price, unless within a time named in the agreement he had a better offer. Dig. 18, 2, 1. In the exposition of the nature and obligations of this contract a distinction was made by the Roman jurisconsults, which may be supposed to partake somewhat of subtlety. It arose out of the terms used in the contract. If the terms were that a better offer being made the contract may be abandoned, "discedatur," the sale was declared to be pure, subject to be dissolved on the happening of the resolutory condition, and the right of property, if the condition did not occur, with all the consequences attached to this right, was considered as transferred from the time when the contract was made. But if the terms of the contract were that the sale should be accomplished, or perfected, unless a better offer was made, "perficiatur nisi," the sale was conditional, and the right of property did not pass, until the happening of the negative condition, that is, until it appeared that no better offer was made. The distinction, though, at first, it may appear refined, and to partake of subtlety, has a just foundation in the nature of the contract. It is that between what the civilians call a resolutory and a suspensive condition, and it will be perceived that important consequences, as affecting the interests of the parties, were attached to it. Dig. 18, 2, 2; Id. 18, 2, 4, § 3; Voet ad Pand. lib. 18, tit. 2, § 1; Huber. Pract. Dig. lib. 18, tit. 2, §§ 1, 2.

This contract, in its second form, bears a very close analogy to that entered into in our sales by auction. The purchaser had a right to the thing, on the payment of the price, if a better offer was not made within the time fixed by the contract. The same right, I think, a bidder at auction has, after the auctioneer has accepted his offer as a bid. To give room for the resolution of the contract, there must be found another purchaser, who makes a better offer, and this must not be a supposititious purchaser. The words of the jurisconsult are so emphatic, and coincide so exactly with the view that I have taken of this matter, that I quote them at large: "Si falsus emptor subjectus sit, eleganter scribit Sabinus, priori rem esse emptam, quia non videatur melior conditio allata esse, non existente vero emptore." Pract. Dig. lib. 18, tit. 2, §§ 6, 7. That is, if a supposititious purchaser is brought forward according to the accurate[3] doctrine of Sabinus, the thing shall go to the first purchaser, because a better offer does not appear to have been made, there being no real purchaser. Pothier adds still further, that the second purchaser must not be a person notoriously insolvent, for if he is, he will be presumed to be supposititious. Pothier, De Vente. § 447. Now this is the precise case of a puffer at auction, the falsus emptor, the acheteur suppose, is the private bidder employed by the owner of the goods. The decision of the Roman law appears to me to apply with great exactness to modern auction sales, particularly as they are conducted in this country. And such also is the opinion of Huber, though from the peculiarities in Dutch auction sales it applies with an exactness to them. Pract. Dig. lib. 18, tit. 2, §§ 6, 7.

In referring to the Roman law as a code of written reason, I do not rely on the opinion of Cicero as applicable to this subject (De Officius, lib. 3, c. 15), though Mr. Sugden, in his Law of Vendors (chapter 1, lect. 2), seems to consider it as a civil law authority, because his book of offices was intended as a manual of pure and high moral duties, and not as a treatise on jurisprudence. He discusses and explains moral obligations and distinctions, as they may be apprehended and practised by a wise and good man, and not in the manner of a jurist, as far only as they are tangible by the law. Lib. 3, c. 17. The authorities to which I have referred, are those, which prevailed in the forum, and governed the daily transactions of common life.

But this question of puffing at auction, does not, it is conceded, as a question of practical jurisprudence, now stand on principle alone. It is affected by previous decisions of the courts, and it is readily admitted that these decisions do not all speak the same language. In the case of Bexwell v. Christie, Cowp. 395, Lord Mansfield declared, in terms as strong as I have used, that it was a fraud; it was a fraud on the sale and the public. He put his opinion on this plain ground, that the basis of all dealings ought to be good faith, that this principle applied with peculiar stringency to public auctions, and that the owner's employing another person privately to bid for him was a breach of good faith, and therefore a fraud on the purchaser. I am aware that the opinion of Lord Mansfield has been criticised as being expressed in a little too strong terms, when he compared the practice to gaming, stock-jobbing, and swindling. Conolly v. Parsons, 3 Ves. 625, note. But the object of this reference was only to show that fraud did not change its nature and cease to be fraud by being practised by many persons. This opinion was concurred in by all his colleagues on the

[3] The word "elegans" I have translated "accurate," the primary sense of the word, and that in which it appears to be used in the Digest most frequently, and not in its secondary sense, "tasteful," in which we have transferred it into our language.

bench, and was, some years afterwards, fully confirmed by the same court, under Lord Kenyon. Howard v. Castle, 6 Term. R. 642. It has also, as I understand, received the approval of the most grave authorities in this country. 1 Story, Eq. Jur. § 293; 2 Kent, Comm. 539. It must be admitted, however, that the doctrine of Lord Mansfield has, to a certain extent, been qualified by subsequent decisions of the English courts. But these decisions seem to me to have turned in part, at least, on the act of parliament imposing a duty on sales by auction, which has been supposed to control Lord Mansfield's decision. At the same time, it may be added, that some of the most distinguished judges appear to have submitted to these limitations of the doctrine with apparent reluctance. And they seem now in England to be reduced to this, that the owner, without giving notice of his reserving a right to bid, may appoint one, but not more than one private bidder, in order to prevent a sacrifice of the property at an under price, and to counteract unfair practices among purchasers to prevent competition. So far the limitation of Lord Mansfield's doctrine appears to me to be consistent with sound legal principles, with good morals, and fair dealing, and has been received in some cases with approbation in this country. Steele v. Ellmaker, 11 Serg. & R. 86. For, in the first place, such a combination among purchasers is itself a fraud on the owner, and in some cases at least, if not in all, will render the sale void. Story, Eq. Jur. § 293. And further, if, on opening the auction, it should appear, that there were no persons present or only one, who wanted the property, and of course no fair competition, in either case, the owner ought to have the power of protecting himself in some way against a sacrifice resulting from a fraud or surprise, and it appears to me, that he may do it either by withdrawing the property offered, which perhaps would be the least objectionable mode, or by employing some person to bid it in without any violation of good faith and fair dealing. But in all cases where a puffer is employed not to prevent a sacrifice, but to inflame the price beyond the real value, it is a fraud which renders the sale void. The English courts seem to me, after some fluctuations, to have settled down to this doctrine. So it is stated by Mr. Sugden in the tenth edition of his learned treatise on the Law of Vendors (chapter 1, § 2), where he has collected and analysed the authorities down to 1839, to which I refer generally, without going over the cases. The principle, when stated in this way, may prevent some difficulties occasionally in the actual administration of the law, because it may sometimes be difficult to say when the private bidding is purely defensive, and when it is practised to take advantage of the eagerness of competitors for the purchase. In a case of doubt, the sale perhaps should be held valid, but there can be no embarrassment in a case palpably gross.

Such appears to me to be the character of this case. The value of the estate, according to the estimate of the owner, was about $15,000; the minimum price privately given to the auctioneer, was $14,500. And that also appears to have been about the estimate of the purchasers, for the bidding went up quickly to a little rising that sum, then flagged a little, but rose on real bids to about $20,000, and here I think the real competition ceased. From this point, Veazie's agent was run up by the solitary bids of Head, the auctioneer, to $40,000, nearly three times what the owner supposed to be the fair value of the property, and unquestionably all of that above the real value. In all this long race from $20,000 to $40,000, Head was either bidding as the agent of Wadleigh or bidding as a puffer; for it cannot be contended, I think, that he was bidding in good faith for himself. It is not even pretended that he wished to become a purchaser. Now Wadleigh expressly denies that he was bidding on his authority, and his testimony is corroborated by all the facts in the case. It is opposed, as far as I recollect, only by the testimony of Williams, which, as hearsay, is not evidence on this point for any other purpose than for discrediting Head. He says that, immediately after the auction, Head told him that he bid for Wadleigh up to $39,000 and then bid on his own responsibility; that is, as I infer, he bid as a puffer. So that, if this testimony is brought into the case, even this proves the fraud. It is certain then, that the price was inflamed by puffing; it is equally certain, that the purpose of the private bidding was not to prevent a sacrifice but to enhance the price. And, if I have correctly inferred the facts from the evidence, the price was carried up by absolute puffing from $18,000 to $20,000, after all real competition ceased. The act of the private bidder, approved and adopted by the defendants, was not defensive but aggressive. It was intended and operated as a fraud, and the case appears to me to be brought clearly within the modern English rule, as it is stated by Mr. Sugden on analogies of all the leading cases down to quite a recent time. I am not aware, although the decisions of our courts may not be in very exact harmony, that a different doctrine has been established in this country.

I have dwelt the longer on this point, because it appears to me to be the great point of the case. If I may be allowed to go back for an old but expressive Saxon word, the whole matter of controversy between these parties wells out of this fountain of bitter waters. If the plaintiff had discovered the fraud immediately after the sale, he might, I suppose, have repudiated the contract. Has any thing since occurred which bars this right? I was satisfied by the argument of the plaintiff's counsel that the release is not a bar to all relief. It appears to me fairly to admit the interpretation put upon it; that is, that it is a release of damages only, and not a release of the right to rescind the contract, nor of any modified relief that does not include damages. And this was undoubtedly the intention of the parties.

Then comes the question of lapse of time,

which the defendants rely upon, as a bar to relief, in their answer. It is certainly true that lapse of time is an element in equity, which often and justly has a material influence in the question of relief. Though the statute of limitation does not in its terms embrace proceedings in equity, these courts often act either in obedience or analogy to the operation of the statute at law. And in such cases, the courts have a plain rule to follow. Time will be held to be a bar to equitable relief, when it would be a bar if the title were legal. But in other cases the courts apply this element not precisely either in obedience or analogy to the statute, on their own inherent doctrine of discouraging, for the peace of society, antiquated demands. They therefore refuse to interfere, when gross laches in the prosecution of a right is imputable to a party, and he has acquiesced in a wrong for an unreasonable length of time. 2 Story, Eq. Jur. § 1520. The sale in this case was on the 1st of January, 1836, the fraud was discovered in January, 1840, and the suit was commenced in July, 1841, five years and a half after the fraud was committed, but one year and a half only after it became known to the plaintiff. Time begins to run against relief in cases of fraud only from the discovery. 2 Story, Eq. Jur. (2d Ed.) § 1520; Fonbl. Eq. bk. 1, c. 4, § 27, note q; Sherwood v. Sutton [Case No. 12,782]. It is certain, then, that the plaintiff is not barred of his remedy, either by the direct or analogical application of the statute of limitation. If lapse of time excludes him from relief, it must be in the second mode in which this principle is applied by the court, that of discouraging antiquated claims. What length of time will constitute a bar on this ground is left, it seems to me, by the authorities in no inconsiderable degree of uncertainty. In some cases it is described as a great length of time, sometimes as a considerable time, and then again as gross laches. Nothing can be more indefinite than these general expressions, nor does the nature of the subject appear to me to admit a more exact definition; for what in one case might be considered gross laches, in another might not be an unreasonable delay. The length of time that will affect a demand with the quality of staleness must depend in a great measure on the peculiar nature and particular circumstances of each particular case. And the principle will apply in various cases with very different degrees of force. The considerations which influence courts of equity in fixing this prescription of stale demands, vary in some measure according to the nature of the cases, sometimes arising out of the impolicy of disturbing titles, which have long been unquestioned, and when the estates may have passed into different hands, in confidence that the title was good; sometimes growing out of a presumption, that the matter may have been settled by the parties and the evidence of this settlement lost; and, at other times, turning on the more general ground, that time in its progress leaves all past transactions involved in more or less obscurity, and that a party by the loss of the instruments of proof, and by the death or forgetfulness of witnesses, may be deprived of the means of defending and vindicating his rights, which he might have effectually used, if he had been called to do it, when the transaction was recent. It is only in this last way, as it appears to me, that lapse of time can be urged as a bar to relief in this suit, and it is in this light that it is relied upon in the defendant's answer. Now what media of proof, either documentary or testimonial, may the defendants have lost, or be supposed to have lost, during the period that elapsed from January, 1840, to July, 1841, for this is the whole time. The prescription does not begin to run until the fraud is discovered by the plaintiff. The defendants surely cannot be heard, in the circumstances of this case, to complain of the four years that elapsed from 1836 to 1840, during the whole of which the fraud was known to them, and by them the knowledge of it studiously withheld from the plaintiff. They might well suppose, if the discovery should be made by him, that he would not rest quietly under it, and would, therefore, naturally be put upon their vigilance to preserve all the evidence necessary for their defence. In fact, lapse of time in this case is far more embarrassing to the plaintiff than to the defendants, because he must make out his claim by satisfactory proof. And if they may complain because he has kept them in the dark as to his intention, for eighteen months, it seems to me that he may, at least, parry the force of this objection, by replying that they had before, for four years, kept him in ignorance of facts most material for him to know, and which by no possibility could be learnt except from them or their agents. I have said that the defendants withheld the knowledge of the fraud from the plaintiff, and it is true undoubtedly, both in the jurisprudence of law and equity, in some cases, that "aliud est celare, aliud tacere"; but when a man is bound in good faith to speak, they are identical in morals as they ought to be in law, and such, in many cases at least, is the wholesome doctrine of equity. If I am right in principle, that the false bidding was a fraud on the purchaser, then, on a rigorous analysis of the matter, the withholding from him the knowledge of it was a continuing fraud, and thus the act celandi and tacendi becomes the same thing.

On the whole after the most careful consideration that I have been able to give to this case, it does not appear to me that the plaintiff has slept on his rights, if he has any, such an unreasonable length of time as ought to bar him of all relief. But as the whole matter of enforcing and rescinding contracts, is not, in equity, one of strict right merely, but is addressed in part, at least, to the prudence and conscience of the court, lapse of time, without being a bar to all relief, may be a reason, connected with intervening events, for giving it in a modified form.

If the views I have taken of the facts and of the law arising out of them be correct, it does not seem to be using too strong language, to say, that the fraud was a gross fraud, and that it was perpetrated under such circumstances as do not entitle it to any special indulgence. It was known before the sale that there was great competition for the property. Among the competitors, two men, reputed to be men of wealth, were particularly desirous of purchasing, not only from the opinion then generally entertained of the value of the property, but from the fact that they had other property in the same waterfall contiguous or near to this, the value of which might be affected by uniting with it the mill seats of the defendants. The fairest field was open for an astute auctioneer or puffer to play upon the hopes and fears and rivalships of the competitors. How successfully this was done, appears as well from the graphic description of the sale by some of the witnesses, as from the final result. This competition carried up the price fairly to about thirty-three per cent. above its supposed value, and full three hundred per cent. above what subsequent events have proved to be its real value. All this is the good fortune of the owner, to which he is fairly entitled. And with this, in my opinion, he ought to be contented.

The conclusion to which I have come, on the whole, is, that a decree allowing the sale to stand, and cutting down the price to about and perhaps a little over $20,000, will do substantial justice between the parties. It leaves to the defendants, all the advantages of a sale, under the most favorable circumstances which they can justly claim, and takes from the plaintiff only what others were willing to give.

Other points were made in the learned and able arguments of the counsel; but if I am right in the views I have taken of what I consider the main points in the case, they do not affect the conclusion to which I have arrived; and, as the opinion is already extended to a much greater length than I originally intended, I pass them by.

[Upon an appeal to the supreme court, the judgment of this court was reversed. 8 How. (49 U. S.) 134.]

VECHIO (CALHOUN v.). See Case No. 2,310.

Case No. 16,908.

VEIL et al. v. MITCHEL.

[4 Wash. C. C. 105.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1821.

PRINCIPAL AND AGENT—CONVERSION BY AGENT—RIGHT TO PROCEEDS.

When the principal can trace his property into the hands of an agent or factor, whether it be the identical article which first came to his hands, or other property purchased for the principal, by the factor, with the proceeds; he may follow it, either into the hands of the factor, or of his legal representatives, or his assignees if he should become insolvent; unless such representatives or assignees should pay away the same before notice of the claim of the principal.

[Cited in Terry v. Bamberger, Case No. 13,837; German Sav. Inst. v. Adae, 8 Fed. 109.]

[Approved in Fahnestock v. Bailey, 3 Metc. (Ky.) 50. Cited in Whitley v. Foy, 6 Jones, Eq. 34; Roca v. Byrne, 145 N. Y. 182, 39 N. E. 813; Van Alen v. American Nat. Bank, 52 N. Y. 9; Lee v. Hennick (Ohio Sup.) 39 N. E. 474; Shaw v. Bauman, 34 Ohio St. 31; Overseers of Poor v. Bank of Virginia, 2 Grat. 548.]

The special verdict stated, that in the lifetime of Abner Mitchel, the intestate, the plaintiffs sent to him, for sale, two bills of exchange on France, with instructions to remit them the proceeds. The intestate sold the bills, and remitted to the plaintiffs the proceeds of one of them, except $60, which he had in bank notes of the South Carolina banks. For the other bill he took the check of the purchaser, payable some days after the sale. Before the check came to maturity, Mitchel died, leaving in his possession the check, and the South Carolina notes amounting to $60; all of which came to the hands of the defendants, who received payment of the check when the same became due. On another account, the plaintiffs were indebted to the intestate, in a balance of $344 82 cents. The intestate died insolvent, and the question reserved for the opinion of the court is, whether the plaintiffs are entitled to recover the amount of the check, and the notes for $60, after deducting what is due to the intestate.

Mr. Chauncey, for plaintiff. A factor can acquire no property in the goods of his principal, or the goods purchased with the proceeds for the principal, so long as they remain unchanged, and can be traced. Hourquibee v. Girard [Case Nos. 6,732, 6,733], and Mac Millan v. Ewing, decided in this court [unreported]. See 1 Salk. 160; 2 Vern. 638; 2 Atk. 232; 5 Term R. 215, 494; 1 East, 544; Giles v. Perkins, 9 East, 12; Willis, 400; 3 P. Wms. 186, note.

C. J. Ingersoll, for defendant, admitted the law to be as stated. But he denied that the verdict traced the property into the hands of the defendant; neither does it state that the proceeds of the check, and the $60, remain in the hands of the defendants distinct from their money; or that it was not mingled, before notice of the plaintiff's claim to it. He cited 5 Bin. 398; 2 Madd. 494, 510; 12 Ves. 119.

The court, after hearing the defendant's counsel, stopped the reply.

WASHINGTON, Circuit Justice. The cases upon this subject are uniform, in laying down the rule, that where the principal can trace his property into the hands of his agent or factor, whether it be the identical article which first came to the hands of the factor, or other prop-

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

erty purchased for the principal by the factor with the proceeds; he may follow it, either into the hands of the factor, or of his legal representatives, or of his assigns if he should become insolvent or a bankrupt. The factor is a trustee for the principal, so long as he retains the property, or its representative in his hands; and his assignees, or legal representatives take it, subject to the same trust, which they cannot defeat by turning it into money; unless indeed, they should pay it away in their representative character, before notice of the claim. It is in this point of view only, that notice is necessary. Judgment for plaintiffs.

Case No. 16,909.

VEITCH et al. v. BASYE et al.

[2 Cranch, C. C. 6.] [1]

Circuit Court, District of Columbia. July Term, 1810.

PROMISSORY NOTES—INDORSEMENT AND TRANSFER—BURDEN OF PROOF.

The indorsement by the plaintiffs, and delivery of the note to a third person so indorsed, is prima facie evidence that it was transferred for value received, and throws the burden of proof on the plaintiffs to show that it has been retransferred, or was indorsed for collection, or that they had repaid the money.

Debt by payee against the maker of a promissory note. Veitch & Company had indorsed it specially to Robert Cooper & Company, which indorsement is erased, leaving the name of Veitch & Company. There was no evidence that the note had ever been in the possession of Cooper & Company, nor that Veitch & Company had paid Cooper & Company the amount, nor that it had been retransferred. Gorgerat v. McCarty, 2 Dall. [2 U. S.] 144.

Mr. Swann, for plaintiffs, offered evidence that it was indorsed to Cooper & Company for collection, and not for value received.

THE COURT (THRUSTON, Circuit Judge, absent) instructed the jury that if they should be satisfied, by the evidence, that the note with the indorsement was delivered to Cooper & Company, the indorsement was prima facie evidence that it was transferred to Cooper & Company for value received, and throw the burden of proof upon the plaintiffs, to show that it was either put into the hands of Cooper & Company for collection, or was retransferred, or that Veitch & Company had repaid to Cooper & Company the value received.

Case No. 16,910.

VEITCH et al. v. FARMERS' BANK.

[3 Cranch, C. C. 81.] [1]

Circuit Court, District of Columbia. April Term, 1827.

DECREES IN EQUITY—REVIVOR.

A decree in a chancery attachment, after the expiration of the year and day, must be revived by scire facias before execution can be had.

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

Scire facias to revive a decree against the garnishee in a chancery attachment. General demurrer.

Mr. Hewitt, in support of the scire facias, cited the Virginia act of 10 December, 1793, p. 306, § 53; 3 Tuck. Bl. Comm. 414, note 2; and 1 Har. Ch. Prac. 669.

Judgment for the plaintiffs on the demurrer.

VEITCH (PEYTON v.). See Case No. 11,057.

VEITCH (UNITED STATES v.). See Cases Nos. 16,613, 16,614.

Case No. 16,910a.

The VELASCO.

[Blatchf. Pr. Cas. 54.] [1]

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

PRIZE—ENEMY PROPERTY—COSTS—ADVANCES BY MASTER—WAGES OF CREW.

1. Vessel condemned as enemy property. Her cargo, being neutral property, on transportation in a lawful trade, released, without cost to the captors, there having been no probable cause for its arrest.

2. Whether the captors, as distinguished from the United States, can have an award of costs in a prize suit, quere.

3. A claim of the master to be reimbursed his advances for repairs and necessary supplies for the vessel reject-d.

4. A claim of the crew for their wages rejected on the ground that the vessel was enemy property.

In admiralty.

BETTS, District Judge. This vessel was captured at sea, off Cape Hatteras, by the United States vessel of war Albatross, July 18, 1861, and sent into this port, with the cargo on board, both as prize of war. The cargo was merchandise purchased for and shipped at Matanzas to merchants of New York, as their property, and the United States attorney, on the trial, abandoned all claim against the cargo, including costs to the United States in this suit, on its capture. Mr. Upton, of counsel for the individual captors and libellants, insists that costs should be imposed on the cargo, there being valid cause for the capture of the vessel, and reasonable cause for the arrest of the cargo. No formal claim was filed in court in behalf of the owners of the cargo. The master of the vessel filed a claim in his own behalf and for his principals, the owners of the vessel, denying the lawfulness of her arrest, and averring that she is not the property of enemies of the United States, but is owned by citizens thereof, and averring that she is not liable to condemnation as prize of war. He also sets up a claim to be reimbursed for advances made by him, as master of the vessel, for her repairs and necessities whilst under his command, to the amount of $184.75. Daniel M. Stebbins filed

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

his libel against the vessel and cargo, to recover wages for his services as a seaman on board the vessel during her last voyage. The United States appeared to that suit, and denied the right of action set up by the libel. It was admitted, on the trial, that other members of the crew on the same voyage had outstanding claims of the same character, which the counsel on both sides desired should be considered and disposed of by the court in the decree to be rendered in this cause. The libellants deny the right of the master or crew to any lien or remedy against the vessel or her cargo upon either of these claims.

The ship's papers found on board at the time of her seizure, and the preparatory proofs, show that the owners of the vessel reside in Florida and Texas, and did so at the time the vessel left port on her last voyage. The master testifies, on his examination in preparatorio, that he is a naturalized citizen of the United States; that his family lives in Brooklyn, New York, where he had resided ten years; and that he had resided for the last two years in Pensacola, Florida. He knew of the state of war existing before he entered upon the voyage, and that the Southern States were blockaded by the United States, before he went to Matanzas and entered upon the voyage thence to New York. The cargo began to be laden on board there the 6th of July last. There is no controversy, upon the proofs, that the vessel was the property of enemy owners at the time of her capture and entering upon the voyage in question, and she is, therefore, condemned as lawful prize to the libellants, with costs; but she was a lawful bottom, on which neutral cargo could be transported from one neutral port to another, or to a port of a belligerent not in a state of blockade. 1 Kent, Comm. 59. The cargo shipped from Matanzas to New York was, therefore, transported in a lawful trade, and was properly released, on arrival here, from arrest, and restored to its loyal owners in this port. 1 Kent, Comm. 124. It seems to me, also, that the restoration must be absolute as to the libellants, without any condition of costs against the claimants. There were no facts upon the face of the papers, or produced from the preparatory proofs, creating a probable cause for arresting this cargo. Its transportation in an enemy's bottom was legal and innocent as to the neutral shippers, and lawful in respect to the master or owners of the vessel; and the evidence is clear of all color of semblance that the shipment was under any agency or connivance of the consignees, with a view to aid or promote the navigation of commerce of an enemy marine, or with knowledge or notice that such mode of conveyance was to be employed.

The claim of costs in behalf of the individual captors must, accordingly, be denied. I do not touch in this decision the point whether, in suits so framed and conducted, the individual libellants so associated with the United States as party actors can have a decree for costs to themselves separate from an award made to the libellants in common, and whether, in this class of prize actions, the United States have or not the entire control of the suit in respect to incidental expenses, as well as its disposition upon the merits.

The demand of the master, through the claim and answer interposed by him to this suit, that he be repaid, out of the proceeds of the vessel, the disbursements made by him for her use, cannot be maintained. If this demand was an incumbrance at all on the vessel, by the jurisprudence of the place where the alleged credit was given, the lien was a tacit one, no way manifested by the ship's papers, and of a character which Sir William Scott held not to be sufficient to support a claim of property in a court of prize. The Marianna, 6 C. Rob. Adm. 24. And he ever refused to recognize the claim, although resting in a bottomry bond, because it amounted to no more than a right of action, although of a character highly favored in maritime courts. The Tobago, 5 C. Rob. Adm. 218. The claim must be rejected.

The demand of wages to the seamen on board of the schooner is not brought before the court technically by way of claim or answer to the libel, but one of the crew filed a libel against the vessel for the recovery of his wages on the voyage upon which she was arrested, and the question respecting his right so to be allowed wages, or to have them awarded to the crew, is submitted to the court on the general hearing upon the issue in the suit for the condemnation of the vessel as prize.

This vessel being owned by enemies, at war with the country, the United States, as her captors, stand in no relation of equity making them or her proceeds answerable to the seamen navigating her for enemy owners. The services on board of her in that character were in prejudice of the interests of the United States, and no way in promotion of them. It was in direct conflict with the interest and safety of the United States that the enemy should be enabled to carry on trade in their vessels, either from and to her own ports or those of neutral powers, and it is a dereliction of duty and allegiance to their own country to engage in any capacity in navigating the vessels of an enemy, or giving any support to such navigation. The Benjamin Franklin, 6 C. Rob. Adm. 350. The goods of neutrals, honestly placed on board the vessel, would be exempt from arrest, because intrusted to such carriage; but the vessel, as a means of conveyance in the interest of the enemy, by all the rules of public law, becomes justly prize of war to the government against which her owners are waging war. Sir William Scott says, in the case of The Friends, 4 C. Rob. Adm. 144, that nothing can be better settled than that the act of capture defeats all rights and interests of seamen to and in wages for service in the captured ship; and this rule stands firm in the elements of public law, except as modified by the event of a recapture of the vessel and her virtual restoration to her original owners. 3 Kent, Comm. 192, and notes; Curt. Seam. Rights, 378, and notes; Abb. Shipp. (5th Am. Ed., by

Perkins) pt. 4, c. 3, and notes; 1 Pars. Merc. Law, 274, note 2. The seamen, therefore, possess no legal claim for wages earned on an enemy vessel; and no equity arises in their behalf, because no act has been rendered by them contributing to the seizure of the vessel, intended for the benefit of the captors. The libel filed in their favor against the vessel or her proceeds in court must, therefore, be dismissed, with costs. The case presented by them bears no analogy to a prosecution by seamen against a vessel recaptured and restored to her original owners, and thus made capable of earning wages for their benefit. These seamen were serving voluntarily on board an enemy vessel, and it no way strengthens their claims that they are in part neutrals, and in part loyal subjects of the United States, in their private sentiments. They were acting on the voyage in support and furtherance of the interests and commerce of an enemy, and against the rights of the United States, and both their suit and petition, as against the proceeds of the captured property, must be dismissed. Decree accordingly.

Case No. 16,911.

The VELOCITY.

[13 Law Rep. 61.]

District Court, N. D. New York. Feb. 2, 1850.

MARITIME LIENS—STATE STATUTES—SURPLUS PROCEEDS.

The act of the legislature of the state of Ohio, entitled "An act providing for the collection of claims against steamboats, and other water craft, and authorizing proceedings against the same by name," passed February 26, 1840, confers no lien in favor of the description of persons therein mentioned, and consequently such persons having claims against a vessel which has been sold under a decree of a district court of the United States in an admiralty suit in rem, are not entitled to payment out of the surplus proceeds of the sale of such vessel. Quære, whether if the act gave a lien, it could be enforced out of the state of Ohio.

The schooner Velocity was owned by citizens of the state of Ohio; and having been sold under a decree of this court, in a suit for wages, and a portion of the proceeds of the sale remaining in the registry of the court after payment of the amount decreed, petitions were exhibited in behalf of divers persons, being also citizens of Ohio, asking payment out of such surplus proceeds, for supplies by them furnished for the use of the Velocity during the last season of lake navigation. The supplies having been furnished in the home ports of the vessel, there was no pretence that an implied lien was given by the general maritime law of the United States; but the petitioners insisted that they were entitled to sue in virtue of an act of the legislature of Ohio, cited and commented on in the judgment of the court. The cases were submitted without argument, and with several others of a like nature against the surplus proceeds of the steamer Ohio, were taken under advisement by the court.

CONKLING, District Judge. The question whether the court can properly afford the relief sought by the petitioners, being one of considerable importance, not only to them but to the public at large, I have been anxious since the petitions were exhibited, to give to the subject the best consideration in my power. So far as I am informed, the question is wholly new: it is so, at least, in this court. This, however, is not the first time that the attention of the court has been called to the statute of Ohio, under which the question arises. It being a settled doctrine of our maritime jurisprudence, that where a lien is given to the material-man by the law of a state, such a lien may be enforced by a suit in rem in the admiralty, notwithstanding the supplies have been furnished in a home port; several applications were made to the court in behalf of citizens of Ohio, not long after the passage of the late act of congress, imposing a quasi admiralty jurisdiction on the district courts, of certain cases arising on the lakes, for original process of arrest against vessels owned in Ohio, to enforce payment for supplies furnished in that state. But for reasons then assigned, and without entering into a critical examination of the act, for the purpose of ascertaining whether it conferred a lien enforceable by admiralty process in the district of Ohio, my opinion was, that I should not be warranted, as the judge of this district, in assuming the jurisdiction thus invoked, and I accordingly declined its exercise. And in a recent case which it was supposed might turn upon a sale of the vessel under process from a court of the state of Ohio, in pursuance of this act, its provisions were again brought into discussion. The case, however, was decided upon other grounds. With regard to the particular question, which it has now at length become my duty to decide, although it has been repeatedly mentioned in court, I have cautiously abstained from intimating any opinion upon it (for in truth I had formed none), contenting myself, when declining to entertain original suits founded upon it, for demands of this sort, with saying, that if parties so situated were entitled to relief in any form, in this court, it could only be by a suit against surplus proceeds.

Having thus explained the actual predicament of the question in this court, I proceed in the next place, as well as I am enabled by the light of judicial decisions to do, to state the general principles on which the rights of the petitioners depend. These principles are of no inconsiderable practical importance. Vessels of great value are sometimes allowed by their owners to be sold, to satisfy demands of comparatively small amount; and as the entire proceeds of sales under the process of the court are in all cases paid into the registry, it thus happens that in some instances a large sum, and in most instances, a portion of the proceeds, remains, after payment of the amount decreed to the libellant, and to peti

tioners, if any (as there generally are in this court), who, also having maritime liens against the vessel, intervene for their interest, pendente lite. Of sums so remaining in the registry, the court is bound to make a just disposition; and in discharging this duty, to proceed with the same cautious circumspection, and the same strict regard to law and justice, as in the decision of original suits. Prima facie, such surplus belongs to the person who was the owner of the vessel before sale; and no reason to the contrary appearing, it is a matter of course to direct its payment to him —proper care being first taken, especially if he had not before appeared and been admitted as claimant, to ascertain with legal certainty that he was in fact such owner. But the right of intervention continues, notwithstanding the consummation of proceedings in the original suit, and may be exerted by petition against the fund remaining in the registry; and with respect to demands which constituted a lien on the ship in specie, and of which, therefore, the court might have taken cognizance in an original suit, no doubt has ever been entertained, that the court has authority and was bound to direct their payment out of such surplus fund. To decree a sale of the property to which the lien attached, equally with that on account of which the property had been brought under the power of the court, and thus to give to a third person, as purchaser, an indefeasible title to it, discharged of such lien —and then to direct the payment of the surplus proceeds to the debtor, in preference to the holder of such lien, would be manifestly unjust. On the other hand, however, it has never been supposed that the claims of the mere general creditors of the owner could be recognized in this form. It is true, indeed, in England, although, latterly, until by a recent act of parliament (3 & 4 Vict. c. 65) the law was changed, material-men, even in the case of a foreign vessel, were held not to have a lien on the ship, that it was the practice of the high court of admiralty, nevertheless, to direct their payment out of surplus proceeds, provided the demand was liquidated and undisputed; but it seems to have been done under the idea, that this might be rightfully regarded as a remnant of the authority formerly exercised by the court, to entertain original suits in favor of material-men, but subsequently restrained by prohibitions from the courts of common law. The Neptune, 3 Hagg. Adm. 129. But claims depending wholly upon the common law were uniformly rejected as not cognizable in the admiralty at all; and so rigorously was this principle enforced, that even mortgagees and judgment creditors after levy on execution, were excluded. The Portsea, 2 Hagg. Adm. 84; The Exmouth, Id. 88, note; The Fruit Preserver, Id. 181; The Prince George, 3 Hagg. Adm. 376; The Percy, Id. 402; The Flora, 1 Hagg. Adm. 298, 303. In the case last cited, however, in which the high court of admiralty directed the surplus proceeds to be paid to the owner, in preference to the sheriff who had levied upon the ship before its arrest by the admiralty process, the court of delegates, on appeal, ordered the money to be paid to the sheriff, being of opinion, that "although the court of admiralty cannot enter into the contracts of general creditors, yet it may be bound to take a judgment on record as a debt." And, now, by a late act of parliament (3 & 4 Vict. c. 65), that court is authorized to give relief to mortgagees.

In our own courts, the first reported case I have met with, in which the right of intervention against surplus proceeds was discussed, is that of Gardner v. The New Jersey [Case No. 5,233], decided by Judge Peters in 1806. At that time, the only reported English case, tending to shed any light on the subject, which had probably reached this country, was that of The Favourite, 2 C. Rob. Adm. 232, in which Sir William Scott alluded to a practice of the court, allowing the claims of material-men against surplus proceeds in the case of a foreign ship. The views of the subject then entertained by Judge Peters, may be gathered from his own words in the following extract from his judgment, in the above cited case of the New Jersey, in which a petition against the surplus proceeds of the sale of the vessel was exhibited in behalf of the master, for money by him advanced on account of the ship, and another in behalf of a person who served on board in the capacity of physician, during a voyage from Philadelphia to Canton and back again: "When I first came into this court, I made, in several instances, distribution of surplus moneys, under the idea that I had power to do so, agreeably to the doctrine now stated, to justify me in granting the prayers of the petitions. But on experience, I found myself involved in many difficulties and mistakes, in the application of this doctrine. It was one among the mass of irregularities I had to encounter, before I established, by frequent decisions, and with much consideration, the general principles which now prevail. I found it best and safest to fix some general rules applicable to most cases, though at times some anomalous instances should occur, inducing particular hardships. The rule by which I have governed myself for several years past, is, that it shall appear that a sum claimed out of the surplus or remnant, is either of itself, or in its origin, a lien on the ship, or other thing out of which the moneys were produced. I shall continue to adhere to the principles I have endeavored to establish, not to admit the distribution or payment of surplus, to others than those who originally had liens, or legal appropriations, on the object from which the moneys in court were raised. I deem it an exclusion from a distribution, or a claim to a surplus, unless a lien or appropriation is precedently and legally fixed, that those who claim such distribution, could not sue in the admiralty for their demands." In the cases of Brackett v. The Hercules [Case No. 1,762] and Harper v. New Brig [Id. 6,090], decided many years later in the same court,

Judge Hopkinson adopted the principles thus laid down by Judge Peters, applying them in the one case in favor of a mortgagee, and in the other against a mere personal creditor. From the case of The Mary Ann [Id. 9,195], I infer also, that the doctrine of these cases would be approved by the distinguished judge of the district of Maine, and I am not aware that it has ever been judicially controverted. I have accordingly considered it to be my duty, thus far, to follow it. (A more ample exposition of this subject may be found in Conk. Adm. pp. 38–50, 540–562.) The question for decision in the present case, therefore, is, whether the petitioners are to be considered as having had a lien on the Velocity. "A lien," said Lord Ellenborough, in Wilson v. Balfour, 2 Camp. 579, "is a right to hold"; and in the case of Hammonds v. Barclay, 2 East, 227, 235, Mr. Justice Gross, delivering the opinion of the court, defines a lien to be "a right in one man to retain that which is in his possession belonging to another, till certain demands are satisfied." At common law, therefore, no lien can subsist without possession. With liens conferred by the maritime law it is otherwise, and valid liens independent of possession may also be created by statute. This has been done by the legislatures of several states of the Union, in favor of the class of persons to which the petitioners allege themselves to belong. Thus by a statute of the state of Maine, it is enacted "that all ship-carpenters, calkers, blacksmiths, joiners, and other persons who shall perform labor or furnish materials for or on account of any vessel building or standing on the docks, by virtue of a written or parol agreement, shall have a lien on such vessel for his wages." Read v. Hull of a New Brig [Case No. 11,609]. "A similar act has been passed in Pennsylvania, the preamble to which declares that ship-building is an important branch of the commerce of the state; that tradesmen employed in this business are liable to losses by reason that the persons employing them are frequently masters of ships, strangers, and persons having no fixed property in the country." And to remedy this evil, it is enacted, "that ships and vessels of all kinds, built, repaired and fitted within this state, are hereby declared to be liable and chargeable for all debts contracted by the masters or owners thereof, for or by reason of any work done or materials found or provided by any carpenter, blacksmith and others, for, upon, and concerning the building, repairing, fitting, furnishing and equipping such ship or vessel, in preference to any and before any other debts, due and owing from the owners thereof." Harper v. New Brig [supra]. Not having these statutes of Maine and Pennsylvania in full before me, I am not apprized of the limitations and conditions which they impose, nor of the forms of proceeding which they enjoin. But an act for the like purpose has also been passed in the state of New York, which enacts as follows.

"Section 1. Whenever any debt, amounting to fifty dollars or upwards, shall be contracted by the master, owner, agent or consignee of any ship or vessel within this state, for either of the following purposes. 1. On account of any work done, or materials or articles furnished in this state, for or towards the the building, repairing, fitting, furnishing, or equipping of such ship or vessel; 2. for such provisions and stores furnished within this state, as may be fit or proper for the use of such vessel, at the time when the same were furnished; 3. on account of the wharfage and expenses of keeping such vessel in port, including the expenses incurred in employing persons to watch her:

"Sec. 2. When the ship or vessel shall depart the port at which she was, when such debt was contracted, to some other port within this state, every such debt shall cease to be a lien, at the expiration of twelve days after the day of such departure; and in all cases such lien shall cease immediately after the vessel shall have left this state."

The act then proceeds, in forty-one additional sections, to prescribe with great particularity the forms of proceeding to enforce the liens it confers, and to define the rights of the parties concerned. It contains, among others, the following provisions: The application for the warrant of arrest is to be made to a commissioner authorized by law to perform the duties of a justice of the supreme court at chambers, or in the city of New York to a justice of the supreme court of law therein: when a warrant is issued, no other warrant shall issue against the same ship or vessel, unless the first is superseded: notice of the arrest is to be published in one or more newspapers at least once a week for three successive months, requiring all persons having claims, which by the act are declared to be a lien on the vessel, to deliver an account thereof to the officer issuing the warrant, within three months after the first publication of the notice, on pain of forfeiting their remedy against the vessel; and all persons having such claims may at any time before the expiration of the notice, deliver to the said officer an account thereof in writing, verified by oath, and shall thereupon be deemed an attaching creditor, on a footing of equality with him at whose instance the warrant was issued: all liens not so presented shall cease: the proceeds of the sale of the vessel, or of the security taken in lieu of it, are to be distributed among all the creditors, who shall appear and establish their claims. The language of each of these three statutes, it will be observed, is perfectly explicit, and such as to leave no room for doubt that they were intended to confer liens equal in efficacy to a lien at common law founded on possession; or a lien given by the maritime law, which is preferred to the title of a bona fide purchaser without notice. The Chusan [Case No. 2,717]. Indeed, this is of the very essence of a lien, and is that quality which gives it efficacy and value; and even to the title of

the United States, acquired by forfeiture. Id.; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409; Cond. R. 631.

Having thus endeavored to pave the way for the purpose, I proceed to the examination of the statute of Ohio, on which the petitioners rely. The title of the act, and those sections of it which more particularly require attention, are as follows:

"An act providing for the collection of claims against steamboats, and other water crafts, and authorizing proceedings against the same by name.

"Section 1. Be it enacted, &c. That steamboats and other water craft navigating the waters within or bordering upon this state, shall be liable for debts contracted on account thereof, by the master, owner, steward, or consignee, or other agent, for materials, supplies, or other labor in the building, repairing, furnishing or equipping the same, or due for wharfage; and also for damages arising out of any contract for the transportation of goods or persons, or for injury done to persons or property by such craft, or for any damages or injury done by the captain, mate, or other officer thereof, or by any person under the order or sanction of either of them to any person who may be a passenger or hand on such steamboat or other water craft, at the time of the infliction of such damage or injury.

"Section 2. Any person having such demand may proceed against the owner or owners, or master of such craft, or against the craft itself.

"Section 3. When such suit shall be commenced against the craft, the plaintiff shall file a precipe to that effect, naming said craft, if she have a name, and if not, giving a substantial description of the same; and with it a bill of the particulars of his demand, verified by his own affidavit, or that of his agent or attorney, or other credible person.

"Section 4. The clerk of the proper court shall, on receiving such precipe, issue a warrant, returnable as other writs, directing the seizure of such craft by name or description as provided for in the third section of this act, or such part of her apparel or furniture as may be necessary to satisfy the demand, and to detain the same until discharged by due course of law, and the officer executing the writ shall return with it an inventory of the effects seized and held under it."

Section 5 authorizes the redelivery of the property arrested on bond, with sufficient sureties in double the amount claimed by the plaintiff.

Section 6 authorizes the sale on execution, of the property arrested, to satisfy the judgment, if any, which may be rendered for the plaintiff, and directs that "the surplus money, if any, arising from such sale, shall be returned to the owner, master, or agent, on demand, as the surplus money is in other cases of execution; and if the proceeds of the sale shall fall short of satisfying the judgment, the balance shall remain to be collected on execution, as upon other judgments."

Section 7 gives jurisdiction to justices of peace of all cases arising under the act, when the amount claimed shall not exceed $100.

Section 8 gives a right of action for the recovery of damages against any person who shall commence a suit under the act without reasonable or probable cause.

Sections 9 and 10, which are the only remaining ones, give an appeal from judgments rendered under the act, and when the proceeding has been against the vessel by name, regulate the proceedings on such appeal.

Now, in the first place, it is to be observed, that neither the term "lien," nor any other word of the like import, occurs either in the title or in the body of this act; and yet, if it had really been the intention of the legislature of Ohio to introduce so important an innovation as that of conferring a lien, not only in favor of materialmen, as has been done by the other states above mentioned, but also "for damages arising out of any contract for the transportation of goods or persons, or for injury done to persons or property by such craft; or for any damage or injury done by the captain, mate, or other officer thereof, or by any person under the order or sanction of either of them, to any person who may be a passenger or hand on such steamboat or other water craft"; if such had been the design of the act, it is certainly very extraordinary that it should not have been directly, and unequivocally declared. In the total absence of any direct expression of the legislative will to this effect, recourse must therefore be had to the tenor of the act, in order to ascertain whether such a design can fairly be inferred from its provisions. It must be added also, that it can be imputed upon no light grounds; it should at least appear to be entirely consistent, not only with all that the act contains, but also with whatever it omits, which, had such been its intent, it may reasonably be presumed would have been found in it. The primary design of the act unquestionably was to provide additional security for the description of persons therein specified. But it is the universally recognized duty of the lawgiver, in providing a remedy for one evil, to be very cautious not to introduce other evils of equal or greater magnitude. Now, it is manifest that the interests of trade must unavoidably suffer by the multiplication of secret liens upon property, and especially upon vessels actively engaged in the coasting trade; and hence the ample provision made by law, in many, probably in all of the states, and, as I am informed, in Ohio among the rest, for the recording of mortgages as well upon personal as upon real property. If therefore it was intended by the act in question to create a multitude of such liens, is it not reasonable to suppose that care would have been taken to restrict them to the narrowest limits compatible with their design, as was done by the New York statute? But the Ohio act contains no limitation whatever, either as to

amount, time, or place; and if it confers a lien, there is nothing in its provisions to forbid the arrest and sale of a vessel, for any one of the numerous specified causes, whether arising from contract or not, years after the cause of action arose, although the vessel, in the mean time, may have become the property of many successive owners ignorant of the incumbrance. It has been contended, moreover, on a former occasion, in this court, that the liens given by this act, and in favor of material-men and others mentioned in this act, are equivalent to the most favored maritime liens, and consequently that a judgment in a proceeding in rem under the act, has all the force of a decree in an action in rem in the admiralty. If so, a sale under such judgment would confer upon the purchaser an indefeasible title against all the world, discharged of all liens of whatsoever nature, as well antecedent as subsequent. But the conclusive effect of a decree in rem in the admiralty, results exclusively from the principle that all the world, as it is said, are parties to the suit—all persons having an interest in the thing proceeded against, being entitled to intervene for their interest therein and being called upon to do so by the most effective forms of notice that can be devised. Now the New York statute, while in express terms it confers, under very narrow limitations, a lien in favor of material-men, which (in accordance with the maritime law) it declares shall have priority over all other liens except seamen's wages, studiously adopts throughout, as already shown, the precautionary principles and forms observed in the admiralty. The Ohio act, on the other hand, requires no notice of the arrest in any form; it makes no provision whatever for the intervention of third persons who may have demands against the vessel; but, on the contrary, expressly directs that when it is sold, the surplus proceeds, if any, shall be paid to the owner—thus at once extinguishing all other liens (even those created by itself, if, indeed, it creates liens), and exhausting the subject to which they attached. It is not my duty nor design, beyond the absolute exigencies of the question before me, to enter into any speculations touching other grave questions affecting the interests of lake navigation and commerce, to which this act seems adapted to give rise; still less shall I presume, without necessity, to sit in judgment on the wisdom of its provisions. But I must be permitted to observe that, considering the nature, uses, and value of the kind of property which it subjects to indiscriminate arrest (or in the language of this act, and also of that of New York, "seizure," a term properly appropriated to an arrest for the purpose of enforcing a forfeiture), and summary sale for debts or damages however inconsiderable, its operation must, under any admissible interpretation, be so very stringent, as strongly to inculcate the propriety of giving to it the mildest construction of which its language is susceptible. And although I have been accustomed to hear it spoken of, and may have been myself led by imitation to speak of it, as "the lien law of Ohio," the conclusion at which I have now arrived, is, that this is a mistaken appellation, not in accordance with the legislative intent. Upon mature consideration I am thoroughly convinced, that in declaring the vessel "liable" for debts contracted on her account, and for the damages specified in the act, nothing more was intended than to confer the privilege of arresting the vessel by mesne process, as the property of the delinquent party, and, unless security should be given, of having it detained in the custody of the law, to satisfy the judgment, if any, which the plaintiff might recover. With this construction, the provisions of the act are in harmony throughout, and they import nothing more. Thus interpreted, it is but an adoption, with respect to certain classes of persons, and with respect to one species of property, of the attachment laws of the New England states, and, in regard to non-resident debtors of this, and most or all of the other states of the Union —with this difference only, that, for obvious reasons, the necessity of the institution of a personal suit is dispensed with by the statute in question.

After protracted litigation, it has at length very recently been determined by the supreme court of the United States (Peck v. Jennes, 7 How. [48 U. S.] 612) that by the actual arrest of the property of the debtor on mesne process, in states where this form of remedy was sanctioned by law, the creditor acquired a "lien" or "security" within the purview of the proviso of the second section of the late bankrupt act; and it may readily be conceded, that by the arrest of a vessel under the statute of Ohio, while it remains the property of the debtor, the plaintiff obtains a prior right to satisfaction in the judicial tribunals of that state; but no lien attaches to the vessel before arrest. Consequently the claims of the petitioners against the surplus proceeds arising from the sale of the Velocity cannot be allowed. Had the terms of the act been such as to require the opposite construction, it would then have been my duty further to inquire, whether effect could properly be given to it in this court. Laws have no extra-territorial operation per se. The obligation of the laws of one nation within the territories of another is derived altogether from the voluntary consent of the latter. It depends exclusively upon what is denominated the comity of nations. "In the silence of any positive rule, affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests." Story, Confl. Laws, 338. "But in a vast variety of cases, which may be put, the rejection of the laws of a foreign nation may work less injustice than the enforcement of them will remedy. And here every nation must judge for itself, what is its true duty in the administration of justice." Id. § 34; Bank of Augusta v. Earl, 13 Pet. [38 U. S.] 519, 589. "The comity of

nations is applicable reciprocally to the several states of this Union." Id. 590. Similar petitions have also been exhibited against the surplus proceeds arising from the sale of the steamer Ohio, and are to be considered as disposed of in like manner by this decision.

Case No. 16,912.

The VELONA.

[3 Ware, 139.] [1]

District Court, D. Massachusetts. Dec., 1857.

SHIPPING—AUTHORITY OF MASTER—SALE OF CARGO AT PORT OF DISTRESS—FREIGHT.

1. When a ship, in consequence of a disaster occasioned by the dangers of the seas, is obliged to put into a port for repairs, if they are such as will require considerable time, the master, for the interest of the shipper, may sell such part of the cargo as is of a perishable nature.

[Cited in Moore v. Hill, 38 Fed. 334.]

2. The shipper may recover the proceeds of the sale by a libel against the ship.

3. In such case no freight is due to the master.

4. The only case in which a pro rata freight is due, is when the merchant voluntarily accepts his goods at an intermediate port, not when they are forced on him by necessity.

Mr. Bangs, for libellants.

Mr. Pike, for claimants.

WARE, District Judge. This is a libel on a bill of lading. The libellant shipped at Boston, on board the Velona, $129^{220}/_{2000}$ tons of ice, to be carried and delivered at Savannah. The vessel sailed in February last, and on her voyage met such severe gales and was so much injured by the violence of the seas that she was obliged to put into the port of Norfolk for repairs. In that situation the master had a right to repair his vessel, if it could be done in a reasonable time, and proceed on his voyage to deliver his cargo, or he might tranship it and send it in another vessel, and thus perform his contract and earn freight. He did neither, but he called a survey on his vessel, and it was found by the report of the surveyors that the repairs required were so considerable, and would require so much time, that he sold the ice at Norfolk. In such a case of disaster, if the cargo is of a perishable nature, and his own ship cannot in a reasonable time be repaired, the master may either sell or tranship the cargo. But it is said that he is not absolutely bound to send forward the cargo by another vessel, but that he ought, as a faithful agent, to do that which will be most for the interest of the merchant. The master is not ordinarily the agent of the shipper for any other purpose than that of carrying and delivering the goods. But in these cases of unforeseen and unprovided necessity, as they have been called, the law clothes him with the authority of a supercargo, and he is to make such a disposition of the cargo as will be most for the interest of the merchant. The Gratitudine, 3 C. Rob. Adm. 259, 262. In this instance he sold the ice, and I do not understand that any complaint is made that he did not act discreetly.

The libel claims damages for the non-delivering the cargo according to the tenor of the bill of lading. But the contract was safely to deliver it, the dangers of the seas excepted, and these have prevented the master from performing his contract. He is not liable, therefore, for a breach of his contract. But by the sale of the ice a sum of money has come into his hands, to which the shippers have a claim, and my opinion is that it may be recovered in this action against the vessel. The ship is bound to the merchandise and the merchandise to the ship. This vessel having received the goods must account for them. This is not denied, but it is contended on the part of the respondents that they are entitled to deduct from the proceeds of the sale either the entire freight stipulated for in the bill of lading, or at least a pro rata freight. The contract by a bill of lading is an entirety, and the general principle of the common law is that an entire contract cannot be apportioned. Until the whole is performed nothing is due. Cutter v. Powell, 6 Term R. 320. But by the maritime law, the contract for the transportation of goods, whether by a charter party or bill of lading, admits of an equitable apportionment in one case. When a vessel meets with a disaster by which she is obliged to put into a port for repairs, if the owner of the goods then voluntarily receives them, instead of requiring the master to carry and deliver them at the port of destination, the master is entitled not to the entire but to a pro rata freight. It is on the ground that the merchant voluntarily excuses him from completing his contract. The master is then equitably entitled to a compensation for what he has done, so far as the other party has derived a benefit from it. But the acceptance to give this right to the master must be voluntary. The cases cited in the argument establish this beyond a question. The Nathaniel Hooper [Case No. 10,032]; Hurtin v. Union Ins. Co., [Id. 6,942]; Vlierboom v. Chapman, 13 Mees. & W. 230. In this case there was no option left for the merchant, but the goods were sold from necessity to save them from a total loss.

To escape from this conclusion it is contended for the libellants, that the misfortune that had happened to his ship imposed on the master the responsibility of acting as an agent for the benefit of all concerned; that he thus became the agent of the shipper to make the best disposition of his goods, and that as such he might consent for him to accept the goods at Norfolk. But the agency, which in such cases is thrown on the master by the law, is an agency of necessity, and extends no further than the necessity requires. It is an agency like that of the negotiorum gestor of the Roman law, a person who intervenes in the business of another without a previous mandate. The principal will be bound by his acts so far

[1] [Reported by George F. Emery, Esq.]

as they are proper, judicious, and beneficial to him, either in preventing a loss or procuring him a benefit. It is an agency by which he has a right to act for the benefit of his principal, but not to charge him with a burthen. So, in this case, the law made the master the shipper's agent to sell the ice, to save him from a total loss, but it did not make him the merchant's agent to accept the goods at a port of necessity, to excuse him from performing the whole of his contract, and thus charging him with freight. The case of Vlierboom v. Chapman is a perfect parallel to the present. A cargo of rice was shipped at Batavia for Rotterdam. The ship was disabled in a tempest, and put into Mauritius for repairs. The rice was damaged by sea water, and to prevent a total loss was properly sold by the master. The owners of the ship claimed a pro rata freight; but the court, after taking time to consider the case, held that no freight was due, on the ground that there was no voluntary acceptance of the goods by the owners. The case clearly negatives the idea that the master had any power, as their agent, to accept for them. The decree must be for the full amount of the sale of the ice, deducting the necessary and proper charges of sale.

VENABLE (BRENT v.). See Case No. 1,842.

VENABLE (FRENCH v.). See Case No. 5,105.

Case No. 16,913.

VENABLE et al. v. RICHARDS.

[1 Hughes, 326; [1] 22 Int. Rev. Rec. 299.]

Circuit Court, E. D. Virginia. June 2, 1876, and Sept. 5, 1876.[2]

REMOVAL OF CAUSES—ACTIONS AGAINST REVENUE OFFICERS—INTERNAL REVENUE TAXES—SNUFF—GRANULATED TOBACCO.

1. Suits against revenue officers of the United States, on account of acts done under color of their offices, may be removed from state courts into the courts of the United States.

2. Section 10 of the act of congress, approved March 3, 1875, c. 137 [18 Stat. 473], which repeals all acts in conflict with its provisions, does not repeal section 643 of the Revised Statutes of the United States providing for the removal of suits from the state to the national courts in certain cases.

3. The term "granulated tobacco," used in the second paragraph of section 3368 of the Revised Statutes, is not synonymous with "snuff," but is intended to refer only to chewing and smoking tobacco.

4. Snuff is liable, under the acts of July 20, 1868 [15 Stat. 125], June 6, 1872 [17 Stat. 230], and March 3, 1875 [18 Stat. 473], to a tax of thirty-two cents a pound.

Action of assumpsit. This action was brought in the circuit court of the city of Petersburg. The defendant [George S. Richards] being a collector of internal revenue of the United States, and the suit being for taxes collected by him from the plaintiffs as snuff manufacturers, he filed his petition in this court for a writ of certiorari for the removal of the cause out of the state court. His petition was resisted by the plaintiffs [Joseph E. Venable and others] on the ground set forth by the circuit judge (Bond) in the following decision, who overruled their objection and granted the writ. The petition for removal was heard and granted on the 2d June, 1876.

L. L. Lewis, U. S. Atty., for petitioner.

R. G. Pegram and W. P. Burwell, for plaintiffs.

BOND, Circuit Judge. Richards, the defendant in this action, was collector of internal revenue in the district where plaintiffs carried on business as manufacturers of snuff, and required of the plaintiffs the payment of a tax on the snuff manufactured by them, which the plaintiffs alleged was in excess of the tax legally demandable to the amount of five thousand and sixty dollars. The plaintiffs appealed to the commissioner of internal revenue for a reduction of the tax, as required by law, and asked that the excess might be returned to them, which the commissioner refused to do. The plaintiffs brought suit in the circuit court of the state for the city of Petersburg to recover the sum of $5,060.96 so paid in excess of taxes, and the collector filed his petition in this court, under the act of 1866 (Rev. St. § 643 [14 Stat. 306]) for a writ of certiorari to remove the cause from the state court into the circuit court of the United States. This application is resisted on the part of the plaintiffs on the ground that the act of 1875, relating to the jurisdiction of the circuit courts of the United States, and to the removal of causes from the state courts thereto, repealed the act of 1866 relating to the same subject, and that as the defendant has not complied with the provisions of the act of 1875, c. 137, his petition for a writ of certiorari ought to be disallowed.

The sole question, therefore, which the court is called upon to decide is, whether the 10th section of the act of 1875, c. 137, which repeals all acts and parts of acts in conflict with its provisions, repeals the act of 1866, c. 184, now contained in Rev. St. § 643. The act of 1875, by its second section, provides that all suits which arise under the laws of the United States shall be removed in the manner provided in that statute. The act of 1866 (section 643, Rev. St.) provides that, "when any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States on account of any act done under color of his office, or of any such law," the proceedings for removal shall be such as it prescribes. So that it appears that to remove a case, under the provisions of the act of

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

[2] [Affirmed in 105 U. S. 636.]

1875, it is necessary only that it arise under a law of the United States, whereas, to remove it under the act of 1866, it is not only necessary that the suit should arise under a law of the United States, but that it should be brought against an officer of the United States, or some one acting under his authority. The act of 1866 related to civil suits and to criminal prosecutions brought against the officers of the United States. The act of 1875 relates to civil causes only. So that, in one respect, it is manifest it was not intended to repeal, and does not repeal, the former act. Again, under the act of 1866 all suits, without respect to the amount involved, may be removed, whereas, under the act of 1875, the matter in dispute must be of the value of $500, exclusive of costs, so that it was not intended to repeal so much of the act of 1866 as allowed the removal of suits, when a revenue officer was concerned, which involved a less amount than $500, because that provision is not in conflict with the act of 1875, allowing the removal of causes involving $500 or upwards. Again, by the act of 1866 the cause may be removed before trial or final hearing, while, under the act of 1875, it must be removed before the term at which it could first be tried, and under the one act a bond must be filed, while the other requires none, the removal being had upon the filing of a petition to that effect merely. It seems to us that the act of 1875 was not passed to restrict, but to enlarge, the jurisdiction of the United States court.

In this suit the United States are the real defendants, and, while in other cases for the safety of litigants it may be necessary to require a bond to be given to abide the result of suit, when a revenue officer is sued, for whom the United States in his official capacity have made themselves responsible, such a requirement is unnecessary, and, when so many officers of the government are to be consulted in respect to the merits of a case, and the propriety and ground of defence, it is not unreasonable that a longer delay in the determination of the question of removal should be given, than in cases between individual citizens who have complete control over their own suits. A general clause repealing all laws in conflict with a previous statute cannot be held to do so by implication. The former statute must be plainly in conflict with the repealing statute before it can be held to be repealed. We do not think the act of 1866 (Rev. St. § 643) is in conflict with the act of March, 1875, c. 137, and the jurisdiction of this court over this suit will be maintained.

On the 5th of September, 1876, the case was heard on its merits. The plaintiffs declared for two items of money claimed by them to have been collected by the defendant, as taxes upon snuff, in excess of the taxes allowed by law. One of these was the item of $4731.84, collected between July, 1872, and March, 1875, on 39,432 pounds, at the rate of 32 cents a pound, whereas the rightful tax was alleged to have been only 20 cents. The other item was for a similar excess of taxation assessed between March, 1875, and June, 1875, on 42261/2 pounds of snuff, at 32 cents a pound, instead of 24 cents, alleged to be the lawful tax, the excess being 8 cents a pound, or $338.12. The two items make the aggregate sum of $5,069.96. By stipulation between the parties, the questions of fact as well as of law were submitted to the court for decision, the court being held at this time by the district judge.

HUGHES, District Judge. Before the law of June, 1872, snuff and chewing tobacco were both taxed at the rate of 32 cents a pound. The law of 1872 taxed snuff 32 cents, and granulated tobacco only 20 cents. The plaintiffs insist that snuff and granulated tobacco are the same thing, and, as they were required by the collector (the defendant) to pay 32 cents, or 12 cents more than they say the law exacted before March, 1875, they sue for the difference. By the act of March 3d, 1875, the tax on "granulated" tobacco was raised to 24 cents a pound. After that the plaintiffs still paid 32 cents on their snuff (which they insist was granulated tobacco), or 8 cents more than they say the law allowed, and they sue for the difference. The question is, and it is the only question in the case, what did congress mean by "granulated" tobacco? The first two paragraphs of section 61 of chapter 186 of the acts of the fortieth congress, approved July 20, 1868 (15 Stat. 153), provide as follows:

"On snuff, manufactured of tobacco or any substitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, a tax of thirty-two cents per pound. And snuff flour, when sold or removed for use or consumption, shall be taxed as snuff, and shall be put up in packages and stamped in the same manner as snuff."

"On all chewing tobacco, fine-cut, plug, or twist; on all tobacco twisted by hand, or reduced from leaf into a condition to be consumed, or otherwise prepared, without the use of any machine or instrument, and without being pressed or sweetened; and on all other kinds of manufactured tobacco, not herein otherwise provided for, a tax of thirty-two cents per pound."

The forty-second congress passed a law (approved June 6, 1872) amending that of the fortieth congress, but not affecting the clauses just quoted. Section 31 of the latter law (17 Stat. 250, at top), provided that section 61 (of the former act) be amended by striking out all after the second paragraph, and inserting in lieu of what was stricken out, the following words:

"On all chewing and smoking tobacco, fine-cut, cavendish, plug, or twist, cut or granulated, of every description; on tobacco twisted

by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened; and on all fine cut shorts and refuse scraps, clippings, cuttings, and sweepings of tobacco, a tax of twenty cents per pound."

The law stood in this condition up to the time of the adoption of the Revised Statutes (June 22, 1874), when the first of the two paragraphs given from the act of 1868 and the paragraph given from the act of 1872 were adopted, as containing the whole law of the subject; the second of the two paragraphs from the law of 1868 having been omitted from the compilation of 1874. It will be seen that the act of 1868 in the paragraphs given classified the tobacco which it referred to into two distinct divisions, calling one of them snuff and the other chewing tobacco. Snuff of every kind, whether ground, dry, or damp, pickled, scented, or not scented, of all descriptions, and snuff-flour were taxed thirty-two cents. And chewing tobacco, whether fine-cut, plug, or twist, or reduced from leaf into a condition to be consumed, or otherwise prepared, was taxed thirty-two cents. The act of 1872 adopted these two paragraphs of the act of 1868 in terms; and by doing so, adopted also of course their classification, into snuff on one hand, and chewing tobacco on the other. But it enlarged the second class so as also to include smoking tobacco of every species. So that the law as it stood after June, 1872, taxed snuff in all its varieties in one class of taxable things, and chewing and smoking tobacco in all their forms, as another class. Under the head of snuff the law of 1872 mentions its different varieties, and adds to them snuff-flour. Under the head of chewing and smoking tobacco, the law of 1872 (and the Revised Statutes of 1874 adopts its language) mentions as the sorts of tobacco intended to be embraced in the classification, fine-cut, cavendish, plug, twist, cut or granulated, every description of these; also tobacco twisted by hand, fine-cut shorts, refuse and scraps, clippings, cuttings, and sweepings. In this enumeration it virtually defines granulated tobacco to be one class of cut tobacco. It seems to be plain, therefore, that the law of 1872 not only so classified and defined snuff, by the language used, as to forbid its being confounded with any of the terms which it used in enumerating the different sorts of chewing and smoking tobacco, but as if to make assurance doubly sure, it defined "cut" tobacco "granulated"; thus, by identifying "granulated" with "cut" tobacco, forbidding its being confounded with "snuff."

When the oral evidence is taken in the trial of the cause, it is proved that "granulated tobacco" is a term not used by the trade. The witnesses examined were each asked what the law meant by "granulated tobacco"; and each one, while asserting that the term was unknown in the tobacco business, was unable to do more than give his own conjecture of what the statutory term meant, the witnesses seeming to differ widely with each other. None of them, however, spoke in such a way about snuff. There is no doubt what the statute means by "snuff." Practically speaking, granulated tobacco has no existence in actual business, while snuff has. There is no identity between the two articles in practical business, and there can, therefore, be no repugnance between a clause of the law speaking of one of them and a clause speaking of the other.

In construing the acts of congress which employ the term "granulated tobacco," we must interpret it according to the context. So interpreting it, "granulated tobacco" must be classed as a species of chewing or smoking tobacco, and held to be synonymous with "cut tobacco" and not synonymous with "snuff."

Judgment must go for the defendant.

[The above judgment was affirmed by the supreme court, where it was taken on writ of error. 105 U. S. 636.]

VENABLE (UNITED STATES v.). See Cases Nos 16,615, 16,616.

VENTURE, The. See Case No. 2,544.

Case No. 16,914.

The VENUS.

[Blatchf. Pr. Cas. 129.] [1]

District Court, S. D. New York. March, 1862.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned as enemy property, and for an attempt to violate the blockade.

Mr. Woodford, for the United States.

BETTS, District Judge. This vessel was arrested, as prize, in the Gulf of Mexico, off the state of Texas, December 26, 1861, by the United States steamer Rhode Island, and, being of small value, and unfit to send by sea to a Northern port, was surveyed and valued by a navy board appointed for the occasion by a flag officer of the United States navy, and, on such valuation, was, by such officer, appropriated and applied to the use and service of the United States. The vessel was employed in the coasting trade between the Confederate States, and was enemy property, and was laden with a cargo cleared at Point Isabel, a port of Texas, for Franklin, in the state of Lousiana, but destined to Brunswick or New Orleans, consisting of lead, copper, tin and wool, all being enemy property. The prize was carried to Ship Island, and the cargo was there transshipped, by order of Flag Officer McKean, of the United States navy, on board the United States ship Supply, and, in charge of a prize-master, was brought into this port, as prize. The master and crew of the Venus were, at the time of her

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

seizure, taken on board the United States steamer Rhode Island, and transported to Philadelphia, and thence sent to New York, and here examined in preparatorio, before the prize commissioners. The master was part owner of the cargo, and knew of the war with the United States when the schooner sailed, and that the whole Southern coast was under blockade at the time. The schooner sailed under the Rebel flag. No party appeared in court to claim the prize or defend the suit, after processes of attachment and monition therein had been duly served. On these facts there is clear proof that the schooner was lawful prize, both because she was enemy property, and because, at the time, she was pursuing a voyage with design to violate the blockade known to her owner, and the owners of the cargo to be in force. The government having, for excusable causes, appropriated her to the public service, she remains under the jurisdiction of the court, and the libellants are entitled to recover her value fixed by the appraisal, and the decree will be entered in their favor for that sum. The cargo transshipped to this port is condemned as lawful prize, and execution, according to due course of law, is to issue for its sale. The proceeds, when deposited in court, will be distributed according to the provisions of the statute in that case provided.

VENUS, The (BREED v.). See Case No. 1,827.

VERE, The (REID v.). See Case No. 11,670.

Case No. 16,915.

In re VEREMAITRE et al.

[3 Am. Law J. (N. S.) 438; 9 N. Y. Leg. Obs. (129) 137; 13 Law Rep. 608.]

District Court, S. D. New York. Dec. 16, 1850.

HABEAS CORPUS — JURISDICTION — EXTRADITION PROCEEDINGS—STATE COURTS—DISCHARGE OF SOLDIER OR SAILOR.

1. On habeas corpus the court will merely look into the sheriff's return containing the warrant; and if the officer issuing it had jurisdiction of the process, and assumed to take proof upon the issuing of the same, which proof he adjudged to be sufficient, the court will not review his adjudication upon that question, nor undertake to say whether he erred in adjudging the proof sufficient.

[Cited in Re Macdonnell, Case No. 8,771; s. c., Id. 8,772; Re Stupp, Id. 13,563.]

2. A commitment by a United States commissioner, and a warrant of extradition by the secretary of state, charging an individual with "having committed, within the jurisdiction of France, the crime of vol qualifie crime, one of the crimes enumerated and provided for in the treaty of extradition between that government and the United States," contain a sufficient allegation of crime, under the treaty; the words imply the commission of an extensive larceny, attached to which is an infamous punishment, like confinement at hard labor.

3. Where a prisoner brought up on habeas corpus is held under several commitments, one under state authority for an offence against the state, and the other under United States authority by virtue of a treaty of extradition with a foreign nation, the United States court will dismiss the habeas corpus—that portion which relates to offences against the state—for want of jurisdiction, and the other portion because the commitment and warrant of extradition comply substantially with the treaty and the act of congress.

4. A state court has no jurisdiction on habeas corpus to discharge a soldier or sailor held under a United States law.

[Cited in Re Forrand, Case No. 4,678; Re Henrich, Id. 6,369.]

A. R. Dyett and H. D. Lapaugh, for the prisoners.

Mr. Tillon and J. Prescott Hall, Dist. Atty., for the United States.

JUDSON, District Judge. The original petition for this writ was filed in this court on the 14th day of December, 1850, was allowed on that day, and the trial thereof was ordered for the 16th. The writ is in the usual form, supported by the proper oath, and on the 16th day of December, 1850, William Edmonds, to whom the said writ was directed, as warden of the city prison of the city and county of New York, made return of said writ, bringing with him into court the three persons now in his custody by virtue of three warrants of commitments, two of which are from the court of general sessions in and for the city and county of New York, signed by the proper clerk thereof, the first containing an order to imprison, keep, and hold the said Nicholas and George, charged with the crime of bringing into the state of New York, stolen goods, knowing them to be such, a crime against the laws of New York; and the other warrant commanding the said William Edmonds to hold in custody the said Francoise Bernard as a witness, to give evidence in the cause therein named, the said Francoise having failed to give the proper bail for her appearance as a witness; the former bearing date the 11th day of December, 1850, and the latter, on the 13th day of said December, 1850. The return further states, that the said Nicholas, George and Francoise, are also in his custody and keeping, as warden as aforesaid, by virtue of another warrant granted by J. W. Metcalf, United States commissioner, in the following words, to wit: "United States of America. To the Marshal of the United States for the Southern District of New York, and to His Deputies, or to Any of Them: Whereas, a warrant was issued by me on the sixteenth November, 1850, for the apprehension of George Denham, alias Frederick Cole, Nicholas Veremaitre and Francoise Bernard, persons found within the limits of the state of New York, charged with having committed within the jurisdiction of the republic of France, to wit: in the city of Paris, the crime of vol qualifie crime, one of the crimes enumerated and provided for in the treaty of extradition between that government and the United States; and whereas, the said persons having been brought before me, and the evidence of their criminality having been heard and considered, the evidence was deemed sufficient by me to sustain

the charge under the provisions of the said treaty. Now then, you are hereby commanded to keep the said George Denham alias Frederick Cole, Nicholas Veremaitre and Francoise Bernard, in safe custody, in the proper jail, until they shall be surrendered on the requisition of the proper authority to such person or persons as shall be authorized in the name and on the behalf of the said republic of France, to take charge of them for the purpose of returning them to the territories of the said republic. Witness my hand and seal, this sixth day of December, 1850, and of the Independence of the United States the seventy eighth. (Signed) J. W. Metcalf, United States Commissioner."

The object of this writ is to procure the discharge of these prisoners. The petitioners have been fully heard in support of their rights, by learned counsel, and the cause having been deferred for consideration until the twenty-third day of December, 1850, when the prisoners are again brought into court, and thereupon it is ruled by this court as follows: Upon this return, there are two important questions involved, as important as any which can be suggested to our minds—they regard not only the civil liberty of men, the code of criminal law, and treaty stipulations, but also in what manner the same shall be administered. The questions which arise upon the two warrants issuing out of the state courts are passed over; and I proceed directly to consider the main question which has been the subject of discussion here. This is the warrant of the United States commissioner, upon the inquiry which has been had before him on the demand of the republic of France, wherein these three persons were charged with the commission of a crime in France which, as that government claims, is a crime falling within the provisions of the treaty between the United States and France. From this warrant, it appears that a hearing was had before the commissioner, and that he deemed the evidence sufficient to sustain the charge, and thereupon the warrant in question was issued. Accompanying this return of the writ, on the day of the trial, and during its progress, there was also laid before the court, a warrant of extradition, granted by the Hon. Daniel Webster, secretary of state, under his hand and seal of office, dated ——, founded on the proceedings of the commissioner, directing and ordering that the said Nicholas, George and Francoise, be surrendered to the consul general of France, as fugitives from justice. This document is made a part of the case, and the question now is, shall these prisoners be discharged, or shall the habeas corpus be dismissed, and the prisoners left subject to the warrants in the hands of the public officers? The first treaty with France was concluded on the 9th day of November, 1843 [8 Stat. 580], and provided for the surrender of those who were charged with murder, comprehending the crimes designated in the French penal Code, by the terms assassination, parricide, infanticide, and poisoning, attempt to commit murder, rape, forgery, arson, or embezzlement. This being found inadequate to cover all the crimes perpetrated in both governments, on the 24th day of February, 1845 [Id. 817], an additional treaty was concluded, embracing other crimes, in these words: "the crime of robbery, defining the same to be the felonious and forcible taking from the person of another, of goods or money to any value, by violence, or putting him in fear; and the crime of burglary defining the same to be, the breaking and entering by night into a mansion house of another, with intent to commit felony; and the corresponding crimes included under the French law, in the words vol qualifie crime, not being embraced in the second article of the convention of extradition concluded with France, in 1843." The warrant of the commissioner on the face of it is a prima facie compliance with the terms of the treaty, and from the face of the warrant of the secretary of state, it also appears that the proceedings and findings of the commissioner were duly returned to the office of the secretary of state, according to the act of congress of the United States, entitled, "An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders," passed on the 12th day of August, 1848 [9 Stat. 302]. The first section of that act gives jurisdiction to a United States commissioner, upon complaint made on oath, and he is to issue his warrant for the apprehension of persons charged with offences under the provisions of a treaty; and if, on hearing the evidence, he shall deem the same sufficient to sustain the charge, then such commissioner shall certify the same to the secretary of state, and issue his warrant to commit to jail until the surrender shall be made by the secretary of state. On a minute examination of all the proceedings in this case, it appears, from the face of the papers now returned, that the provisions of the act of congress have been strictly complied with.

The first point made by the learned counsel, in opposition to the legality of this proceeding, is, that there has been no crime committed by either of these persons in custody, which will justify the extradition commanded in the warrant of the secretary of state, and it is insisted that the terms "vol qualifie crime" are descriptive of no specific crime whatever, and therefore the counsel insist upon the right of going behind the present finding and warrant of the commissioner, to show, by testimony, that no such crime has been committed as falls within the treaty. The writ of habeas corpus has been long in use as a writ of right. It is a judicial writ, confided to the legal discretion of the courts, to whom its jurisdiction has been imparted. The great principles by which the courts are governed, in the proceedings on this writ, are as well settled, and perhaps better settled, than those applicable to any other department of the law Among these principles, we find the legality or illegality of the imprisonment is to be determined by the return, or in

other words, on the face of the papers of the case. The argument in support of this writ would apply with great force to an appeal, but there is a difference, well settled, between an appeal and this writ. In one case the facts are re-examined, but in the other the law is applied to the facts already found. In determining this case, we are to consider, first, whether the commissioner had jurisdiction of the subject matter. The law of congress, before referred to, confers this jurisdiction in express terms. He is to hear the evidence, and if he deems it sufficient to sustain the charge, the warrant issues. No language can be more explicit, and, from the purport of that language, the jurisdiction is not only given, but it is exclusive. Then the next inquiry is, how can this court go behind the finding of any tribunal having exclusive jurisdiction, for the purpose of reviewing the facts? This question has been so well and so long settled, that there is no room for doubt. Ex parte Kenedy, 7 Wheat. [20 U. S.] 38. In that case the supreme court said: "This court can do nothing, where a person is in execution by the judgment of a court having a competent jurisdiction; this court is not a court of appeal." Gregory v. Story, 1 Dall. [1 U. S.] 135: "When, on the face of the return it appears that the justice exceeded his jurisdiction, then a habeas corpus lies." 1 Ashm. 10; Rush, J., said: "On habeas corpus, it is not competent for one court to inquire into the regularity of the proceedings of another." Johnson v. U. S. [Case No. 7,418]: "On a habeas corpus the court cannot look behind the sentence of the court where it has jurisdiction." In Jacob's Law Dictionary (title "Habeas Corpus"), we find the following laid down, in early times, as the criterion: "This it is which induces the absolute necessity of expressing, upon every commitment, the reason for which it is made, that the court upon habeas corpus may examine into its validity." Wiles v. Brown, 3 Barb. 37: "Where a supreme court commissioner has become possessed of jurisdiction of the subject matter and of the parties, the law clothes him with judicial powers, and in analogy to other proceedings, his decisions cannot be impeached in a collateral way." In re Prime, 1 Barb. 340: "Upon a writ of habeas corpus, the court cannot look beyond the colorable authority of the judge who issued the warrant. The court will merely look into the sheriff's return containing the warrant; and if the court finds that the officer had jurisdiction of the process, and assumed to take proof upon the issuing of the same, which proof he adjudged to be sufficient, it will not review his adjudication upon that question, nor undertake to say whether he erred in adjudging the proof sufficient. If the court thinks that the warrant is prima facie sufficient, that is as far as the court will go on habeas corpus." The counsel, in support of this writ, have cited Ex parte Bollman, 4 Cranch [8 U. S.] 75. On reading that case, it will be seen that there was a writ of habeas corpus to bring up the bodies, and a certiorari to bring up the record. It appeared there, that there was no allegation where the crime of treason was committed; neither was it stated in the warrant before what court the trial was to be had, and on the face of the warrant there was no sufficient statement that the court in the District of Columbia had any jurisdiction of the cause. These authorities are conclusive, that we cannot go behind the proceedings of the commissioner's warrant in this case; and these authorities will apply to all cases of courts or magistrates having exclusive jurisdiction of the subject matter, except where fraud or forgery have been practised, as in the case of The L'Amistad, 14 Pet. [39 U. S.] 518. These authorities are conclusive on this point, and yet the importance of the case will be my apology for giving a further illustration, by alluding to a proceeding which has become familiar to all the states, and which was the foundation of all the treaties recently made for the restoration of fugitives from justice. The 2d section of the 4th article of the constitution of the United States, provides that, "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." Then comes the act of congress of '93, which provides that, when such demand is made, there shall be produced a copy of an indictment found, or an affidavit made before a magistrate charging the person with the crime, certified as authentic by the governor, making the demand. On deeming these authentic, it shall be the duty of the governor, upon whom the demand is made, to cause the person accused to be arrested and delivered up. Now, suppose a person commits the crime of burglary in Rhode Island, and flees to the state of New York—the grand jury of Rhode Island find their bill of indictment, which is certified by the governor of Rhode Island to be authentic, and he demands the surrender of the man charged with the offence, what has the governor of New York to do? He is to examine the evidence of authenticity; and on finding the same properly certified, he has but one duty to perform; to arrest and surrender the prisoner. Here is an opportunity for the habeas corpus to review the decision of the governor, upon which his warrant of arrest issued; and it is proposed to go behind the warrant of surrender, and inquire into the evidence received and considered by the governor, with the addition, if you please, of other testimony, to show that no such crime has been committed as has been charged in the indictment. A habeas corpus, in such cause, accompanied by a proposition to review the cause in this manner, would strike every one as absurd. No such thing can be done in that case; all will admit that. The practice, since 1793, has been uniform, that, on habeas corpus, you cannot go behind the governor's warrant when he surrenders a fugitive from justice. Should there be any statutory provision that the trial of this judicial writ should take place

before a jury, this would only increase the absurdity. To witness a governor's finding and decision reviewed and re-examined by a jury of twelve men, would be so singular and ridiculous that any stranger would pronounce it a farce. In principle there is no difference between that case, and one for the same purpose under the treaty.

It has been argued that even if we are confined to what appears on the face of the return, still the prisoners should be discharged, for the reason that, upon the face of the commissioner's warrant, it does not appear that any offence has been committed in France, called "vol, qualifie crime"—in short, that there is no such offence in France as "vol qualifie crime." An ingenious criticism has been applied to the warrant of the commissioner, and that of the secretary of state, as to the meaning of the French term "vol qualifie crime," used in the treaty, and what should be the proper interpretation of the terms as used in the treaty. This is a technical objection which cannot apply to proceedings on habeas corpus, for in such proceedings the substance is to be regarded and not the mere form. It substantially appears on the face of these warrants, that a crime embraced within the French treaty, has been the subject of evidence before the commissioner. And if it does in substance so appear, that is sufficient. In these proceedings on habeas corpus, all that can be required is a substantial allegation that the offence has been committed in the country from whence the demand is made. And so far as I am able to understand the translation of those terms of the treaty, they imply the commission of an extensive larceny, attached to which is an infamous punishment, like confinement to hard labor.' We cannot shut our eyes against various efforts to legislate this writ of habeas corpus into such a machine as may answer some favorite purpose with the popular voice, and wherever we find such legislation, it will be seen that the utility of the process is much impaired. The unnatural lumber thus attached to its original and simple framework, only serves to embarrass and retard its usefulness. The writ is judicial, and secured to citizens by the constitution. It cannot be suspended except in time of war, and yet it may be so tinkered, changed, altered, that the framers of the constitution would hardly recognize its existence. But it is to be hoped that, in congress at least, the ancient writ of habeas corpus may be retained as an efficient and important right of the citizen, in its simple and long established mode of trial. Should congress go seriously to work in so reforming the judicial system, as to order all the judicial writs known to the common law, such as writs of error, habeas corpus, mandamus and quo warranto, to be tried and determined by jury, the civilized world might well be astonished. There is no danger of any such pretended reform in that quarter. Upon that part of the habeas corpus which shows that these prisoners are held in custody on the warrant of the United States commissioner, and embraced in the warrant of extradition from the secretary of state, it is ruled that the habeas corpus be dismissed. There is still another part of the return, which shows that the prisoners are held by two warrants of commitment from the court of general sessions of the city and county of New York. Those were the first in order, but according to the views which are entertained by the court, it is quite immaterial which branch of the case is first determined. In regard to these commitments, I take this occasion to say, that I do not entertain jurisdiction of this writ on their behalf. There is no occasion for any United States court to express an opinion, at this day, that we can discharge any prisoner who is held and imprisoned under state authority, or by virtue of a warrant issued by any state court. This is wholly beyond the jurisdiction of the district court of the United States. It is a principle acknowledged by all well informed citizens, that the line of jurisdiction between national and state jurisdiction, should be so strongly marked, that every court shall abide by that line. To prevent all conflict of jurisdiction there should be no encroachment on either side. Situated as the states are in relation to the general government, the first step of encroachment or conflict should be avoided. Let this be the rule, and all will be safe and harmonious. Such will be the order on this writ of habeas corpus. This is deemed the true course, if we consult original principles or decided cases. I shall leave the state authorities and their warrants where they are found by this writ, presuming that the state authorities will be quite as ready to remove out of the way of treaty stipulations, all obstructions, as the courts of the United States themselves. The state courts are in no want of knowledge that a treaty is the highest law of the land, the constitution only excepted, and that the states are as much bound by treaties which exist, as congress itself, and we are not to suppose for a moment that any state will thrust obstacles in the way of their execution. In support of these views, I will refer to the following cases. In the present case it is understood that his honor, Judge Edmonds, on this principle, has refused to entertain the habeas corpus brought before him, by these prisoners, and the case was there dismissed. The correctness of that decision is apparent. It has been argued here, on the other point in controversy, that this writ is often brought to relieve persons who belong to the army or navy of the United States, but nothing was contained in the argument as to the proper tribunal. It may be assumed as correct, that in all cases where the imprisonment is under the authority of the United States, the court of the United States only have jurisdiction of the writ of habeas cor-

pus: and in all cases where the imprisonment is under state process or authority, the state tribunals alone have jurisdiction. Ferguson's Case, 9 Johns. 239. The great principle settled in this case is, "that a state court has no jurisdiction of habeas corpus, to discharge a soldier of the United States army." Kent, C. J., gave the opinion of the court in that case, and I quote here the substance of his opinion. This is the language of that learned judge: "My conclusion is, that it would not only be unfit for the court to interpose in this case, so long as the courts and judges of the United States have ample and perfect jurisdiction over the whole subject matter, but that it would be exercising power without any jurisdiction." It will not diminish the weight of this authority when it is stated that the late Mr. Justice Thompson, then a member of the supreme court of New York, concurred in the opinion expressed by Chief Justice Kent, and enforced his own opinion in language equally strong. Two such minds rarely occupy the same bench together, and although many years have passed away, still the authority remains unshaken. I rest upon it with entire confidence, knowing, too, that no other rule can be adopted, without bringing the United States authorities into conflict with the state authorities. I know full well, that during the war of 1812, there were instances where the habeas corpus was brought before a state judge, to discharge an enlisted soldier from the army; but when we know, too, that these small proceedings were countenanced more from an opposition to the war, than from principles of law, they will cease to influence our minds. I am constrained to say that those proceedings were so palpably erroneous, that they can never be urged as authoritative decisions. If the state courts can discharge a soldier from the army, or a sailor from the navy, on habeas corpus, then the United States courts and United States judges may exercise the similar jurisdiction over the militia of the states, in time of peace. Here is a man subject to military duty in Maryland, and a fine is imposed on him for neglect of duty, or for contempt or disobedience of orders while on duty, and he is imprisoned by a warrant from his commanding officer. Now, I will ask, whether it would be either lawful or expedient that a judge of the United States should discharge that person on habeas corpus? No, this could not be done; it never will be attempted; and yet, where is the difference between the two cases? There is none. Further to illustrate my position, we may suppose, under the tax system, in any one of the states on refusal to pay a tax, the person is committed on a tax warrant from a state justice, can a judge of the United States discharge the individual on habeas corpus? Surely not. There is no jurisdiction. It is a state matter altogether. So, on the other hand, where the proceeding is under any law of the United States, the jurisdiction belongs exclusively to the officers of the United States. The exercise of these powers, in the manner stated, will secure peace, while any assumption of power upon either side, will be the source of discord, disastrous to the country. The final order of the court is, that the habeas corpus be dismissed—that portion of it which embraces the return of the warrants from the court of sessions—for want of jurisdiction over the subject matter; and the other portion, embracing the warrant of the commissioner, for the reasons already stated, leaving the warrant of extradition, from the secretary of state, in the hands of the marshal, no way affected or impaired by this writ.

Case No. 16,916.

In re VERMEULE.

[10 Ben. 1.] [1]

District Court, S. D. New York. June, 1878.

CLERK'S FEES FOR SEARCHING FOR PETITIONS IN BANKRUPTCY.

1. The compensation to the clerk of the court for searching for petitions in bankruptcy is not expressly provided for in section 828 of the Revised Statutes of the United States.

2. A reasonable compensation for such service is fifteen cents for each name searched against.

Carlisle Norwood, Jr., for appellant.

George F. Betts, pro se.

CHOATE, District Judge. This is an application to the court to determine the amount of the fees to which the clerk is entitled for making and certifying a search for judgments and for petitions in bankruptcy. The fees claimed by the clerk are for searching for judgments and decrees, fifteen cents for each name searched against, and for searching for petitions in bankruptcy ten cents a year for each name searched against for ten years, making one dollar for each name searched against. It is conceded that the clerk is entitled to fifteen cents for searching for judgments; and no objection is taken to fifteen cents for each name searched against for petitions in bankruptcy, but objection is made to anything more than fifteen cents for each name searched against for petitions in bankruptcy.

The fees of the clerk so far as they are fixed by statute are governed by Rev. St. tit. 13, c. 16, § 828, which contains the following: "For every search for any particular mortgage, judgment or other lien, fifteen cents." "For searching the records of the court for judgments, decrees, or other instruments constituting a general lien on real estate and certifying the result of such search, fifteen cents for each person against whom such search is required to be made."

The second of these provisions is a re-enactment of the statute of 1853, c. 80, § 1 [10 Stat. 161], passed February 26, 1853. The bankrupt law which was passed in 1867 [14 Stat.

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

517] contained no provision in relation to searches or fees for searches; but under its provisions the filing of a petition in bankruptcy affects or may affect the title to real estate, and an examination or search for these petitions therefore becomes necessary before a title is passed. Such a petition seems not to come within the description contained in the act of 1853 or the Revised Statutes, "judgments, decrees or other instruments constituting a general lien on real estate." At least, it is not claimed in this case that it does. The case is therefore a case not expressly provided for by the statute. The clerk cannot be called on to render this service without compensation, if the case is not within the existing provision of the statute. He must in such case be entitled to a reasonable compensation, having regard to the fees allowed for the services most nearly like this as now fixed by law. It is admitted by the clerk that the time and labor required for making this search are no greater than are required in making search for judgments and decrees, and for this service for the last twenty-five years the law of congress has allowed the fee of fifteen cents for each name searched against. No closer analogy or guide could be found than this statute affords for determining what is a reasonable fee for this new service required of the clerk.

It is suggested that by a statute of New York, passed in 1853, the county clerk is allowed fifteen cents a year for each name searched against for judgments, and five cents a year for each name searched against for other papers and records, and that this affords some guide to the determination of the reasonable fees to be allowed the clerk in a case not specially provided for by statute. These two statutes, nearly contemporaneous, proceed evidently upon a very different rate of compensation for similar services. What the difference is owing to is not obvious on the statutes themselves. It may be that the state statute fixed higher rates in view of a very much larger number of judgments and other instruments entered and filed in the county clerk's office; but whatever may be the reason for this difference, I am bound to follow the clear indications of the federal statutes as to the proper fee to be charged for such services in the clerk's office of a federal court. The charge for searching for petitions in bankruptcy in excess of fifteen cents for each name searched against, disallowed.

VERMILYE (UNITED STATES v.). See Case No. 16,618.

Case No. 16,917.

The VERMONT.

[6 Ben. 115.] [1]

District Court, E. D. New York. May, 1872.

WHARFAGE—NAVIGATING THE CANALS.

1. The act of the state of New York of May 6, 1870 (Sess. Laws 1870, p. 1696), fixed certain new rates of wharfage, "except that all canal-boats engaged in navigating the canals in this state, and vessels known as North river barges, shall pay the same rates as heretofore."

2. A vessel propelled by steam power, for the sole purpose of towing boats on the canals, while in the process of construction, occupied a wharf in the port of New York. *Held*, that she was a canal-boat within the meaning of the exception above stated, but was not engaged in navigating the canals, and was, therefore, liable to pay wharfage at the rate prescribed by the act of 1870.

In admiralty.

Barney, Butler & Parsons, for libellants.

Moses Ely, for claimants.

BENEDICT, District Judge. This is an action by a wharfinger to recover wharfage of the steamboat Vermont. The only question which it presents for my determination is whether the vessel proceeded against is to be charged wharfage as a canal-boat navigating the canals in this state.

The statute of the state of New York, passed May 6th, 1870, fixes certain rates of wharfage which may be lawfully charged within the cities of New York and Brooklyn, but contains an exception in the following words: "Except that all canal-boats navigating the canals in this state, and vessels known as North river barges, shall pay the same rates as heretofore."

The Vermont was a boat propelled by steam power, and constructed for the sole purpose of towing boats on canals, and was not adapted to any other navigation. She presented some peculiar features, having been constructed as an experiment, and being an effort to devise a method for using steam power on canals, and was not a vessel of the description ordinarily known as canal-boats. Nevertheless, I consider her to be a canal-boat within the meaning of the exception in the statute in question, which was intended as a protection to all craft while navigating the canals of this state.

If, therefore, it had appeared that at the time she used the libellants' wharf the Vermont was engaged in navigating the canals of this state as her occupation, I should hold her to be within the exception, and only liable to the former rates of wharfage.

But the difficulty here is that the evidence shows that when the Vermont used the libellants' wharf she was in process of construction, and up to the time of leaving this wharf was not completed.

She was intended for navigating the canals of this state, but, as yet, was unfinished, and while so unfinished, and for that reason unfit for any navigation whatever, she could not be considered to be engaged in the canal navigation of this state.

No fact could be referred to as proof of such or any occupation. She was an uncompleted vessel, as yet not engaged in navigating at all. She is not, therefore, covered by the exception, which is expressly confined to vessels engaged in navigating the canals of this state, and must

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pay the rates paid by all vessels not so employed. Let a decree be entered for the amount claimed and costs.

Case No. 16,918.

VERMONT & C. R. CO. v. VERMONT CENT. R. CO.

[Cited in Atkins v. Petersburg R. Co., Case No. 604. See 50 Vt. 500.]

Case No. 16,919.

VERMONT v. SOCIETY FOR THE PROPAGATION OF THE GOSPEL.

[1 Paine, 652.] [1]

Circuit Court, D. Vermont. Oct. Term, 1826.

FORFEITURE OF LAND GRANTS — CORPORATIONS — SCIRE FACIAS—CONDITIONS OF GRANT—NOMINAL RENT—PLEADING.

1. The king of Great Britain granted a charter of a town in that part of the province of New-Hampshire, which is now Vermont, to be divided among the grantees, and to be held on certain conditions mentioned in the charter. The defendants, who were one of the grantees, were a society in England incorporated by a charter from the king. A scire facias was issued on behalf of the plaintiffs, requiring the defendants to show cause why a forfeiture of their right to the lands had not been incurred, and assigning as grounds of forfeiture a non-performance of the conditions on which the lands were held, and violations of their charter of incorporation. On demurrer to the scire facias, *held*, that such violations of their charter of incorporation could not be thus collaterally drawn in question, but that it should be vacated by some direct proceeding for the purpose.

[Cited in Southern Pac. R. Co. v. Orton, Case No. 13,188a.]

2. Among the conditions of the grant were, that the grantees, their heirs and assigns, should pay rent and cultivate a certain portion of the land. *Held*, that no reasons of public policy exempted the defendants from the performance of these conditions, and that they were within their letter and spirit.

3. Each grantee was to pay annually for the first ten years, an ear of corn, rent for his share of the land, if lawfully demanded. *Held*, that this was a mere nominal rent, and its non-payment not a ground of forfeiture, and that the breach of the condition was ill assigned, as there was no averment that it had been lawfully demanded.

4. After the first ten years a rent of one shilling for every hundred acres was to be paid annually to the grantor, in his council chamber in Portsmouth, or to such officer as should be appointed to receive the same. *Held*, that payment at the place appointed had been rendered impossible by the separation of the countries, and that the plaintiffs should have averred that they had appointed another place of payment or an officer to receive the payment, and that notice thereof had been given to the defendants.

5. There was no declaration, but the writ of scire facias was demurred to. *Held*, that the legal effect was the same as if the demurrer had been to the declaration, and the same judgment was ordered to be entered.

T. Hutchinson, for plaintiffs.

J. H. Hubbard, for defendants.

THOMPSON, Circuit Justice. This case comes before the court on a general demurrer to a scire facias issued in behalf of the state of Vermont, calling upon "The Society for Propagating the Gospel in Foreign Parts," to show cause why a forfeiture of their right to all the lands claimed in the town of Berlin, in said state, should not be incurred. The scire facias recites, that on the 8th day of June, in the year 1763, Benning Wentworth, governor of the province of New-Hampshire, then being one of the colonies of Great Britain, claimed to hold jurisdiction, and the right to make grants and charters of land over the whole territory now contained within the state of Vermont. And that on the said 8th day of June, George the Third, then king of Great Britain, by the said Benning Wentworth, made a grant and charter of the said town of Berlin (particularly describing the boundaries thereof) to the subjects of the said king of Great Britain, then inhabitants of the province of New-Hampshire, and other governments, and to their heirs and assigns for ever, whose names were entered on the said grant, to be divided to and among them into seventy equal shares, and that among the grantees aforesaid entered upon the said grant, was the incorporated Society for the Propagation of the Gospel in Foreign Parts, to which society was granted in and by said grant one whole share, consisting of one seventieth part of said township. That to the grant and charter were annexed, as a part thereof, sundry conditions upon which the grantees took and held the estate, and upon the performance of which only have they a right to hold the premises contained in said grant. These conditions are set out as follows: That every grantee, his heirs or assigns, should plant and cultivate five acres of land, within the term of five years from the making of said grant, for every fifty acres contained in his or their share or proportion of land in said township, and continue to improve and settle the same, by additional cultivations, on the penalty of forfeiture of his grant or share in said township, and of its reverting to the grantor, his heirs and successors, to be regranted to such of their subjects as should effectually settle and cultivate the same. That each grantee should pay to the grantor, his heirs and successors, the rent of one ear of Indian corn only for the space of ten years, on the 25th day of December annually, if lawfully demanded. That every proprietor, settler, or inhabitant, should yield and pay to the said grantor, his heirs and successors, yearly and every year for ever, from and after the expiration of ten years, viz. from the 25th day of December, 1773, one shilling, proclamation money, for every hundred acres he so owns, settles, or possesses, and so in proportion for a greater or less tract, to be paid in the council chamber of said grantor in said Portsmouth, or to such officer or officers as should be appointed to receive the same: To be in lieu of all other rents and services whatever. The charter or grant,

[1] [Reported by Elijah Paine, Jr., Esq.]

oyer of which is craved, and set out in the demurrer, contains two other conditions: One relative to the preservation of white pine trees, fit for masts for the royal navy, and the other relative to a certain tract of land in the centre of the township, to be laid out in town lots. But as no breach of either of these conditions is alleged, it is unnecessary particularly to notice them. The scire facias then avers, that all the right which the society ever had to the said land had long since been forfeited to the state of Vermont. For that the said society has never paid any of the rents aforesaid, nor any other rents for the lands aforesaid, nor has said society performed any of the conditions to said charter of said town of Berlin, on the part of said society to be performed. Nor has said society within five years from the making of said grant, of the township of Berlin, nor at any time since, planted and cultivated five acres for every fifty acres of land set off to them, nor continued to improve and settle the same by additional cultivation.

From the statement thus far made of the allegations contained in the scire facias, the only breaches of the conditions contained in the charter which can be drawn in question, in the present state of the pleadings, are those which relate to the cultivation and improvement of the land, and the payment of the rent. These are the only conditions recited and set out in the scire facias, and the general allegation of non-performance of the conditions of the charter must be taken and construed, as having reference to these alone; for, from any thing appearing on the face of the scire facias, they are the only conditions which the charter contained; and the breaches of which are specifically assigned as the grounds upon which the forfeiture of the grant is claimed. All the matter introduced into the scire facias, by recitals of the charter of incorporation of the society, and the allegations of a misapplication of their funds, and a violation of the trusts vested in the corporation, must be entirely laid out of view, being altogether irrelevant, and which cannot be drawn in question under any proceedings on the scire facias now before the court. If this corporation has forfeited its charter, through negligence or abuse of its franchises, whereby the conditions upon which it was incorporated have been broken, the charter must be vacated by some direct proceeding for that purpose (usually by bill in chancery, scire facias, or information in the nature of a writ of quo warranto), where the grounds upon which the forfeiture is claimed, may be put in issue by a regular course of pleadings. It would be against precedent and of dangerous consequence to permit it to be impeached collaterally in the manner here attempted. This is a rule which has been long and well settled in the English courts, and in several of the state courts in this country, as it relates to letters patent. And the same reason applies to charters of incorporation, which are matters of record and good upon the face, and voidable only by some judicial proceeding. 10 Johns. 23; 12 Johns. 77; 1 Bl. Comm. 512. And it seems to be assumed by the supreme court of the United States in the case of Society for Propagation of Gospel v. Town of New Haven, 8 Wheat. [21 U. S.] 483, that the courts of this state have no jurisdiction to declare a forfeiture of this charter and take away its franchises on account of any misuser or non-user. And indeed this is a principle assumed by the legislature of this state in the act of the 30th of April, 1794, and is assigned in the preamble as one of the reasons upon which the act is passed, "That the society is a corporation erected by, and existing within a foreign jurisdiction, to which they alone are amenable."

If this society still exists in its corporate capacity, and is capable of holding real property in this country and is protected under the treaties with Great Britain, in the use and enjoyment of all its rights, in the same manner as natural persons, all which points seem to be settled by the case referred to against the town of New-Haven, we are brought back to the inquiry, whether this society has forfeited its right to the land granted to it in the town of Berlin, by a breach or non-performance of the conditions contained in the grant. And the only conditions drawn in question, as has already been observed, are those which relate to the payment of rent, and the cultivation and improvement to be made upon the land.

As a general answer, applicable to all the breaches alleged as ground of forfeiture, it has been urged, that the society is not embraced within the letter or spirit of the charter, which requires the payment of rent, or the improvement and cultivation of the land: That these conditions apply only to individual grantees, and not to the public rights. It is true, that so far as respects the cultivation and improvement, the charter requires, that every grantee, his heirs and assigns, shall plant and cultivate, &c. The words, heirs and assigns, are not technically applicable to a corporation; but the word grantee may be, without any very forced interpretation. And the argument, if well founded, would go to show that this society could take nothing under this grant. The grant is "to our loving subjects, inhabitants of our said province of New-Hampshire, and other governments, and to their heirs and assigns for ever, whose names are entered on this grant, to be divided to and among them into seventy equal shares." And upon the back of the grant is entered, "One whole share for the incorporated Society for the Propagation of the Gospel in Foreign Parts." And the habendum is, "to have and to hold the said tract of land, as above expressed, to them and their respective heirs and assigns for ever." This language is strictly applicable to private persons, and not incorporated bodies. But not to consider the society as a grantee capable of taking a share, would be a construction that would probably, in its consequences, take away the right of the society in every town in the state, and would be at war with the uniform interpretation heretofore given to these grants. And if the society is capable of taking as a grantee under this charter, no consistent construction

will restrict the conditions so as to exempt the society from a performance of them. The language of the grant, with respect to the payment of rent is, "that every proprietor, settler, or inhabitant, shall pay," &c. The term proprietor may well be applied to a corporation, when it is so obviously within the intention of the grant. No reasons of public policy are perceived to justify making any distinction between what are called the public and the individual rights, as to the performance of these conditions. The language of the grant applies equally to all.

The inquiry then is, whether the breaches of these conditions are sufficiently set out in the scire facias, to entitle the plaintiffs to a judgment on the demurrer. The non-payment of the corn rent reserved, was not relied upon on the argument; but the breach of the condition, as alleged in the scire facias, applies as well to this as to the money rent. It is sufficient, however, to observe, that this was evidently a mere nominal rent, and at all events, only payable if lawfully demanded. The scire facias should therefore have contained an averment, that it was lawfully demanded, and the breach is not well assigned without such averment. There is also with respect to the money rent reserved, a want of proper and necessary averments. It is, as to place, made payable in the king's council chamber in Portsmouth. A compliance with the condition, in this respect, has become impossible, by reason of the Revolution, and by the course of events, which the court is bound judicially to notice. There cannot, since the Revolution, be any such place as the king's council chamber in Portsmouth. The grantor having ceased to have any such place as is appointed for the payment of the rent, a performance of the condition, in this respect, has become impracticable by the act of the grantor, and is void. If the state of Vermont, as is contended, has succeeded to all the rights of the king as grantor, and had a right to substitute any other place for the payment, it should have been averred that that had been done, and due notice thereof given to the grantees before a breach of the condition can be alleged. There is, however, an alternative at the election of the grantor. The rent is made payable in the council chamber in Portsmouth, or to such officer or officers as shall be appointed to receive the same; but the scire facias should have contained an averment, that such officer or officers had been appointed to receive the rent and notice thereof given to the grantees, before any default for non-payment could be incurred by them. There is, therefore, no sufficient breach of the condition for the payment of rent alleged, to entitle the plaintiffs to judgment on the demurrer, on that account.

With respect to the condition relative to the cultivation and improvement of the land, the scire facias does contain an express averment, that the society has not within five years from the making of the grant, nor at any time since, planted and cultivated five acres for every fifty acres of land set off to them in the said town of Berlin, nor continued to improve and settle the same by additional cultivation. The breach is here well assigned. It is in the words of the condition, and expressly denying that what is therein required to be done, has been performed. This is an allegation upon which the defendants might and ought to have taken issue, unless they are by operation of law exempted from the performance of that condition, which we think they are not. The demurrer admits, that it has not been performed. And there is no principle or rule of construction upon which the court can say upon this demurrer, that the society does not come within the condition, or that a performance of it has been dispensed with. If it has been in any manner waived by the state, that is a question to be tried upon a proper issue taken upon the assignment of the breach. The effect of the lapse of time, and the inference to be drawn from the course of legislation of the state, at various times, with respect to these rights, are inquiries to be made on such issue, and cannot be noticed by the court upon this demurrer.

Upon these views of this case, the question arises as to what judgment is proper to be entered. The demurrer is to the writ of scire facias, but the legal effect and operation of it, must be the same as a demurrer to the declaration. The declaration upon a scire facias is no more than a copy of the writ. If there are several counts in a declaration, or if in covenant several breaches are assigned, some of which are sufficient and others not, the defendant should only demur to such as are bad. If he demurs to the whole declaration, judgment must be given against him. And this rule applies equally to a single count, part of which is good and the other not, when the matters are divisible in their nature. 1 Chit. Pl. 643; 11 East, 567; 6 Dane, Abr. 203, and cases there cited. These are rules of pleading well settled in the English courts, and must govern the present case. The plaintiffs are therefore entitled to judgment, upon the breach of the condition, that has been considered well assigned, and will be barred from any benefit by reason of any other breaches which are insufficiently alleged. Leave, however, is given to the defendants to withdraw the demurrer, so far as relates to the breach well assigned, and take issue upon the allegation therein contained, if they shall elect so to do.

[For hearing on demurrer to certain pleas which were interposed, see Case No. 16,920.]

Case No. 16,920.

VERMONT v. SOCIETY FOR THE PROPAGATION OF THE GOSPEL.

[2 Paine, 545.] [1]

Circuit Court, D. Vermont. 1827.

PLEADING—LAND GRANTS—REVERSION—BREACH OF CONDITIONS—FORFEITURE OF CROWN GRANTS—EFFECT OF REVOLUTION—RIGHTS OF STATE—ESTOPPEL AGAINST STATE.

1. On demurrer to several pleas, if any one of them going to the whole merits of the case is

[1] [Reported by Elijah Paine, Jr., Esq.]

well pleaded and contains a full and sufficient answer, it will entitle the defendant to judgment.

2. At common law, nothing that lies in action, entry or re-entry, can be granted over; and, therefore, no grantee or assignee of a reversion, can take advantage of a re-entry by force of a condition broken.

3. Whether a mere right to enforce a forfeiture would result from the Revolution so as to be transferred to a state. Quære.

4. The doctrine of estoppel applies to a state as well as to private persons. Where, therefore, a state, by an act of its legislature, granted to a town forever the use of certain lands for the benefit of the town, it was *held* that the state having parted with all the interest it had in the lands, was estopped from claiming a forfeiture, by reason of a condition broken before the grant was made.

[Cited in Indiana v. Milk, 11 Fed. 397.]

5. Nor would it be a good answer on the part of the state in such case, that the grant to the town was in trust, and that the trust had been violated; the town not having been made a party to the proceedings, and the act not having been repealed, or any measures taken to resume the possession of the land on account of any breach of trust, or violation of the grant.

6. Any one may perform a condition who has an interest in it, or in the land whereto it is annexed; and if a time to perform be appointed, the purchaser may perform.

7. When a condition is once performed, it is thenceforth entirely gone, and the thing to which it was before annexed becomes absolute, and wholly unconditional.

8. Where the grant to which the condition broken was annexed, was originally made by the British government, and the title of the state grew out of the consequences of the Revolution, and the forfeiture was incurred before the state had any interest in the land, it was *held* that the performance of the condition by the town according to the terms of the original grant, subsequent to the grant made to the town by the state, saved the forfeiture.

THOMPSON, Circuit Justice. When this cause was before the court at the last October term [Case No. 16,919], it was decided that none of the breaches alleged in the scire facias were well assigned, except that which averred a non-performance of the condition; that every grantee, his heirs or assigns, should plant and cultivate five acres of land within the term of five years from the making of the grant, for every fifty acres contained in his or their share or proportion of land in said township. The defendants had leave, however, to withdraw their demurrer as to this breach, and plead thereto. Several pleas have, accordingly, been interposed, upon some of which issues in fact have been joined, and others have terminated in demurrers, either general or special.[2] We do not deem it necessary to notice all the questions which arise upon this state of the pleadings; we think they have been spun out to an unnecessary length for the purpose of presenting the real merits of the questions upon which the case must turn, and some of the pleadings would certainly not stand the test of demurrers. If any one of these pleas, however, going to the whole merits of the case, is well pleaded, and contains a complete and sufficient answer to the breach, it will entitle the defendants to judgment.

We think the fourth plea contains allegations of facts which, in judgment of law, form a full and entire answer to the breach, and show that the plaintiffs cannot avail themselves of the alleged breach of the condition in the original grant. To this plea there is a general demurrer. The facts, therefore, set out in the plea are admitted as true. These facts are briefly, that until the 20th of October, in the year 1787, the land contained in said town was wholly unsettled and uncultivated. That by an act of the legislature of Vermont of that date, the selectmen of the several towns are authorized and directed to take the care and inspection of the glebe and society lands in their respective towns, and to lease the same until the end of the then septenary. And that by an act passed on the 30th day of October, in the year 1794, the legislature did grant the lands which had been granted by the British government to the Society for Propagating the Gospel in Foreign Parts, to the respective towns in which said lands lie, to their respective use and uses forever. And that in virtue of said act, the selectmen of the town of Berlin, on the 1st day of May, in the year 1795, took possession of the right of land in question, and soon afterwards did plant and cultivate five acres of said land for every fifty acres set off to the defendants, and did continue to improve and settle the same by additional cultivation. And that on the 1st day of February, in the year 1823, and before the issuing of the plaintiffs' scire facias, the town of Berlin surrendered the possession of the said proprietor's share in the said town to the defendants.

Upon these facts thus disclosed by the plea, and admitted by the demurrer to be true, the questions which arise are: 1. Whether, admitting the condition never to have been performed, the plaintiffs can take advantage of the non-performance, or claim any forfeiture by reason thereof. 2. Whether, as the condition was performed before the issuing of the scire facias, the forfeiture is not thereby saved.

Under the first question there are several points of view in which the case may be considered, which present very serious, if not insuperable, objections to the claim of forfeiture set up by the plaintiffs. The record shows that the grant bears date in the year 1763, and the cultivation required by the condition was to be made within five years from the date of the grant, but was not, in point of fact, made until the year 1795. The grant was made by and under the authority of the British government, and all the right which the state pretends to claim, grows out of the consequences of the Revolution; and whatever right this may be, it was not acquired until long after the expiration of the five years from the date of the grant. The condition was, therefore, broken, and the forfeiture incurred, before the state could pretend to claim any in-

[2] [See note A at end of case.]

terest in the land; and it may admit of some question, whether a mere right to enforce a forfeiture would result from the Revolution, and be transferred to the state. If the title to the territory is derived under the treaty of peace, and the state of Vermont is to be considered as standing in the character of a grantee, it would seem to be at variance with the principles of common law, which, for the purpose of discouraging maintenance and litigation, will permit nothing that lies in action, entry or re-entry, to be granted over. By the common law, no grantee or assignee of a reversion, could take advantage of a re-entry by force of a condition broken. Thus, if a man had made a lease for life, reserving a rent, &c., and a right of re-entry for non-payment, and the lessor granted the reversion over, the grantee could not take advantage of the condition. Co. Litt. 214b. And a condition indeed may be annexed to every species of estate and interest in real property, to an estate in fee as well as for life or years. Cruise, Dig. "Estate on Condition," c. 1, tit. 13, § 17. In the case of Fenn v. Smart, 12 East, 444, it was held that a forfeiture by a tenant for years in levying a fine, not having been taking advantage of by the entry of the then reversioner, to avoid the lease, could not be taken advantage of after the reversion had been conveyed away, to recover the estate in ejectment from the tenant, upon the several demises of the grantor and grantee of the reversion. So, also, it is laid down in the books as a settled rule, that none can take the benefit of a forfeiture, but he that is lord of the manor at the time of the forfeiture; and, therefore, if a copyholder maketh a feoffment, and then the lord alieneth, neither the grantor nor the grantee can take the benefit of the forfeiture, for neither a right of entry or right of action can be transferred from one to another. So, if a freeholder alienate in mortmain, and then the lord granteth away his seigniory, neither the one nor the other can ever take the benefit of the forfeiture.

But if it should be admitted that these principles do not apply to the case, and that the state of Vermont succeeded to all the rights of the crown, other obstacles growing out of the acts of the state itself are presented against the claim of forfeiture. By the act of the 30th of October, 1794, as set out in the plea, the legislature granted to the town of Berlin, forever, the use of this land for the benefit of the town. The state thereby parted with all the interest it had in these lands, and is estopped thereby from claiming any right thereto.[3] That the doctrine of estoppel applies to a state as well as to private persons, cannot be questioned. It was so considered by the supreme court of Massachusetts, in the case of Com. v. Pejepscut Proprietors, 10 Mass. 155. The legislature, by a public resolve, had declared that a certain monument was considered the one mentioned and intended in an ancient Indian deed, under which the title was derived to certain proprietors; and it was held, that the commonwealth was estopped from afterwards showing that such monument was not the one intended by the deed. If the state could claim a forfeiture by reason of the non-performance of the condition, it might thereby defeat the grant to the town; for the general rule is, that when one conveys an estate upon condition, and enters for condition broken, he is in his old estate, and for this reason a grantor of a reversion cannot afterwards enter for a condition broken before such grant was made. Litt. 347; Co. Litt. 214b. It is no answer to say, that the grant to the town was in trust for the inhabitants of the town, and that that trust has been violated by a surrender of the possession of the land to the defendants. The town is not a party to the proceedings in this case, and the state cannot avoid its own grant in this collateral way. The law has not been repealed, or any measures taken to resume the possession of the land on account of any breach of trust or violation of the grant—even admitting that might be done—by the state. But, without placing our opinion entirely upon this view of the case (although we think it would be difficult to surmount the objections already stated to the claim set up on the part of the state), the fact set up in the plea, and admitted by the demurrer, that the condition has been performed, is an unanswerable objection to the claim of forfeiture. It is a general rule, that any one may perform a condition who has an interest in it, or in the land whereto it is annexed; and if a time to perform be appointed, the purchaser may perform. This was the rule laid down in the case of Marks v. Marks, 10 Mod. 419, and is recognized by the elementary writers; and when a condition is once performed, it is thenceforth entirely gone, and the thing to which it was before annexed becomes absolute and wholly unconditional. Litt. §§ 334, 336; Co. Litt. 207b; Cruise, Dig. tit. 13 ("Estate on Condition") c. 2, §§ 6, 20. The pleadings admit that the selectmen of the town of Berlin, under and by virtue of the grant made to the town by the act of '94, took possession of the land, and performed the conditions according to the terms of the original grant. The town, for the purpose of performing this condition, must be considered as having an interest in the land, and having a right to perform it, in order to save the forfeiture. This condition is admitted to have been performed more than thirty years since, and all the benefit arising from the settlement of the country has been realized, according to the spirit and policy of the condition, as much as if it had been performed by the defendants; and to enforce a forfeiture under such circumstances, and after such a lapse of time, would be repugnant to every principle of justice, and, we apprehend, a violation of the settled rules

[3] [See note B at end of case.]

of law. Judgment must, accordingly, be given for the defendants, upon the demurrer to the fourth plea.

NOTE A. If no trick has been resorted to for the purpose of delay, the demurrer cannot be disregarded. Anon., 4 Hill, 56. A plaintiff is not at liberty to treat a demurrer to a declaration as a nullity, and enter the defendant's default for not pleading; and the court, on a motion to set aside such default, will not pass upon the question of the validity of the demurrer. Coster v. Waring, 19 Wend. 97; Anon., 4 Hill, 56. Where the defects in a declaration are of such a character as that a verdict will not cure them, the defendant, on demurrer to a special plea, may attack the declaration, notwithstanding that the general issue was pleaded with the special plea. Miller v. Maxwell, 16 Wend. 9. A plaintiff is not bound to take judgment by nil dicit where a defective plea is interposed, but may demur. Underwood v. Campbell, 13 Wend. 78. It seems where, to a declaration on a bond for the performance of covenants, a plea of non est factum only is put in, without a notice of special matter attached, that the defendant may both demur and plead; but that he cannot do both where such notice is attached to the plea, as the plea and notice conjoined will be considered as equivalent to a special plea to the whole declaration. People v. Ten Eyck, Id. 448. Formerly, in assumpsit, a defendant might traverse not only the contract itself, but the consideration and the plaintiff's performance of a condition precedent; but now the practice is obsolete, and where the defence consists of matter of fact amounting to a denial of the allegation which the plaintiff must prove in support of his declaration, the general issue must be pleaded, or it will be good cause of special demurrer that the plea amounts to the general issue. Wheeler v. Curtis, 11 Wend. 653. Where a defendant pleads the general issue, and also a special plea, to which the plaintiff replies, and a demurrer is interposed to the replication, although the plaintiff may object to the plea, if bad in substance, the defendant cannot overleap the general issue and object to the declaration; he cannot plead and demur to the same count. Id. Where a defendant has pleaded the general issue, he cannot, upon a demurrer to the replication, or subsequent pleadings, attack the declaration. Russell v. Rogers, 15 Wend. 351; Dearborn v. Kent, 14 Wend. 183. Though a demurrer be interposed to the defendant's plea, and it be defective, he will still prevail, if the count to which the plea relates is bad in substance. U. S. v. White, 2 Hill, 59. Otherwise, where the plea is to several counts, one of which is good in substance, though all the rest be bad Id. In England, if a plea begins as an answer only to part of the declaration, and is in truth only an answer to part, the plaintiff cannot demur, but must take judgment for the part unanswered as by nil dicit. Here, however, it is otherwise; and to such plea a general demurrer will be sustained. Etheridge v. Osborn, 12 Wend. 399. In indebitatus assumpsit, it is not a cause of demurrer that the declaration states the indebtedness of the defendant, and his promise to pay in a sum greater than what, from the cause of action set forth in the declaration, he is entitled to recover. Waite v. Barry, Id. 377. Where a demurrer to a declaration is overruled by a justice, and the defendant subsequently pleads the general issue, and after verdict against him appeals to the common pleas, that court is authorized to pass upon the validity of the demurrer, and, if well taken, to give judgment for the defendant. Wickware v. Bryan, 11 Wend. 545. In debt against several on a judgment of the supreme court of Ohio, two of them, viz., P. and T., pleaded that it was void for want of jurisdiction, having been rendered in a suit of which neither they nor their co-defendants had notice, and that none of them appeared therein, &c.; replication that P. and T. employed an attorney to appear in the suit, and did, by said attorney, so appear, as well for themselves as for the other defendants, &c. On demurrer to the replication, it was sustained, and the matter contained in it held sufficient to estop P. and T. from alleging either their own non-appearance, or that of the other defendants. Reed v. Pratt, 2 Hill, 64. Where a demurrer is interposed to a surrejoinder, the plaintiff may go back and avail himself of a defect in the plea. Mercein v. Smith, Id. 210. Where there are two counts in a declaration on the same instrument, and there is no plea to the second count, but the plea to the first count contains an averment that the instrument set forth in that count is the same identical instrument set forth in the second count, it cannot be objected upon general demurrer that there is a defence to only one of the causes of action set forth in the declaration. Case v. Boughton, 11 Wend. 108. Though after a demurrer to a declaration is adjudged frivolous, the court reluctantly gives leave to a defendant to plead anew; yet where, in such a case, an affidavit was made that the demurrer was put in in good faith, that the defendant had a defence on the merits, and that unless he was permitted to plead to the count demurred to, the whole cause of action would stand confessed upon the record, leave will be given to plead anew. Patten v. Harris, 10 Wend. 623. It seems that a demurrer put in, not with a view of disposing of the case on the merits, but solely in the hope of its proving successful, cannot properly be said to have been put in bona fide. Id. A demurrer is not an issuable plea within the meaning of the 21st general rule of this court. Marsh v. Barney, Id. 539. Nonjoinder of a private corporation as defendant cannot be taken advantage of by demurrer, unless the declaration show the corporation to be still in existence. State of Indiana v. Woram, 6 Hill, 33. If a plaintiff assigns a good breach of a condition of a bond, and then proceeds and specifies the items of damage sustained by him, the defendant cannot demur to such specifications; the question whether the plaintiff is entitled to recover the items specified, will be determined on the trial. Williams v. Maden, 9 Wend. 240. A declaration by a plaintiff, as administrator, containing counts for goods sold and delivered and work done, with the common money counts, without stating any indebtedness to the intestate, or referring to the plaintiff in his representative character in any subsequent part of the declaration, except in a profert of letters of administration, is bad on demurrer. Christopher v. Stockholm, 5 Wend. 36. Each count should distinctly state the indebtedness of the intestate. Id. A defect of duplicity in pleading, cannot be taken advantage of by general demurrer, but it must be specially pointed out; and upon a general demurrer to two or more counts, if one be good, there will be judgment for the plaintiff. Wolfe v. Luyster, 1 Hall, 146. The first count of the declaration set forth that the defendant (an auctioneer) received certain goods of the plaintiff, to be sold for him under an agreement not to part with or dispose of them below a certain stipulated price; and that, in violation of this agreement, he had sold the goods for a sum below that to which he was restricted, and had not accounted for the proceeds. The second count alleged that the defendant received the plaintiff's goods for sale, and agreed to render, as the amount brought by said goods, the full sum of $500. The breach assigned was, that the defendant had not rendered a just account of the goods, nor paid the full sum of $500. Upon a general demurrer to these two counts, the first was held to be good in substance, although defective for duplicity in assigning the breach; but the second was held to be bad on the face of it, for the want of an averment of the sale of the goods. Id. If a plea profess to answer only a part of a count, and is in truth but an answer to part, the plaintiff may demur, and is not bound to take judgment for the part unanswered; so held, where, in covenant, two breaches were assigned, and the defendant put in a plea as to the

breach first assigned, without taking any notice of the second breach. Slocum v. Despard, 8 Wend. 615. So, also, where a plea professes to answer all the breaches assigned in a declaration where there are two or more, and is, in fact, but an answer to one the plaintiff may demur. Id. Where a defendant pleaded non assumpsit and three special pleas, and the plaintiff put in a general demurrer; it was held, that such demurrer did not apply to the plea of the general issue, the demurrer purporting to be an answer in the several pleas of the defendant, by him pleaded to the first, second and third counts of the declaration, and the plea of the general issue being to the whole declaration, and not specifically to either count. Gomez v. Garr, 6 Wend. 583. A defendant cannot both plead and demur to the same part of the declaration. Rickert v. Snyder, 5 Wend. 104. The declaration alleged that it was agreed between the plaintiff and the defendants: 1. That the plaintiff should subscribe for and take eighty lots of ground in a certain tract in the city of New York, "agreeably to the conditions as set forth in said articles of subscription." 2. That he should pay over at the meeting of the said subscribers for the division of said lots, a certain sum of money. 3. That the defendants should allow to the plaintiff, on the settlement for said lots, a certain sum as commissions, &c. It then averred a performance on the part of the plaintiff in the words of the agreement, as set forth, and assigned, as a breach, the non-payment of the sum to be allowed as commissions. Upon general demurrer to this declaration, for the want of a sufficient statement of the cause of action, it was held to be sufficient, although liable, perhaps, to objections upon a special demurrer. Smith v. Wiswall, 2 Hall, 469. A demurrer to a declaration containing several counts will not be sustained if either count is good. Cochran v Scott, 3 Wend. 229. Where there are several breaches assigned in one count, some good and some bad, and there is a demurrer to the whole count, the plaintiff will have judgment. The defendant should demur to the defective portions of the count. Glover v. Tuck, 24 Wend. 153. Where in a contract relative to the transportation of merchandise on the canal, the dangers of canal navigation are excepted out of a warranty for delivery by a specific time, a plea generally alleging such dangers, without specifying them as an excuse for non-performance, is not sufficient on special demurrer. Woodworth v. McBride, 3 Wend. 227. Where a plea is an answer to but a part of the declaration, the plaintiff must demur, and doing so, he shall have judgment. Hickok v. Coates, 2 Wend. 419. Where a plaintiff sets up title by purchase to personal property, claimed under a dormant execution, it is not necessary for him to aver on his replication the time or place of purchase, nor the time when directions were given to suspend proceedings under the execution, nor that such directions were given to defraud, nor is it necessary to set forth the consideration paid; and the omission in the pleadings to set forth these particulars cannot be taken advantage of, even by special demurrer. Id. A rejoinder averring that the defendant has assets, but not more than sufficient to pay and satisfy a judgment of upward of $1,000, is not a departure in pleading from a plea of plene administravit præter, averring the goods unadministered to be of the value of only $1. So held, on demurrer. Burr v. Baldwin, Id. 580. The omission to make a profert of letters of administration is only cause for a special demurrer. Allison v. Wilkin, 1 Wend. 153. The want of profert of letters of administration can be taken advantage of only by special demurrer. Id. On a return to a mandamus, the relator may demur or traverse, but he cannot do both. A rule both to join in demurrer and reply, is irregular. People v. Vail, Id. 38. In an action by the Utica Insurance Company (incorporated by St. Sess. 39, c. 52), against the endorser of a promissory note, he pleaded that the plaintiffs, contrary to the statute (Sess. 36, c. 71, § 2), subscribed to and became members of an association, institution or company, and became proprietors of a bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, and transacting all other business which incorporated banks may and do transact by virtue of their respective acts of incorporation; that for this purpose they established an office or banking-house, and issued notes, received deposits, and made discounts, as incorporated banks may, &c.; and averred that the note in question was made for the purpose of being, and was discounted at their office, they knowing for what purpose it was made. The plaintiffs replied the act constituting them a corporation, which authorized them to loan their surplus funds; and alleged that they lent a part of their surplus funds on the security of the note, showing the particulars; without this, that the plaintiffs had subscribed and become members of an association, &c. (as in the plea), for the purpose in the plea set forth, concluding with a verification. Special demurrer, assigning for cause, that the plaintiffs had not, in their replication, confessed and avoided, traversed, or denied that they illegally and corruptly established an office or banking-house, and issued notes, received deposits, and made discounts as stated in the plea. Held, that the plaintiffs were entitled to judgment upon the demurrer. Utica Ins. Co. v. Scott, 8 Cow. 709. In slander for charging the plaintiff with perjury, the defendant pleaded that the words spoken in reference to certain parts of the plaintiff's testimony were so understood by the hearers. Replication de injuria, &c. On demurrer to the replication; held, that the plea would have been bad as amounting to the general issue, on special demurrer; but this could not be objected on an issue in law upon the replication. Allen v. Crofoot, 7 Cow. 46. A plea containing matter of fact and matter of record may conclude to the country; de injuria, &c., is a good answer to matter of excuse set up in a plea. Id. A plea in trespass quare clausum fregit, that a third person was seized in fee, and demised to the defendant for years, without giving express color, amounts to the general issue; and is bad on special demurrer. Collet v. Flinn, 5 Cow. 466. A strong conclusion of a plea in bar, can be taken advantage of only by special demurrer. Terboss v. Williams, Id. 407. Color in pleading, form and use of. Id. 467, 468, note a. A frivolous demurrer is in fraud of the ninth rule of April term, 1796, declaring a cause at issue after twenty days, &c., and though served within the time, will not be cause for setting aside an inquest. Carey v. Hanchet, 1 Cow. 154. Where a sheriff was sued for taking insufficient pledges in an action of replevin, and for taking no pledges, and there was a demurrer to one of the counts in the declaration and issue joined on the other counts; and a judgment was given for the defendant on the demurrer, and a verdict found for him on the issue, on which judgment was rendered; held, that the defendant was entitled to a writ of inquiry of damages, as he had sustained no damages in defence of his suit, except the costs. Gibbs v. Bull, 20 Johns. 212. Declaration in case against five defendants, and one of them not brought in court, the declaration was held bad on special demurrer, though it would be good after verdict. Mumford v. Fitzhugh, 18 Johns. 457. If the plaintiff adds the similiter to his replication, the defendant may demur without striking it out. Bank of Auburn v. Aikin, Id. 137. Where the general issue is pleaded, and also a special plea, to which there is a replication, and a demurrer to the replication, and contingent damages are assessed at the trial of the general issue, and the demurrer is afterward argued, the court will not allow the defendant to amend his special plea; aliter, if the demurrer had been argued before the trial of the issue. Hallett v. Holmes, 18 Johns. 28. A misjoinder of counts is a fatal defect on demurrer, arrest of judgment or error. Cooper v. Bissell, 16 Johns. 146. A demurrer for misjoinder of counts must be to the whole declaration; the

defect cannot be reached under a demurrer to particular counts. Ferris v. North American Fire Ins. Co., 1 Hill, 71. A demurrer is a plea; and the relator, or party prosecuting a writ of mandamus, may demur to the return of the writ. People v. Champion, 16 Johns. 61. On demurrer to plea or replication, the sufficiency of the declaration may be attacked on the argument, although the general issue be also pleaded. Auburn & O. Canal Co. v. Leitch, 4 Denio, 65. Where on a demurrer to a subsequent pleading, a party goes back to take advantage of a defect in a previous pleading, he can object only to such defects as are grounds of general demurrer. Comly v. Lockwood, 15 Johns. 188, 191. If there is a demurrer to the whole declaration, and one of the counts is bad, the count cannot be referred to for the purpose of helping out and aiding another count. Nelson v. Swan, 13 Johns. 483. Where the day of making a contract is immaterial, it is not ground of demurrer, that the contract is illegal by reason of its having been made on the day laid in the declaration. Amory v. McGregor, 12 Johns. 287. Where a plea contains distinct matters divisible in their nature, as separate and distinct demands, the plaintiff cannot demur generally to the whole, because a part is bad; but should demur as to the matters badly pleaded, and traverse the residue. Douglass v. Satterlee, 11 Johns. 16. So, where an executor or administrator defendant pleads outstanding judgments, some of which are well pleaded, and others badly pleaded, the plaintiff should not demur to the whole plea, but only to such of the judgments as are not well pleaded, and should traverse the residue of the plea. Id. A special demurrer includes a general demurrer. Utica Ins. Co. v. Scott, 8 Cow. 709. A bill of exceptions and demurrer to evidence or special verdict may be taken in the same cause. Powell v. Waters, Id. 669. A challenge for principal cause may be demurred to, or issue may be taken upon it. Ex parte Vermilyea, 6 Cow. 555. When the facts are admitted and referred to the court, this is in substance a demurrer, and should be entered on the record as such. Id. The defendant pleads two distinct pleas, neither in itself good, though both together would be; the plaintiff can avail himself of the defect only by demurring. Shook v. Fulton, 4 Cow. 424. Of the replication and demurrer in quo warranto. Id. 148, note a. A reference will not be granted if there is a demurrer in a cause, which relates to the whole action, and is undetermined. Jansen v. Tappen, 3 Cow. 339. In a declaration against heirs, where it appears that only a part of them are arrested in the suit, those who are may demur. Whitaker v. Young, 2 Cow. 569. In an action of covenant, a plaintiff is bound to aver enough to show with all reasonable certainty that he has been damaged. Thus, where G. agreed to sell a farm to A., containing 161 acres, and A. agreed to pay G. $26 per acre for all the land except the road running through the same, and covenanted to purchase in the premises, if they were sold under certain mortgages which were liens upon the land, and to advance sufficient to pay such mortgages; on the land being sold under the mortgages, and an action brought on the agreement, for the recovery of damages, it was holden on demurrer that the declaration was defective for the want of an averment as to the quantity of land contained in the road, so as to enable the court to say that the plaintiff had sustained damage by the neglect or refusal of the defendant to purchase in the farm at the mortgage sale. Gould v. Allen, 1 Wend. 182. It is not ground for demurrer that consequential damages are laid in the declaration which do not legitimately result from the acts of all the defendants; and a demurrer to two counts cannot be sustained unless both are defective. Leland v. Tousey, 6 Hill, 328.

NOTE B. The principle of an estoppel, as applicable to deeds, is to prevent circuity of action, and to compel parties to fulfill their contracts; thus a party asserting in a deed the existence of a particular fact, and thereby inducing another to contract with him, cannot by a denial of that fact compel the other party to seek redress against his bad faith by suit; but the court will decide upon the rights of the parties, without subjecting them to the expense and delay of a new litigation—and this they will do, not on the ground of concluding the party from showing the truth, but because the whole truth being shown, the justice of the cause is not changed. Id. M. having mortgaged premises in 1792, with a covenant of seizin, and the mortgage having been foreclosed; held, that the estate which thus came to him by descent, enured by estoppel to the title derived under the mortgage. Vanderheyden v. Crandall, 2 Denio, 9. In ejectment for dower against grantee of the husband by quit-claim, defendant is not estopped from showing that the husband was not seized of such estate as would entitle his widow to dower. The cases of Sherwood v. Vandenburgh, 2 Hill, 303; Bowne v. Potter, 17 Wend. 164, and other similar cases, are overruled in this respect. Sparrow v. Kingman, 1 Comst. [1 N. Y.] 242. The recital in a bond to A., that the obligee had sold and conveyed to the obligor certain lands, is not evidence of such conveyance where it is not shown that the bond was ever in possession of the obligee; but a recital by an obligor in a bond executed by him, that he had conveyed certain premises, is sufficient evidence of the fact of conveyance. Jackson v. Brooks, 8 Wend. 426. A party in possession of lands, claiming the same under a warranty deed from a stranger, is estopped from saying that he holds as a tenant in common with the plaintiff. Siglar v. Van Riper, 10 Wend. 414. But when where he holds as a tenant in common, if he denies the plaintiff's title when possession is demanded, the plaintiff is entitled to recover, such denial amounting to an ouster; a denial in terms is equivalent to an act amounting to a denial. Id It seems, too, that such a demand may be made of a tenant in possession, though not the tenant of the freehold. Id. Recitals in a deed of land are evidence against the party making them, or any person claiming under him; they estop parties and privies; privies in blood, in estate, and in law. Jackson v. Parkhurst, 9 Wend. 209. A person entering into possession of land under a party thus bound by a recital, is a privy in law of such party, and is bound by whatever would conclude or affect him. Id. Recitals in an ancient deed of land are not evidence against a stranger unless it be shown that the land or some part of it has been held under the deed. Schermerhorn v. Negus, 2 Hill, 335. Accordingly, where the plaintiff in ejectment, who claimed as one of the devisees of S., gave in evidence a deed executed by L., and others, nearly seventy years before the trial, which, after reciting that partition had been made of a tract of land before granted to thirteen persons by letters-patent, and that a part of the tract had since been sold to the grantors, purported to convey two lots of the part thus sold, including the land in question, to S. and one G.; and it was further shown that G. had subsequently released to S. all his interest in the two lots, but there was no evidence that any part of these lots had ever been possessed by L. and others, their grantees, and those claiming under them: held, that no title was shown in the plaintiff which would authorize a recovery; and this though there was proof that other lands, not a part of the two lots, had been occupied under S.'s will. Id. A person entering under another, either as tenant or under an agreement to purchase, cannot dispute that title, while he continues in possession, nor can he legally attorn to a stranger. Every one entering immediately or directly under such tenant stands in the same situation as the original tenant. Jackson v. Miller, 6 Wend. 228. Although the testator, at the time of the making of the will, had no legal estate in the premises, the grantees in the deed, and those claiming under them, are estopped from setting up any title inconsistent with that conveyed thereby. Jackson v. Ireland, 3

Wend. 99. A partition deed operates as an estoppel between the parties and persons claiming under them. Jackson v. Hasbrouck, 3 Johns. 331. A recital in a will is an estoppel to all claiming under the will. Denn v. Cornell, 3 Johns. Cas. 174. There, Lieutenant-Governor Colden, in 1775, made his will, and in it recited that he had conveyed to his son, David, his lands in Flushing, and he then devised his other estate to his sons and daughters, &c. Afterward, David's estate was confiscated under the act of attainder, and the defendant in ejectment claimed under that confiscation, and deduced his title from the state. No deed of the Flushing estate, the land in controversy, was proved from the father, and the heir-at-law sought to recover upon that ground. But the court held, that the recital in the will, that the testator had conveyed the estate to David, was an estoppel of the heir to deny that fact, and bound the estate. Id. So, where a party has given a deed with warranty of land, of which he had not sufficient title, it enures to his grantee by way of estoppel; and this to avoid circuity of action. But a covenant of seizin, or what is equivalent, that the party had good right to convey, does not thus operate upon an after-acquired title. Jackson v. Wright, 14 Johns. 193; Whitlocke v. Mills, 13 Johns. 463. The general principle to be deduced from the cases is, that an instrument which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterward by descent or by purchase, does in fact pass an interest and a title from the moment such estates come to the grantor. Jackson v. Murray, 12 Johns. 201. A deed by the grantor, who conveys with warranty, being at the time under contract to convey the land granted; held, that such deed was an estoppel as to him and all others claiming under him; and a conveyance made subsequently to the grantor, would enure to the benefit of the grantee. The former is estopped by his deed and covenant, to make title to the land; and one claiming subsequently under the grantor was bound by the estoppel, being privy in estate. Id. In such case, the covenant in the deed being one which runs with the land, the assignee of the grantor may avail himself of it. Id. The principle is, that the estoppel concludes the party from alleging the truth; and, therefore, a man who admits a fact or deed in general terms, either by reciting in a deed executed by him, or by acting under it, shall not be received to deny its existence. Sinclair v. Jackson, 8 Cow. 543. But when the truth appears from the same deed or record, which would otherwise work the estoppel, then the adverse party shall not be estopped to take advantage of the truth; for he cannot be estopped to allege the truth when it appears on record. Thus, where the deed of grant and release, containing the recital in question, was endorsed on the release and referred to it; and the terms of the recital were, that he, (C.) was the owner for his life, of the premises described in the within indenture of lease, and in and by the same demised and leased to G. S., within named, and was justly and lawfully entitled to the yearly rent by the within indenture of lease; held, that this recital of the lease and reference to it made it part of the deed of grant and release, as fully as if it had been recited at large and incorporated therein. Id. A party, admitting the title to land to be in another, and agreeing to purchase, is estopped from setting up title in himself under a deed which he had held for six years previous to such admission; and such estoppel extends to all claiming under him. Sayles v. Smith, 12 Wend. 57. But where the defendant, when he made the admission of the plaintiff's title made no claim himself to the lot, but there were conflicting claimants, and after agreeing to purchase of the plaintiff, he became satisfied that the other claimant had the better title, and purchased of him; held, that he might deny such title, and set up title in himself, if the acknowledgment of the plaintiff's title was produced by imposition, or made under a misapprehension of the rights of the respective parties. Jackson v. Spear, 7 Wend. 401; Jackson v. Cuerden, 2 Johns. Cas. 353. If, however, he has entered into possession under an agreement to purchase, he will be estopped from disputing the title of him under whom he entered, until after a surrender of the possession. Id. One in possession of lands under a devise in fee to himself, purchased and took a deed from another who pretended to have an adverse title; held, that neither the grantee nor his successors were estopped from disputing the validity of the title thus purchased. Osterhout v. Shoemaker, 3 Hill, 513. The principle of the rule by which a tenant is estopped from questioning the title of his landlord, does not apply as between a grantee in fee-simple and his grantor. Id. There is no such estoppel except where the occupant is under an obligation, express or implied, to restore the possession at some time or in some event. Id. The doctrine that in dower, the grantee of the husband is estopped to deny that his grantor had title, ought not to be extended. Id. By the common law the widow of an alien husband could not be endowed; but by Rev. St. 740, § 2, the widow of an alien, who at the time of his death was entitled by law to hold land, if she be an inhabitant of this state at that time, shall be endowed of such estate in the same manner as if her husband had been a native citizen. And where the defendant derives his title from, and holds the premises under the husband of the plaintiff; held, that a tenant or defendant in such condition is estopped from denying the seizin of the husband, although there was no statute in existence at the time the husband purchased, nor was such purchase affirmed by any subsequent statute. Davis v. Darrow, 12 Wend. 65. So where a tenant for life or years made a feoffment in fee and died, and his wife brought dower against the feoffee; held, that he could plead that the husband was not seized. Hitchcock v. Harrington, 6 Johns. 290. Where the plaintiff gave in evidence a deed from V. and his wife of the lands in question with covenant and warranty; and the defendant proved title in a third person by virtue of a judgment, &c., against V. and her late husband; held, that she was not estopped by the deed executed with her husband to the lessors of the plaintiff. Jackson v. Vanderheyden, 17 Johns. 167. Grantee in fee by quit-claim deed, or deed with warranty, is not estopped from denying that the grantor had title, at or before the date of the deed; he holds adversely to the grantor, and may controvert the title, and fortify his own by purchase of any other title which will secure him in quiet enjoyment of the premises. Averill v. Wilson, 4 Barb. 180. The mere taking of a quit claim deed does not estop the grantee from questioning the title of his grantor: but the rule is different as between vendor and vendee before conveyance; and between landlord and tenant; in such cases possession must be surrendered before title can be questioned, and there can be no estoppel unless the occupant is bound at some time, or in some event, to restore possession. Hill v. Hill, 4 Barb. 419. Where the lessor of the plaintiff and the defendant claimed by the same title. The plaintiff produced a lease on which there was an assignment written from P. to B. The judge admitted the assignment without proof on the ground that B. had reassigned at a subsequent date to P., which was also endorsed; and P. conveyed to J. and the lessors of the plaintiff; held, that the acceptance of the reassignment endorsed on the same paper that contained the assignment, was an explicit acknowledgment of the authenticity and genuineness of the latter. P., or those claiming under him, therefore, cannot be permitted to deny the execution. Jackson v. Halstead, 5 Cow. 216; Jackson v. Kingsley, 17 Johns. 158. A person cannot gainsay a title as against a plaintiff who claims under the same title by a prior right. Jackson v. Ayers, 14 Johns. 224. Where one enters on land under a contract to purchase, but neglects to pay the consideration money, he and those claiming under him are estopped to

question the title of the vendor, or his heirs; though more than twenty years have elapsed from the time when the last payment became due; though the vendee and those claiming under him have made permanent and valuable improvements, defended several actions of ejectment, and not been called on by the vendor to pay; and have even acquired title by conveyance from a third person. Jackson v. Hotchkiss, 6 Cow. 401. The form of pleading an estoppel is, to rely on the deed as an estoppel, and pray judgment that the party may be estopped, or not admitted to deny the facts which the deed purports, without demanding judgment si actio, &c. Davis v. Tyler, 18 Johns. 490. Estoppel may be by matter in pais as well as by matter of record; as by accepting an estate, making partition, &c. Springstein v. Schermerhorn, 12 Johns. 357. So, if a man take a lease of his own land, he is estopped from setting up his original title. And whether he takes a new lease to himself, or directs in writing, under seal, that his landlord should give new leases to his brothers, for the premises, he is equally estopped from asserting any claim in opposition to the new leases. No title, not in esse, will pass by deed as bargain and sale unless it contain a warranty, in which case it will operate as an estoppel. Jackson v. Wright, 14 Johns. 193. Where a person in possession of land covenants with another to pay him for the land, and receive a deed from him, in an action of ejectment by the covenantee he will be estopped from setting up an outstanding title, unless he shows he was imposed upon in making the agreement. Jackson v. Ayers, 14 Johns. 224. Where a person has conveyed land, he will not be permitted afterward to claim it in opposition to his own deed, although the deed may not amount to an estoppel. Jackson v. Stevens, 16 Johns. 110. It was decided that a man shall never be permitted to claim in opposition to his deed, by alleging he had no estate in the premises; and that if a man make a lease of land by indenture, which is not his, or levies a fine of an estate not vested, and he afterward purchase land, he shall, notwithstanding, be bound by his deed, and not be permitted to say that he had nothing. Jackson v. Bull, 1 Johns. Cas. 90; Jackson v. Murray, 12 Johns. 201.

VERMONT & C. R. CO. (CODMAN v.). See Cases Nos. 2,935 and 2,936.

VERMONT & M. R. CO. (WHITE v.). See Case No. 17,559.

VERMONT CENT. R. CO. (BROOKS v.). See Case No. 1,964.

VERMONT CENT. R. CO. (VERMONT & C. R. CO. v.). See Case No. 16,918.

VERMONT VAL. R. CO. (POND v.). See Cases Nos. 11,264 and 11,265.

Case No. 16,921.

VERNARD v. HUDSON.

[3 Sumn. 405.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1838.

BILL OF LADING—PRESUMPTIONS AS TO STOWAGE—STOWAGE ON DECK—FREIGHT.

1. Where goods are shipped under the common bill of lading, it is presumed, that they are shipped to be put under deck, as the ordinary mode of stowing cargo; unless there is a positive agreement to the contrary, or circumstances from which this may be inferred.

[Cited in The Waldo, Case No. 17,056. Quoted in The Wellington, Id. 17,384; 260 Hogsheads of Molasses, Id. 14,296.]

2. Where goods were shipped under the common bill of lading, at an under-deck freight, but were carried on deck, and finally delivered without damage, *held*, that the ship-owner was entitled only to a deck freight.

This was the case of an appeal from the decree of the district court [of the United States for the district of] Massachusetts, rendered in a suit in admiralty, brought to recover the freight due on a bill of lading of thirty hogsheads of bacon, shipped on board of the schooner Rolla, belonging to the libellant [Henry T. Vernard], at New Orleans, in April, 1838, to be transported on board of the said schooner to Boston, and there to be delivered (the dangers of the seas only excepted) to the respondent, Sumner Hudson, or to his assigns; he or they paying freight for the said goods eight dollars per hogshead, with five per cent. primage and average accustomed. The bill of lading was in the common form, specifying the goods to be "thirty hogsheads bacon," signed by the master, but with the further written statement, "contents unknown." The schooner arrived at Boston, and there delivered to the consignee. It appeared from the evidence, that the freight to be paid was the common under-deck freight, and that the hogsheads were actually brought on deck—the ordinary freight of goods so brought varies 5-8ths from the under-deck freight. The defence set up in the answer was in substance, that the contract was, that the goods should be carried under deck; that damage had occurred to the goods by reason of their exposure on the deck on the passage; that one hogshead was lost or stolen on the passage; and that on the remainder, even if there were no damage, the only freight which could become due and payable, would be the common deck freight; and that the respondents, at the time of the receipt of the goods, protested against the conduct of the master in bringing the goods on deck, and gave notice, that he should hold the owners responsible for damages. Upon the hearing in the district court, a decree was entered for the libellant for full freight and primage, amounting to $243.60, deducting therefrom the loss of the one hogshead, amounting to $80, and also the damage to thirteen hogsheads, amounting to $65, and costs. [Case unreported.] From this decree the present appeal was taken.

B. Rand, for libellant.

B. R. Curtis, for respondent.

STORY, Circuit Justice. It is admitted, on all sides, that the libellant is bound to pay for the loss of the one hogshead. That, therefore, does not enter into the controversy upon the present appeal. The questions here made are, first, whether there was any contract between the agent of the respondent (very fitly called at the bar the libellee), and the master of the Rolla, that the goods should and might be brought on deck; secondly, whether any damage occurred from their being carried on deck; and, thirdly, to what freight the libellant is en-

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

titled, whether to the under-deck freight, or to the deck freight only, if there has been no damage.

As to the first point, I take it to be very clear, that where goods are shipped under the common bill of lading, it is presumed, that they are shipped to be put under deck, as the ordinary mode of stowing cargo. This presumption may be rebutted by showing a positive agreement between the parties that the goods are to be carried on deck; or it may be deduced from other circumstances, such, for example, as the goods paying the deck freight only. The admission of proof to this effect is perfectly consistent with the rules of law; for it neither contradicts nor varies any thing contained in the bill of lading; but it simply rebuts a presumption arising from the ordinary course of business. The onus probandi is, therefore, on the libellant to establish such an agreement. Now, although one witness has sworn to such an agreement, he is contradicted directly by as positive denials on the part of the agent, who shipped the goods for the libellee. And then, again, in support of the latter, there is the clear fact, that a full under-deck freight is stipulated for in the bill of lading, a fact certainly not easily reconcilable with the supposition, that they were to be carried on deck. So that the preponderance of the evidence decidedly is, that there was no such agreement to carry the goods on deck. If it had existed, one of two things ought to have occurred, either that the mere deck freight should have been payable; or that there should have been some written memorandum on the bill of lading, to repel the inference from a full freight being stipulated for.

As to the question of damages, my opinion is, that the evidence is not clear and determinate, that there has been any damage by carrying the goods on deck, for which the libellant is answerable. The onus probandi is on the libellee to establish the damage; for here in the bill of lading the words are written, "contents unknown;" and as the contents were not known, no presumption can arise as to the true state of the goods at the time of the shipment. How can the master be presumed to agree, that the goods are shipped in good order and condition, when he is utterly ignorant what they are, and what is their nature, and what is the state, in which they are? It is true, that the bill of lading states that the contents are bacon; but the master does not admit the fact to be so. He says he knows not the contents of the hogsheads, and therefore he can speak only to the external character of the hogsheads, which might be properly fit for one description of goods, and not for another. The evidence shows that these were western hams, which came from Cincinnati to New Orleans. When they came, how long they had been at New Orleans, and what was their condition, when shipped at New Orleans for Boston, are facts not proved by any clear and determinate evidence. That they were in very good order when shipped at Cincinnati is proved; but it is quite consistent with this fact, that, before they were put on board of the Rolla, they may have suffered all the deterioration and leakage, which were found to exist at Boston. Indeed, the evidence of the persons in Boston, who received them for smoking at Boston, is that they were in as good condition as the average of other shipments of western hams coming to Boston by the way of New Orleans. What I put the case upon in respect to damage is, that the evidence goes no further than this, that there might have been a probable damage from the goods being brought on deck, not that in this case there positively was such a damage. Now, under all the circumstances, my mind is left in great doubt on the point; and such a doubt alone is sufficient, under such circumstances, to repel the claim.

As to the other point, I am very clear, that the libellant is entitled to no more than the deck freight. His contract was, that he would carry the goods under deck for the full freight. He has not performed his contract, as he stipulated. But he seeks to recover the same freight, as if he had punctiliously performed it. His argument is, the hogsheads arrived safe, and without damage, and therefore I am entitled to a full compensation. By carrying the goods on deck I took upon myself the additional responsibility of the additional chance of loss to the goods. To this argument the true answer is, that by so doing he has violated the terms of his contract. He has thrown additional risks on the shipper beyond what he knew or intended. If the shipper had procured insurance on the goods, it would have been utterly lost. If he had none he is compelled to stand his own underwriter, without his own consent, under circumstances, which greatly enhanced the perils of the voyage. He is compelled to rely on the responsibility of the master and owner in a case where he has not trusted them; and his election to seek security from other underwriters is taken away, not only without his knowledge, but against his positive stipulation. At the common law we all know, that ordinarily no man can recover upon a contract who by his own default has not performed its stipulations; unless, indeed, the other party waives his rights. In the court of admiralty, which in this respect acts as a court of equity, the contract is not so rigidly construed or enforced. The compensation is apportioned, according to the nature and extent of the default of the party. I think, I am not only warranted, but bound by the doctrines of courts of admiralty on this point to say, that the libellant is not entitled to a higher compensation than the ordinary deck freight of five-eighths of the full freight. This is dealing out to him a liberal compensation in a case, in which there has been a gross departure from duty. Sound policy dictates, that neither the master nor the owner should here derive any advantage from their departure from duty; and that they should not be tempted to put the property of shippers at risk beyond the con-

templated arrangements, by becoming, as it were, insurers, without the consent of the shippers. The decree must be reformed accordingly; but no costs are to be allowed to either party in this court. But the libellant is to have the costs in the district court.

VERNON (CASSELS v.). See Case No. 2,503.

Case No. 16,922.

VERNON v. D'WOLF.

[4 Mason, 123.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1825.

WILLS—CONSTRUCTION—LEGACY—PLEDGE OF SECURITY.

A by his will left B, a minor, 20,000 dollars to be invested by his executors in an institution for savings, to be paid on her marriage or arrival at age, and in the mean time the interest thereon to be paid to his wife for the maintenance of B; and he directed, that all the public stock standing in his name in the loan office at P. should remain there, and be bound to pay the 20,000 dollars, adding, that his reason for so doing was to make good any deficiency or depreciation that might take place in the savings bank. *Held*, that the whole public stock (amounting to upwards of 50,000 dollars) was pledged as security for the principal legacy, but not for the accruing interest.

Bill in equity by the plaintiff for the due appropriation and security of a legacy left her by the last will and testament of her grandfather, Charles D'Wolf. The bill being taken pro confesso, by consent, the only question submitted by the parties was, what sort of decree the plaintiff, under the circumstances, was entitled to. The testator made his will, and afterwards annexed several codicils thereto. His second codicil, dated 26th of June, 1816, contained the following clause: "I also order and direct that in lieu of what I intended, as expressed in my will, for my dear daughter Eliza, deceased, I give and bequeathe to my granddaughter Eliza D'Wolf Vernon (the plaintiff) 20,000 dollars, to be placed in the hands of William Vernon, her father, at my decease without loss of time, the interest of which to be appropriated, or as much of the interest as is necessary, for the bringing up and education of the said Eliza D'Wolf Vernon, and to be paid her by her said father on the day of her marriage, or in case of her decease before marriage, to the said William Vernon, to have and to hold the same to his heirs and assigns for ever." On the 2d of February, 1820, the testator, by a third codicil, added the following clause: "A change of circumstances has caused me to alter my will as respects the manner in which I have given 20,000 dollars to my dear and much beloved granddaughter, Eliza D'Wolf Vernon. Instead of paying it over to her father, Mr. William Vernon, it is my will and pleasure, that all my United States stock standing in my name in the loan office in Providence, shall remain in my name, and shall be held bound to pay the above mentioned 20,000 dollars, equal to gold or silver, until my said granddaughter shall arrive to the age of 21 years or marriage, then to be paid over to her; the interest of the above named 20,000 dollars to be paid over to my wife, as it may become due, and from the time of my decease up to the time of my said grand daughter's age of 21 or marriage, to be by my said wife laid out in the maintenance and education of my said granddaughter. I do order that at my decease my executors do deposit 20,000 dollars in the Bristol Institution for Savings, in their name, as trustees to my said grand-daughter. My intention in binding the above mentioned United States stock is to make good any deficiency or depreciation that may take place in the savings bank. I do order the overplus interest of what may be over sufficient for her said maintenance and education, to be added to the principal in said institution. It is also my will, that in case my dear grand-daughter should die before she arrives at the age of 21 or marriage, that the above mentioned 20,000 dollars go back to my sons George and Charles, or their heirs, in lieu of the said 9,000 dollars as mentioned in my second codicil." The bill charged, among other things, that the United States stock, amounting to more than 20,000 dollars, had been sold by the executors; and prayed a reinvestment and other security, &c. &c.

Upon the hearing, Whipple and Tibbets, for respondents, contended: 1. That no sum ought to be invested to make up any deficiency in the 20,000 dollars deposited in the Bristol Institution for Savings, as the stock in the loan office was paid off by the United States, and not voluntarily disposed of by the respondents: 2. But if any sum was to be reinvested for this purpose, no part of the interest arising on such invested sum ought to be appropriated to make up any deficiency in the interest on the said 20,000 dollars, as no provision was made in the will to supply any such deficiency, and it did not appear that such was the intention of the testator.

Mr. Searle, for plaintiff, contended, that the bill charged the defendants with the sale of the stock, and they admitted it by not answering. That if the stock had been paid off by the United States, the proceeds were equally pledged in the executors' hands, and ought to be placed in some safe fund, where they might be reached, if necessary, in any future event. That under the will it was apparent the testator intended the 20,000 dollars' legacy should produce, in any event, the annual interest of six per cent.; and that the stock, and the fund substituted for the stock, ought to be held to make good any deficiency in such interest.

STORY, Circuit Justice. The obvious intention of the testator was, that the United States stock held by him should, at his decease, stand bound as collateral security to make good any deficiency or depreciation

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

that might take place by depositing the 20,000 dollars' legacy, given by him to the plaintiff, in the Bristol Institution for Savings. That stock has been sold by the executors; and the sale is a manifest violation of the direction of the testator that it should remain in his name, which must mean, that it should remain until the purpose of the trust was fulfilled, that is, until the legacy should become absolutely due by the arrival at age, or marriage, or death of the plaintiff. It is said by the defendants' counsel, that the sale was involuntary, as the stock was paid off by the United States; but that does not appear, and the bill charges it as a voluntary sale. Indeed a payment by the United States is a transaction wholly distinct from a sale, and in no sense to be confounded with it. But whether the transaction were a sale or payment, in my judgment, the legal result will be the same. The proceeds of the sale or payment must stand charged in the hands of the executors with the same trusts as the original stock. I shall, therefore, direct a reinvestment to be made of the whole proceeds, subject to the authority and control of this court, for the purposes of the original trust.

In respect to the interest accruing from time to time upon such original stock, or any future investment of it, in the shape of dividends or otherwise, I see no reason why it should not be paid over to the executors as an unappropriated fund for the general purposes of the will. It is not in terms, nor by fair implication, pledged by the testator in aid of, or as security for, the legacy of the plaintiff.

As to the other point, that the testator intended to secure to the plaintiff an interest of six per cent. on her legacy during her minority, &c.; and that the original stock was charged with making up any deficiency of such interest, I cannot say that I perceive any such intention in the will and codicils. By the second codicil the testator bequeathed a legacy of 20,000 dollars to the plaintiff, to be placed in her father's hands, and directed so much of the interest thereof, as was necessary for that purpose, to be applied to her maintenance. But what interest was to be appropriated? Certainly not any specific interest, but such as the 20,000 dollars might or would yield upon a due investment. There is no pretence to say, that upon this clause the estate of the testator would have been bound to make up any deficiency in the interest, if it should fall short of six per cent. The obvious intent of the third codicil was not to change the amount of this legacy, but the hands, by which it was to be administered. It is to be deposited in the Bristol Institution for Savings, and the interest accruing therefrom, which certainly must mean the interest or dividends which should be declared thereon by the Bristol Institution, is to be applied to her maintenance. But the testator foresaw that there might be a deficiency or depreciation of the capital of the 20,000 dollars, in consequence of this investment, either by losses or mismanagement; and, as he intended that the plaintiff should, at all events, on her marriage or arrival at age, receive 20,000 dollars, "equal to gold or silver," he bound his United States stock as collateral security for the payment of that sum, and that only. He says nothing as to the amount of the intermediate interest, or any depreciation of it, though it is obvious that if the principal were depreciated, the interest would ordinarily share the same fate. The omission, therefore, to provide for the interest, is strong to show that he meant an ultimate security only as to the principal. And he seems to have thought that in no probable event the interest would be less than what might be necessary for the maintenance of the plaintiff, for he expressly provides for adding the surplus of the interest to the principal in the institution. Yet he has not pledged his United States stock for the payment of such surplus so added; but in terms only for the principal legacy of 20,000 dollars.

Perceiving no clear intention of the testator that the legacy should produce six per cent. interest, or that the United States stock should be pledged for the deficiency, I am of opinion that the plaintiff is not entitled to any decree to this effect. Decree accordingly.

VERNON (LAWRENCE v.). See Case No. 8,146.

VERNON (OLIVER v.). See Case No. 10,501.

VERNON COUNTY (McKEE v.). See Case No. 8,851.

VERNON COUNTY COURT (UNITED STATES ex rel. McKEE v.). See Case No. 14,877.

Case No. 16,923.

The VERONICA MADRE.

[10 Ben. 24.] [1]

District Court, S. D. New York. June, 1878.

SALE OF CARGO BY MASTER—CHARTER.

1. A bark sailed from Philadelphia with a cargo of corn, bound to Cork for orders. She met with heavy weather and put into Bermuda in distress, where, on the recommendation of surveyors, part of the cargo was discharged, being found to be heating, wet and damaged, and the vessel was repaired. While the cargo was being reloaded it was found to be again heating, and, a survey being called, the surveyors recommended that part of it be again discharged and cooled. While this was being done the master went to Philadelphia and informed the underwriters and the shipper of the corn of the situation of affairs. Neither the underwriters nor the shipper gave him any instructions. The latter told him they had sold the corn to a London house whose name they gave to the interpreter who accompanied him, he being an Italian and speaking no English. The master sent no information to the London house, but returned to Bermuda. After

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

his return to Bermuda another survey was held, which reported the corn, as well that which was discharged as some 8,500 bushels still on board, as being unfit to proceed on the voyage to Europe, and therefore recommended its sale. Previous to the sale the master made an agreement with one Gray, by which if Gray bought 10,000 bushels of the corn the master was to carry it to New York, free of freight, but was to have half the profit arising on its sale in New York. The cargo was sold and Gray bought 11,000 bushels, including the 8,500 bushels which had never been discharged from the vessel, and the master carried it in the bark to New York. The master acted in what he did with the knowledge and concurrence of the agent of the underwriters. The corn which was carried to New York arrived there in good shipping condition for Europe. It was sold there for four times what Gray paid for it, but for about 6 cents a bushel less than sound corn, and was immediately shipped to Europe by the purchaser. The London house, which had purchased the cargo from the shipper, filed a libel against the vessel for breach of the charter party under which the cargo had been shipped, in that the vessel had not proceeded to Cork for orders with the cargo. The owners of the vessel set up as a defence that the voyage had been broken up by perils of the sea, and the condition of the cargo. *Held*, that the agreement made by the master with Gray was one which should subject his acts and motives to the closest scrutiny and throw upon him the burden of showing that it was made in entire good faith.

2. The facts attending the condition and sale of the cargo in New York were not sufficient to overthrow the evidence that, when it was sold in Bermuda, it was not in a condition to be carried forward to Europe.

3. The master was not bound under the circumstances of the case to have communicated with the owners of the cargo before selling.

4. He was not authorized to bring the cargo to New York for account of its owners.

5. The sale of the cargo by the master was justified under the circumstances, and that the libel must be dismissed.

Blatchford, Seward, Griswold & Da Costa (R. D. Benedict, of counsel), for libellants.

Coudert Brothers, for claimants.

CHOATE, District Judge. This is a libel filed by John Walker and others, owners of the cargo of the Italian bark Veronica Madre, for damages occasioned by breach of charter party. On the 24th of September, 1877, in London, the bark, which was then at Naples, was chartered to the libellants to proceed to Philadelphia, and thence with a full cargo of wheat or corn, for a voyage to Cork or Falmouth, for orders. The bark arrived at Philadelphia and took on board her cargo, about 29,000 bushels of Indian corn, and on the 28th day of December, 1877, set sail on her voyage to Cork, for orders, according to the charter party. The breach of the charter party relied on by the libellants is, that the bark did not proceed on her voyage to Cork or Falmouth for orders, and that the master has failed and refused to deliver the cargo to the libellants and has converted the same to his own use. The defence set up by the master, in his answer on behalf of the owners of the bark, is, that his bark being disabled by the perils of the sea, on the voyage, he put into the port of St. Georges, Bermuda, in distress, and there his cargo was sold from necessity, being wholly unfit to be carried on the voyage, and in a decaying condition.

The testimony shows that while the bark was proceeding on her voyage, on the 3rd or 4th of January, 1878, she met with gales and heavy seas, in consequence of which her cargo shifted, she was thrown on her beam ends, her stanchions were started, and her pumps choked with corn. After throwing over some spare sails and other things belonging to the bark, and a part of the corn, and throwing the corn over from the port to the starboard side, the master found it impossible to right the vessel, or to make the pumps work, so as to keep her clear of water. And the vessel taking some water, and the cargo being wet, the master, after taking the advice of his crew, concluded to put into Bermuda, then about three hundred miles distant, and the nearest port he could make, with the wind then blowing and his vessel listed over. He arrived at Bermuda on the 9th of January, and on the 11th of January a survey was ordered by the Italian vice-consul, to be made by three competent persons, under whose advice the cargo was partly discharged, in order that the vessel might be repaired. On the 19th of January, another survey of two competent persons was called to examine the cargo. They visited the vessel and the warehouse in which the part of the cargo that had been discharged was stored, at various times between the 19th and the 29th of January, and reported that much of the corn in the vessel on both sides was damaged, evidently by sea-water, that it was black and decaying, and much of the corn on the floor of the vessel amidships was also heated. They recommended that every precaution be taken to separate the decaying from the heated corn and both from the uninjured, during the discharge of the cargo; and they also reported that every precaution was being taken in the warehouse to separate the heated from the uninjured corn, and they finally recommended that the decaying corn, estimated at 4,000 bushels, be immediately sold at auction, and that the heated corn be properly aired and handled to expedite its cooling, and that what remained in the vessel be relanded.

The evidence shows that the recommendations of the surveyors were faithfully carried out. So far as could be done, the decaying corn was separated from that which appeared to be sound, and such appliances were availed of as were practicable in the port to cool and preserve that part of the cargo which was thought capable of being saved and reshipped. And, the vessel having been repaired and the corn that was left being apparently cooled and fit to be reshipped, the master commenced reloading the vessel. When the corn had been nearly all reloaded, there came on rainy weather and the hatches had to be closed for three days. On removing the hatches on the fourth day, the corn in the vessel was found to be very hot and steaming. Thereupon a survey was called and the same surveyors, who had examined the cargo before, reported on the 20th

of February that the greater part of the cargo had been shipped and that they found it in a very heated condition, fermenting and smoking, while that which remained in the warehouse was in apparently good condition; and they recommended that the cargo be immediately unloaded and cooled with the view of saving it for the interest of whom it may concern.

On the same day, Feb. 20, another survey was made by the resident agent of United States underwriters and by one Ellis, who is described as the "special agent of New York," and who is shown by other evidence to be the agent of New York underwriters. They reported that they found the corn to be in a very heated condition, undergoing fermentation, and they advised that the interest of those concerned would be consulted by its reshipment to the United States as speedily as possible, as the market in Bermuda was already glutted with a similar article.

Immediately after this the master came to New York by steamer to consult the shippers of the cargo and the underwriters, leaving directions for the discharge of the cargo into the warehouse during his absence. He went to Philadelphia, and with an interpreter called on the firm of Waln & Co., who shipped the corn. The master is an Italian, and understands very little English. The president of the insurance company that had insured the cargo refused to give any instructions about the matter, stating that they were liable only for a total loss. The shippers at Philadelphia told him that they had nothing to do with the corn, that it was sold to a London house, and they gave the name of the libellants as the owners. This was understood by the interpreter, but seems not to have been understood by the master. They told him that they would look up their telegraphic code, and if they could find a short way of telegraphing, they would telegraph the libellants. Not finding any such, they told him that he might telegraph, which, however, he did not do. On the 27th of February, he wrote a letter to Waln & Co., giving a full and truthful account of what had happened up to the time he left Bermuda, and he sent with it copies of one or more of the surveys that had been taken. Waln & Co. were in constant communication with the libellants, and acted for them in the shipment of this cargo. They had received notice before the master's arrival that the vessel had put into Bermuda in distress; and within a few days after receiving this information, Waln & Co. wrote to the libellants at London, giving them the same information, and the libellants' replied, but gave no special instructions as to the matter. The master then returned by steamer to Bermuda, having been absent from there fourteen days or less. The discharging of the cargo was still going on when he arrived.

On the 5th of March, another survey was appointed by the Italian vice-consul. The surveyors were the American consul, and the special agent of the New York underwriters, Mr. Ellis, and they reported that about one-third of the cargo was still in the vessel, that this portion they found extremely hot, sweating very badly, and very musty. As to the other portions of the cargo spread out in the stores they reported that notwithstanding the stores were very large and thoroughly ventilated, the corn was in a similar condition to that which was in the hold of the vessel; that superficially the corn was comparatively cool, but a very few inches below the surface it was extremely hot, sweating and musty; that when pressed by the hand, the grains became adhesive one to the other, and that it was very hot and clammy; that this was the prevailing condition of the entire lot. They added: "We are therefore decidedly of opinion that this cargo is not by any means in a fit condition to be reshipped for Europe, and we do not believe that it could be rendered in a fit condition for such reshipment." They also say that the stores in which it was spread were not sufficiently large to admit of the entire cargo being spread and cooled; and they recommended that portions be sold from the stores at judicious intervals of time to furnish space for that which was then excessively hot on board the vessel, and that, after that portion had been discharged and spread for cooling, it also should be sold for benefit of all concerned, and then concluded their report as follows: "We cannot express too emphatically our opinion of the decided unfitness of the cargo for reshipment for Europe."

About 3,000 bushels more were afterwards discharged from the vessel, leaving still in her about 8,500 bushels. The sales of the corn at auction under the recommendation of the report of this survey commenced on the 9th of March, on which day 1240 bushels were sold at prices varying from 17 cents to 23 cents per bushel. On the 14th of March 2000 bushels were sold, on the 20th of March 1100 bushels, and on the 28th of March the rest of the cargo, including what remained on the vessel, in all about 17,000 bushels. Of the corn so sold, one Gray bought 11,000 bushels at 12½ cents a bushel. It included what remained in the vessel.

Besides the evidence of these surveys there was evidence of several witnesses who saw the corn in Bermuda, both that in the vessel and that in store, which strongly corroborates the statements of the surveyors, that the corn was very much heated, discolored, undergoing fermentation, and that it was not in a fit condition to be shipped on a voyage to Europe, and that the master did all that could be done down to the time of the reloading of the cargo and after its discharge a second time, to cool and save it. It also appeared that the sales were extensively advertised and numerously attended. Much of the corn was bought in small lots, and one of the purchasers was examined, by whom it appeared that his pigs, fowls and horses refused to eat the corn.

Thus far the evidence is entirely satisfactory that the cargo was in such a condition that it could not be carried forward on the voyage with safety, and that, if carried for-

ward, it would in all probability become worthless; and as to the bulk of the cargo, that it could not, so far as could be foreseen by the master at the time, be made fit by the use of any means at hand to be carried forward; that it was in fact in a state of fermentation and decay.

But the libellants rely especially on the evidence of the condition of a part of the corn, after its arrival in New York, in the bark, as showing that the cargo was not in so bad a condition as represented in the surveys, and by the Bermuda witnesses, and that the sale was not necessary, nor made in good faith. The bark arrived at New York about the 20th of April. She had on board about 11,000 bushels of the corn shipped by Gray. The account which the master and the witnesses for the claimants give of the matter, is as follows: After it was determined to sell the cargo, the master inquired for ballast and found that it would cost him about $400 to get ballast for his vessel. It was then suggested by Mr. Ellis, with whom he consulted on the subject, that Mr. Gray might be induced to buy a part of the cargo, and that it could be taken to New York as ballast and the bark might get some freight for carrying it. Gray wrote the master a letter, asking on what terms he would take a part of the corn to New York, if he should buy it. This led to the making of an agreement in writing between the master and Gray, under the advice of Ellis and others whom the master consulted. The agreement is dated the 19th of March, and is to the effect that if Gray should buy 10,000 bushels or more of the corn at a price not to exceed 12 cents a bushel, it should be carried in the bark to New York, "there to be sold to the best advantage, and on the following conditions," the master to deliver it in New York "without any charge of freight," "but shall receive instead of freight one-half of the profit arising from the sale thereof, after deducting out thereof the cost at auction, the expenses of putting it aboard and delivering and selling it at New York," and Gray was to bear any loss on the transaction.

Under this agreement the corn was brought to New York and soon after its arrival was sold at 50 cents a bushel, and witnesses have been examined as to its condition and value on its arrival. The evidence clearly shows that the corn was sold at about ten cents above its market price here; that the corn having been through a process of fermentation, is unfit for use as food for man or animals; that the purpose for which such corn is bought in this market is for making whiskey and that it is shipped from this port to ports in the Mediterranean for that purpose. But the evidence also shows, that the corn when it arrived here was almost entirely cooled off; that the process of fermentation through which it had gone was arrested, and that though a very bad lot of corn of its kind, that is, damaged corn, it was worth in this market about 40 cents a bushel, sound corn being worth 56 cents a bushel. The purchaser of the corn here immediately shipped it, mixed with other corn, to Naples.

This evidence is not sufficient to overcome the great weight of the testimony, which shows, that when the sale of this cargo was determined upon, it was in the condition certified to by the surveyors and that it was then apparently fermenting and decaying; nor does it show that in the circumstances in which it then was and with the information that the master could then obtain, the sale of the cargo at Bermuda was not a wise and prudent course for the master to take. The fact that the corn brought ten cents more than it was worth, was a lucky accident for Gray, the purchaser. The fact that it arrived in New York in better condition than it was in on leaving Bermuda, that it was worth forty cents a bushel here in the condition in which it in fact arrived, were facts which it cannot be held that the master should have foreseen, and it is evident that no such thing was expected as probable by those who saw the corn in Bermuda.

The agreement between the master and Mr. Gray is one which should subject the acts and the motives of the master in making it to the most rigid scrutiny. It throws on him a very heavy burden of showing that it was made in entire good faith towards the owner of the cargo, but the circumstances and the evidence do satisfactorily show that he acted in entire good faith. The facts testified to, as to the difficulty and expense of getting ballast at Bermuda, are not controverted. All his acts from beginning to end were open and without any attempt at concealment. His efforts to save the cargo and to get proper advice as to his duty were throughout constant. There is no reason for believing that Mr. Ellis had any interest in the matter of promoting the sale to Gray, except to aid the master in his difficulty, and he was certainly a competent and proper person for the master to consult. He advised this course, and by his intervention secured a purchaser for the remnant of the cargo, which it might have been very difficult to sell, and at the same time secured for the master a chance to ballast his vessel without expense and possibly to earn some freight.

Nor does the fact that 11,000 bushels of the corn came safely to New York, and cooled on the voyage, with the aid of the means used by the master, as he testifies, for that purpose, show that the cargo or any substantial part of it could have been safely carried to Europe, still less that in the situation of affairs at Bermuda such a possibility should have been foreseen.

It is urged, that the master should have brought the corn to New York for account of the owner of the cargo instead of selling it. But what authority had he to do so? As the agent of the owner, he was bound to act with the intelligence and care which a prudent owner would exercise if present, but this rule is

necessarily subject to the limitation that he must still act, and could only act, within the limits of his agency. He could not, as the owner could, if present, take new risks and enter on new speculations, not within the scope of his employment, and such would be the shipping of the corn to another distant market, at least unless such were obviously the only way in which the corn or its value could be saved to the owner.

It is suggested that the master, before selling, should have communicated with the owners for instructions. But under all the circumstances and in the urgent situation in which the condition of the cargo put him, and after his attempt at Philadelphia to do so, I think he is not chargeable with fault in this respect.

On the whole case, therefore, while the rule that the master to justify a sale of the cargo must show a "moral necessity" for the sale, and must also show that he acted in perfect good faith, should be firmly adhered to in the interests of commerce, that rule is not infringed nor impaired in this case by holding the master justified in his acts by the proofs.

The libel must be dismissed, with costs.

Case No. 16,924.

The VERSAILLES.

[The case cited under this title in The Philah, Case No. 11,091a, and in Marvin's Wreck and Salvage, 123, is the same as Hennessey v. The Versailles, Case No. 6,365.]

VERSAILLES, The (HENNESSEY v.). See Case No. 6,365.

Case No. 16,925.

VERSELIUS v. VERSELIUS et al.

[9 Blatchf. 189.] [1]

Circuit Court, N. D. New York. Oct. 10, 1871.

BANKRUPTCY—EQUITY JURISDICTION—BILL BY ASSIGNEE FOR ACCOUNTING—FRAUD—DISCOVERY—PARTIES.

1. A bill in equity was filed by an assignee in bankruptcy against the bankrupt and another, to set aside a conveyance of property made by the bankrupt to the other defendant, and to compel an account of the same, and payment to the plaintiff, and for a discovery. The bankrupt demurred to the bill for want of equity. *Held*, the jurisdiction to entertain such a bill is clear. Independent of the question, whether the assignee may not always, if he sees fit, seek the aid of a court of chancery, to set aside a fraudulent conveyance or illegal transfer, instead of proceeding by various actions at law, the right to call for an account is not questionable.

[Cited in Schrenkeisen v. Miller, Case No. 12,480.]

2. Although the charge, in the bill, of fraud and illegality, is in the alternative, either ground is sufficient.

3. The assignee has the right, as ancillary to the principal relief, to have a discovery from the defendants; and the need of such discovery also excuses the want, in the bill, of a more precise specification of the particular fraud alleged.

4. The bankrupt is a proper party to the bill.

This was a bill in equity [by George W. Verselius, assignee in bankruptcy of William S. Verselius, against William S. Verselius and George A. Verselius] to set aside a conveyance of real estate and personal property, book accounts, choses in action, &c., and to compel an account of the same, and the proceeds thereof, and payment to the complainant, and for a discovery, &c. There was a demurrer to the bill, by the bankrupt, William S. Verselius, for want of equity.

C. W. Smith, for plaintiff.

Q. Van Voorhis, for defendants.

WOODRUFF, Circuit Judge. This demurrer is submitted to me for decision upon the brief of the counsel for the defendant only. I have considered the objections, and am of opinion:

(1.) The jurisdiction to entertain such a bill is clear. Independent of the question, whether the assignee may not always, if he sees fit, seek the aid of a court of chancery, to set aside a fraudulent conveyance or illegal transfer, instead of proceeding by various actions at law, the right to call for an account is not questionable.

(2.) Although the charge of fraud and illegality is in the alternative, either ground is sufficient. The transaction is alleged to have taken place in November, 1869. That is less than four months before the adjudication which declared the demurrant a bankrupt, namely, February 1st, 1870.

(3.) The assignee has the right, as ancillary to the principal relief, to have a discovery from the defendants, and he properly seeks it, to supply the deficiency in his own knowledge; and his ignorance of the particulars sought not only entitles him to the discovery, but excuses the want of more precise specification of the particular fraud alleged.

(4.) The bankrupt has a direct interest in the question whether the property shall be taken from the other defendant, and is, therefore, a proper party.

The demurrer is overruled, with costs, and the demurrant has leave to answer, on payment of the costs of the demurrer, and of the proceedings thereon.

VESSEL OWNERS' TOWING ASS'N (BOTHWELL v.). See Case No. 1,687.

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

Case No. 16,926.

In re VETTERLEIN et al.

[5 Ben. 7;[1] 4 N. B. R. 599 (Quarto, 194).]

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

ORDER TO EXAMINE BANKRUPT.

An order was made by the register for the examination of one of the bankrupts. The order recited that it was made on the application of F. & Co., a party claiming to be interested in the estate, "and who have duly proved their debt herein." The bankrupt objected that the register had no power to make such an order, that the order should have been made only on a verified application in writing, and that the order did not purport to be "on the application of a creditor" who had proved his claim: *Held*, that the order was correct in form and was properly issued.

[Cited in Re Dole, Case No. 3,965.]

[In the matter of Theodore H. Vetterlein and Bernhard T. Vetterlein, bankrupts.] In this case, the register granted an order for the examination of one of the bankrupts. The order recited that it was made on the application of Fatman & Co., "a party claiming to be interested in the estate of the said bankrupts, and who have duly proved their debt herein."

[I, Henry Wilder Allen, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said matter before me, the following questions arose pertinent to the said proceedings, and were stated and agreed to by the counsel for the opposing parties, to wit: Mr. Ward, who appeared for the bankrupts, and Mr. Hill, who appeared for Fatman & Co., creditors of the said bankrupts. The bankrupt, Bernhard T. Vetterlein, appeared, but through his counsel, Mr. Ward, objected to being examined under the accompanying order for the reasons following: First. That the register has no authority to grant an order for the examination of a bankrupt, either by statute or rule. Second. That the order, if granted, as it recites on application, should have been on a verified application in writing. Third. That the order is on its face defective, in that it does not purport to be "on the application of a creditor who has proved his claim." And the said parties requested that the same should be certified to the judge for his opinion thereon.

[The register is of opinion that the order for examination referred to is correct in form and properly issued. The second objection to the order is disposed of in the Case of Solis [Case No. 13,165]. The third objection has no force because the order recites that the parties upon whose application it was issued have duly proved their debt.] [2]

BLATCHFORD, District Judge. The register is correct in his views. As to the first objection, see In re Brandt [Cases Nos. 1,812 and 1,813]. As to the second objection, see In re Solis [Case No. 13,165]. The third objection is frivolous.

[See Cases Nos. 16,927–16,929.]

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

[2] [From 4 N. B. R. 599 (Quarto, 194).]

Case No. 16,927.

In re VETTERLEIN et al.

[5 Ben. 311.] [1]

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

DISTRIBUTION OF INDIVIDUAL ESTATE OF A PARTNER—DIFFERENT FIRMS.

Bankrupts had been doing business in two different places under different firm names, and one firm appeared to be largely indebted to the other. The assignee in bankruptcy realized funds out of the individual estate of one of the partners; more than enough to pay his individual debts: *Held*, that the two firms were to be treated as one; that the proceeds of the separate estate, over and above the individual debts, were to be added to the joint stock; and that no notice was to be taken of the indebtedness of one firm to the other.

[Cited in Re Williams, Case No. 17,707; U. S. v. Reid, 17 Fed. 498.]

Prior to May, 1865, the firm of Vetterlein & Co., in Philadelphia, was composed of Theodore H. Vetterlein and Charles A. Meurer. On May 1, 1865, Bernhard T. Vetterlein and Theodore J. Vetterlein were taken in as partners. In February, 1870, Meurer retired from the firm. Prior to May 1, 1865, the firm of Th. H. & B. Vetterlein & Co., in New York, had been composed of Theodore H. Vetterlein, Bernhard Vetterlein and Henry Thiermann. On May 1, 1865, Bernhard Vetterlein and Henry Thiermann retired, and Bernhard T. Vetterlein and Theodore J. Vetterlein were taken in, and the business was conducted under the name of Th. H. Vetterlein & Sons, its only capital being the interest of Theodore H. Vetterlein in the former firm. In 1867 Theodore J. Vetterlein retired from both firms. On February 7, 1871, Theodore H. Vetterlein and Bernhard T. Vetterlein were adjudged bankrupts. The assignee in bankruptcy realized funds from the separate estate of Theodore H. Vetterlein, against whom no individual debts were proved. He also realized something from the assets of each of the firms. Th. H. Vetterlein & Sons were proved to be creditors of Vetterlein & Co. to the amount of $40,000. Different debts were proved against each of the two firms.

The following questions were raised by the assignee and submitted to the court: 1. Shall Th. H. Vetterlein & Sons and Vetterlein & Co. be treated as separate and distinct firms in the distribution of the assets? 2. What disposition shall be made of the proceeds of the estate of Theodore H. Vetterlein? 3. How shall the assignee treat the indebtedness of Vetterlein & Co. to Th. H. Vetterlein & Sons, as regards the distribution of the assets?

[For a prior proceeding, see Case No. 16,926.]

BLATCHFORD, District Judge. 1. Th. H. Vetterlein & Sons and Vetterlein & Co. ought not to be treated as separate and distinct firms in the distribution of assets belonging to Theodore H. Vetterlein and Bernhard T. Vetterlein, as copartners.

2. If there are no debts proved against Theo-

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

dore H. Vetterlein individually, the proceeds of his separate estate must, under section 36 [of the bankrupt act of 1867 (14 Stat. 534)], be added to the joint stock and property of the copartners, for the payment of their joint creditors.

3. The assignee ought to take no notice, in the distribution of the assets, of the indebtedness of Vetterlein & Co. to Th. H. Vetterlein & Sons.

In the foregoing conclusions, I assume that no other person is liable jointly with Theodore H. Vetterlein and Bernhard T. Vetterlein in the debts for which they are jointly liable, and that no other person is joint owner with them of the assets in which they are jointly interested.

[See Cases Nos. 16,928 and 16,929.]

Case No. 16,928.

In re VETTERLEIN et al.

[5 Ben. 571; [1] 6 N. B. R. 518.]

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

BANKRUPTCY—APPOINTMENT OF TRUSTEE.

A resolution was adopted by three-fourths of the creditors, appointing a trustee. It appeared that each creditor who signed that resolution had received from the assignee in bankruptcy a dividend of 16 per cent. and had signed an agreement, under which the person named as trustee, was, as soon as three fourths in value of the creditors had signed it, to deposit in the hands of the assignee enough money to pay to each signer 19 per cent. more, and, the trustee being then appointed, the assignee was to convey the estate to the trustee, and to be discharged, and then to pay to each signer the 19 per cent., and that payment was to operate as an assignment of the claims of the signers to such person as the trustee should name. By an agreement made at the same time, between the trustee and the bankrupts, certain real estate conveyed by the sons of the bankrupts, and the wife of one of them, to a person named by the trustee, was to be sold, and its proceeds, with other moneys, were to be paid to the trustee; and the claims of the signers of the first instrument were to remain as security to the trustee for the moneys advanced by him, until those advances, and $12,500 as a compensation for his services, were reimbursed to him; and, after the bankruptcy proceedings were superseded, and the trustee was so reimbursed, he was to convey to the bankrupts all that remained of the estate: *Held*, that the resolution appointing the trustee could not be approved.

[For prior proceedings, see Cases Nos. 16,926 and 16,927.

F. N. Bangs and J. L. Ward, for the application.

S. Boardman, opposed.

BLATCHFORD, District Judge. The 43d section of the bankruptcy act [of 1867 (14 Stat. 538)], in providing that the court shall confirm a resolution passed under that section, if it shall appear to it that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, refers to the interests of all the creditors, and its design is to put it in the power of the court to protect the interests of those who do not vote in favor of the resolution. The will of three-fourths in value of the creditors whose claims have been proved, is not to control in respect to the claims of those who do not vote in favor of the resolution, unless the court sees that the interests of the latter will be promoted by carrying the resolution into effect.

The 22d section of the act provides, that a creditor, to have his demand allowed, must make a deposition setting forth, among other things, that no agreement has been made by him to sell or dispose of his claim, or to receive any consideration whereby any action on his part, in the proceedings under the act, shall be in any way affected, influenced or controlled; and that no claim shall be allowed, unless all the statements set forth in the deposition shall appear to be true. The 29th section of the act provides, that no discharge shall be granted, or, if granted, be valid, if the bankrupt, or any person in his behalf, has influenced the action of any creditor, at any stage of the proceedings, by any pecuniary consideration or obligation.

In the present case, it appears that every one of the creditors who has signed the resolution appointing the trustee and the committee, has made an agreement to sell his claim to the trustee, and to receive a consideration for voting in favor of the resolution. Each has already received from the assignee a dividend of 16 per cent. By an agreement signed by each, the person named as trustee is, as soon as three-fourths in value of the creditors shall have signed the agreement, to deposit in the hands of the assignee enough money to pay to each signer 19 per cent. more; and attorneys designated are to vote, on behalf of such signers, for such person as trustee; and, when such person is appointed trustee, and the assignee has conveyed all the estate to the trustee, and been discharged, the assignee is to pay to the signers the 19 per cent., out of the deposit; and such payment is to operate as an assignment of the claims of the signers to such person as the trustee shall name. By a contemporaneous agreement between the trustee and the bankrupts, certain real estate conveyed by the sons of the bankrupts, and the wife of one of them, to a person named by the trustee, is to be sold, and its proceeds, and other moneys in the hands of such person, are to be paid to the trustee; and the claims of the said signers are to remain as security to the trustee for said moneys advanced by him, until the same, and the sum of $12,500, as a compensation for his services as trustee, shall be reimbursed to him; and, after the bankruptcy proceedings are superseded, and the trustee is paid such advances and compensation, he is to convey to the bankrupts all that remains of the estate.

Certainly, this court can give no sanction to such an arrangement. As well might the bankrupts themselves be appointed trustees. A person who is to hold the estate, under such a private trust is not a proper person to be appointed trustee. The 43d section provides

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

that the trustee shall proceed to wind up and settle the estate, under the direction and inspection of the committee of the creditors, for the equal benefit of all the creditors. This trustee has obligated himself, by a private agreement, to wind up the estate for his own benefit, and that of the bankrupts, and that of the signing creditors, to the exclusion of the non-signing creditors.

Moreover, but a single person is named as a committee, and he is one who has signed the agreement referred to, and will thereby cease to be a creditor the moment the trustee takes the estate and the 19 per cent. is paid.

A trustee who, after his appointment, should enter into such obligations and arrangements as those shown to have been entered into in advance by this trustee, would be removed by any court of equity. The interests of the non-signing creditors are deliberately sacrificed by the arrangements entered into. Under them the trustee has obligated himself to use the estate to reimburse to himself his advances, and to pay his compensation of $12,500, and to turn over the rest to the bankrupts. The money put into the hands of the assignee, it is expressly agreed, shall be used to pay the creditors who sign. No others can receive the 19 per cent. Those who have not signed appeal to the court not to sanction such a proceeding. The proposed trustee resides in Philadelphia, and, if the estate should pass into his hands, he would hold it without having given security, and free from the control of any committee or of this court.

The application to confirm the resolution is denied, with costs to the opposing creditors, to be paid by the assignee out of the estate.

Case No. 16,929.

In re VETTERLEIN et al.

[13 Blatchf. 44; [1] 12 N. B. R. 526; 21 Int. Rev. Rec. 212; 1 N. Y. Wkly. Dig. 177.]

Circuit Court, S. D. New York. June 25, 1875.

BANKRUPTCY — PROVABLE CLAIMS — JUDGMENT IN FAVOR OF UNITED STATES—MERGER—EVIDENCE.

1. Before the commencement of proceedings in bankruptcy, the United States brought an action at law against the bankrupts, to recover the value of goods which had been forfeited for violation of the customs revenue laws. The defendants, after the bankruptcy proceedings were commenced, admitted the right of the United States to recover, and a judgment in favor of the United States was rendered. The United States proved, as a debt, against the bankrupts, the claim for the value of the goods, and sustained it by evidence derived from the books and papers of the bankrupts, seized under a warrant issued under section 2 of the act of March 2d, 1867 (14 Stat. 547). *Held*, that the claim was provable as a debt under section 19 of the bankruptcy act of March 2d, 1867 (14 Stat. 525).

[Cited in Re Van Buren, Case No. 16,833; U. S. v. Reid, 17 Fed. 498.]

2. The claim was not so merged in the judgment as not to be provable.

3. The evidence from the books and papers was competent.

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

This was an appeal by an assignee in bankruptcy from the allowance by the district court of a claim in favor of the United States. [Goods had become forfeited for violation of the revenue laws, and the statute gave the United States an action to recover their value. This right had been put in force by the commencement of an action to recover such value before the proceedings in bankruptcy were commenced. The statute says that "all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy * * * may be proved against the estate of the bankrupt."][2]

[See Cases Nos. 16,926–16,928.]

Francis N. Bangs, for appellant.

Thomas Simons, Asst. Dist. Atty., for the United States.

HUNT, Circuit Justice. 1. I see no reason to doubt that the debt of the United States was provable under section 19 of the bankrupt act (14 Stat. 525). The goods had become forfeited for violation of the customs revenue laws, and the statute gave the United States an action to recover their value. This right had been put in force by the commencement of an action to recover such value, before the proceedings in bankruptcy were commenced. The statute says, that "all debts due and payable from the bankrupt, at the time of the adjudication of bankruptcy, * * * may be proved against the estate of the bankrupt." That an admitted right to recover from the bankrupts, in an action at law, the value of certain goods, which value is offered to be proved by witnesses, constitutes a debt against the bankrupts, is reasonably certain. Whether the debt arises from a promise to pay, or whether it arises from a duty or obligation to pay, is not important. In re Rosey [Case No. 12,066]; Stockwell v. U. S., 13 Wall. [80 U. S.] 531 (where the point is expressly decided by the supreme court); Bailey v. New York Cent. R. Co., 22 Wall. [89 U. S.] 604; Chaffee v. U. S., 18 Wall. [85 U. S.] 516; In re Denny, 2 Hill, 220; 2 Bl. Comm. 153, 160, bk. 3, c. 9.

2. I do not discuss the question, whether the judgment recovered against the bankrupts was evidence of the indebtedness. If it was a valid judgment, it should be held to afford competent evidence of the debt. If it was not, it must be held, in these proceedings, as no judgment, and the parties must stand as if there were no judgment in existence. In the latter event, the claimant must establish his debt by proof upon the merits. This was done in the present case, by evidence obtained from the books and pa-

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

[2] [From 1 N. Y. Wkly. Dig. 177.]

pers of the bankrupts, which were in possession of the collector by virtue of a warant issued by the district judge. It will not do for the assignee to say that the judgment is forbidden by law to be recovered, and that it is no judgment and affords no proof of the existence of the debt, and to say, also, that it is a good enough judgment to merge the original claim and prevent proof thereof by the owner. He cannot thus blow hot and cold with the same breath.

3. It is objected, that evidence taken from the bankrupts' books, which had been seized under the act of March 2d, 1867 (14 Stat. 547), was improperly admitted. Waiving the suggestion that this objection was not taken on the trial, and waiving the question whether this objection, if good, is available to an assignee, it is sufficient to say, that I have carefully examined this subject in the case of U. S. v. Hughes [Case No. 15,417], and have reached the conclusion, that the objection is not tenable. The act of 1868 [15 Stat. 227], which it is supposed will exclude this evidence, applies only to the evidence derived from a personal examination of a party or witness, not to evidence found in books or papers, and which may have been obtained under the statute referred to.

The order must be affirmed.

[See Vetterlein v. Barnes, 6 Fed. 693; In re Vetterlein, 20 Fed. 109; In re Jayne, 28 Fed. 419; In re Vetterlein, 44 Fed. 57; Vetterlein v. Barker, 45 Fed. 741.]

VICE (RUMFORD CHEMICAL WORKS v.). See Case No. 12,136.

VICKERS v. The DANIEL AUGUSTA. See Case No. 9,540.

Case No. 16,930.

In re VICKERY.

[3 N. B. R. 696 (Quarto, 171).] [1]

Circuit Court, W. D. Michigan. April 27, 1870.

BANKRUPTCY—PROVABLE CLAIMS—JUSTICE'S JUDGMENT—MERGER.

Where judgment had been rendered for a debt by a justice of the peace, previous to the adjudication of bankruptcy, and had not been satisfied, quære, was the debt, as it stood at the time of the adjudication, provable or not? *Held*, the debt is not so merged in the judgment as to deprive the creditor of the right to prove it.

[Cited in Re Mansfield, Case No. 9,049; Re Swift, Id. 13,693; Burpee v. First Nat. Bank of Janesville, Id. 2,185; Re Stansfield, Id. 13,294; Bourne v. Maybin, Id. 1,700.]

[Cited in Conway v. Seamons, 55 Vt. 10. Cited in dissenting opinion in Wells v. Edmison (Dak.) 22 N. W. 501.]

I, J. Davidson Burns, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, Latham Hull, a judgment creditor of the said bankrupt [Jonathan W. Vickery], applied for leave to prove his judgment under the proceedings in bankruptcy, and produced a transcript from the docket of a justice of the peace, showing that on the 31st day of December, A. D. 1869, he, the said Hull, commenced suit against the said bankrupt, before the said justice. Summons was issued, returnable on the 6th day of January, 1870; and on the said last-mentioned day, judgment was rendered in favor of the said Hull, and against the said bankrupt, for damages and costs of suit. It appears that on the 3d day of January, 1870, the said Vickery filed his petition in said district court for adjudication of bankruptcy, and that on the 5th day of January he was adjudged a bankrupt. The said suit of the said judgment creditor having been commenced before the said Vickery was so adjudged bankrupt, but judgment not rendered until after that event, I declined to take proof of the judgment for either damages or costs, on the ground that it was not provable —the judgment itself not being an existing debt at the time of the adjudication of bankruptcy. The question then arose whether the debt, as it stood at the time of the said adjudication, was or was not provable. It has been held by the United States district court for the district of Connecticut, in Re Williams [Case No. 17,705], that neither the judgment nor the debt are provable, where, after the commencement of the proceedings in bankruptcy, the judgment has been rendered upon a debt which has existed before that time; that the debt was merged in the judgment and extinguished by it, and that the judgment, which had no existence at the date of the adjudication of bankruptcy, constitutes a new debt, which takes its date from the time of recovery. In reference to the debt, directly the contrary has been held by the district court for the Southern district of New York, in Re Brown [Id. 1,975], it being decided in that case that the debt, but not the judgment, was provable. While I am of the opinion that the true and reasonable construction of the law is contained in the decision last named, and that the claim of the said Hull, as it existed upon the day the said Vickery was adjudged a bankrupt, is provable, yet in view of the fact that two such eminent jurists as Judges Shipman and Blatchford, differ so widely in passing judgment upon the question, I declined to admit proof of the said debt until the matter has been certified to the judge for his opinion thereon. And the said judgment creditor and the assignee of the said bankrupt requested that the same should be so certified to the judge for such opinion.

WITHEY, District Judge. I dissent entirely from the rule laid down in Re Williams [Case No. 17,705], and fully concur in the decision in Re Brown [Id. 1,975]. The debt in the case reported by Register Burns existed at the time of the adjudication of bankruptcy,

[1] [Reprinted by permission.]

and if it has never been paid or satisfied may be proved in bankruptcy. The fact that judgment has been rendered for the debt, is neither payment or satisfaction thereof in any sense which prevents proof of the debt in bankruptcy. It is not the judgment, but the debt as it existed on the 5th day of January, the day of the adjudication, that is provable.

VICKERY (UNITED STATES v.). See Case No. 16,619.

Case No. 16,931.

The VICKSBURG.

[3 Ben. 298.] [1]

District Court, S. D. New York. June, 1869.[2]

COLLISION IN EAST RIVER—STEAMER AND LIGHTER—CROWDED RIVER.

1. A lighter, loaded with casks of oil, was beating down the East river, which was crowded with vessels, the wind being southwest, and the lighter being on her port tack, and a steamer, coming up the river, saw the lighter before she came on that tack, and, on seeing her come about upon that tack, slowed her engine, and afterwards stopped it, but did not reverse it or change her course, and struck the lighter on the bluff of her port bow. *Held*, that the fault of the collision was with the steamer, in plunging into the crowd of vessels, taking her chance of finding an opening through them.

2. The lighter was entitled to keep her course, and did so, and did nothing to embarrass the steamer, and was not in fault.

In admiralty.

Oscar Frisbie, for libellants.

Vose & McDaniel, for claimants.

BLATCHFORD, District Judge. The libellants, owners of the lighter G. A. Graves, sue the steamer Vicksburg, to recover damages for a collision between the two vessels on the afternoon of the 5th of December, 1867, just before dusk, in the East river, off the Brooklyn slip of the Catherine street Ferry, and about in the middle of the river. The Vicksburg had come around from the North river, and was going through the East river, into the Sound. The lighter was heavily loaded with casks of oil. The wind was from the southwest, and the lighter was beating down against it. The tide was ebb. The river was crowded with vessels. The stem of the Vicksburg struck the lighter on the bluff of her port bow, and tore out her mast, and damaged her seriously. The lighter was on her port tack, standing from Brooklyn to New York, at the time of the collision. She was seen by the Vicksburg before she came about upon that tack. The Vicksburg slowed to half speed on seeing the lighter come about, and subsequently, before the collision, stopped her engine, but did not reverse or change her course. The fault in the collision was on the part of the Vicksburg. She plunged into the crowd of vessels, taking her chance of finding an opening through them. The lighter was entitled to keep her course, and did so. She made no movement to embarrass the steamer, and did not come about at such a time, or in such a way, as to prevent the steamer from taking the proper measures to avoid her; and the steamer must bear the consequences of not having avoided her. There must be a decree for the libellants, with costs, with a reference to compute the damages.

This decision was affirmed by the circuit court, on appeal. [Case No. 16,932.]

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

[2] [Affirmed in Case No. 16,932.]

Case No. 16,932.

The VICKSBURG.

[7 Blatchf. 216.] [1]

Circuit Court, S. D. New York. April 23, 1870.[2]

COLLISION — SCHOONER AND STEAMER — BEATING OUT TACK—DAMAGES—EVIDENCE OF VALUE—ADMIRALTY APPEALS.

1. Where a schooner was crossing the course of a steamer, towards the port side of the steamer, and the steamer starboarded her helm, *held*, that the steamer was in fault.

[Cited in McWilliams v. The Vim, 12 Fed. 913.]

2. Where a vessel is tacking in a river or a narrow channel, a vessel approaching her under the pressure of an obligation to avoid her, has, in general, the right to assume that she will beat out her tack; but this assumption must yield to peculiar exigencies.

3. Where a vessel is injured by a collision, and the sum expended to repair her is claimed as damages, it is not competent to show how much her cost was to her owner four years before, as evidence tending to prove that, at the time of the collision, she was not worth as much as such sum.

4. It is not competent, on an appeal in admiralty, to ask this court to send the case back to the commissioner, on the ground that he rejected evidence offered before him, on the reference in the district court as to damages, where the question as to the rejection of such evidence was not raised in the district court.

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

In admiralty.

Oscar Frisbie, for libellants.

Everett P. Wheeler, for claimants.

WOODRUFF, Circuit Judge. The outline of uncontested facts disclosed by the testimony in this case is, that the schooner G. A. Graves, of which the libellants were owners, was, at about five o'clock in the afternoon of the 5th of December, 1867, sailing down the East river, with a head wind, bound for a pier in New York, between the Catherine Street Ferry and the Fulton Street Ferry. Her progress was necessarily made by tacking. When on her tack towards the Brooklyn shore, another vessel was running on the same tack, about 100

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

[2] [Affirming Case No. 16,931.]

feet off from her port side, and a little ahead of her. When this vessel had reached a point near to the Brooklyn shore, both of them tacked at or about the same moment, which brought the G. A. Graves on a course nearly across the river towards New York, closehauled on the wind, with the other vessel in her wake. The steamer Vicksburg, having come around the Battery into the East river, was steaming up near the centre of the river, or a little the nearest to the Brooklyn side, and, when at a distance below the G. A. Graves, variously estimated by the witnesses at from 800 to 1300 feet, saw the G. A. Graves tack, to take her direction across the river towards the New York shore. The steamer slowed her engine, put her helm to starboard, and then stopped her engine. This had the effect, in some degree, to retard her speed, and was a plain endeavor to cross the bows of the schooner, which was closehauled on the wind. A collision ensued, the schooner was injured, and her owners claim damages.

I do not deem it necessary to recapitulate or discuss the evidence in detail. It is voluminous, and I have examined it with care, and am unable to resist the conclusion that the Vicksburg was greatly in fault. The chief conflict is in the testimony relating to the number of craft of various kinds which were then in the East river, all of which the Vicksburg was bound to avoid by diligence and skill, and to their location and course in the river. If the account in that respect given by the witnesses for the libellants be taken, then it was the plain duty of the Vicksburg, when she saw the schooner tack, not to put her helm a-starboard and attempt to cross the schooner's bows, but to port her helm and pass astern. The reason for not doing so, assigned by the witness for the claimants, that she would then have been in danger of hitting the other vessel in the wake of the G. A. Graves, may tend to show that the Vicksburg should not have attempted to pass at all at that moment, but it did not justify the movement she did make, to cross the bow of the schooner. On the other hand, if the account given by the claimants' witnesses be taken, then the river was so crowded with vessels on either side, that the Vicksburg was culpably negligent in approaching them at such speed that she could not or did not so control her motion as to avoid them. The obligation rested upon her to avoid the schooner; and, if the latter was not in fault, that obligation was violated. She could have reversed her engine, and, if that would have had the effect which the claimants' witnesses state, namely, to throw her bow to starboard across the stream, it would have avoided the schooner, unless too long delayed. And, in this explanation of the effect of reversing the motion of the propeller, no doubt lies the reason why the pilot attempted to force her way across the bow of the schooner, namely, she would lose time, and her headway would be lost. He might better have followed the example of the ferry boat which was at that moment lying two hundred feet up the river, waiting for an opportunity to pass these vessels with safety to both.

Nevertheless, if the schooner was also in fault, the burden of the loss cannot rest on the owners of the Vicksburg alone. It is, therefore, insisted, that the schooner did not beat out her tack, as she was bound to do, and that it was her premature tacking toward the New York side that placed her in danger and prevented the success of the endeavor of the Vicksburg to cross her bow. Doubtless, when a vessel is tacking in a river or a narrow channel, a vessel approaching her under the pressure of an obligation to avoid her, has, in general, the right to assume that she will beat out her tack. Such approaching vessel must have some guide by which to anticipate and guard against the movements of the other. But this assumption, like all general rules of navigation, must yield to peculiar exigencies. In this case, there are two considerations which must defeat this claim in behalf of the Vicksburg: (1) She saw the schooner change her course and start on her way across the river towards New York, in season to avoid her. I am aware that this is denied, but, in my judgment, the testimony establishes it. (2) I am satisfied that the schooner could not have continued on her tack towards Brooklyn longer than she did, without imminent danger of collision with the other vessel, which was on the like tack, between her and the shore. The other vessel was compelled to tack when she did, and the weight of the evidence shows, I think, that it was necessary for the G. A. Graves to tack at or about the same time, to prevent their coming together. If the Vicksburg did not see this precise condition of the two schooners, she did see them both, saw the movement, and should have avoided them.

I am satisfied, in view of all the evidence, that the loss caused by the collision was properly charged upon the Vicksburg.

The claimants further insist, that, if the Vicksburg is to be held liable for all the loss, still the case should be referred back to the commissioner, because he refused to permit them to show how much the schooner cost the libellants four years before this collision. This they claim to be proper, because it might, by that evidence, have appeared that the schooner was, at the time of the collision, not worth so much as the sum allowed as damages. I think that the enquiry was properly excluded. The time of the purchase of the schooner and the fact sought to be proved are too remote from the time and circumstances of the collision to warrant any such inference. The libellants had a right to repair the schooner so as to make her as good as she was before—certainly, unless the cost of repairing her would exceed her value at the time of the collision. To prove that value, her cost in 1863 to the libellants was too remote.

Besides, no exception was taken before the commissioner to the rejection of this evidence, no exception on that ground was presented to the district court, and I do not understand that

it is competent to ask this court, on the appeal, to send back the case to the commissioner upon a question not in due form raised below. [See Case No. 16,931.]

This last observation applies with even more force to the claim that the commissioner allowed too much for the new mast and for repairing the sails. No question appears to have been raised before the commissioner that these were overcharged, and no exception to these charges in his report was taken in the district court. The decree must be affirmed, with costs.

VICKSBURG, ETC., R. CO. (JACKSON v.). See Case No. 7,150.

Case No. 16,933.

The VICTOR.

[Brown, Adm. 449.] [1]

District Court, E. D. Michigan. July 1, 1873.

COLLISION—TUG AND TOW—MANNING AND EQUIPMENT OF TUGS.

1. A tug, having a schooner in tow, ran aground upon the bank of Detroit river, and the schooner ran into her. *Held*, that the tug was in fault, because the officer of the deck was also acting as wheelsman, and that the want of a proper lookout on the schooner did not contribute to the collision.

[Cited in The Young America, Case No. 18,179.]

2. A steamtug, whose master also acts in the capacity of wheelsman, is insufficiently manned.

[Cited in The Coleman, Case No. 2,981.]

This was a libel for a collision between the schooner Victor and the tug Clara, which, at the time of the collision, was towing the schooner through the Detroit river, having taken her at Port Huron, under an agreement to tow her to Lake Erie. While passing Detroit, about midnight, the master of the tug made the green light of a propeller so near ahead that he decided to starboard his helm to pass her. After he had passed the propeller, he endeavored to port his wheel, and resume his course down the river, but owing to the breakage of the links of her port wheel chain, the tug failed to obey her wheel, and, before she could be stopped, ran ashore upon the Canadian side of the river—the schooner coming on without changing her course, and striking the tug upon her starboard quarter, within a few feet of her stern. As soon as he discovered her failure to obey the wheel, and before the tug struck the bank, the master ran aft and hailed the schooner to port, and avoid striking him, but the hail was not heard upon the schooner. The tug, at the time of the collision, was under the charge of the master and wheelsman, nor was there any one upon the deck of the schooner except the wheelsman at the helm, and the mate, who was walking upon the cabin, aft. Neither vessel had a lookout.

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

H. B. Brown, for libellants, argued that the collision was owing to the want of a lookout upon the schooner, and her consequent failure to hear the hail of the tug, and to port her wheel in time to prevent the collision. If a vessel be shown to be in fault for want of a lookout, every doubt with regard to this having contributed to the collision must be resolved against the vessel so in fault. The Ariadne, 13 Wall. [80 U. S.] 475; The Genesee Chief, 12 How. [53 U. S.] 443, 463. The tug was not in fault for running aground, if it was owing to the breakage of her machinery, and the court finds she was provided with proper appliances for navigation—in other words, was seaworthy. 1 Pars. Mar. Ins. 372–376.

L. S. Trowbridge, for claimant, argued that the tug was insufficiently manned, her officers incompetent, her machinery defective, and that no proper signals of danger were given, and that the want of a proper lookout on the schooner did not contribute to the collision.

LONGYEAR, District Judge. The principal fault urged against the schooner is that she had no lookout man on duty. Such appears to be the fact. Did this contribute to the collision? The tug and tow were proceeding down the river at a speed of eight miles an hour. The tow line was 52 fathoms in length in all. Making a reasonable allowance for portions taken up at each end, the length of the line between the two could not have exceeded 45 fathoms, or 270 feet. The proof shows that it would take about half a minute to put the schooner's wheel over hard aport, and that it would take about as much longer for her to begin to swing, making one minute in all. During this period the schooner, at her then rate of speed, would pass over a space of a fraction over 700 feet, or a little over two and a half times the distance between her and the tug. So that even if the tug ran once and a half the distance between the two, or about 400 feet, after the hail was given warning the schooner to port her helm and keep clear, and before the tug grounded, it could have been of no avail if a lookout man had been on duty and had heard the hail and promptly reported the same. The proofs do not show how far the tug did run between the hail and the grounding, but I think it reasonably certain that she did not run more than 400 feet—probably less than that. So that, conceding that the hail given was a proper one, and that it would have been heard and heeded on the schooner if she had had a lookout man on duty, it seems the collision would still have been inevitable, so far as the schooner was concerned. But the hail or signal given was not the usual one in such cases, the usual signal being a blast or blasts from the tug's steam whistle, and the hail given being by the master shouting to the schooner. Besides being unusual, it was evidently much less effective than the usual signal, considering the distance and that the wind was blowing fresh against the direction of the sound. It was not heard on the schooner, and

I think it reasonably certain from the proofs that it could not and would not have been heard by a lookout man if one had been on duty on her at the time. But it is claimed that if there had been a lookout man on duty, the disabled condition of the tug would have been discovered on the schooner sooner than it was by the slackening of the line. But it does not appear that the line slackened perceptibly before the tug grounded, but, on the contrary, I think it reasonably certain from the proofs that such was not the case. It is true, the tug's engine was stopped when it was first discovered that she did not mind her helm, but was started again almost instantly, and at full speed. The headway of the tug could hardly have been checked at all. But when the tug grounded the vessels were only about 270 feet apart, as we have seen, a distance at which, as we have also seen, it was impossible for the schooner to have avoided the tug, at her then rate of speed. I think, therefore, that the want of a lookout man on the schooner did not contribute to the collision. The master of the tug, then in charge of her navigation, was also acting as wheelsman. I think this was a fault, and one not without significance in this case. The responsible character of the occupation of tugs requires that there should be some competent person in charge of their navigation, separate and distinct from the wheelsman, and who has no other duties when the tug is in actual service. The master testifies, that after having starboarded to pass another vessel, and after having put his wheel aport as it was before, it was some ten minutes before he discovered that the tug was not minding her helm and was running in towards the shore; and as appears with reasonable certainty, she was already almost upon the channel bank when he did make the discovery. If his individual attention had been directed to the navigation of the tug, as it ought to have been, and he was competent for the position, he would certainly have made the discovery at once, and a collision would probably have been avoided. Libel dismissed.

Case No. 16,934.

VICTOR et al. v. CISCO.

[5 Blatchf. 128.] [1]

Circuit Court, S. D. New York. Dec. 3, 1862.

REMOVAL OF CAUSES — SUIT AGAINST OFFICER OF UNITED STATES.

A suit against an assistant treasurer of the United States, in a state court, to recover the value of certain bonds issued by the United States, which, when they came into his hands from the plaintiff, he, under instructions from the treasury department of the United States, retained, on the ground that they were unlawfully put into circulation as against the party to whom they were issued, is not a suit which can be removed into this court under the 3d section of the act of March 2d, 1833 (4 Stat. 633), which provides for the removal into this court of a "suit commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person, under any such law of the United States."

This was a suit originally brought in the supreme court of New York, and removed into this court. The plaintiffs [Theodore Victor and others], merchants in the city of New York, received from a correspondent in Mexico, five coupon bonds of $1,000 each, with instructions to collect the overdue coupons and sell the bonds. The bonds were known as Texas indemnity bonds, and were issued to the state of Texas by the United States, under the act of congress of September 9th, 1850 (9 Stat. 446). The plaintiffs, on receiving the bonds, allowed them to go into the hands of the defendant [John J. Cisco], who was assistant treasurer of the United States at New York. He, under instructions from the treasury department of the United States, retained the bonds in his possession, on the ground that they were unlawfully put into circulation as against the state of Texas. The plaintiffs brought the suit to recover the value of the bonds. [Case unreported.] The proceedings to remove the cause into this court were claimed to be taken under the act of March 2d, 1833 (4 Stat. 633), which provides for the removal into this court of a "suit commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person, under any such law of the United States." The plaintiffs now moved to remand the case to the state court, on the ground that it was not one embraced by the act of 1833, and that, therefore, this court had no jurisdiction of it.

Benjamin D. Silliman, for plaintiffs.

E. Delafield Smith, Dist. Atty., for defendant.

THE COURT (SHIPMAN, District Judge) granted the motion on the ground on which it was made.

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

Case No. 16,935.

VICTOR SEWING-MACH. CO. v. LANGHAM et al.

[9 Biss. 183.] [1]

Circuit Court, E. D. Wisconsin. Nov., 1879.

DISCHARGE OF SURETIES — CHANGE OF CONTRACT.

Where A. and B. became sureties for the faithful performance by C. of a contract with D., by which C. was to receive a salary, and the expenses of the business were to be borne by D.: *Held*, that the sureties were discharged by a subsequent alteration of the contract so that C. was to pay the expenses and sell on commission.

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

This was an action on a surety bond executed by the defendants [John Langham and others] to secure the faithful performance by the defendant Adams of a supplementary contract entered into by him with one Joslin, who acted as the agent of the plaintiff. This contract was made in April, 1873, and provided that Adams should sell sewing machines to be furnished by Joslin, receiving a salary of $50 per month and $3 on each machine sold; Joslin to pay office expenses. In June subsequently, without the knowledge or consent of the sureties, this salary contract was waived, and it was agreed that Adams should receive a commission of 40 per cent. on all machines sold by him, he to pay all the expenses of the business. The complaint set out the bond and default of Adams to the extent of $8,000. The defendants pleaded the alteration of the contract as releasing the liability of the sureties. The decision was upon a demurrer to the answer.

Finches, Lynde & Miller, for plaintiff.
Jenkins, Elliott & Winkler, for defendants.

DYER, District Judge. The answer alleges full performance of the contract by Adams up to June 3, 1873, and a settlement and payment of all moneys due to that date; further, that without the knowledge or privity of the defendant sureties, the contract was by agreement between Joslin and Adams altered as follows: that it was then and there agreed between them that the agreement by which Adams was to receive a stated salary as compensation for his services, and by which Joslin was to pay the rent of office and other necessary expenses of the business, should be, and the same was, then and there abrogated and annulled, and instead thereof, it was agreed between them that Adams should thereafter pay all the expenses of the business, and should receive a commission of 40 per cent. upon the retail prices of all machines sold; all without the knowledge, privity or consent of the defendant sureties or either of them, and that thereafter the business was carried on under such changed and modified contract, and not otherwise, and that all deficit, if any, in the accounts of Adams, and all failure on his part to account for property of Joslin or any other party, under any contract made between said Adams and said Joslin, if any such failure occurred, did in fact arise and accrue after the change and alteration of said contract.

Thus it is charged that the agreement was changed by the principal parties, so that Adams should pay all the expenses of the business, and should in lieu of a salary receive a commission on his sales, and that the default of Adams, if any, occurred after this alteration; and the question raised by the demurrer is, whether this was a material alteration, affecting the liability of the sureties. I am of the opinion that it was. By the contract before the alteration complained of, Adams was to receive a salary and the expenses of the business were to be borne by Joslin. Now it might well be that the sureties would be willing to become obligated for the performance of such a contract by Adams, and unwilling to assume liability upon a contract under which Adams was to defray expenses and sell on commission. The contract as altered would throw upon Adams expenses and risks that he would be free from under the contract not so changed. And it would seem that when the contract was altered the agency became in some respects essentially changed and the risk of the sureties was increased.

The case of Amicable Mut. Life Ins. Co. v. Sedgwick, 110 Mass. 163, is relied upon by counsel for plaintiff. In that case an insurance company appointed an agent, to be paid by commissions. The agent gave bond faithfully to conform to all instructions of the company and to remit to them all sums received, less his commissions. The sureties on the bond knew the terms of the appointment. Subsequently the company and the agent agreed, without the knowledge of the sureties, that he should receive increased commissions but give up all claim on a certain guaranty previously given by the company that the commissions should amount to a specified sum monthly. It was held that this change in the mode of compensation did not discharge the sureties. It is evident here that the change in the agreement imposed no new duties or obligations or expenses upon the agent. He was still to collect and remit moneys and to receive his compensation in the form of commissions as under the original agreement. The change was merely in an increase of his commissions and a relinquishment of his claim on the guaranty. The court in its opinion points out the distinction between such a change and a change in compensation from a salary to a commission. The change as to remuneration did not subject the parties to any greater or other risks than they originally intended to assume. It is to be observed further, that the bond in the case cited, was a general one, while the bond in the case at bar rests upon a particular contract which is mentioned therein. In the respects mentioned, the case seems distinguishable from the one under consideration.

In Northwestern R. Co. v. Whinray, 10 Exch. 75, the facts were these: The defendant as surety executed a bond to the railway company, which, after reciting that the company had agreed to appoint L. as their agent for the purpose of selling coal, at a yearly salary of £100, was conditioned for the due accounting by L. of all moneys received by him for the use of the company. L. performed the duties of such agent at the salary specified, until a certain time, when it was agreed between L. and the company to substitute for such salary a commission of 6d per ton on all coal for which he should ob-

tain orders. After this change in the agreement L. became indebted to the company for sums which he did not pay over, and the company having sued the defendant on the bond, it was held that the change in the contract from an agency at a salary to an agency with compensation by commissions so altered the relation between the principal and sureties that the latter were not responsible for the former's default.

The facts of the case at bar as alleged in the answer, appear as strongly to sustain a similar conclusion here. For here is a contract by virtue of which Adams was to receive compensation by way of salary, and the expenses of the business were to be defrayed by Joslin. And it was for the performance of such a contract that the defendant sureties became bound. It is then charged that at a time subsequent the contract was without the knowledge of the sureties changed so that Adams was to receive compensation by way of commission and was to pay the expenses of the business. The similarity between this case and that last cited is such as to lead me to adopt the latter as an authority upon the point involved. It is true that the character and amount of the compensation to be paid to the agent in that case were recited in the bond, and therefore the recital was to be looked at as part of the contract. But I do not regard this as weakening the application of the case as an authority, to that at bar, because here the compensation is stated in the contract and the contract is referred to in the bond as the basis of defendants' liability; and is really part of the bond for the purpose of determining what liability the sureties have assumed. Demurrer overruled.

NOTE. See further that a principal can make no change in an agreement so as to bind his sureties, without their assent. Burt v. McFadden, 58 Ill. 479; Chapman v. McGrew, 20 Ill. 101. The undertaking of a surety is construed strictly; his liability will not be extended by implication. Myers v. First Nat. Bank, 78 Ill. 257; Reynolds v. Hall, 1 Scam. 35; Phillips v. Singer Manuf'g Co., 88 Ill. 305; Millar v. Stewart, 9 Wheat. [22 U. S.] 680.

Case No. 16,936.

VICTOR SEWING-MACH. CO. v. MINGUS.

[5 Reporter, 518;[1] 25 Pittsb. Leg. J. 125.]

Circuit Court, W. D. Pennsylvania. March 2, 1878.

CIRCUIT COURTS—JURISDICTIONAL AMOUNT—DAMAGES.

The question of jurisdiction of the circuit court, where the same depends on the amount involved in the action, is to be determined by the amount of damages laid in the declaration.

Action of covenant on a bond for the performance of an agreement in the penal sum of $1,000. The breach assigned in the narr. and in the affidavit of claim amounted to $141.52, but the damages laid in the narr. were $1,000. The defendant pleaded to the jurisdiction that the amount involved did not exceed $500. The plaintiff demurred.

W. R. Jennings, for plaintiff.

Sterrett, Kennedy & Doty, for defendant.

THE COURT held the plea bad on the ground that the damages laid in the declaration constituted the criterion as to jurisdiction,—Martin v. Taylor [Case No. 9,166]; Sherman v. Clark [Id. 12,763]; McKENNAN, Circuit Judge, remarking that inasmuch as the act of assembly, relative to suits on bonds to secure the performance of agreements, authorized the entry of judgment for the full amount of the penalty, execution to be restrained to the damages assessed for the breach, it would be a strange anomaly that the court could not entertain jurisdiction of a cause in which, if successful, the plaintiff could have judgment for one thousand dollars. Demurrer sustained.

[1] [Reprinted from 5 Reporter, 518, by permission.]

VICTORIA, The (FRENCH v.). See Case No. 5,106.

VICTORIA, The (SAUNDERS v.). See Case No. 12,377.

VICTORIA, The (THORNE v.). See Case No. 13,988.

VICTORIA PEREZ, The (UNITED STATES v.). See Case No. 16,620.

Case No. 16,937.

The VICTORY.

[Blatchf. & H. 443.][1]

District Court, S. D. New York. Dec. 3, 1834.

COSTS IN ADMIRALTY—SUIT FOR WAGES—SETTLEMENT OUT OF COURT—SET-OFF.

1. In a suit brought by a seaman for wages, a court of admiralty will not allow an out-door settlement, without the concurrence or knowledge of the libellant's proctor, to bar his claim for costs.

[Cited in Peterson v. Watson, Case No. 11,037; The Ontonagon, 19 Fed. 800.]

2. The action may be pursued after such settlement, for the purpose of determining the right to costs; and the court will, to that end, inquire into the fairness of the settlement with the seaman.

3. Costs unnecessarily created by side issues on that investigation, will be decreed against the libellant, and may be set off against those allowed him upon the main issue.

4. Where, in a suit in rem for wages, an answer to the libel on the merits was filed, and issue was joined, and afterwards a supplemental answer was filed, alleging a settlement, to which the libellant replied, alleging fraud in the settlement, and noticed the cause for hearing upon that issue, and it appeared that there was a good cause of action for more than the amount paid on the settlement, the costs upon the main issue were

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

decreed to the libellant, and the claimant was allowed to set off the costs created by the new issue.

This was a libel in rem, in which the master intervened, as claimant. The libel demanded a balance of wages, amounting to $190, due for an outward and homeward voyage of fourteen months continuance. The libellant alleged, that he shipped on a voyage from New-York to Marseilles, and thence back to a port of the United States, but that the vessel went from Marseilles to Tarrogona, in Spain, thence to Gibraltar, thence to Rio Janeiro, thence to Monte Video, and thence to Boston; that he was forced to leave the vessel at Rio Janeiro, by the cruel usage of the chief mate; and that the voyage was changed to South America without his knowledge or consent. The master alleged, in his answer, that the libellant shipped for the voyage actually performed; that, from his insubordinate and dangerous conduct on board the vessel, the claimant had determined to discharge him at Rio Janeiro, to which the libellant assented; that previous to such discharge, in a controversy between him and the first mate, during the absence of the master on shore, the libellant attacked the mate with a drawn knife, and, to avoid being arrested for his mutinous conduct, jumped overboard and swam ashore; that the American consul at Rio Janeiro, on hearing the libellant and the claimant, endorsed on the roll of the crew his consent that the libellant be discharged from the vessel; and that he was accordingly discharged. This answer was filed in the latter part of August, 1834, and the case was set down for hearing at the September term, proofs having been taken on the part of the libellant. Some misapprehension having arisen at the hearing, between the counsel, as to the effect and operation of a stipulation admitting certain evidence of the first mate, the claimant moved to have the cause put off, and, on the 13th of September, obtained an order for commissions to examine witnesses out of the country, and for a stay of proceedings for six months. On the 3d of October, the claimant filed a supplemental answer by way of plea puis darrein continuance, alleging a settlement of the matter with the libellant by paying him $50, and setting forth a release in full, by the libellant, of his demand, for the consideration of one dollar and divers good causes. On the 2d of November, the proctor for the libellant filed a replication to the supplemental answer, averring that the release was fraudulently obtained from the libellant without the knowledge and consent of his proctor, and without payment of the taxable costs due in the suit, and to defraud the officers of the court of their legal fees. On the same day, an order was entered by the court, at the instance of the proctor for the libellant, allowing the libellant to notice the cause for hearing upon the latter issue, notwithstanding the order staying the proceedings for six months to take testimony, and, thereupon, the cause was set down upon the calendar for hearing at the November term; but, as the judge was sitting in the circuit court at the time, there was no opportunity to bring it on. On the 6th of November, the proctor for the libellant gave the proctor for the claimant notice in writing, that the cause was continued in prosecution to recover the taxable costs unpaid therein, and that, on payment thereof, the suit would be discontinued. At the December term, the cause came on to be heard, when it was insisted, for the libellant, that, notwithstanding the settlement out of court. the vessel should be held answerable for costs incurred to the time of the hearing, and for all which should subsequently accrue in enforcing their payment, while it was contended, on the part of the claimant, that costs were merely an incident to the suit or cause of action and fell of course when the latter was disposed of.

Erastus C. Benedict, for libellant.
David D. Field, for claimant.

BETTS, District Judge. In the case of The Sarah Jane [Case No. 12,348], this court decided that an out-door settlement of a cause with a seaman prosecuting for the recovery of wages, would not be allowed, as of course, to debar the libellant's proctor from the recovery of costs; and that, when the right to recover the debt and costs was manifest, the court would regard such settlement as a fraud on the seaman and on the officers of the court, in respect to their costs, and would retain possession of the thing against which the suit was proceeding, until the taxable costs were satisfied. That decision did not assume a power in the court to deny to seamen, in common with other suitors, the right of compromising their law suits, for arrangements of this kind made in that case were allowed to stand in full force; but it proceeded upon the broad doctrine, that the court is bound to exercise a supervisory authority over agreements of that character entered into with seamen personally, and to see that no injustice or wrong is done them. There can, however, be no doubt, upon general principles, that a court of admiralty will retain a suit, to pass upon questions of costs, although the principal cause of action is adjusted and no other matter remains for decision. The doctrine may be applied to other proceedings in the court, as well as to actions by sailors for wages. It would follow, as a necessary incident to the course of procedure in rem, where the thing itself remains with the court until all the equities connected with the lien upon which it was attached are satisfied, and because, after a warrant is issued, the costs become, equally with the main demand, a portion of the lien. The court of admiralty will support a reasonable and fair offer of settlement made to a sailor before suit brought, by imposing costs on him if he refuses the offer

and sues for wages at large. And since, if the action is defended, it is to be carried on by the claimant or respondent without expectation of reimbursement from a common mariner, the court will be cautious not to construe an offer to settle, into an admission of the justice of the demand. It is rather regarded as an attempt to avoid an expensive litigation, by paying a specific amount to be free from it. Accordingly, if the matter is referred to the court, the precise sum offered is decreed, and without costs, when the proof does not show that the mariner must have recovered more had the suit progressed. The court acquaints itself with the fair rights of the seaman, and endeavors to give a liberal construction to offers of compromise with him. After a suit is in court, however, it is subject to the supervision of the proctors. In courts of civil law, according to the strict principles of practice, the parties themselves have no authority over the cause after their regular appearance by proctors. The proctor is regarded as dominus litis, having the management and control of all the proceedings, until a final decree, or until his authority is revoked. In actions by mariners especially, the promovents are regarded as essentially under tutelage. Every dealing with them personally by an adversary party, in respect to their suits, will be scrutinized by the court with great distrust. Lord Stowell declares, that negotiations with seamen, even before suit brought, are conducted more to the satisfaction of the court, when entrusted to their proctors; (The Frederick, 1 Hagg. Adm. 211, 220;) thus distinctly implying that the court may extend its quasi guardianship to their interests not in prosecution. And the authorities are clear to the point, that bargains to the disadvantage of seamen, in respect to their services and the wages due them, will not be regarded in admiralty courts, when unconscientious or overreaching in their bearing. There would be still greater reason, in a case presenting a clear ground for recovery, to withhold from them an unrestrained control over the rights of their proctors, which become blended with their own after suit instituted. Accordingly, the payment of a particular sum to a mariner out of court, without the knowledge of his proctor, to settle a suit for wages in progress and prepared for decision, if sanctioned as a settlement of the cause so far as a recovery of the matter in demand was concerned, would still be regarded by the court as evidence against a claimant or respondent, different from what an offer of the same sum to prevent a suit would be. Such a payment does not wear the face of only purchasing peace or buying off the hazards of a law suit, but it is bidding against the greediness and ignorance of the seaman, after the respondent or claimant is aware of the strength of the seaman's case and of the weakness of his own. Coming in that shape, it may well be acted upon as an acknowledgment that the seaman was justly entitled to the full amount paid.

The transaction bears another aspect. If not explained on the part of the master or owner, the court must consider a settlement so made to have been procured for the purpose of depriving the libellant's proctor of the legal costs accrued in the action. Those costs almost inevitably follow a recovery in a suit for wages. They, equally with the wages, are a lien on the vessel, from the moment she is attached. When the testimony before the court indicates to the master or owner that the seamen must have a decree in their favor, he will be deemed, in procuring a settlement and release, to have employed the temptation of cash in hand, to influence needy and reckless parties to desert their suit and fraudulently throw the costs upon their own proctor.

At law, where costs are incident to the success of the suitor's claim or defence, and accordingly depend upon the final event of the litigation, a settlement between the parties is ordinarily held to extinguish all claims for costs on the part of the attorney of either, as against the other. Watson v. Depeyster, 1 Caines, 66; Johnston v. Brannan, 5 Johns. 268; People v. Hardenbergh, 8 Johns. 335; Chapman v. Haw, 1 Taunt. 341; Graves v. Eades, 5 Taunt. 429; Charlwood v. Berridge, 1 Esp. 345; Nelson v. Wilson, 6 Bing. 568. But, even courts of law will protect attorneys against settlements made collusively, with intent to destroy their remedies for costs, and even against those which are made after notice to pay costs to the attorney. Pinder v. Morris, 3 Caines, 165; Martin v. Hawks, 15 Johns, 405; Swain v. Senate, 2 Bos. & P. N. R. 99; Cole v. Bennett, 6 Price, 15. Slight circumstances are often regarded as competent proof of collusion—as that the party settled with has a good cause of action, and is irresponsible to satisfy his attorney's costs; or that there is an appearance of concealment in the settlement. In some instances, the English courts have regarded the mere retainer of an attorney, where no arrest of the party had yet been made, as legal notice to the opposite party that the demand could only be settled with the attorney or on a satisfaction of his costs. Toms v. Powell, 7 East, 536. There must necessarily be much technicality mingling with the judgment of courts of law in relation to costs as the concomitant of a suit. An attorney is, accordingly, not allowed to continue the suit, to recover his costs, after his client has discharged the action, unless fraud and collusion in the settlement render it nugatory.

Courts proceeding upon the principles of the civil law act upon broader doctrines. The charges a party sustains in contesting a suit are estimated with reference to all the equities brought to view, and are apportioned ad libitum by the courts. In chancery and in the ecclesiastical courts, costs are regarded as a distinct equity, though taking origin in and springing out of the general subject of controversy. The unsuccessful or litigious party, pro salute animæ, may undergo the penalty of costs, in correction of a disposition considered to be too grasping or refractory. Those courts also regard the reality of rights

and interests more than their technical name and aspect. Costs are treated as the distinct and exclusive right of the proctor, although nominally granted to the party. This right will be vigorously supported by the courts, subject only to the general principles upon which costs are allowed or denied. The proctor's interests and those of his client are one in that respect only. When the right is settled, the interference of a party chargeable with costs, to dispossess the proctor of his remedy for them, would be grossly irregular. The court of admiralty proceeds upon analogous principles with other courts which take jurisdiction conformably to the rules of the civil law, and imposes or withholds costs, in respect to parties, according to their fair merits and equities in relation to the subject matter of the litigation. And, in regard to the incidental interests of proctors, it does not consider its power, in this behalf, controlled by any compromise between the parties which does not appear apud acta. The Thomas Handford, 2 Hagg. Adm. 41, note.

To determine, therefore, the disposition of costs as between the parties, the court must necessarily inform itself of their relative rights and liabilities, and examine the circumstances indicative of bona fides in the suitors, either in bringing the action or in defending it. The settlement now in question is marked by exceedingly suspicious traits. The suit had progressed almost to maturity. Large expenses were already incurred. The whole case of the libellant was known to the claimant. The libellant is a transient person, wholly irresponsible for the expenses, and it was accordingly manifest that they must not be lost to the proctor if they were not obtained from the claimant by an award of costs, or secured in the damages decreed against him and recovered by the libellant. The libellant is an illiterate black man, alleged by the claimant to be disorderly and reckless. He is no doubt the kind of person with whom the proffer of ready money would be likely to have quick influence. It is not to be expected his avidity would be restrained by any concern for the rights of his proctor, and he may, withal, have been ready to unite in a trick upon his lawyer, without great concern as to its honesty. Under such circumstances, the claimant negotiated a secret settlement with him, paid him $50 in cash, and took his release in full satisfaction of the cause of action. In this the claimant had the assistance of his own counsel, whilst the libellant acted without the presence of any legal adviser. This has the appearance of dealing separately with the libellant with intent to defeat a recovery of costs, and nothing would induce the court to uphold a transaction so managed, short of evidence that the libellant had but a questionable ground of action, or that the claimant would be enabled to present a meritorious defence, so that the court could pronounce the bargain a fair one for the libellant, and one which his proctor ought to have sanctioned, if consulted.

It is urged, accordingly, that the claimant furnishes at least prima facie evidence of a substantial defence on the merits. But the answer nowhere sets up a misconduct which could operate as a satisfaction of wages. It does not claim a forfeiture of them, and if, on a trial, it had been sustained throughout, it would only have exonerated the vessel from the libellant's claim for wages after his discharge at Rio Janeiro, but would in no way affect his right to a full recovery of wages up to that time. Wages were thus due the libellant for eight months, so that, after deducting the advances to him, a balance of $100 would have been left, against which the answer sets up no payment. To this must be added two-thirds of the advance which the master is bound by statute to make on discharging a seaman in a foreign port. It accordingly results, that upon the pleadings and proofs before the court, the libellant is entitled to recover a sum exceeding $100, without regarding his claim for wages subsequent to the time he left the vessel. It is manifest, therefore, that the settlement was highly advantageous to the claimant, even if he is compelled to pay the costs of suit in addition to the compromise money. If he is released from paying costs, he makes a large saving, and has, in effect, succeeded in perpetrating a fraud on the libellant or his proctor.

It can hardly be supposed that, had the terms of compromise been referred to the court, it would have sanctioned a settlement, in view of the pleadings and proofs before it, without also imposing costs. The equity with respect to costs, then, remains unaffected by the arrangement pleaded as a satisfaction and release. Conceding that a suitor has, in this court, equally as at law, an abstract right to discharge from the lien for costs the thing or proceeds held under arrest, a proceeding like this, behind the back of the proctor, and operating to deprive him of his rights, could hardly be upheld in any tribunal.

As the libellant does not invoke the court to relieve him from the bargain, as being unequal in respect to his rights, it will not be interfered with further than to declare that the settlement is no bar to the proctor's remedy for costs. But, as the proctor has unnecessarily made costs, by replying to the supplemental answer and noticing the cause upon the issue thus framed, the taxable costs arising from those proceedings must be allowed to the claimant as a set-off. Decree accordingly.

Case No. 16,938.

The VICTORY.

[2 Spr. 226.] [1]

District Court, D. Massachusetts. Oct., 1863.

PRIZE—MARSHAL'S FEES—DISTRIBUTION OF PRIZE MONEY—SALVAGE—COTTON AS PRIZE—INTERNAL REVENUE TAXES.

1. When a vessel is taken by the secretary of the navy under the act of 1863 [12 Stat. 759], the marshal is not entitled to his fees as in the case of a sale, or to half commissions, as he is when the case is settled without a sale.

2. Distribution among vessels engaged in a capture.

3. Vessels which pick up enemy's goods thrown overboard during a chase, are entitled to them as captors, and not as salvors.

4. The claim of the wife of an officer of the prize to her private adventure rejected.

5. Cotton captured as prize, and in the custody of the marshal, under a warrant from the prize court, is not liable to be proceeded against for the internal revenue tax while in his custody.

In admiralty.

R. H. Dana, Jr., U. S. Atty., for the captors.

Mr. Sargent, Collector, in support of the tax.

SPRAGUE, District Judge. This prize, a steamer, was taken by the secretary of the navy, for the use of the navy, after she had been libelled and was in the marshal's possession. This was done under section 2, c. 86, of the act of 1863 (12 Stat. 759). That act authorizes the secretary of war or the secretary of the navy "to take any captured vessel, any arms or munitions of war or other material," either before or after the vessel shall have been sent in for adjudication, and requires the department for whose use it is taken to "deposit the value of the same in the treasury of the United States, subject to the order of the court in which prize proceedings shall be taken in the case." When it was known that the secretary was about to take the vessel, the United States attorney moved for appraisors. These were ordered, not as a preliminary to the taking, but for the benefit of the captors and claimants, that the court might have some evidence of the value of the property taken. This right to take, given by the statute, is absolute, and is to be exercised at the discretion of the secretary. Neither the judge nor any officer of the court has any duty to perform to effectuate the taking. It is not the appraised value which the secretary is to deposit, but the true value. The secretary is not bound to wait for an appraisement, or to make the deposit before taking the vessel; but may take the vessel at once, by an exercise of power delegated to him by congress, and has the duty cast upon him to make the deposit of the value.

The marshal charges a commission on the amount the secretary deposited in this case, on the ground that it is a sale of the vessel. This is objected to by the United States attorney, on behalf of the captors, and the question is submitted to me. The act regulating fees gives the marshal a percentage "for sales of vessels or other property, under process in admiralty, or under the order of a court of admiralty, and for receiving and paying the money." Acts 1853, c. 80 (10 Stat. 164).

This is in no respect a sale. The marshal could not have sold the vessel to the secretary. He is liable to the court for the vessel; and in this transaction is protected by the fact, that the vessel has been taken from him by act of law. This is the return which he should make, and in this case has made, on his warrant. It appears that the secretary sent the sum of $65,000 to the marshal, which was the amount of the appraisement, with a kind of bill of sale, which said, "Bought of the marshal of the United States," &c., the steamer Victory, &c., for $65,000. This bill the marshal signed and returned to the department, and deposited the money with the assistant treasurer to the order of the court. He suggests that this transaction makes the process a sale, and that it was treated as such by the secretary of the navy. However the secretary and marshal may have proceeded, the transaction is not a sale. The marshal had none of the duties of a sale, nor, indeed, any act to perform in the premises, but to yield to the taking by virtue of the statute.

The marshal submits the further question whether, if not entitled to full commissions, as on a sale, he is not entitled to half commissions as in a case "where the debt or claim shall be settled by the parties without a sale of the property." I do not think this to be such a case. The "debt or claim," if there be one in this case, is not settled by the parties. The suit goes on to an adjudication, without settlement or compromise, only the money is substituted for the vessel. The secretary is to deposit "the value" in the treasury, not the value less commissions. If he deposits the money through any person as his agent, the compensation of that agent, whether it be the marshal or any one else, cannot be charged on the fund. The result is, that the marshal is not entitled to commissions in any form on the value of property deposited by the secretary of the navy under the authority of the act of congress.

In October, 1863, the vessel and cargo having been condemned for breach of blockade, and for being enemy's property, the question of distribution was presented to the court, and the following opinion given by

SPRAGUE, District Judge. The Victory, a fast and powerful steamer, deeply laden with cotton, had run the blockade off Wilmington, N. C., and was nearing Nassau, when she was seen by three cruisers of Admiral Wilkes's squadron. They pursued her, but only one, the Santiago de Cuba, was able to keep up with her. The other two, the Tioga and Octorora, dropped astern, and passed out of signal distance, and at last out of sight, and employed

[1] [Reported by Hon. Richard H. Dana, Jr., Esq., and here reprinted by permission.]

themselves in picking up the deck-load of cotton which the Victory threw overboard in her attempts to escape. The Santiago de Cuba overhauled the Victory, and brought her to, after a chase of five hours, and after firing several shotted guns. At the time of the capture and for more than an hour before, the two other steamers were out of sight. They came up after the capture, and put on board the prize the cotton they had picked up. The commanders of the Fioga and Octorora do not claim to share in the steamer or the cargo found on board; and in this, I think, they rightly construe the statute, which limits participation to vessels within signal distance at the time of the capture. They claim to share as sole captors in the cotton they picked up, and, if not as captors, then as salvors.

I am of opinion that they are captors of this cotton. It was enemy's property thrown overboard during the pursuit, and had been carried through a blockade on that voyage. Salvage assumes that the title to the property remains in the owners, for whose benefit it is saved, and who may rightly claim it of the salvors or of the court. The owners of this cotton could do neither.

Mrs. Harriet A. Bird, wife of the purser of the prize, claims one bale of cotton and two barrels of spirits of turpentine, as her private property, and says that she left Wilmington in the Victory to return to Connecticut, her native state, and invested her money in these articles of merchandise as a means of getting it out of the country. Assuming it to be capable of proof that the merchandise was her sole and absolute property, and held by herself for the purpose she states, and that she did leave Wilmington for the purpose she now represents, she knowingly embarked it in a breach of blockade, and it must take the fate of war. Her husband, too, is a resident of Charleston, and continues to be a rebel in fact, engaged in violating our laws of peace as well as of war; and she calls upon the court to furnish her funds out of the prize with which to support herself, which will relieve her husband from that burden, and enable him the better to give his time and means to the aid of the Rebellion. The claim must be dismissed.

After the above decision was rendered, the collector of the internal revenue petitioned that the amount of revenue tax due on the cotton might be paid from the proceeds of the sale of the cotton.

SPRAGUE, District Judge. The cargo of the prize-steamer Victory, consisting chiefly of cotton, was brought into this district, a libel was filed, and a warrant issued to the marshal, by virtue of which he took possession. It was ordered to be sold by an interlocutory decree. The collector of the internal revenue demanded the payment of the tax on cotton, under section 75, c. 119 of the act of 1862 (12 Stat. 465). That section imposes a tax of one-half of one cent per pound "on all cotton held or owned by any person or persons, corporation, or association of persons; and such tax shall be a lien thereon in the possession of any person whomsoever." It seems that the regulations established by the commissioner of internal revenue provide that, when this tax is paid, tags shall be affixed to the bales by the collector, and a receipt given to the person making the payment; but when this sale was ordered, the collector had not been furnished with the tags. The question arose, whether the cotton was liable to the tax in the hands of the marshal; and it was thought that, to require it to be sold subject to the tax, when the evidence of payment, i. e. the tags, was not ready, might be an inconvenience to the purchasers, and so operate unfavorably upon the sale. The marshal agreed with the collector to pay the tax from the proceeds, and it was announced at the sale that the purchasers would not be called upon for the tax. The vessel and cargo have since been condemned, and distribution is about to be made: and the marshal asks to have the tax allowed and paid from the proceeds. This is objected to by Mr. Dana, in behalf of the captors. Mr. Sargent, the collector, has presented the subject, and been heard in behalf of the allowance. It is understood that, in this case, the cotton has long since passed into consumption, and cannot be traced, and that the tax cannot be collected unless from these proceeds.

The decision of this question depends upon whether the cotton was liable to be taken out of the hands of the marshal to satisfy this tax. The cotton was in the custody of the court as prize. It had been captured by order of the government, and this court called upon to determine whether it should be condemned or restored. If prize property is liable to be taken for this tax, it is so liable at any time from the moment it arrives in port. The collector may demand the tax, and, if not paid by the marshal, he may enforce the lien. And to this end it is contended that he has the right to take possession of it and sell it. Now, what would be the effect of this? Who is to pay the tax, and relieve the property? The marshal has no funds from which to pay the tax; and the court has none. It is not until the property is sold, and the proceeds collected, that there are any funds. Now, to provide a demand for payment upon official persons, who can have no means of paying, is nugatory. The result will be, that, in all cases, the collector must take the property from the court and sell it. But, until adjudication, the court holds all prize property, as it were, in trust. The rights of neutrals are involved. International questions may arise. There is a right of appeal to the supreme court. The result of the adjudication may be a decree of restitution to the owners; and these owners may be neutrals, whose government may enforce their rights. The decree may entitle them to a specific restitution. If the prize court, following the practice allowed by the law of nations, has converted the property into money, the owner

must be satisfied with the proceeds; but it would be a dangerous anomaly, when the prize law authorized a specific restitution, to allow an officer of an executive department, not acting under the orders of the court, and not responsible to the court, to seize and sell the property for purposes having no relation to the law of prize, the rights of the parties, or the belligerent rights of the government. There would also be many practical inconveniences in such a course. The documents by which the quantity, character, and history of the property are to be ascertained are in the strict custody of the court until a certain stage of the proceedings, not to be seen by the parties; and the court, responsible under the law of nations, would not be justified in delivering them to the collector, nor, under some circumstances, in permitting him to see them. Neither can this court exercise any control as to the manner in which the collector shall sell the property, the expenses he may subject it to, or the disposal he may make of the proceeds.

In this view of the effect of such a course, the language of the statute must be very clear, or there must be something like a necessity to sanction it. Neither a necessity nor a policy is apparent. This claim rests upon the assumption that the cotton is liable to this tax, and that, if not collected before the sale, it would be a lien thereon in the hands of the purchaser; whether such a lien would exist after the sale, or the purchaser in any way be liable for such tax, I express no opinion. But, supposing the assumption to be correct, and the cotton liable to the tax in the hands of the purchaser, I see no necessity, nor even reasons of policy, that would authorize the marshal to assume the payment of the tax. If the collector obtains the tax from the purchaser instead of from the marshal, the result is that the cotton sells for just so much less. The government gets its tax less the collector's commission in either event. It is the same thing to the purchaser, if he understands his position. The captor loses one-half the amount of the tax in either event; but if the purchaser pays the entire value, and the marshal pays the tax to the collector, the captors and the government lose also the marshal's commission on so much of the proceeds as represent the amount of the tax.

There are the strongest reasons of policy against this demand. It is of the utmost importance that prize property should be dealt with by a court recognized by the law of nations; and I cannot think that congress intended that the government should collect a tax for its own benefit out of its own property, or property for which it is responsible, by a proceeding so anomalous, and attended with so many dangers and inconveniences.

But the marshal, in good faith and in the exercise of his judgment, for the benefit of the sale, agreed that the tax should be paid from the proceeds; and the collector, in the faith of that, allowed the cotton to pass into consumption; and the captors, it is said, have had the benefit of the arrangement. Still the marshal acted in an official, and not in a personal capacity. He may subject the cotton to expenses when necessary for its preservation; but this property could not have been taken out of his hands by the collector, and no necessity existed which could authorize him to make any contract subjecting the proceeds to this claim. The most that can be said is, that, by this arrangement, the purchaser, by being assured that he would not be liable to the lien, gave more for the cotton than he would if he was to receive it subject to that incumbrance; that is to say, that the marshal, for the sake of enhancing the price, undertook that the purchaser should be relieved from a burden that would be consequent upon his purchase. Now it cannot be admitted that a marshal can burden property in his hands by arrangements of this nature. They rest upon no necessity or policy, and might be carried to a dangerous extent if the principle were admitted. I am satisfied that the claim for the tax against the proceeds must be disallowed.

Case No. 16,939.

VIDAL v. PHILADELPHIA.

[Cited in Miller v. Lerch, Case No. 9,579. See Vidal v. Mayor, etc., of Philadelphia, Executors of Stephen Girard, 43 U. S. (2 How.) 127.]

Case No. 16,940.

VIESCA v. WYCHE.

[3 Woods, 336.] [1]

Circuit Court, W. D. Texas. June Term, 1878.

TRESPASS TO TRY TITLE — NECESSARY PROOFS — MEXICAN GRANTS—DOCUMENTARY EVIDENCE—ARCHIVAL RECORDS.

1. Under the statute law of Texas, it is not necessary, in an action of trespass to try title, to prove an actual trespass by defendant, except in cases where there is no controversy about the title, but only as to boundaries, and where the plaintiff having the superior title charges the defendant with trespassing on his land.

2. The document offered in evidence in this case as a link in plaintiff's title, dated at Monclova, March 18, 1835, signed by José Benito Camacho Y. Estrada, as deputy secretary, or second clerk, purporting to be an appointment by José Maria Cantu, ad interim governor of Coahuila and Texas, of José Maria Balmaceda, as commissioner for the distribution of lands to the colonists of the empressarios MacMullen and McGloin, is valid and genuine.

3. The document purports to be an original or protocol, has all the appearance of being such, is authenticated by the seal of the state, and there is no suggestion that it is a forged instrument.

4. The fact that the document is signed by the deputy and not by the principal secretary, is not fatal to its validity. The deputy secretary was considered competent at that time to sign decrees of the government.

5. In this case the principal secretary, José Maria Falcon, was the attorney of Viesca, the grantee of the title, and made the application to

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

the governor for the identical appointment in question; hence there was a propriety in his not signing it.

6. A document shown to be a genuine original act of the government, is proper evidence of the appointment or decree which it embodies.

7. The proper depository for such a document is among the archives of the state. But its absence therefrom is not fatal to its authenticity, but may be explained.

This was an action of trespass to try title [against H. C. Wyche]. The case turned wholly upon questions of law. A jury was impaneled pro forma, to which instructions were given by the court, and, in accordance therewith, they were directed to return a verdict for plaintiff [Roberto Viesca.]

Wm. M. Walton, for plaintiff.

The bill is claimed to have issued by virtue of a special commission to Balmaceda, and this authority is questioned upon the ground that it is neither a matrix in the archives of the state department, nor testimony of such, in contemplation of law. That it is competent to question the authority of the officer issuing, is well settled: U. S. v. Arredondo, 6 Pet. [31 U. S.] 691. If it appear that he was not legally authorized to grant the title, then it is void and cannot be used as evidence of title. State v. Delesdenier, 7 Tex. 76; Sampeyreac & Stewart v. U. S., 7 Pet. [32 U. S.] 222; Stoddard v. Chambers, 2 How. [43 U. S.] 284. The protocols or commissions of commissioners or alcaldes to make titles to purchasers remained in the archives of the executive department of the state of Coahuila and Texas. Paschal v. Perez, 7 Tex. 348; U. S. v. Sutter, 21 How. [62 U. S.] 170; Luco v. U. S., 23 How. [64 U. S.] 515; Palmer v. U. S., 24 How. [65 U. S.] 125. Copies of such decrees must be authorized (authenticated) by the secretary, and "without this requisite they shall not be obeyed, or be productive of faith" (section 5, art. 141, Const. Coahuila & Texas), and this article fully contemplates that originals signed by the governor and secretary shall remain in the archives, and a copy thereof issued to the party, attested by the secretary. The secretary shall sign every copy emanating from the office under his charge: Laws Coahuila & Texas, p. 31, § 3, art. 51. In Mitchel v. U. S., 9 Pet. [34 U. S.] 723, the court said: "The original is a record, and preserved in the office, which cannot be taken out; a testimonio, or copy, is delivered to the party." Such copies (testimonios) must come accompanied with the certificate of the keeper of the public archives, who declares or certifies to have copied them by order of the king (governor). 1 White, Rec. p. 297; Paschal v. Perez, supra. The testimonio of a decree of concession, set out in Jenkins v. Chambers, 9 Tex. 167, shows how such executive orders are authorized or authenticated by the secretary. It is believed that the article of the constitution of Coahuila and Texas, supra, and decree of No. 102, of the laws of Coahuila and Texas, fully authorize the retention of the original in the archives of the state department, as stated in Paschal v. Perez, supra, and it is the copy (testimonio) which serves as the officer's commission in his possession, to attach to the act or deed as his authority to grant it. The commission is a document issued or made by an officer in matters pertinent to the offices he exercises with public authority, and is an authentic document (Roa Barcena's Man. p. 44), and subject to the rules governing the execution of such; and the rule is, "that the officer authenticates it with his signature and seal, and puts it and retains it in his book of protocols, or register, a sealed copy of the instrument not to be given to the party without these requirements being complied with, under penalty of the copy being null," etc. Escriche, Dict. p. 889; L. 54, tit. 18, pt. 3; L. 3, tit. 8, lib. 1, del Fuero Real; L. §§ 1, 6, tit. 25, tit. 10, Nov. Rec. The instrument, without a protocol, has no authority, and documents made by governors are subject to the rule. U. S. v. Sutter, supra; Luco v. U. S., supra; Palmer v. U. S., supra. It seems Balmaceda took from his pocket, just as the government was about to be changed by revolution, an original document, without a protocol or counterpart in any of the public archives, and claiming none such, and attached it to a title extended by him, as the only manifestation of authority in him to issue the same. It is believed that the rule is well established that such documents are no authority in the hands of an individual who proposes to act or claim rights under them.

Bethel Coopwood, F. W. Chandler, and Wm. McGregor, for defendant.

Before BRADLEY, Circuit Justice, and DUVAL, District Judge.

BRADLEY, Circuit Justice (charging jury). The defendant claims a verdict in this case because the plaintiffs have failed to prove that he was in possession of, or had committed any trespass on the premises described in the petition or any part thereof. On this point the statute of 1840, section six, is very explicit, declaring that "it shall not be necessary to prove an actual trespass on the part of the defendant to support this action," meaning the action of trespass to try title. It was decided, however, in the case of Strond v. Springfield, 28 Tex. 649, that it is necessary to prove trespass when there is no controversy about the title, but only as to boundaries, and where the plaintiff, having the superior title, charges the defendants with trespassing on his land. That decision was clearly right, for, in that case, unless the plaintiff could prove that the defendants had trespassed on his land, he had no cause of action against them, since they conceded his title to be good, and merely questioned the fact that their occupation was within the boundaries of his title. But the statute certainly applies to cases where the title is disputed, whether the

defendants have actually attempted to take possession or not. The adverse title, or contestation, set up by them is a sufficient trespass to justify the bringing of the action. It is a cloud on the plaintiff's title, which he has a right to have removed.

Had the defendant, in the present case, contented himself not to dispute the plaintiffs' title, it would have been necessary for the plaintiffs to prove that the defendant was in possession at the time of bringing the suit, in order to obtain a verdict. But the defendant has contested the plaintiffs' title from the beginning. Having done this, he cannot now get out of court by setting up, as a dernier resort, that he was not in possession. This being so, it is unnecessary for the jury to inquire about any actual trespass. The only question will be as to the validity of the plaintiffs' title; and that depends upon the legality of the proof of a certain document which forms one of the links of that title. This document is the appointment, by the governor of Coahuila and Texas, of José Maria Balmaceda as commissioner for the distribution of lands to the colonists of the empressarios MacMullen and McGloin, which bears date at Monclova, March 18, 1835. The importance of this document in the case arises from the fact that all the subsequent steps in the completion of the title were taken by, or under the authority of Balmaceda as such commissioner. The concession had been made to José Maria Viesca, the ancestor of the plaintiffs, on the 16th of April, 1831; and it would seem that the tract had been actually surveyed in October, 1833, by Carvajal, the government surveyor, but no further steps had been taken. At the time when the document in question bears date, José Maria Cantu, by whom it purports to be signed as governor, was governor ad interim at Monclova, having been appointed by the congress and instituted in office on the 12th of March, 1835; and José Benito Camacho Y. Estrada, by whom it purports to be signed as deputy secretary, or second clerk, was deputy secretary of the government at that time. The decrees of the congress at this period are signed by Cantu, as governor, and by Camacho Y. Estrada, as deputy secretary, in the same manner as the document in question is signed. See Laws and Decrees of Coahuila and Texas, March, 1835.

This document purports to be an original, or protocol, and has all the appearance of being such, and is authenticated by the seal of the state; and no suggestion has been made that it is a forged instrument. It is objected to it, that Camacho Y. Estrada was only deputy secretary, and that to be a valid act of the government, it ought to be signed by the principal secretary. But it seems that the deputy was considered competent to sign the decrees of the government at this time. It further appears by other decrees made nearly at the same time, that the principal secretary was José Maria Falcon, who was the attorney of Viesca, the grantee of the title in this case, and who made the application to the governor for the very appointment in question. Hence there was a propriety in his not signing it. It was decided by the supreme court of Texas, in Hancock v. McKinney, 7 Tex. 384, that when a concession of land in sale to a person who, at the time, was secretary of state, is authenticated by the first officer instead of the secretary of state, it is no objection to the validity of the title.

The question then is, whether an original act of the government (for that this is an original act is demonstrated by the seal of the state) is proper evidence of the appointment or decree which it embodies? And we cannot conceive how this can well be doubted. A testimonio of it would have been received without objection; and yet, the highest value of a testimonio is that it faithfully presents and represents the original. The only circumstance calculated to raise a question on the subject, is the fact that this original commission did not remain amongst the archives of the state. That is, undoubtedly, the proper place for the originals to be. But plausible reasons for its presence here may be suggested. A duplicate original may have been executed; or, in the public disturbances which soon afterwards took place, original documents may have been removed to places of greater safety, or to places of public deposit nearer to the locality of the lands to which they related. This document is found, with the other title papers in the case, bound up amongst the public archives of the land office. These particular papers (relating to the present title) were deposited in the office by Col. Volney E. Howard, in 1846, and probably came from the archives deposited at San Antonio—the most likely and natural place to look for them. Being a genuine instrument, found in connection with the other title papers in the case, at a place where it would most likely be (if not retained amongst the original archives at Monclova or Sattillo), we think that its presence here, especially in view of the great lapse of time which has intervened since it became a part of the public archives of this state, ought not to cast discredit upon its validity. The authorities to which I have been referred by defendant's counsel seem to relate more especially to acts passed before a notary between private persons, and not to public acts of the government.

Something was said on the argument about irregular grants having been made by Governor Cantu, which were afterwards disapproved by the congress, but it does not appear that this was one of them. This was merely the appointment of a commissioner for carrying out a previous concession made several years before.

We think the document must be received as evidence. This being the only remaining question in the case, the verdict must be for the plaintiffs.

VIETOR v. CISCO. See Case No. 16,934.

VIETS (PORTER v.). See Case No. 11,291.

VIEW, The A. J. See Case No. 118.

VIGOL (UNITED STATES v.). See Case No. 16,621.

VIGUS, The LILIAN M. See Case No. 8,346.

Case No. 16,941.

In re VILA.

[5 Law Rep. 17.]

Circuit Court, D. Massachusetts. March 19, 1842.

BANKRUPTCY — SALE OF ASSETS — AUTHORITY OF COURT—NOTICE TO CREDITORS—PROCEDURE.

1. The district court of the United States has authority to order the sale of the whole or any part of the property of a bankrupt, by his consent, even before the declaration of bankruptcy.

2. The creditors must have due notice of any application for a sale, so that they may appear and show cause against such sale, or for a postponement thereof.

3. Such sale, if directed by the court, should be made by a commissioner. The time and place of the sale should be fixed by the court, and duly advertised, and the conveyance should be made by the bankrupt to the purchaser in the form prescribed by the commissioner.

A petition was filed in the district court by James Vila, setting forth that on March 11th he filed in this court a petition to be declared a bankrupt; that at the time of his bankruptcy he was seized and possessed of certain real estate and personal property, which was specifically set forth; that it would be for the benefit of the said estate, and of all parties having interest therein, that the same should be sold, transferred and assigned, inasmuch as it would be necessary to expend large sums of money in order to preserve the same from deterioration and waste, and if the time of the sale was postponed until an assignee of said estate should be appointed, the same could not be sold except at great loss and disadvantage. Wherefore the petitioner prayed the court to pass an order for that purpose, according to the provisions of the act of congress. No opposition was made to the petition. At the hearing, the district judge made an order, that the question, whether upon the facts set forth in said petition, the said James Vila, or any other person, might be empowered to sell and convey the property mentioned in said petition, or any part thereof; and if so, in what manner the same should be done, be adjourned into the circuit court, to be there heard and determined. [Case unreported.]

Francis C. Loring, for petitioner.

STORY, Circuit Justice. I have no doubt whatsoever of the authority of the district court to order the sale of the whole, or any part of this property, in the present stage of the proceedings in bankruptcy, in its discretion, if it will, in the judgment of the court, be beneficial to the creditors, and is assented to by the bankrupt. The authority results from the general jurisdiction of the court as a court of equity sitting in bankruptcy; and it becomes the duty of the court, from the moment that the property is submitted to its custody, under the proceedings in bankruptcy, to take due order for its preservation, and to turn it to the best account for the creditors. No one could well doubt this, if the property were perishable; and quite as much injury might result, if it were, in the interval, subject to great depreciation from other causes. I say, that the sale may be made with the consent of the bankrupt; for, as he has not as yet been decreed to be a bankrupt, it would seem unfit to exercise the authority without such consent, until the property is devested from him under the decree declaring him a bankrupt. It is necessary, however, that the creditors should have due notice of this application, before the sale takes place, so that they may appear and shew cause in the district court against any sale, or for a postponement thereof; and doubtless the best mode of giving notice to the creditors would be by advertisement in some public newspapers, a sufficient time before the sale to enable them to act, if they see fit, in the premises.

The sale, if directed by the court, should, as I think, be made by a commissioner appointed by the court, and not by the bankrupt. The commissioner would naturally seek the aid and service of the bankrupt and of the creditors to assist his own judgment, not indeed as a matter of strict duty, but of convenience and propriety. The time and place of sale should be fixed by the court and duly advertised; and the conveyance should be made by the bankrupt to the purchaser or purchasers, in the form prescribed by the commissioner, and with his sanction and approbation as a party thereto, with the proper recitals. I shall direct an order to be sent accordingly to the district court, certifying this opinion.

The following order was accordingly sent: Circuit Court of the United States, Massachusetts District. In Bankruptcy. March 19, 1842. In the Matter of James Vila, Petitioner. Upon the question certified and ordered to be adjourned into this court by the district court, to be heard and determined, it is hereby ordered and decreed to be certified to the district court, as follows: That it is competent for the district court, sitting as a court of equity in bankruptcy, to authorize and decree a sale to be made of the property mentioned in the said petition, or any part thereof, as the district court may, in its discretion, deem for the interest of the estate. The sale is to be made at public auction, at such time and place as the said court may direct, by a commissioner to be appointed by the court for that purpose. That the creditors, who have proved their debts, and all other creditors, who shall prove their debts, are to have notice, by a publication in some newspaper or newspapers designated by the court, of the time and place of such intended sale, that they may appear and show cause, why the sale should not be made, and apply to the court for a stay or suspension thereof. That the deed to be executed to the purchaser shall

be executed by the said Vila in due form of law, and shall be in such terms and with such covenants as the commissioner shall advise and direct; and that the commissioner shall also be a party to the said deed and execute the same, and that the same shall contain a recital, that the sale has been made by him, under the authority of the court, and has been approved by him, and that the proceedings under the sale have been in all respects conformable to the decretal order of the court.

VILAS (AKERLY v.). See Case No. 119.

VILLAGE OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the villages.]

VILLATO (UNITED STATES v.). See Case No. 16,622.

Case No. 16,942.

The VILLE DE PARIS.

[3 Ben. 276.] [1]

District Court, S. D. New York. June, 1876.

BILL OF LADING — DELIVERY OF CARGO — PLEADING — EVIDENCE.

1. A case of goods, being one of three specified in a bill of lading, was put over the ship's side, upon the wharf, and placed on a truck belonging to the ship, and wheeled by an employee of the ship up the wharf to the door of a little house, in which the custom-house inspectors, who had charge of the discharging of the vessel, transacted their business, and there one of the inspectors marked it "P. S." (which indicated that it was to be taken to a public store,) and it was then wheeled farther up the wharf, but what was done with it after that did not appear, although it was in the course of business for it to be deposited in a part of the wharf designated for such goods as were to go to a public store, but it could not be found when search was made for it half an hour after, the wharf being exclusively occupied by the owners of the ship, and being enclosed on the inner end by a fence, access through which was had by gates. On a libel being filed against the ship for the non-delivery of the case according to the bill of lading: *Held*, that the facts did not constitute any delivery of the case on the wharf, or to the custom-house authorities, so as to exonerate the vessel from her liability under the bill of lading.

[Cited in Unnevehr v. The Hindoo, 1 Fed. 630.]

2. Where a libel was filed by the consignee named in a bill of lading, to recover damages for non-delivery of the goods, and the libel contained no averment that the libellant was the owner of the goods, and the answer set up that the goods were delivered, but did not allege that the libellant was not the owner of them, or contain any exception to the libel for not averring ownership in the libellant: *Held*, that, on these pleadings, the point that the libellant was not the real owner of the goods, must be taken as having been waived.

3. The fact that the libellant, on October 24th, 1867, on the entry of the goods at the custom-house, made oath that the goods then belonged to a house in Switzerland, is not evidence to show that the libellant did not own the goods when the libel was filed, on December 27th, 1867.

In admiralty.

Henry H. Anderson and Thatcher M. Adams, for libellants.

Charles Donohue and Walter L. Livingston, for claimants.

BLATCHFORD, District Judge. This is a libel filed to recover the sum of $4,500, as the value of a case of silks carried by the steamship Ville de Paris from Havre to New York, under a bill of lading wherein the libellants, Adolph Rusch and others, were named as the consignees of the case. The libel is founded on the non-delivery of the case under the bill of lading. It does not aver that the libellants were or are the owners of the goods. The only defence set up in the answer is, that the case was delivered to the libellants at New York. There is, in the answer, an allegation, that the libellants are not entitled to recover anything from the vessel, but there is no averment in it that the libellants were not the owners of the merchandise, nor any exception in it to the libel, for want of an averment in the libel that the libellants are or were such owners. On the trial, the claimants took the point that they had a right to rebut the prima facie title which the libellants showed as consignees under the bill of lading (Lawrence v. Minturn, 17 How. [58 U. S.] 100, 107), by showing that the libellants were not the owners of the merchandise in question, and therefore not entitled to bring the suit. I think, however, that, on the above state of the pleadings, the point must be regarded as having been waived by the claimants. But, even if it were open to them, they gave no proof of non-ownership by the libellants, when the suit was brought. The only testimony they introduced bearing on the subject, was the oath, made by one of the libellants, on the entry of the goods at the custom-house in New York, on the 24th of October, 1867, after the vessel arrived there, that the goods then belonged to a house in Switzerland. The libel was sworn to on the 27th of December, 1867, and filed on the same day, and no evidence was offered by the claimants to show that the libellants did not then own the goods.

The case in question was one numbered 170. The bill of lading covered two other cases, numbered 169 and 171. The libellants entered all three of the cases, and paid the duties on them, and obtained from the custom-house a permit, authorizing the delivery to them of the cases numbered 169 and 171, and requiring the case numbered 170 to be sent to the public store for appraisement. That permit was addressed to the inspector of the port, and was delivered to two customs inspectors who had charge of the discharging of the vessel, and transacted their business in a small movable house on the wharf at which the vessel was lying. The

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

case numbered 170 was delivered over the ship's side by its employés, and placed from its tackles upon a hand-truck belonging to the ship, and was then wheeled by an employé of the ship to the door of the movable house referred to, which stood at a point between the ship's gangway and the inner end of the wharf. The employé stopped, with the truck having the case upon it, in front of the inspectors, who were at the door of the house, and submitted the case to their view. One of them placed upon it the letters "P. S.," with chalk, and it was then wheeled away on the same truck, by the same employé of the ship, further towards the inner end of the wharf, and further from the ship than the house. So far as appears, it has never been seen or heard of since. Its deposit upon the wharf from the truck is not shown. The letters "P. S." indicated that it was to be taken to a public store and it was in course for the truckman to deposit it at a particular place on the wharf which the inspectors had previously designated as a place for the aggregation of such packages as were to be taken to a public store. It was not found at that place. Search was made for it about half an hour afterwards, but it could not be found. The other two cases, which came out of the ship at other times, and were wheeled separately on other trucks to the inspectors' house, and were there marked by them each with a cross, to denote that they were to be delivered to their consignees, were afterwards found at their proper place of deposit on the wharf, which was a different place from that where the case numbered 170 ought to have been deposited, and were received by the libellants. The wharf was exclusively occupied by the claimants, and was enclosed on the inner end of it by a fence, access through which was had by gates.

These facts do not constitute any delivery of the case on the wharf, or any delivery of it to the custom-house authorities, so as to exonerate the vessel from her liability under the bill of lading. There must be a decree for the libellants, with costs, and a reference to compute the damages.

Case No. 16,943.

The VILLE DU HAVRE.

[7 Ben. 328.] [1]

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

COLLISION IN THE PORT OF NEW YORK — VESSEL AT ANCHOR IN CHANNEL—LIGHTS—LOOKOUT —NIGHT-GLASSES—EVIDENCE.

1. A bark, lying at anchor at night in the swash channel, in the entrance to the port of New York, was sunk by being run into by a steamship entering the port. No light was seen on the bark by those on the steamship, and it was claimed that she had none. The steamer had two lookouts stationed forward, and her master and a lieutenant were on the bridge. Her second captain was forward also, and the pilot was also on deck. The night was clear. None of the officers used the night-glasses which they had, to examine the channel ahead of them. If they had they would have been able to see the bark, even without a light, sooner than she was seen: *Held*, that, on the evidence, it must be held that the light on the bark had become dim, so as not to be a good light.

2. The failure of the officers of the steamer, under the circumstances of this case, to use a night-glass, was negligence.

3. Both vessels were in fault, and the damages must be apportioned.

4. The failure to call a witness whose duty it was to have charge of the light, warrants the inference that his evidence would have weakened the case of the bark in reference to the light.

In admiralty.

Evarts, Southmayd & Choate, for libellants.

W. L. Livingston and C. Donohue, for claimants.

BENEDICT, District Judge. This is an action to recover of the French steamer Ville du Havre the sum of $73,000 damages, caused by the sinking of the bark Curacao, in a collision which occurred between those vessels, in the port of New York, on the 3d day of June, 1873. On the evening of the 2d of June, the bark Curacao came to anchor in the swash channel, about one-third of the way from the lower end and near the middle of the channel, with room for vessels to pass her on either side. She there remained until two o'clock next morning, when the steamship Ville du Havre, coming in from sea, ran into and sunk her. The accident is claimed, by each vessel, to have arisen from carelessness on the part of the other. Several charges of negligence are made on each side.

I shall consider, first, the charge made against the bark, that she had no proper light displayed, and thereby caused the accident. The bark was anchored in a fairway, at night, and is, of course, called on to show that she maintained while there a signal light properly set and burning brightly. This burden she has assumed, and her libel alleges and she claims to have proved that she performed her duty in this respect.

Upon this question a mass of evidence has been presented to me, which I have considered in all its aspects, and I can say, with the advocates of the bark, that it is seldom indeed that a vessel at anchor is able so clearly to prove the setting of a light and the maintaining of the same for so long a period in the night as is covered by the testimony produced by the libellants in this case.

The evidence proves that a bright light was set on this bark when she came to anchor, and that it was there and burning brightly up to nearly the time of the accident. But the point of the inquiry is as to the condition of the light at the time of the accident; that is to say, from half past one to two o'clock in the morning of the 3d of June. When the inquiry is thus limited, the testimony in support of the libellants'

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

averment is largely reduced both in quantity and quality.

One of the witnesses from on board the bark, who speaks as to the condition of the light, is Melani, who says that about fifteen minutes before the collision he came out of the forecastle and went to the head, and in a few minutes returned to the forecastle. That as he returned he saw the light in the rigging burning brightly, and also that he saw two men on the deck—one of them by the galley. But he also says that when he returned to the forecastle he went to sleep and was awakened by the alarm given by the watch on deck when the steamer was upon them. The value of the testimony of this witness, as bearing upon the question at issue depends upon the accuracy of his estimate of the length of time he was asleep after he returned to the forecastle, and before the alarm was given. Very little reliance can be placed upon an estimate of time made, no matter by whom, under such circumstances. In this instance, the witness's opinion as to the time he was on deck appears clearly wrong, for he does not speak of seeing the steamer while he was at the head, when, if his opinion of the time be correct, she was in plain sight and quite certain to attract his attention. Furthermore, during the time he was below after his return to the forecastle, Hartman, the watch on deck, came into the forecastle and shook the man who was to succeed him on watch until he awakened him and the latter arose and began to dress, of all which Melani knew nothing.

The evidence of this witness appears, therefore, to be of little value to prove the condition of the light at the time in question.

Another witness called by the bark, who undertakes to speak of the condition of the light at the time of the collision, and who gives testimony of much more value, is the seaman Hamester, who, after the steamship was in sight, was awakened by Hartman that he might follow him upon watch. This witness says that while he was dressing in the forecastle after he was awakened, he was enabled to see Hartman standing on deck by the reflection of the signal light upon him, and that when he himself put his head out of the hatch at the instant of the collision, he saw the signal light. But he says no more than that he could see the light, and does not state whether it was burning brightly or not. Still another witness called by the libellants to the same point, is Peterson—a seaman on the bark, who says that he saw the light after the blow, but, like the previous witness, he proves no more than that a light was there which he could see. The remaining witness on this point is Hartman, whose watch on deck it was at the time of the collision, and whose positive statement that the light was burning brightly when the steamer struck them, must be considered in connection with the fact that any failure to maintain the light would be chargeable to him alone. This is the sum of the evidence on the part of the libellants in regard to the particular time in question. Many other witnesses testify to seeing the light during the night, but a close examination of their testimony shows that none of them can be relied on as giving positive evidence in respect to its condition within a half hour of the accident. Still, the testimony of the witnesses above mentioned, coupled with the strong evidence adduced to show that a light was set upon the bark when she anchored, and was seen by other vessels near to the time of the collision, may be claimed to furnish proof that at the time of the collision the light was still in the rigging and burning so that it could be seen from the deck of the bark. But more than this cannot be found proved by the testimony offered by the libellants. This testimony is fairly harmonized with the testimony of those on the steamer, who say that as they approached the bark no light was to be seen upon the bark, by the statement of a witness called by the libellants, the pilot on the bark, who says that a moment or two after the blow he climbed into the bark's main rigging, and adds, "I could see the light then burning, but it was burning dim." No evidence is produced to show that the lantern was broken or its light diminished by the jar of the collision, and any inference that the condition of the light testified to by this pilot might be the result of the collision is overcome by the strong evidence from the steamer, that, as she approached the bark and before the blow, no light was to be seen. Some eight witnesses are called from the steamer, including seamen, officers, passengers and the pilot, every one of whom sooner or later had his attention fastened upon the bark before the blow, and every one is positive that no light was displayed by the bark.

I reconcile the evidence, therefore, by the testimony of the pilot of the bark, and find the fact to be that while there was a light placed in the bark's rigging, which burned brightly till near the time of the collision, still, that at the time of the steamer's approach the light had become dim, so as to be invisible at any distance from the bark.

This conclusion derives much support from the fact proved, that either from want of oil, a short wick, or other cause, the light in question had become dim once before during this night, and it had been found necessary to take it down and trim it. The cause of the first failure of the lantern is not stated. The lamp was then filled, the wick was cut, not renewed, and a short wick would account for the failure on both occasions. It is also to be remarked in this connection, that the steward, whose duty it would be to put the lantern in condition to be placed in the rigging, is not called as a witness, nor is his absence explained. This circumstance is made significant by some minor facts in evidence. Thus it would seem that no long time before the collision, although before the steamer hove in sight, the steward was on deck, for Melani says that when he was on deck in Hartman's watch, he saw two men there, and one of them by the galley. All

persons on board except the steward have been called, and none of those except Melani speak of having been on deck in Hartman's watch. Furthermore, something which is not explained by the evidence occurred after the blow to detain the steward, so that he failed to get into the boat in time to leave with the captain and the rest of the crew. He was afterwards picked up by the crew of the steamer, to whom he then stated that, "he had just been lighting the lamp," and it appears in evidence that after the blow, some one did take down the lamp and trim it, for when the captain of the bark returned to his vessel after going to the steamer, he says the signal lantern was used on deck to give him light through the cabin skylight. These facts can be stated to afford ground for the supposition that shortly before the steamship hove in sight, the light on the bark began to go down, as it had done before,—that the steward came on deck to trim it, Hartman, the watch on deck, being unable to do so by reason of the sore hand which he speaks of,—that he did not then take down and trim the light, perhaps because the steamer then appeared in sight; but after the blow, and when the condition of the light was noticed by the pilot, he attempted to trim it, and so was left—and then, when picked up, he naturally explained his being left to those who picked him up by the statement that he "had just been lighting the lamp." Whether such a supposition as this be correct or not, would appear by an examination of the steward; and although the failure to call the steward may not support such a supposition, at least it warrants the inference that the evidence of the steward would, in some way, weaken the case of the bark in the matter of the light.

Another circumstance should be noticed as tending to confirm the opinion that the light of the bark was in bad condition at the time of the collision. That is the omission of the master, mate, and others of the bark's crew to prove the actual condition of the light after the blow. It is difficult to suppose that the condition of the light after the blow was not the subject of the attention of all on board the bark. And yet some say they did not see the light,—some of them, including the master, say that they did not look to see it,—but one, the pilot, says he did see it when he climbed up the main rigging, and it was then burning dim.

These views, which are the result of as careful an examination of the evidence as I am capable of making, compel me to the conclusion that at the time of the steamer's approach, the bark did not have a bright light displayed in her rigging, as required by law. For this omission she must be held guilty of fault, for it is entirely clear that a bright light displayed from the bark would have attracted the attention of the persons on the steamship in time to have enabled the steamer to avoid the bark.

I now pass other faults charged upon the bark to consider the faults charged upon the steamer. Of these, I find it unnecessary to express any opinion except as to her failure to discern the bark in time to avoid her. It will be conceded that if the bark without a light could have been seen from the steamer sooner than she was seen, and in time to avoid collision, the steamer was in fault. The evidence shows that at the time of the collision, the night was clear. The stars were shining, but the moon had set. It is described as "clear, not very clear, but clear enough"—"you couldn't see very far." It was too dark to read the time from a watch. On the part of the bark it is claimed that in such a night the lookouts stationed at the bow of the steamship could have seen the bark sooner than they did, and that fault must be found in the stationed lookouts for neglecting their duty. It is true, that the evidence of the pilot of the steamship conveys the impression that, in his opinion, the lookouts did not do their duty; but I find difficulty in arriving at that conclusion upon the evidence as it stands, and turn from the conduct of the seamen on the lookout to the action of the officers of the steamer, who were on the bridge and on the deck.

The steamship under their command was an immense vessel of 5,400 tons register, and 450 feet long—the largest vessel ever built, except the Great Eastern. She was proceeding in the night time at a rapid rate through the narrow channel of the swash, which is a fairway for vessels entering and leaving the harbor of New York. The circumstances called for the exercise of every reasonable exertion to discover objects ahead at the earliest moment. The master of the steamship and a lieutenant were on the bridge, and the 2d captain was on deck forward. The master had a night-glass with him, and he says, "All the officers had their glasses with them," yet no one of these officers resorted to his glass to scan the narrow channel ahead through which the steamship was then rapidly pushing her way. The master testifies positively that he was not looking with his glass, and is careful to say that, "it is the duty of the men on the watch to see anything ahead, and not those on the bridge." It is true that there were two seamen stationed on the lookout, but situated as this vessel was, it was not enough to double the lookout. Under the circumstances, it was the duty of the commander of this steamer to resort to any additional means at hand reasonably adapted to aiding him in ascertaining whether his course through the swash was clear. Such means were at hand and unused. The night-glass is an aid easily used on such an occasion. As is well known, it is constantly resorted to by navigators in the night. The evidence

of the pilot of the steamer, given in this very cause, shows that by using a night-glass, from the bridge even, the bark would have been seen sooner than it was possible for the lookouts to see her, and he undertakes to say that in fact he, by using his glass, did see the bark before she was reported by the lookout; but his testimony in this respect is contradicted and overthrown by the other witnesses for the steamship, who, as is conceded by the claimants, prove that no one upon the steamer saw the bark before she was seen by the lookout ahead, when she was under their bows. And it is not pretended that any officer made any use of his glass as they passed through the swash. This omission I consider to be negligence. To require that a night-glass be put in the hands of seamen stationed on the look-out would neither be reasonable nor useful. Nor would the use of a night-glass by an officer upon occasion dispense with the necessity of having a stationed lookout forward; but certainly it is not unreasonable to say that when several of the officers of this steamer were on deck, provided with glasses which would have enabled them to discern the bark before the lookouts could, and of which they made no use at all, they were guilty of negligence. I do not say that in every dark night, or that at all difficult places, the omission to use a night-glass would be negligence; but I do say that with such a narrow channel leading into such a harbor, to be passed by such a steamship as the Ville du Havre at her then rate of speed, it was negligence on the part of the officers not to use the glasses which they had with them, and which their own pilot swears would have enabled them to see the bark sooner than she was seen, and, as I cannot doubt, in time to make the slight change necessary to avoid her.

I am aware that no statute exists requiring the use of the night-glass, and that its use on any occasion has not been in terms made obligatory by any rule of the maritime law, and I know of no adjudged case which has mentioned such a requirement.

But the rule of the maritime law which requires a good lookout to be kept, in principle covers the case. For the rigor of that rule rises with the power and speed of the vessel and the hazard of the navigation in which she is for the time engaged. Situated as this steamer was, the best possible lookout ahead was the only good lookout. Here intelligent eyes, aided by the night-glass, and capable of examining every yard of the channel before them, were at hand. Had they been resorted to, it seems certain that the disaster would not have occurred; and for the omission to resort to this effective means the steamship must be accounted guilty of fault. Fault thus appearing on both vessels, the damages must be apportioned, and a decree will be entered accordingly.

VINACKE (REEVES v.). See Case No. 11,663

Case No. 16,944.

The VINCENNES.

District Court, D. Maine. 1851.

SHIPPING—TITLE TO VESSELS—DISAGREEMENT AMONG MOIETY OWNERS.

In this case there were three part owners of the vessel, one owning a moiety, and the other two a quarter each. The owner of the moiety was in possession, and was ship's husband; but the parties disagreed as to the voyage, and, on application of the two part owners of the one moiety, the vessel was ordered to be sold.

[Cited in The Annie H. Smith, Case No. 420.]

[Decided by WARE, District Judge. Nowhere reported; opinion not now accessible. Statement of the point decided was taken from 2 Pars. Shipp. & Adm. 343.]

Case No. 16,945.

The VINCENNES.

[3 Ware, 171;[1] 21 Law Rep. 616.]

District Court, D. Massachusetts. July 17, 1858.

RES JUDICATA—SHIPPING—CHARTER-PARTY—SEAWORTHINESS—BURDEN OF PROOF—EVIDENCE.

1. When a former judgment is relied on as a defence in the admiralty, it should appear by the record that the precise question or title set up was passed upon in a former suit, not merely that it might have been.

2. For a ship to be seaworthy for the voyage, she must be manned by a competent master and crew.

[Cited in Premuda v. Goepel, 23 Fed. 412; The Giles Loring, 48 Fed. 470.]

3. In a libel by the owners on a charter-party, for refusing to furnish a cargo on the pretence that the ship was unseaworthy, the burthen of proving the seaworthiness is upon the owners.

4. When the question of seaworthiness is in issue, evidence of the performance of voyages, immediately before or after that contemplated is inadmissible, except so far as they may offer just inferences as to her actual condition at the time.

In admiralty.

B. F. Hallett, for libellants.

W. G. Russel, for respondent.

WARE, District Judge. This is a libel on a charter-party. Henry Jones & Co., merchants in Boston, chartered the brig Vincennes on the 22d of December, 1853, then lying in that port, for a voyage from Baltimore to Boston. The vessel was immediately to proceed to Baltimore, where the charterers agreed to furnish a full cargo, both under and on deck, of white oak ship-plank, of the dimensions mentioned, with treenails for small stowage, and to pay freight at the rate fixed by the contract on the delivery of the same at Boston. The lay days for loading were to commence two days after the master reported his vessel ready to receive

[1] [Reported by George F. Emery, Esq.]

the cargo; and then that was to be delivered as fast as it could be received and stowed by the crew, and twenty dollars a day was to be paid by the charterer for every day's detention of the vessel for default in furnishing the cargo. Under this charter the brig arrived at Baltimore, and was ready to receive her cargo the 31st of December, and began to load Jan. 2d. The loading was continued to the 6th and 7th, when she was about or nearly one-half ready, and then Abbot, who furnished the cargo, and for whom the brig was chartered, refused to furnish any more on the ground that the vessel was unseaworthy. The real reason for Abbot's refusal to proceed with the loading, it appears from the evidence, was the difficulty he found in getting insurance. The owners were informed, and negotiations were entered upon to obviate the difficulty with such success that the loading was renewed on the 20th, but was again suspended on new misunderstandings, on the 22d, and not resumed after. Abbot demanded the re-delivery of the cargo, which was refused by the master, who was preparing to sail with what he had, when on the 11th of February, the vessel and cargo were taken into the possession of the sheriff on a writ of replevin sued out by Abbot against the master. The cargo was discharged by his officers, and the brig restored to the master on the 16th. The brig was then loaded with a cargo of coal and wood, by Mr. Cunningham, a commission merchant, and sailed for Boston, where she arrived on the 15th of March.

This suit is brought by the owner of the ship against the charterer, for a breach of the covenant of the charter-party. The first ground of defence relied on, is that the subject-matter of this suit has already passed in rem judicatam in the replevin suit at Baltimore. The defense of res judicata, whether made in the form of a plea in bar, or offered as evidence on the general issue to avail this party, must be between the same parties, and the judgment must be on the same question or point that is sought to be litigated in the new action. That was a suit by Edwin A. Abbot against Allen Gatchel. The parties were not, therefore, the same. But it is said that though nominally different, there is a substantial identity between the parties to that suit and this; that Gatchel, as master of the ship, was the representative of the owner; and that between Abbot and Jones & Co., there was such a relationship of principal and agent, that one was the legal representative of the other. But even admitting this to be the case, and this objection to be surmounted, there is another difficulty that appears to me to be not easily overcome. That was a suit by Abbot founded on the right of property, and claiming the possession on the ground of his proprietory right. Gatchel pleaded, first, the general issue; secondly, a special plea denying the property to be in Abbot, alleging that it was in Jones & Co., and he claimed the rights of possession as their agent. In a third plea he claimed property in himself. Issues were joined on these pleas, and found for the plaintiff. Nothing more appears by the record to have been necessarily decided in that case, than that the right of property was in Abbot. But this suit is founded on a contract, not touching the proprietory interest in the goods, but for their transportation; and the right of possession is claimed by the libellant under this as bailee; a right to detain and hold the goods by virtue of a lien for what was due to him on them under the contract of bailment. It does not appear that these rights of the libellant were necessarily decided in this suit. The pleading opens an entirely different ground of defence. But when a former judgment is relied on as a defence, whether presented as a plea in bar or as evidence only, I think it should appear from the record itself, that the very question, the precise title, which is the subject of litigation in the new action, was involved and decided in a former action; not that it might be, but actually was. The conclusiveness of a former judgment rests on this presumption, res judicata pro veritate accipitur, Dig. 50, 17, 207, which all know is but a legal fiction. It may be true, but it may not, and is so far from being universally true that the uncertainty of judgment, the alea judiciorum, has passed long ago into a proverb. The thousands of overruled cases in the jurisprudence of the commercial law, collected in Mr. Greenleaf's volume, it must be admitted give some countenance to the proverb. It appears to me, therefore, it is not enough to show that the title set up in this libel, might have been decided in the replevin suit at Baltimore, but that the record itself, to be a bar, should show that it actually was.

The second ground of defence is the unseaworthiness of the vessel. And this is presented under a double aspect. First, the incompetency of the master, and secondly, the unfitness of the ship itself. There is no question but that by the covenant of the charter-party, the libellant was bound to have the brig manned by a competent master and crew. The owner covenanted not only that the brig should be tight, staunch, and strong, but that she should be every way fitted for the voyage, and this includes a sufficient equipment, and a suitable master and crew. Abb. Shipp. The vessel began to receive her cargo on the 2d of January, and on the 6th, when a considerable part of the cargo had been taken in, Abbot informed the master that he should not complete her cargo on account of the unseaworthiness of the vessel. But from the evidence, the principal, if not the sole reason of his refusal at that time, was the difficulty he found in getting insurance on the cargo in Baltimore. The loading was suspended, the owners informed, and further negotiations were entered upon, and on the 20th this loading was recommenced, and again suspended on the 22d, and not resumed. Now, whatever objection to the master there might have been on the 6th and 7th, that was removed on the 10th by the

appointment of a new master, who is admitted to have been omni exceptione major. It is not, therefore, available in this suit. We are brought, then, to the actual condition of the brig in her hull, spars, and equipment. The objection in the answer is, that she was leaky, and her timbers rotten; in the technical language of the sea, that she was neither tight, nor staunch. The evidence against her as to leakiness I think fails. All vessels leak more or less, and there is a want of reliable proof that the Vincennes leaked more than vessels ordinarily do. The preponderance of proof is, I think, that she did not.

The whole question of seaworthiness, then, comes to the actual condition of the vessel. The owner covenanted that his vessel was tight and staunch, and if this is called in question on probable grounds it is incumbent on him to prove it. He only has the means of doing it as the ship is in his hands. In the matter of the seaworthiness of the ship, especially of the hull, her age is especially to be regarded. The Vincennes was an old vessel; she was built in 1833, but as is proved, and not questioned, of the best materials in the most thorough manner, with an extra amount of copper fastenings, and was considered as a first-class vessel for one of her tonnage. She was overhauled in 1843, and so thoroughly refitted that she was said to be rebuilt. In 1852-3 further repairs were made, but not so thorough as those of 1843, and in December, 1852, she was chartered for the voyage out of which this controversy has arisen. The age of the vessel, together with the want of a thorough overhauling after ten years' use, and the possible incompleteness of the repairs last made, I think, impose on the owners pretty rigorously the burthen of proving her seaworthiness, especially in her hull. And it is accordingly to this point that the principal part of the large body of testimony taken in this case is directed.

I do not propose to go into a minute and critical examination of the whole of the voluminous deposition presented. They occupied four days in the reading, and a critical examination of each would draw out this opinion to an inconvenient and tiresome number of folios. I shall advert particularly only to that part of the evidence which appears to me to have the most direct and stringent bearing to the question at issue. After the Vincennes was discharged of her cargo by the sheriff, she was taken by Mr. Cunningham, a commission merchant in Baltimore, and laden with a cargo of 150 tons of coal, and a few cords of wood on deck. She sailed for Boston on the 23d of February, and arrived there on the 13th of March, and delivered her cargo in good order. The counsel for the respondent objects to the admissibility of any evidence of voyages performed either before or after this charter, as proof of her seaworthiness at that time. I think that it is admissible so far as fair inference may be drawn from it, as to the condition of the vessel at that time, and no farther. It is very far from being conclusive, either way. This vessel performed the identical voyage for which she was chartered, and in the condition in which she then was, in weather at least of the ordinary security of that season, with a cargo that tried her strength quite as much as that for which she was chartered would, and she performed it well. This affords some, though not conclusive, ground for believing that she was fit for the voyage. She arrived at Portland, her home port, on the 17th, and on the 22d was examined by three sworn surveyors, appointed by the notary for that purpose. Two of the examiners were old and experienced ship-masters, who had been accustomed to examine vessels, and the third a master ship-builder, who rebuilt the vessel in 1843, and repaired her in 1852 and 1853. The depositions of all three were taken, and they all state that they examined her fully, that two planks of her ceiling were taken off, her timbers tried and found to be sound, and after as thorough an examination as they deemed necessary, they pronounced her seaworthy. This was immediately after she had performed the voyage for which she was chartered, with a cargo at least as trying to her strength as a cargo of lumber. Without recurring to the subsidiary proof of the libellant by which this is fortified, this must be considered as satisfactory evidence of her fitness for the voyage, unless it is overcome by opposing evidence.

The evidence to control this, relied upon as much as any part of the proofs by the counsel for the respondent, is the deposition of Mr. Clockner, of Baltimore. He has been employed for many years by the insurance offices in Baltimore, to examine vessels in that port, and report their condition to the underwriters, and his reports are relied on as a guide in making insurance on vessels and their cargoes. His employment in such a trust is a sufficient warrant of his good character and reliability. These examinations he makes and delivers to all the offices in weekly, printed reports. Two of these he has annexed to his deposition, one made March 26th, 1853, and one January, 1854. In both these, the Vincennes is marked A 2½. In his system of marking, he divides vessels into five classes, and in both these reports this vessel is put in the fourth class. In his deposition, he says, without qualification, that a vessel marked in the fourth class, is deemed fit to carry a load of lumber, and that one in the fifth class, the lowest insurable, is fit to carry such a cargo, if not heavily laden. The last of these reports was at the time when this controversy arose. After the report of Jan. 7th, Clockner was employed by Mr. Howell, president of one of the offices, to make a special examination of this vessel, why, he does not state, but probably it had some relation to the insurance of the cargo. On the second examination he made a private report to Howell that she was unseaworthy. The reason of the difference between his general and his private re-

port, was, that on his second examination he found one piece of rotten timber in one of her bow ports, which had escaped his notice in his former examination; that the Vincennes was an old vessel, and that if a timber thus exposed to the air was rotten, it furnished a presumption that she had other rotten timbers, less exposed, and more liable to rot. This was his only reason for reporting her unseaworthy, and the vessel being partly loaded, a thorough examination could not be made. This rotten timber in the bow port appears in many of the respondent's depositions, and is much relied on as proof of the vessel's unseaworthiness, not as rendering her unseaworthy by itself, but as an indication that she was probably defective in other parts. To remove this suspicion, Clockner says she should have been unladen and opened, and a plank on each side of the vessel, inside and outside taken off and the timbers exposed. This was done by the surveyors in Portland, on the inside, and the timbers were found to be sound. Dyer repaired her in 1852, and found her frame sound, and again in April, 1854, he new-sheathed her, and examined her thoroughly, and found her timber in good condition.

In connection with the deposition of Clockner, ought to be mentioned that of Capt. Hubbs, of Portland. He is an examiner for the Ocean Insurance Co. in that place, and he says that he examined the Vincennes after she was repaired by Dyer in 1852, and that he thought the repairs were insufficient to render her seaworthy. The opinion of Capt. Hubbs would carry with it more authority, but for the fact that she was marked in the books of that company, of which he was then, I think, a director, as an insurable vessel, in the grade of 2½, the same note at which she was marked by Clockner, in Baltimore. Whatever doubts or suspicions may have been suggested by this defective timber in her bow port, the soundness of which would be naturally preserved by its exposure to the air, but which was liable to be bruised by taking in timber, is, in my mind, overcome by direct proof, and I think of a satisfactory kind, that her timbers were in fact sound. No part of her frame was found defective in April, 1854, four months after this charter, when she was fully laid open and sheathed by Dyer.

There is a large amount of testimony produced on both sides, more or less confirmatory of the positions assumed by the adverse parties, which I have not thought it necessary to comment upon in detail. When examined minutely it will be found to leave the case standing about where it rests in the deposition to which I have particularly adverted. On the whole evidence, I feel bound to say, that in my opinion the Vincennes was seaworthy. This unhappy bow port which makes so considerable a figure in many of the depositions, might not unnaturally awaken the suspicions of underwriters, and occasion some difficulty in getting insurance. They are a wary and cautious people. But the owners did not covenant that the charterer could get insurance. They covenanted only that their vessel was seaworthy, and thus insurable.

The measure of damages is, I think, correctly stated by the counsel for the respondent. It is the difference between the freight received for the cargo of coal and wood, and what would have been the freight received on such a cargo of lumber as the master stipulated for in the charter-party. The wharfage or any other port charges paid by the master, is, I think, covered by demurrage.

By the agreement of the parties, the lay days for receiving the cargo were to commence two days after the brig was reported to be ready, and that then the cargo should be delivered as fast as the crew could receive and stow it, and for every day's detention by the default of the charterer, twenty dollars a day to be paid by him. The loading was begun on the 2d of January, and continued to the 6th, then it was suspended, and recommenced on the 20th for two days. The brig was then about half laden. I think that fourteen days ought to be allowed for receiving a cargo of lumber, and being prepared to sail. This time the vessel must spend to earn the freight of the lumber, and as that by the decree is allowed, these fourteen days should be deducted from the period of detention. This would carry the time to the 16th of January. The brig was redelivered to the master after the replevin suit was ended, on the 16th of February. This will leave thirty-one days demurrage, and will amount to $620.

The case will be referred to an assessor to ascertain the amount of freight actually received for the coal and wood, and also what would have been the freight of such a cargo of lumber as the charterer agreed to furnish, and the difference added to the damages, will be the damages with interest from the time of the delivery of her cargo of coal and wood at Boston.

NOTE [from 21 Law Rep. 616]. The cause was subsequently opened for a fourth hearing, upon an error of date as to the time when the new master was appointed, it having been, in fact, the 10th of February, and not the 10th of January, as stated in the opinion. Respondent's counsel contended that seaworthiness required that a competent master should be on board all the time the vessel lay in port, and that the intemperance of the first master in port made the vessel unseaworthy, until the new master was appointed; and he claimed a deduction of thirty-one days from the demurrage. The counsel for libellant maintained that the master's competency, as to seaworthiness, means only at the commencement of the voyage, and not in port, and that a competent mate being on board to receive cargo, no master or crew need be on board until the vessel sailed, and he cited McLanahan v. Union Ins. Co., 1 Pet. [26 U. S.] 184, cited in Curtis, 7, 520; Weir v. Aberdeen, 2 Barn. & Ald. 320; Fland. Shipp. 64; Abb. Shipp. 421. The judge, without giving an opinion upon the point raised, allowed demurrage for twenty-six days, and decree was entered for $1,515 damages and costs, for libellant; from which respondent claimed an appeal.

Case No. 16,946.

VINCENT et al. v. The PENELOPE.

LOCKE v. The PENELOPE.

[MS.]

District Court, D. South Carolina. Sept. 16 and 25, 1858.

SALVOR OF VESSEL—CHARGE FOR SUPPLIES.

[The salvor of a vessel which is not derelict has no right, after the vessel has been brought into port, to provide supplies, and thereby charge the owner with the cost thereof, or create a lien upon the vessel.]

In admiralty.

MAGRATH, District Judge. These libels have been filed in rem to subject the vessel to the maritime lien which the libellants [H. E. Vincent, E. Jordan, and B. C. Locke] claim to be entitled to, for necessary supplies furnished, by order of Eben T. Sears, alleged to have been acting as master. In the answer, it is denied that Eben T. Sears was master, and it is insisted, therefore, that he had no authority to contract for repairs or supplies, so as to bind the owners personally, or affect the vessel with a lien. It is not pretended that the owners ever appointed Eben T. Sears master of the Penelope. He acted in that capacity under these circumstances. The Penelope, during the voyage, became infected with fever. The master and mate died. The crew were disabled. Her signal of distress attracted the Rawlins, of which vessel Eben T. Sears was master. He bore down, went on board, undertook to navigate her; brought her into this port; joined with the owners and crew of the Rawlins in a claim for salvage, and salvage has been decreed by this court. The Penelope was brought within the quarantine limits, where she remained, and while there, these bills for which libels have been filed, were contracted by Eben T. Sears.

Two principles of law are so well settled that they are received without dispute. The first is that the master, by an implied authority from the owners, may bind them and the vessels by his contracts for necessary supplies and repairs. The second is that the duties of a salvor, and therefore any authority with which he may have been invested in the salved vessel, cease, when he has brought her to a place of safety. To have brought the vessel to a port of safety is that which entitles the salvor to his compensation. Without this, no matter how perilous the attempt, or meritorious the service, no compensation can be claimed. When, however, the vessel has been brought to a port of safety, the salvor is not bound to surrender absolutely that possession which he held during the salvage service, and which was involved in its discharge. The nature of this possession is thus explained by Dr. Lushington in The Glascow Packet, 2 W. Rob. Adm. 313: "In some cases, it is true, salvors have a right to retain possession, to secure for themselves the compensation which may be due. What is a still more important fact (for it is the foundation upon which the salvors are allowed at any time to retain possession), there was no necessity for retaining the ship, to secure the demands upon the owners; for the ship could not by any possibility, under the circumstances, have escaped the process of the court." In The Amethyst [Case No. 330], in the case of a derelict, the possession is thus explained by Judge Ware: "The finder of property left derelict at sea does not acquire the dominion or the absolute property in what is found. He acquires a right of possession only, with a title to reasonable reward for his services when the property is brought to a place of safety." And in The Bee [Id. 1,219], the rule is thus laid down, referring to a derelict: "The owner does abandon, temporarily, his right of possession, which is transferred to the finder, who becomes bound to preserve the property with good faith, and bring it to a place of safety, for the owner's use. He is not bound to part with the possession until this is paid, or it is taken into the custody of the law, preparatory to the amount of salvage being legally ascertained." This rule, however, is only applicable to derelicts. When the vessel is not derelict, the absolute possession is not vested in the salvor.

During the time in which Eben T. Sears continued in the Penelope, whatever services he rendered, whether in the capacity of master or navigator, were incident to his position as salvor. When, therefore, his duties of salvor ceased, all service which was required from him, ceased also. If his services were continued after the salvage service ceased to be such as would be a charge upon the owners, they must have been rendered under some new arrangement with the owners, or some persons authorized to represent them. As salvor, his duties ceased with the safe position of the vessel; and, with the duties of a salvor, all others ceased, except such as arose under such new authority. If, during the time when the vessel was in distress, he discharged the duties of the master, that duty was the salvage service he rendered. Its end was to bring the vessel into a port of safety, not to assume to the owners and other persons that relation which the master regularly appointed occupies. During the time when the salvage service is being performed, a salvor may be put to great expense. It may become his duty to procure the assistance of other salvors. He may have to employ various agencies, and use many means to accomplish the safety of the property. All such are considered in the amount of compensation allowed for salvage. Whatever is done, or expended for the safety of the property in danger before it reaches a place of safety is in aid of the salvage service. In these cases I do not understand that it is alleged that these supplies were at all connected with the safety of the vessel or cargo. They were procured after she was in a place of safety, when the duty of the salvor had ceased; with it, whatever authority he had exercised, as necessary for the discharge of that

duty; and when his right to the continuance of a claim to possession was itself but the means permitted to secure his lien in case of the possibility of the vessel being taken away before he could ask the aid of the court. Whatever contracts, therefore, were made by Eben T. Sears for repairs or supplies, would bind him personally, but they would not be a charge against the owners, nor out of them would a lien arise.

The cases came up to be heard on the pleadings, and, after argument, it is ordered, adjudged, and decreed that the libels be dismissed, with costs.

Case No. 16,947.

The VINCENZO PEROTTO.

[8 Ben. 483.] [1]

District Court, E. D. New York. June, 1876.

COLLISION AT SEA — SAILING VESSELS CROSSING.

1. The brig M. was sailing close-hauled on her starboard tack, heading S. by E. with the wind about S. W. She made the red light of the bark V. P. several points on her port bow. The bark was sailing N. W. and saw the red light of the M. several points on her port bow, which disappeared, and shortly afterwards the brig was seen almost directly ahead of the bark. The helms of both vessels were ported at the last moment, but the two vessels came together nearly head and head, the bark striking the brig on the port bow: *Held*, that, on the evidence, the course of the brig must have been changed by a starboarding of her helm after the light of the bark had been seen;

2. The collision was due to such change of course, and the brig was responsible therefor.

This was a suit by the owners of the brig Martha and her cargo to recover the damages occasioned by a collision between her and the bark Vincenzo Perotto, which occurred on the night of May 2nd, 1876, about a hundred miles east of Cape Hatteras. The libellants alleged that the wind at the time was about southwest by west, and the brig was sailing about south by east, close-hauled on the starboard tack; that the red light of the Perotto was seen bearing five or six points under her lee, between one and two miles distant; that the brig held her course till the Perotto was a short distance off, when the green light also came into view, whereupon the helm of the brig was put hard-a-port to avoid the collision, but the bark struck the brig on her port side, forward of the fore-rigging, sinking her in a few minutes. The claimants of the bark alleged in answer that the wind was about south-west, and the bark was heading northwest; that the red light of the brig was seen about four points on the weather bow of the bark and about three-quarters of a mile off, which indicated to the bark that the brig, bound down the coast, had already passed the line of the bark's course; that that light went out of sight and no light was visible to those on the bark, who were carefully scanning the horizon with night glasses, which was probably due to a light cloud passing by and enveloping the brig, and preventing her from being seen till her sails were seen right ahead, about a ship's length distant, when the helm of the bark was at once ported, but the collision could not be avoided and the vessels came together nearly head and head; and that the collision was caused by the brig, in that she did not keep her course but put her helm to starboard, after the light of the bark was seen. The mate of the brig, when examined as a witness, testified that after seeing the light of the bark he ordered the man at the wheel of the brig to keep the sails full, which order was obeyed by the man at the wheel, but the mate also testified that that did not change the course of the brig.

W. W. Goodrich and Scudder & Carter, for libellants.

R. D. Benedict and Beebe, Wilcox & Hobbs, for claimants.

BENEDICT, District Judge. It is plain that, if the red light seen by those on the bark was the light of the Martha, the only way in which the collision could have been brought about was by a false manœuvre on the part of the brig in keeping away. That the helm of the brig was put up after the bark had been seen to leeward, is proved by every person on the brig's deck at the time; and I am free to say that I do not see how the mate can be believed, when he says that his vessel, running close-hauled under a full sail breeze, did not keep away, when not only was her helm put up but her sheets at the same time started. In such a breeze she must necessarily have fallen off. That manœuvre on her part will fully account for all that occurred, and it was a clear fault.

The only answer that has been made to this view is by the suggestion, that the red light seen to windward of the bark was not the light of the brig but of another vessel, and that the brig was not seen at all until under the bark's bows and when a collision was inevitable. But the difficulty with this suggestion is, that, if it be supposed that the red light seen from the bark was not the light of the brig, the fact that the red light of the bark was seen from the brig and to leeward, as those from the brig say, is equally conclusive to show that the collision could not have occurred as it did unless the brig was kept away.

Not only do the two men from the brig's deck say that the red light of the bark was so seen from the brig, but this is averred in the libels and must therefore be taken to be true. The conclusion, therefore, cannot be avoided, that the collision was caused by

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

the brig's being kept away, instead of holding her course, as it was her duty to do.

The libels are accordingly dismissed, with costs.

Case No. 16,948.

The VINCENZO T.

[10 Ben. 228.] [1]

District Court, S. D. New York. Jan., 1879.

BILL OF LADING—DAMAGE TO CARGO—STOWAGE—PERIL OF THE SEA—BURDEN OF PROOF.

A piece of marble statuary was shipped at Leghorn on board a bark, packed in a wooden case, to be carried to New York. It had been packed at Carrara, and brought to Leghorn in a lighter. A bill of lading was given for it by the bark acknowledging the receipt of the case in good order, "measurement and contents unknown," and excepting perils of the seas. On the discharge of the case at New York, it was externally in good condition, but a rattling was heard in it, and on opening it the statuary was found to be broken, and the bark was libelled for the damage. The case was proved to have been well stowed. The bark met with heavy weather on the passage: *Held*, that the burden was on the libellant to show that the statuary was in good condition when it was delivered to the bark; and that in the absence of such proof, and on the proof of good stowage of the case and of perils of the seas, the vessel was not liable for the damage.

In admiralty.

H. T. Schenck, for libellant.

W. R. Beebe, for claimants.

CHOATE, District Judge. This is a libel in rem to recover for damages to a piece of marble statuary shipped at Leghorn, for New York, alleged to have been broken by reason of bad stowage or negligent carriage. The bill of lading acknowledged the receipt of a case containing "marble works," in good order, "measurement and contents unknown." The piece of statuary was packed in a wooden case, and on delivery in New York it was found to be broken.

Under the bill of lading the burden was on the libellant to prove that when the case was delivered to the vessel its contents were in good order and condition. The Columbo [Case No. 3,040]; Clark v. Barnwell, 12 How. [53 U. S.] 272. It appeared that the case was brought by a lighter from Carrara to Leghorn, and there shipped on board the bark. The master, mate and seamen were all examined and testified that it was carefully handled and properly stowed. It was stowed in the upper layer of the cargo and near the deck beams. The testimony also is that in discharging it was carefully handled. While it was being taken over the side of the vessel at New York, a rattling noise was heard in the case. The vessel encountered several very heavy gales. I think the libellant has not produced the necessary evidence that the piece of statuary was in good order and condition when delivered to the ship, and that the evidence does not warrant the conclusion that it was improperly stowed or negligently carried. Nothing is shown to have happened after its receipt by the ship which could have produced the injury, unless it be the rolling and pitching of the vessel, and, as the stowage is proved to be good, this (if the cause of the injury) is not chargeable to the vessel under the bill of lading, which excepted perils of the sea. It is suggested that the case may, in the rolling of the ship, have been thrown up against the deck beams and thus the statuary been broken, and that it should have been placed further from the beams; but this is mere conjecture, and not a conclusion that can properly be drawn from the evidence. It is claimed that if it had been broken when received by the vessel, a rattling noise within the case would have been then heard. And one or more of the seamen testified that they heard no rattling when it was delivered to the vessel at Leghorn. I think, however, that this circumstance is not of sufficient weight to overcome the evidence that has been produced of the careful handling and stowage of the case. When delivered in New York, the case was externally uninjured and apparently in the same condition in which it was received on board. Whether the marble was broken before it was put on board, or by the rolling and pitching of the ship on the voyage, is not proven. The evidence is that it was packed in the case in a proper and usual manner, with wooden braces, but its form was such that the upper part of the marble, two feet and more in length, a slender cross, but weighing about a hundred and fifty pounds, could not be braced. This part of it was therefore peculiarly liable to breakage.

Libel dismissed with costs.

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

VINEY (HARTELL v.). See Case No. 6,158.

Case No. 16,949.

VINING v. WOOTEN.

[Brunner, Col. Cas. 187; [1] 1 Cooke, 127.]

Circuit Court, D. Tennessee. 1812.

WITNESS — INCOMPETENCY FROM INTEREST — HOW PROVED.

Interest of a witness for the purpose of proving his incompetency to testify cannot be shown by hearsay evidence or declarations out of court.

The plaintiff produced as a witness one William Chism. The counsel for the defendant objected that he was incompetent, and produced a witness who proved that he had heard Chism say if the plaintiffs gained the land he would get six hundred and forty acres of it.

It was objected by Dickinson, Haywood, and Cooke, for the plaintiffs, that the interest could not be established from anything he had been heard to say on the subject.

Mr. Whiteside, for defendants.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

Before TODD, Circuit Justice, and McNAIRY, District Judge.

TODD, Circuit Justice. His interest cannot be proved in this way. It would be nothing more than hearsay evidence, which shall not affect the plaintiff. You may prove him incompetent from acts, or from facts that are capable of being seen and judged of; but you cannot show his interest by anything he has said. It might be that he would say a thing of that kind barely to prevent a party from having the benefit of his testimony.

McNAIRY, District Judge, said he was not perfectly satisfied with the opinion of his Brother TODD. The objection to the introduction of the witness upon a division of the court would fail; it was, therefore, unnecessary for him to give any opinion upon the subject, but he said it would seem strange, at first view, that if a witness should say that he was to have five hundred dollars of the income to be recovered by the plaintiff, this should not render him incompetent. The acts and facts spoken of may exist only in the knowledge of the witnesses and the party.

Declarations of a witness as to his interest are not admissible to prove his incompetency to testify. See Erickson v. Bell, 53 Iowa, 631, 6 N. W. 19, citing case in text.

VINSENT (UNITED STATES v.). See Case No. 16,623.

Case No. 16,950.

VINT v. KING et al. FINDLAY v. VINT et al. ALLEN v. VINT et al. SHEFFEY v. VINT et al.

[2 Am. Law Reg. 712.]

District Court, W. D. Virginia. 1853.

CONSTRUCTION OF WILL — LEGAL AND EQUITABLE ESTATE — CONDITION SUBSEQUENT — RESULTING TRUST—ALIENAGE AND NATURALIZATION—ABEYANCE — BILLS OF PARTITION — FRAUD — INADEQUACY OF CONSIDERATION—RECITALS IN A DEED —RECEIPT PRIMA FACIE EVIDENCE — ANSWER, WHEN EVIDENCE — ISSUE OUT OF CHANCERY — LACHES — CREDITOR AT LARGE—ASSIGNOR AND ASSIGNEE.

1. A will contained the following clause: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to W. K. son of brother J. K., on condition of his marrying a daughter of W. T. and my niece R. T. in trust for the eldest son or issue of such marriage." W. T. and his wife both died without having had a daughter born to them, whereby the performance of the condition on which W. K. took the estate, became impossible. *Held* by the supreme court of the United States: (1) That this clause vested in W. K. the legal estate in fee simple, on a condition subsequent. Findlay v. King's Lessee, 3 Pet. [28 U. S.] 346. (2) But W. K. took no beneficial estate in fee, but an estate in trust for his issues, springing from his intermarriage with the unborn daughter of a husband and wife, both of whom died without the birth of a daughter, and that the trust having failed, there remained a resulting trust to the heirs at law of the testator, who were entitled to partition. King v. Mitchell, 8 Pet. [33 U. S.] 326.

[Cited in Benter v. Patch, 18 D. C. 592.]

2. The next of kin of the testator were three brothers and sisters of the whole blood, and a brother and sister of the half blood. These last, by the law of descents of Virginia, were entitled to half portions. This half brother and half sister were born in Ireland, and were never naturalized by any act of their own. But their father, also an Irishman by birth, was naturalized under the law of Virginia, in 1787. The two children last referred to were then minors, living in Ireland, came to Virginia in 1792, and resided there until after 1802, when an act of congress was passed declaring that the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passage of any law on that subject by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized, shall, if dwelling in the United States, be considered as citizens of the United States. These children were naturalized by virtue of this act of congress, and so capable of acquiring title to real estate by descent.

3. The resulting trust remaining in the heirs at law of the testator was not a mere possibility, incapable of being granted, assigned or devised, but an equitable estate perfectly capable of such transfer. This resulting trust, the creature of equity, had its existence at the moment of the testator's death. It descended to his heirs at law, subject to be divested whenever the express trust created by the will became vested, and did not remain in abeyance, until the condition on which the express trust was to vest, became impossible. Therefore, from the moment of the testator's death, his heirs at law, had a defeasible and conditional estate cast upon them by the law, which they might as effectually alien as if it had been indefeasible and unconditional, and legal as well as equitable.

4. In limitations of legal estates where a remainder of inheritance is limited in contingency, by way of use or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of the testator, until the contingency happens to take it out of them. An equity herein, follows the law.

5. Ordinarily, an application to a court of equity for partition is not an appeal to the sound discretion of the court, to be granted or refused according to the circumstances of the case, as in cases of specific execution and other cases, but the right to demand partition is ex debito justitiæ if the complainant can show a clear legal title.

6. The bill for partition is a substitute for the now obsolete remedy by writ of partition in the law courts, and courts of equity, in their proceedings on these bills as in other cases of concurrent jurisdiction, give the same relief that was formerly afforded in the courts of law by writ of partition. Questions of fraud were not cognizable in these latter tribunals where a party brought his writ of partition, and the same rule obtains in equity courts whenever the plaintiff had his election to proceed either at law or in equity. But where complainant in equity stands upon a purely equitable title, of which courts of law will not take cognizance at all, the jurisdiction of equity is exclusive, and courts of equity are left free to adopt our cherished principles, and to apply their power to detect and eviscerate latent frauds and concealments which the process of a court of law is not adapted to reach, and to relieve against them.

7. It seems, that even where a plaintiff in equity seeking partition, shows a clear legal title, if the defendant files a cross-bill alleging fraud in the procurement of his conveyance by the plain-

tiff in the original bill, who, instead of demurring to the cross-bill, answers and denies the fraud, and depositions are taken on each side to establish and repel the imputation of fraud respectively, it is too late at the trial, for the original plaintiff, to object that equity has no jurisdiction to examine questions of fraud on bills for partition. The cross-bill, filed by the defendant against a plaintiff is, to some extent, a substitute for an independent and original bill: and as, after a decree for partition in favor of a plaintiff showing a clear legal title, the defendant would doubtless be entitled to relief in equity by a new bill impeaching the plaintiff's title, on the ground of fraud, no reason is perceived why the same measure of relief should not be applied in favor of the plaintiff in the cross-bill, the defendant having waived his right to object to the jurisdiction of equity to take cognizance of questions of fraud in such cases. Fraud is never presumed by the law: it must always be proved, and the onus is upon the party alleging it.

8. The power of courts of equity to set aside and annul executed contracts on the ground of inadequacy of consideration, is a most delicate one, and should be applied with extreme caution. Mere inadequacy of consideration is not to be understood in equity as constituting per se, a ground to avoid a contract, unless it be so gross as to shock the conscience. In such cases, it is evidence per se, sufficient to avoid it. But where the contract is one of hazard, and the question whether it will be profitable or ruinous is dependent on future contingencies, the issue of which no human foresight can discover, the court has no satisfactory standard by which to determine whether the price was inadequate or no, much less, whether the inadequacy was so gross as to constitute per se evidence of fraud: and it should refuse to interfere with the legal operation of the contract.

9. Quære, whether the recitals of a deed executed by a grantor to a grantee, tending to show the execution of a former deed by the same grantor to another grantee, estop the grantor and those claiming under him from denying the fact of the execution of such deed? This question cannot be determined unless the party claiming a benefit under such deed, puts the fact of its execution distinctly in issue by bringing his bill to set it up as a lost deed, averring its execution and loss.

10. A bill for specific execution of a contract is not entertained in equity as a matter of right, but is addressed to the sound discretion of the court. Case in which in the exercise of this judicial discretion, the prayer for specific execution was denied.

11. In ordinary cases the nonpayment of money by a stipulated day is not sufficient of itself to defeat the claim of a party to specific execution, since interest will usually compensate the party for the delay, and equity relieves from forfeitures whenever it can make compensation. But when parties enter into an executory contract of sale whereby it is stipulated, that if the vendor did not pay the purchase money within a prescribed period, the contract should be null and void, they have chosen to make time of the essence of their contract in express terms, and even partial payments made within the period will not entitle the vendor to demand a decree for specific execution. To decree specific execution, under such circumstances, would in truth be, not the enforcement of the contract between the parties, but the assumption of authority by a court of equity to make a contract for the parties which they had not made for themselves. The court should treat the contract as rescinded and require the vendor to refund so much of the purchase money as has been paid by the vendee. Especially should specific execution be refused when the bill was brought after a great lapse of time which wrought great changes in the relations of the parties and in the subject of the contract.

12. A receipt is prima facie evidence that the sum of money expressed in it, was paid according to its tenor.

13. A bill is brought for specific execution of a contract of sale of real estate between the ancestor of the plaintiffs and the defendant: a written contract of sale, between the parties and a receipt executed by the vendor to the vendee, acknowledging the payment of a large portion of the purchase money are produced by the plaintiffs and filed as exhibits with their bill: no discovery is sought by the bill of the genuineness of the contract and receipt, or of the fact whether the money was paid or not: the answer admits the execution of both by the defendant, but denies that the money was in fact paid, as stated in the receipt, and other evidence exists in the cause tending to show that the money was not paid: *Held*: (1) That the answer not being responsive to the bill, was not evidence that could avail the respondent. (2) That as there was other evidence in the cause tending to repel the presumption of payment arising from the execution of the receipt, it was proper to direct an issue to be tried by a jury, to determine whether the money had been in truth paid or no?

14. A mere creditor at large will not be entertained in equity, to enable him to reach the equitable estate of his debtor. He must obtain a judgment at law, binding the real estate of his debtor, before he can come into equity. The judgment lien is the necessary foundation for the equitable jurisdiction, and equity lends its aid to make that lien effectual whenever it cannot be enforced by execution at law.

15. The relation of assignor and assignee of a chose in action examined and discussed.

[This was a bill in equity by John Vint against the heirs of Samuel King and of John Allen and Hannah, his wife, and others; also, three cross bills, brought, respectively, by Alexander Findley, Hannah Allen's heirs, and Daniel Sheffey's administrator and heirs, against John Vint and others.]

James W. Sheffey and A. H. H. Stuart, for complainant in the original bill and the representatives of Daniel Sheffey.

Beverly R. Johnston, B. Rush Floyd, and Mr. Leftwick, for Alexander Findlay and the heirs of Hannah Allen.

Thomas J. Mickie, on behalf of the representatives of Daniel Sheffey.

BROCKENBROUGH, Circuit Justice. William King died in October, 1808, seised and possessed of an immense real and personal estate. His will contains the following clause: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg, and my niece Rachel, his wife, late Rachel Findlay, in trust for the eldest son or issue of such marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King's, or of sister Elizabeth, wife of John Mitchell, and to their issue." William Trigg and his wife both died about the year 1813, without having a daughter born to them during their coverture; whereby the perform-

ance of the condition on which the estate was devised to the testator's nephew became impossible. William Trigg and his wife left four sons, but neither of these has intermarried with a daughter of James King, or of Elizabeth Mitchell; and it is said that such intermarriage has become, by the death of some of the parties, and the marriage of others, and the advanced age of all the survivors in this class, an extremely improbable but not an absolutely impossible event. The question, therefore, whether this second limitation over is valid, or too remote and therefore void, does not arise on this record, since none of the contingencies on which it was to rest have as yet occurred. The construction of the clause of the will of William King quoted above (except the last member of it) has been determined by the supreme court of the United States, in two cases presenting this question. In the first of these cases (Finlay v. King's Lessee, 3 Pet. [28 U. S.] 346) it was held: (1) That the estate was devised to William King, son of James, on a condition subsequent. (2) That the legal title of all the testator's real estate, not specifically devised to his wife for life, vested in the devisee William King, at the death of the testator, and that the devisee took a vested remainder in the residue. (3) That the question whether William King took an estate which, in the events which had happened, (the death of William Trigg and wife without the birth of a daughter, whereby the performance of the condition subsequent had become impossible,) enured to his own benefit, or was to be considered as a trustee for the heirs at law of the testator, could not be decided in an action of ejectment, and could only be determined by a court of equity, on a bill to be brought by the heirs to enforce the execution of the trust.

In accordance with the suggestions of the supreme court, a bill was exhibited on the equity side of this court by some of the heirs-at-law of William King, the testator, praying that the judgment rendered in the action of ejectment in favor of the devisee, William King, be enjoined, and that partition be made of the real estate of said testator among his heirs-at-law, the trusts on which the legal estate was devised to William King, the younger, having failed. A decree directing partition to be made in accordance with the prayer of the bill was rendered by this court, and from this decree William King, the younger, appealed to the supreme court. After a forensic and judicial argument of eminent ability, the supreme court decided that William King, the devisee, had "no beneficial estate in fee, but an estate in trust for his issue; and that the trust having failed, there remains a resulting trust to the heirs-at-law of the testator, if the devise over does not take effect." King v. Mitchell, 8 Pet. [33 U. S.] 326. The decree of this court was affirmed. The testator, William King, died without issue. He survived his father, and his heirs-at-law were three brothers and sisters and their descendants of the whole blood, and a half brother and half sister, who by the laws of Virginia inherit half portions. The original bill, in the causes now before the court, was filed at the December rules, 1838. The object of the bill was to have the one-fourth part of the estate of William King, the testator, which had descended to his half-brother, Samuel King, and his half-sister, Hannah Allen, set apart and conveyed to the complainant, John Vint, in virtue of an alleged purchase of those interests from John Allen and the said Hannah, his wife, by deed bearing date November 16th, 1810, and from the said Samuel King and wife, by deed dated January 1st, 1811. These deeds are filed as exhibits with the bill. Their validity has been impeached on various grounds, both by the answers and cross-bills, by the heirs of Hannah Allen and of Samuel King, and by Alexander Findlay, pendente lite purchaser from the heirs of Samuel King, of their interest in the estate of their half-uncle, William King. Several of these grounds apply in common to both deeds, and will therefore be considered in connection with both. The allegation of fraud and covin made against each, will demand a separate consideration, as the state of facts and circumstances attending the two transactions from which the conclusion of fraud, if it exist, is evolved, is essentially different in the two cases. The consideration of the claim of the personal representative, widow and heirs of Daniel Sheffey, resting as it does on grounds peculiar to itself, will be postponed until the merits of the controversy between the other parties have been discussed and determined. The objections to the validity of the deeds will be severally considered.

It is insisted in the answers and cross-bills of the defendants, that the deeds were inoperative and void because the grantors, Samuel King and Hannah Allen, were unnaturalized aliens, and therefore could inherit no part of the real estate which descended from their deceased half-brother, William King, to his heirs-at-law. The defendants, children of Samuel King and Hannah Allen, insist that, being born in Virginia, they are invested with the full rights of citizenship, and that the law of Virginia cast the descent of the proportion of the estate of which William King died seised, which their parents, if citizens, would have inherited, immediately upon them. By the stern principles of the common law, not only could an alien not inherit lands in England, but it was generally true that no inheritance could be transmitted from or through an alien ancestor, either lineal or collateral; nor was it of any consequence whether the alien ancestor through whom the party claimed were living or dead at the time of the descent cast. In either case, the alienage of the medius ancestor was an absolute bar to the descent, for an alien had no inheritable blood. This harsh feature of the

common law was abrogated in England by the statute 11 & 12 Wm. III. c. 6, subsequently modified by the statute 25 Geo. II. c. 39, and the more benign policy of these British statutes was at an early period of our history adopted in the legislation of Virginia. By the act of 1785, it was enacted, that "in making title by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or hath been an alien." This provision has been uniformly re-enacted by all the subsequent revisals, and has constantly been perpetuated as a rule of descent in Virginia from the time of its original adoption to this hour. At the late revisal of 1849 it was re-enacted in the very language of the original act, except that the words "whether living or dead" are interpolated in brackets. This interpolation was wholly unnecessary, for it had already been decided by the unanimous judgment of the court of appeals that, by virtue of this provision a title by descent was transmissible through an alien ancestor, lineal or collateral, even though such ancestor were living at the time of the descent cast. Jacksons v. Sanders, 2 Leigh, 109. Indeed, assuming the hypothesis that Samuel King and Hannah Allen were unnaturalized aliens to be true, the present case would be precisely parallel with the case of Jacksons v. Sanders, and it would result, as a necessary conclusion from the premises, that the children of Samuel King and of Hannah Allen, who were in being at the death of William King, (having been all born in Virginia,) acquired title by descent to one-eighth part, respectively, of the real estate whereof he died intestate. But the hypothesis itself is not true. In the progress of this cause it has been ascertained, from an examination of the records of Botetourt county, in this state, that Thomas King, the father of Samuel King and of Hannah Allen, was duly naturalized on the 9th of May, 1787, and an official copy of the certificate of naturalization is filed as an exhibit in the cause. It is in proof, that the said Samuel and Hannah were both minors at the date of their father's naturalization. The only question remaining to be considered in this connection is: Did the naturalization of the father confer upon his infant children the rights of citizenship without any act of their own? The solution of this question must be found in the act of congress of 1802 [2 Stat. 153], and the interpretation placed upon it by the courts. By the 4th section of the act of April 14th, 1802, it is enacted that "the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passage of any law on that subject by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States."

Thomas King, an Irishman by birth, came to Virginia in 1782, was naturalized in 1787, and continued to reside in Virginia till his death, which occurred but a short time before that of his son, William King. His children, Samuel and Hannah, were born in Ireland, came to Virginia in 1792, and continued to reside in this state till after the death of their half-brother, William. If the requirement of the act, that the minor children who shall be entitled to its benefits shall be residents of the United States, has reference to the date of the naturalization of the father, then Samuel and Hannah were not naturalized by the naturalization of their father, since they were then in Ireland, and did not come to Virginia till five years after that event: but if it is to be interpreted as having reference to the date of the passage of the act, they became in virtue thereof duly naturalized citizens of the United States. This is not an open question. It was before the supreme court of the United States in the case of Campbell v. Gordon, 6 Cranch [10 U. S.] 176, and the court adopted the latter construction. They held that the act conferred the rights of citizenship upon a party who, at the date of her father's naturalization, was an infant residing in Scotland, where she was born, but who came to the United States before 1802, and resided here at the passage of the act. It is altogether clear, therefore, that Samuel King and Hannah Allen were naturalized by the naturalization of their father, and that, consequently, they and not their children were heirs-at-law of their half-brother, William King.

It is insisted again, that these deeds were void ab initio, because it is said that the grantors had no estate in the subject of the grant, but only a possibility, which at common law could not be granted, assigned or even devised unless it were a possibility of a trust. Jac. Law Dict. tit. "Possibility," 4 Coke, 66. The proposition is undoubtedly correct that the common law treated all transfers and conveyances of mere possibilities, as well as of all choses in action, as absolute nullities, and the wisdom of the common law herein is warmly commended by Lord Coke. But what does the term "possibility," as used by common law writers, import? It has never applied to interests which were vested either in interest or possession, but always to remote and improbable contingencies. A few examples drawn from the old books will illustrate the meaning of this term better than any definition, however accurate. Thus, where a term is divised to A for life, remainder to B, and B devises this future interest to C, and dies; and then A dies: this devise to C is void, and the executors of B shall have it. 3 Lev. 427, cited in Jac. Law Dict. ubi supra. So, of an assignment. A man possessed of a term for divers

years, devised the profits thereof to one for life, and after his decease to another for the residue of the years, and died: the first devisee entered by the assent of the executor and afterwards he in remainder, during the life of the first devisee, assigned it to another, and afterwards the first devisee died: it was adjudged that the assignment was void, for he in remainder had but a possibility during the life of the first devisee: for it is as much in law as if the land had been devised to him for so many years as he should live, or for the whole term, if he should live so long, so that the interest of the term, sub modo, is in him, and the other in remainder has but a possibility, which he cannot grant over. Coke, pt. 4, p. 66. Now, here the common law reasoned with its accustomed technicality. A term of however long duration is but a chattel interest, a chattel real, and the law presumed that the life of the first taker would or might endure beyond the term, and therefore the limitation over, which would have been void by way of remainder, was supported when made by will as a good executory devise: but though a good executory devise, the probability of its ever vesting was considered to be so remote as to constitute the expectant interest devised a mere possibility, whereas a like interest in a freehold estate would have been held to be a vested remainder, which the remainder-man might well assign. But though the devise of the residue of a term after a life estate was thus anciently held to be a mere possibility which the devisee, during the continuance of the life estate, could neither devise nor assign, yet Mr. Fearne cites many modern adjudications of the court of chancery to prove that, in his day even, possibilities of personal estates were devisable as well as assignable in equity. 2 Fearne, Rem. (4th London Ed.) 439, 440. And in reference to freehold interests, we are told by the same high authority that modern decisions have extended the same power of testamentary disposition to contingent and executory descendible interests by considering the word "having" in the statute of wills as equivalent to "having an interest in." In such cases, a distinction has been established between a bare possibility and a possibility accompanied with an interest: and the broad proposition is maintained, that wherever the interest, though contingent, is descendible, it is also devisable. 1 Fearne, Rem. 546.

Now, we are to determine whether the resulting trust remaining in the heirs at law of Wm. King, was a bare possibility, incapable of transfer by deed, or a vested equitable interest, perfectly susceptible of such transfer. Its equitable nature is determined by the decision of the supreme court. The whole legal estate in fee was vested in William King, son of James, but he had no beneficial interest whatever. The equitable estate was devised in contingency to the issue of a marriage between the devisee of the legal estate and an unborn daughter of parents, both of whom are dead without having a daughter born to them. The condition, therefore, on which the equitable estate was to vest, has become impossible. But this condition was not impossible when the deeds were executed to the complainant by two of the heirs at law of the testator. William Trigg and wife were then both living, and survived the execution of the deeds several years. The argument of the counsel for the defendants is, that no trust resulted to the heirs at law of the testator, until the condition on which the express trust was to vest, became impossible by the death of the Triggs without a daughter; and that the express trust having only failed at that moment, the implied trust at the same instant resulted to the next of kin of the testator, who were then in esse, to whom the equitable title then, and not till then, descended on the heirs at law of the testator. The question is an important one, because at this latter period, Samuel King, one of the grantors in the deeds, was dead, leaving children who are parties to this suit. If the position of their counsel be sound, they and not their father are heirs at law of William King. In support of this position that the next of kin of the testator who were in being at the death of Mr. and Mrs. Trigg without a daughter, are his true heirs at law to whom the trust resulted, I am referred by the counsel to two cases found in the English Chancery Reports. Upon examination, I find that they were cases, not of resulting, but of express trusts. In each case the will carried the whole estate, not absolutely indeed, but yet the whole estate. In the first of them (Harding v. Glyn, 1 Atk. 469), the testator devised certain personal estate to his wife, "but did desire her, at or before her death, to give such estate, (jewels, furniture, &c.,) unto, and among such of his own relations as she should think most deserving, and approve of." The will was held to create a trust by the force of the words above quoted, in favor of such of the testator's relations living at the death of the wife, as she should deem most deserving. It was held to be a trust in favor of his relations who should survive his wife with a power of selection by her. This power was not executed by the wife, who died without designating the favored object of her husband's bounty, and as in equity a trust never fails for want of a trustee, the execution of the power devolved upon the court. The master of the rolls said that though this was not to pass by the statute of distribution, (for it was not a case of intestacy at all,) yet that the statute furnished a good rule to go by, and he directed an equal distribution among the relations of the testator who were his next of kin at the time of her death. The other case (Cruwys v. Colman, 9 Ves. 319) is extremely similar to the first. "The testatrix bequeathed her whole estate for life to her sister, and expressed her desire that her legatee, at her own death,

bequeath to those of her own family the property given by the will, provided they behaved well to her, with decency and affection." The master of the rolls, Sir William Grant, said: "To constitute a valid trust, undoubtedly three circumstances must concur: sufficient words to raise it, a definite subject, and a certain and ascertained object. There is no doubt that in this instance the words are sufficiently certain to raise a trust. There is no doubt that there is a definite subject. The doubt is whether the object is sufficiently definite, or capable of being ascertained." The conclusion he reached was, that the word "family" used in this will, was as definite a designation of the objects of the testator's bounty, as the word "relations" used in Harding v. Glyn. In this case, as in that, the legatee for life had declined to execute the power of selection conferred by the will, and its execution devolved on the court; and the property was given to the next of kin of the legatee, in whose favor the will created the trust. . It is extremely clear, then, from the review of these two cases, that they wholly fail to establish the position for which they were cited, and in the absence of any express authority to guide me, I must solve the question by the light of reason, aided by the well established analogies of the law.

The question is rendered complicated by the complete separation which the will has made between the legal and the equitable estate. The legal estate vested in William King the younger in fee, the equitable estate, so far as it is disposed of at all by the will, is devised to persons not in esse. Let us simplify the question by inquiring what would have been the effect if no divorce had been effected between the legal and equitable estates. Suppose the whole estate had been devised to William King for life, remainder to such of the children of a marriage to be consummated between him and an unborn daughter of William and Rachel Trigg, as should be living at the death of the devisee for life, in fee simple. This would be a devise to William King for life, with a good contingent remainder in fee to persons not in esse, which could never vest till the death of the devisee for life. What would become of the reversion, meanwhile? There is no principle better settled by authority than that where a remainder of inheritance is limited in contingency, by way of use, or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of the testator, until the contingency happens to take it out of them. 1 Fearne, Rem. 513. Thus, where one made a feoffment to the use of such person or persons, and for such estate and estates as he should limit and appoint by his last will in writing (Sir Edward Clere's Case, 6 Coke, 17b), one of the resolutions of the court was, that where a man makes a feoffment to the use of his last will, he has the use in the meantime. So, where the inheritance is devised in contingency, it descends, if not otherwise disposed of, to the testator's heir, till the contingency is removed: as, where A devised lands to B, his heir, for life, and if B should die without issue living at his death, that then the same should remain to C in fee: but if B should have issue living at his death, then the fee should remain in the right heirs of B; it was resolved that B took an estate for life, with remainder in fee in contingency; and it was said by Wyndham and Twisden, and agreed by the other judges, that the fee descended to B as heir, until the contingency happened, though not so as to confound his estate for life, and was not in abeyance; that in relation to C, B took only an estate for life: but in the meantime, by operation of law, he had the fee in such sort, as that there should be an hiatus to let in the contingency when it happened. So in the case of Purefoy v. Rogers, 2 Saund. 380; 1 Fearne, 517, where S. devised lands to his wife for life, and if it should please God to bless her with a son, and she should call that son by the testator's Christian and surname, he gave the inheritance of the lands to him, after his mother's life, and if he died before he came to 21, then the testator gave the inheritance of his lands after his wife's life, to the testator's heirs forever. Before any son was born, the heir of the testator conveyed the estate to the wife and her second husband by fine. Saunders urged that the contingent remainder to the son was not destroyed, for that at the time of the fine, the heir of the testator had no reversion or estate in him: for that an estate for life was devised to the wife, and the remainder in fee was devised to the son in contingency; so that until it could be known whether such contingency would happen or not, the reversion must be in abeyance and not in the heir: and then his conveyance gave no estate to the husband and wife, but they were only tenants for life of the wife as before. But Hale, C. J., interrupted him and said it was clear that the reversion was in the heir of the testator by descent and not in abeyance; and accordingly it was adjudged that the contingent remainder was destroyed by the merger of the particular estate for life in the reversion conveyed by the testator's heir at law. 1 Fearne, Rem. 516; 2 Saund. 386, 387.

I have made these large citations from this celebrated work, not only because it is of the highest authority on all such questions, but because this doctrine is one of rare application in Virginia. The cases cited are sufficient to show that this old notion of the fee being in abeyance where there is a contingent limitation in fee, until the contingency happens, a notion which was adopted by a no less celebrated writer than Blackstone himself, is an egregious fallacy, and has been triumphantly exploded by Fearne. The argument of this latter writer, drawn both from reason and authority, is close, logical and unanswerable, and affords one of the most beauti-

ful specimens of demonstration to be found in any legal work. I am sure, therefore, that I stand upon impregnable ground in holding that, in case of conveyances of legal estates, either by way of use or devise, if the entire fee is not granted or devised, or is granted or devised by way of contingent remainder; in either case the reversion in fee remains in the grantor and his heirs, or descends to the heirs of the testator; and that this reversion so descending is not a mere possibility, which cannot be granted, but an estate vested in the first case, contingent in the latter, which may be conveyed as effectually as if it were vested in possession as well as in interest. All the cases cited above illustrate and establish this proposition.

But the resulting trust remaining in the testator's heirs at law, in the case at bar, is not a legal, but an equitable estate. Does equity adopt a different rule from that adopted by the law courts, or does it follow the law? It is generally true that equity applies the same rules of construction to trust estates, that a court of law applies to legal estates. This general proposition is liable to many exceptions where a departure from the rigid technical rules of law is necessary to give effect to the limitations of the trust estate. These exceptions need not be here discussed, since the case at bar does not fall within the operation of any of them, but must be governed by the general rule. Fearne says, after noticing some of those exceptions, and particularly cases in which Lord Hardwick had denied the application of the rule in Shelley's Case, to limitations of trust estates, that "even a court of equity, in order to preserve as near a correspondence as may be, between the rules of construction, with regard to trust estates and those laws by which legal estates are construed, considers itself as bounden, even in the case of trust estates, to decree according to the rule I have been speaking of, whereever it can be done without manifest violation of the intention of the parties. Of this, the case of Sweetapple v. Bindon [2 Vern. 536], is a strong instance. Thus where A. by will gave £300 to her daughter to be laid out in land and settled to the use of her said daughter and her children, and if she died without issue, remainder over. The daughter married, and after her decease a bill was brought by her husband to have the money laid out in land, and the land settled on him for life, as tenant by the curtesy, or to have the interest of the money for life, in lieu of the profits of the land. The court held that if it had been an immediate devise of the land, the daughter would have been, by the words of the will, tenant in tail, and consequently the husband would have been tenant by the curtesy; and that in case of a voluntary devise, the court must take it as they found it, and not lessen the estate or benefit of the legatee; although, upon like words in marriage articles, it might be otherwise, where it appeared the estate was intended to be preserved for the benefit of the issue; and therefore decreed the money to be considered as lands, and the husband to have the interest for his life, as tenant by the curtesy. 1 Fearne, Rem. 184 and 164. In discussing the same rule, Judge Story says that trusts in real property which are exclusively cognizable in equity, are now, in many respects, governed by the same rules as the like estates at law, and afford a striking illustration of the maxim, "Aequitas sequitur legem." Thus, for example, they are descendible, devisable and alienable; and heirs, devisees and alienees, may, and generally do take therein the same interests in point of construction and duration, and they are affected by the same incidents, properties and consequences, as would, under like circumstances, apply to similar estates at law. 1 Story, Eq. Jur. § 974. These authorities are apt and conclusive to show that in cases like that at bar, the same rule of construction must be applied in equity to the equitable estate or resulting trust remaining in the heirs at law, that a court of law would apply to legal estates similarly circumstanced; and since we have already shown that if this had been a legal estate, the reversion not disposed of by the will would have descended to the heirs at law, and not have remained in abeyance; that such reversion, so descended, would have constituted not a mere possibility, but a vested estate, susceptible of transfer by deed or devise; it results that the equitable estate here was impressed with the same qualities, and that this objection to the validity of the deeds from Samuel King and from John Allen and wife to John Vint, is not well taken.

The question of fraud arising in this case next presents itself for consideration, but a preliminary objection raised by the counsel for the complainant, must first be disposed of. This is a bill for partition, and as there is no question as to the genuineness of the deeds under which the complainant claims, it is said that he has a right to demand partition of this estate ex debito justitiæ, and that this court cannot take cognizance of the question of fraud in such a suit. A decision of the court of appeals of Virginia, is cited to sustain this proposition. Wiseley v. Findlay, 3 Rand. [Va.] 361. It was held in that case, that an application to a court of equity for partition, was not an appeal to the sound discretion of the court, to be granted or refused, according to the circumstances of the case, as in cases of specific performance and other cases, but to be due ex debito justitiæ. It is a remedy substituted for the perplexed and difficult remedy by writ of partition, a remedy which is now wholly obsolete. The only indispensable requisite, says Judge Green, in his opinion in that case, to entitle the plaintiff to relief in such cases, is, that he shall show a clear legal title. If this title is disputed or doubtful, as if there be a question whether the deeds under which he claims are forged, or if his title depends upon difficult and doubtful questions of law which are emphatically proper for a court of law; the de-

cree for partition is suspended until he establishes his title at law, not in a writ of partition, but by ejectment or other legal remedy. And if in such proceeding he establishes the genuineness of his title papers, or the questions of law on which his title depends, are decided in his favor, he returns to the court of equity, and partition is decreed according to his established rights. In these views of Judge Green, the whole court concurred, and I am satisfied that the conclusion of the court is abundantly sustained by authority. But there are several reasons why this case, in my view of it, has no application to the case at bar. The narrow jurisdiction exercised by courts of equity in ordinary bills for partition, results chiefly from the consideration that its jurisdiction is exercised only concurrently with that of a court of law; that it is a mere substitute for the inconvenient remedy at law by writ of partition, and the measure of relief is, therefore, the same in both courts. But the jurisdiction exercised by this court in the case now before it, is not a concurrent, but an exclusive jurisdiction. The complainant stands upon a pure equitable title, of which a court of law would not take cognizance at all, and in such cases, a court of conscience may apply its own peculiar and established principles. One of the most cherished and valued of these principles is, the application of its power to detect and eviscerate latent frauds and concealments which the process of a court of law is not adapted to reach, and to relieve against them. But even if the complainant had come into this court with a clear legal title, I apprehend that the court would not be precluded from opening the question of fraud in the actual state of the pleadings in this cause. This case does not stand upon the original and supplemental bills, and the answers thereto, but by special leave of the court, the original defendants have filed cross-bills, impeaching the conveyances under which the complainants claim for fraud. These cross-bills were filed many years since, and the complainant, instead of demurring to them, as he might well have done if the question of fraud could not be investigated on a bill for partition, has answered denying the fraud, the evidence has been taken to meet the issue arising on these pleadings, and the objection to the jurisdiction of the court to investigate the whole merits of the case, as it stands upon the pleadings and evidence, raised for the first time in the argument at the bar, is not entitled to the favorable consideration of the court. Judge Green says, in the case last cited, that a decree of partition would in nowise prejudice the rights of the defendants, and intimates that they would be entitled to relief in a court of equity, by a bill impeaching the conveyances on the ground of fraud. As the cross-bill is in some sort, a substitute for an independent bill by the original defendants, I cannot perceive why the same measure of relief may not be afforded in this form of proceeding.

I proceed to inquire, whether the defendants have been successful in their efforts to invalidate the conveyances under which the complainant claims. The first of these deeds, in the order of time, is the deed from John Allen, and Hannah his wife, to the complainant Vint, dated November 16th, 1810. The deed purports to convey "all the right, title, property, interest, claim and demand which the said John Allen and Hannah, his wife, have in the estate of William King, the half-brother of the said Hannah, lately deceased, the specific legacies in the will of the said King to the said Hannah and her children only excepted, being one-eighth part, as well as one-fifth part of Samuel King's part in the estate of the said William King, deceased, which the said John Allen hath purchased from the said Samuel King, the half-brother, &c." The reservation of the one-fifth part for the benefit of Daniel Sheffey will be hereafter considered. The terms here used are very comprehensive. The deed was drawn by Andrew Russell, clerk of Washington county, at the mutual instance of Allen and Vint. Its execution by those parties is duly proved. Its execution also by Mrs. Allen, in due form of law, on the same day on which it was executed by the other parties, is shown. It was spread upon the records of Washington county in May, 1811. Thus, everything is regular on the face of the transaction; it is an executed contract, and if the deed was inoperative and void, it is because either no valuable consideration moved from Vint to the grantors, or a consideration so grossly inadequate as to amount to proof of fraud. Both grounds are insisted on by the plaintiffs in their cross-bills. The deed having been regularly executed for the expressed consideration of $18,901.27, the law presumes the transaction to have been fair and bona fide until the contrary be shown. Fraud is never presumed by the law; it must always be proved, and the onus is upon the party alleging it. Was any consideration paid by Vint to Allen? It is proved by the depositions of Andrew Russell and David Stout, that recently before the execution of this deed John Vint had in his possession, at the house of the grantor Allen, store goods of considerable amount. These goods were transferred to Allen, and constituted, according to the statement of Allen, made at the time of the contract, the consideration of the deed, except a debt of $2000 previously due by Allen to Vint, which was extinguished by the sale. We have no means of determining with accuracy, or even of making a reasonable approximation to the value of these goods. But it is in proof that the stock of goods was considerable, that the shelves were well filled and made a handsome display. The whole of Vint's visible estate consisted in this stock of goods, and after the sale he seems not to have been in possession of property. There was, then, valuable consideration moving from Vint to Allen to a considerable amount, but it is by no means clear that it amounted or approximated to the sum expressed in the deed. It would

seem from the affidavit of Vint, that the real consideration was but $10,000, and that a larger sum was inserted at the suggestion of Allen, to improve his credit with his creditors at the North! The conduct of Vint, in acquiescing in this fraudulent suggestion is wholly indefensible, in foro conscientiæ, but as between the parties themselves, and those claiming under them, it does not vitiate the contract if an adequate consideration was in truth paid. Assuming, then, that $10,000 was the actual consideration for the purchase, is this sum so grossly inadequate as to amount to proof of fraud, vitiating the entire contract and rendering it null and void?

This is confessedly a most delicate ground of equitable jurisdiction. Mere inadequacy of price, or any other inequality in the bargain, is not to be understood as constituting, per se, a ground to avoid a bargain in equity. For courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he pleases, and whether his bargains are wise and discreet or otherwise, or profitable or unprofitable, are considerations not for the courts of justice, but for the party himself to deliberate upon. Yet there may be such an unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence, and in such cases, courts of equity ought to interfere on the satisfactory ground of fraud. But the inadequacy must be so gross as to shock the conscience, and amount, in itself, to decisive evidence of fraud. 1 Story, Eq. Jur. §§ 244, 246. If courts of equity were to undertake to unravel all the transactions of men, and set aside all their improvident contracts as void, they would produce far more mischief than they would correct. On the other hand, were they to refuse relief in such extreme cases as we have supposed, fraud and chicanery would be unchecked, and equity tribunals would become a mockery and a cheat. Such, then, being their recognized and well established principles, I am now to apply them to the transaction in question. Was the sum of $10,000 so grossly inadequate a consideration for the one-eighth part of the estate of William King as to constitute, per se, evidence of fraud? To answer this question intelligently, we must recur to the circumstances under which this contract was made. William King died in October, 1808, leaving a colossal fortune, but he did not leave it, or supposed he had not left it, subject to the disposition of the law. Far better had it been for the interests of his next of kin had he done so. He made a will in which he supposed he had given a direction to his splendid estate very different from that which the law would have given it. His half-brother and half-sister were not peculiar objects of his bounty, for he had cut them off with very trifling pecuniary legacies. When the testator wrote his will he was childless, and his primary object seems to have been, in the event of his leaving no children of his own, to give his vast estate, subject to a very liberal provision for his wife and some other favorite relatives, to the issue of a marriage to be consummated between his nephew, William King, son of his brother James, and a daughter, not then born, of William Trigg, a brother of his wife, and Rachel Trigg, wife of William Trigg and niece of the testator, which issue would thus have united the blood of his own family and of that of his wife. The language of his will is: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel, his wife, lately Rachel Findlay, in trust for the eldest son or issue of said marriage: and in case said marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg that will marry a child of my brother James King's, or of sister Elizabeth's wife of John Mitchell, and to their issue." There is no limitation over in the event of all these trusts taking effect. The testator seems not to have contemplated the failure of all these marriages as within the range of any reasonable probability, and yet, the trusts have all failed. William and Rachel Trigg have been long dead, never having had a daughter, and none of the other contemplated marriages have as yet occurred. We now know how the supreme court have expounded the obscure clause in the will of the testator quoted above. They have said that the will clothed William King, son of James, with the whole legal estate, but without any beneficial interest whatever, in trust for persons not then in esse, and, as subsequent events have shown, who have never yet come into being, and that no disposition of the equitable estate having been made by the will, until it should vest by the occurrence of some one of the specified contingencies, a resulting trust remained in the heirs-at-law of the testator. Now, in determining the question of inadequacy of consideration, we must look to the actual state of things existing when this contract was made, and we cannot fail to see that the contract, on the part of Vint, was of an extremely hazardous nature. It was doubtful whether Hannah Allen had any interest in the estate, and if she had, the chances, humanly speaking, of its being diverted by the occurrence of some one of the various contingencies specified, would seem to have greatly preponderated over the chances of the failure of all. We have no standard furnished whereby we can estimate the value of interests so precarious, and without such data to determine their value, it is impossible to say that the price was grossly inadequate. My opinion, then, is, that the deed from John Allen and wife to the complainant was founded upon a valuable and sufficient consideration, and that this court should not interfere with its legal operation.

The effect of the subsequent contract of

the 6th April, 1812, between John Allen and the complainant, upon the rights of the parties, will be determined after deciding the question of the validity or invalidity of the deed of January 1, 1811, from Samuel King and wife to John Vint. The last mentioned deed is also assailed by the heirs of the grantor, Samuel King, and by Alexander Findlay, a pendente lite purchaser from those heirs, in their answers and cross bill, as fraudulent and void. This deed is founded upon the expressed consideration of $10,000. It purports to convey to Vint "all the right, title, property, interest, claim and demand which the said Samuel King and wife now have in the estate of William King, the half-brother of said Samuel, lately deceased, the specific legacies only excepted, the portion of the estate of the said William King hereby intended to be conveyed to the said John Vint, reserving one-fifth of the estate which descended to his heirs or the said Samuel King, it being already sold and conveyed to John Allen for his trouble in carrying on the said suit as specified in a former conveyance, by John Allen and Hannah his wife, to said Vint." This deed was acknowledged in the clerk's office of Pulaski county, Tennessee, on the 29th January, 1811, by Samuel King and wife, and admitted to probate, (the parties residing in that county and state,) but was not recorded in the clerk's office of Washington county, until 25th September, 1837. In his original bill the complainant alleges that the deed was made to him by Samuel King and wife for the consideration of $10,000; in his supplemental bill he says it was founded upon full and fair consideration. Are these allegations true? In the cross-bill filed by Alexander Findlay, it is charged that the real consideration of the deed was not $10,000 as alleged, but $6,000; that the purchase money was to be paid in ten annual instalments of $600 each, and that ten bonds were executed by Vint to King for the amount of these instalments respectively; that nine of these bonds were in possession of Vint, and that no part of the purchase money had ever been paid to Samuel King. These allegations, except the last, are all admitted to be true by Vint in his answer to the cross-bill, and the nine bonds are accordingly produced as exhibits. He avers that he had paid off these bonds, but not to Samuel King. The amount is alleged to have been paid to John Allen, King's brother-in-law, in a settlement between Vint and Allen, on the 6th April, 1812. Samuel King was then in his grave, having mysteriously disappeared in the February preceding, and being never heard of more. He had come from his home in Kentucky to Abingdon, to draw the small annuity given him by the will of his half-brother, William King, on the express condition that he should apply for it in person. How did Allen acquire possession of these bonds? That can never certainly be known. Vint says he supposed he had acquired them fairly by some satisfactory arrangement between him and King. He did not suppose that they were in Allen's possession as King's agent to collect them, for he says that he gave Allen credit on his own account for the amount, and that they constituted part of the $11,600 for which he gave his receipt to Allen on the 7th April, 1812. He supposed that Allen had acquired the legal ownership of the bonds, as he avers. Why, then, was there no endorsement on the bonds? With his intimate knowledge of the circumstances and character of Allen, he had no right to suppose that he had acquired them fairly by the payment of valuable consideration. If Vint believed that the transaction was a fair one, why did he subsequently go to Kentucky and purchase the dower right of Samuel King's widow? If the transaction was fair she had no interest in the subject, for she had relinquished her dower right by joining her husband in the deed and executing it with all due formality. The evidence abundantly shows that no part of the purchase money was ever paid by either Vint or Allen to King in his lifetime, or his representatives since. Was the contract of the 1st January, 1811, entered into in good faith on the part of Vint? There is too much reason to believe the contrary. Samuel King was an incorrigible bloated drunkard. Some of the witnesses say that they had never seen him in a fit condition to transact business. The character of John Allen was singularly infamous, and he is the most prominent actor in the contract between Vint and King, which resulted in the execution of the deed. The contract, the bonds, the deed are all in his handwriting, and Vint says in his affidavit that he bought Samuel King's interest from Allen. The transaction wears throughout the worst possible aspect, and I shall render a decree pronouncing the deed from Samuel King and wife to Vint null and void, and, if necessary, directing a reconveyance from the heirs of Vint, or by a commissioner of the court specifically appointed for that purpose.

This conclusion, of course, renders it quite unnecessary to notice that part of the argument of the counsel for Alexander Findlay, in which they attempted to establish that even if this deed should be pronounced valid, the language employed in the operative part of the deed would require the court to narrow its operation to Samuel King's interest in the personal estate, or at least to exclude from its operation the Salt Works property, of which partition could not be demanded until after the death of the widow of William King. Having thus arrived at the conclusion that the deed from Allen and wife to Vint was valid, and that from Samuel King and wife to Vint was null and void, it next becomes necessary to determine what proportion of the estate of William King which descended to his heirs at law, was conveyed by the first of those deeds, and what proportion of the same estate the second deed purported to convey. In reference to the first question, some difficulty is produced from the apparent inconsistency between different parts of the deed. The first of these apparently con-

flicting clauses purports to convey the one-eighth part of the estate which had descended to the grantor, Hannah, as one of the heirs at law of her half-brother, William King, "as well as one-fifth part of Samuel King's part in the estate of the said William King, which the said John Allen hath purchased from the said Samuel King, the half-brother of the said William King, deceased." The deed then proceeds thus: "The one-fifth part of the interest of the said John Allen and Hannah, his wife, either as heirs or as purchasers from Samuel King, without the specific legacies, being reserved as a compensation to Daniel Sheffey, Esq., for his labor and trouble as counsel employed to recover said part of the estate of the said William King, as shall descend to the said John Allen and Hannah, his wife, either as heir to the said William King, or by purchase, as aforesaid, from Samuel King." If the deed had gone no further, I should feel no difficulty in saying that it purported to convey the one-eighth and the one-fifth of an eighth of the whole estate, with a declaration of trust as to the fifth of an eighth in favor of Daniel Sheffey. But the following clause shows an explicit purpose to restrict the operative words of the conveyance to the one-eighth part of the estate which descended to Mrs. Allen. The language is: "The portion of the estate of the said William King, deceased, hereby intended to be bargained, sold, and conveyed to the said John Vint, being one-eighth part of the estate which may descend to his heirs." This is sufficiently explicit, and as we are required in the interpretation of all documents to expound them so that every part shall, if possible, take effect, I construe the deed in question as conveying, and as purporting to convey to the grantee only the one-eighth part of the estate of William King, which descended to the grantor, Hannah Allen, with a declaration of trust in favor of Daniel Sheffey as to the fifth of an eighth, which fractional part was intended to be retained by John Allen, as trustee for Daniel Sheffey. In pronouncing, therefore, the deed from Allen and wife valid, as having a sufficient consideration to support it, the grantee, Vint, becomes, by operation of the deed, invested with the legal ownership of the one undivided eighth part of the estate of William King, deceased, not specifically devised. But the deed from Samuel King and wife to Vint, which has been annulled, only purported to convey four-fifths of the estate which descended to him as heir at law, the deed in express terms "reserving one-fifth of the estate which descended to Samuel King, it being already sold and conveyed to John Allen for his trouble in carrying on the said suit, as specified in a former conveyance by John Allen and Hannah, his wife, to said Vint." The question, what is the effect of this recital, and whether it operates as an estoppel on Samuel King and his heirs, and all persons under him, mediately or immediately, by title subsequently acquired, to deny the execution of the recited deed, is one of very grave moment, but I am of opinion that this question cannot be properly decided in the present state of the pleadings in this cause. The recital refers to a deed from Samuel King to John Allen, the existence of which does not otherwise appear than by the recital itself. If such a deed was made, it is incumbent on the party claiming a benefit under it to produce it; or, if it cannot be produced by reason of its loss, the party seeking to set it up as a lost deed, must lay a proper foundation for proving its contents by showing its loss. That fact should be distinctly put in issue by the pleadings. The court cannot incidentally take cognizance of such a question. If Allen's heirs seek to have the deed set up in equity, they must comply with the terms which equity prescribes. They must bring their bill, alleging the execution of the deed and its loss, and thus afford an opportunity to the heirs of the supposed grantor, or the purchaser from them, to contest the claim. Such an opportunity has not been afforded to those parties by the pleadings in this cause. The execution of such a deed, or its loss, is nowhere alleged by Allen's heirs, either in their answer or cross-bill, while the fact of its execution is expressly denied by Alexander Findlay in his answer to the complainant's bill. No attempt, then, having been made on the part of Allen's heirs to set it up against the claimants under Samuel King, I cannot inquire here into the effect of the recital in the deed from Samuel King to Vint, acknowledging the previous execution of the deed in question to John Allen. As the case now stands, I must assume that the remaining one-fifth part of the estate of William King, which descended to Samuel King, and which was not embraced in the deed from Samuel King and wife to Vint, was never conveyed by him, and consequently descended to his heirs at law.

The next question presented for solution is of no little difficulty and perplexity. The original bill was brought to secure to the complainant the benefit of the two deeds from Allen and wife, and Samuel King and wife, and it does not appear from that bill or the supplemental bill, that there was any subsequent contract between the plaintiff and any other party whereby the title acquired by the plaintiff by operation of the deeds, was lost, modified, or in anywise affected. This new phase of the case is put upon it by the cross-bill of the heirs of John Allen, and the answer to that cross-bill by the original plaintiff, John Vint. A somewhat detailed statement of these pleadings is necessary to the development of the question which they present for adjudication. The cross-bill charges that the complainant, in filing his bill and supplemental bill, had fraudulently suppressed the important fact that, by a contract between the complainant and John Allen, the ancestor of the plaintiff in the cross-bill, subsequent to the execution of the deeds from Allen and wife, and from Samuel King and wife to Vint, dated April 6th, 1812, Vint had resold a moiety of

the two shares thus acquired, to Allen, for the price of $14,450.63; that $11,600, part of the purchase money under this new contract, was paid by Allen to Vint on the 7th April, 1812, evidenced by Vint's receipt of that date; and that the payment of the residue must be presumed after so great a lapse of time. The contract and receipt are exhibited by the complainants with their cross-bill, and the alternative prayer is, that the court will annul, by its decree, the deed from Allen and wife to Vint of the 6th November, 1810; or, that it shall compel Vint to execute specifically his contract by a conveyance to the plaintiff of the moiety of the two shares sold by him to their ancestor; or, if the contract be rescinded, that the court render a decree directing Vint to refund the said sum of $11,600 with its accruing interest since April 7th, 1812.

The defendant Vint, in his answer, admits that the contract of April 6th, 1812, was entered into between himself and John Allen, but insists that the contract was avoided by the failure of Allen to comply with the condition on which Allen could call for a conveyance, viz: the payment of the purchase money within five years. He denies that the said Allen or any other person, did pay to him within five years after the date of the agreement, or at any other time the said purchase money. He admits the execution of the receipt to John Allen, of April 7th, 1812, for $11,600, but denies that he did in fact receive of Allen the sum of money for which the receipt was drawn. He specifies various items as composing the aggregate sum mentioned in the receipt. He says he distinctly recollects, that as part of the said sum of $11,600, he received from John and W. Allen their order upon John Jett, for $2,333, which, when presented for payment, was protested by Jett, of which refusal and protest Allen had notice. This order is filed as an exhibit, with the answer, and the respondent avers that no part of it was ever paid either by the drawers, drawee or any other person. The answer says in the second place, that the sum expressed in the receipt was constituted in part of debts due by Vint, which Allen assumed to pay for Vint, and which he had only partially paid. Thirdly, the respondent says that the balance due by him to Samuel King, of four or five thousand dollars on account, of the purchase money for his interest, conveyed by the deed of January 1st, 1811, was settled by John Allen, and that the sum was included in the sum of $11,600, specified in the receipt. That before the receipt was executed, Allen procured from Samuel King, and handed over to Vint the notes which Vint had given to Samuel King for the balance of purchase money due to him, and that the amount so settled by Allen with King, was all that Vint ever realized on account of said receipt. The respondent repels, with apparent indignation, the charge of fraudulent suppression of these two papers, made by the plaintiffs in their cross bill, and says that the charge cannot be true, since these papers were not retained by him, but were handed over to their ancestor; and, as he and his heirs were interested in these papers, he supposed that they would take care of them, and at all times have them at their command. Upon this state of the pleadings, several important questions are evolved, which will be severally considered, though not in the precise order in which they are presented.

The profound silence of the complainant Vint, in his original and supplemental bill, with reference to this subsequent contract between Allen and himself is significant and suspicious, and the excuse alleged for it in his answer to the cross bill is not satisfactory. In those bills, he asserts his legal and equitable right to demand that the two shares of the estate of William King, of one-eighth each, which had descended respectively to Samuel King and Hannah Allen, should be confirmed to him by virtue of the conveyance to him of those shares, by the deeds of November 16th, 1810, and January 1st, 1811, for which he says he had paid full and valuable consideration. Assuming it to be true that he had paid the purchase money in full for Samuel King's share, yet, by his own showing, he had paid it to Allen and not to King. Now, Allen had acquired those bonds given by Vint to King, fairly or surreptitiously. If fairly, then Allen's heirs had a right to demand either specific execution of the contract of re-sale, in consideration of the part payment of the purchase money for which they were received by Vint, or a rescision of that contract of re-sale, and to have the amount refunded by Vint: if surreptitiously, Samuel King's heirs had a right to demand either that their ancestor's deed be annulled as fraudulent, or that the stipulated purchase money be paid to them. Upon either hypothesis, the assertion of Vint in his bill, that a perfect equitable right to both shares had vested in him, and was a subsisting title at the time of the institution of his suit was untrue, and I am constrained to think, therefore, that in claiming the full benefit of his deeds, as executed contracts for which a full consideration had been paid, he was guilty of a fraudulent purpose in deliberately suppressing the fact, that the subsequent contract of re-sale had been entered into, and partial payments made in virtue of it. We might have charitably imputed his silence on this subject, to the fallibility of human memory, had he allowed us to do so. But his silence proceeded, according to his own showing, not from any lapse of memory, but from the persuasion that "as Allen and his heirs were interested in said papers, he supposed that they would take care of them, and at all times have them at their command." The original actors in these transactions, had all been long dead, except the complainant himself: twenty-six years

had elapsed before the filing of the bill, in the meantime the plaintiff Vint, had made an absolute conveyance of the entire interest conveyed by both the deeds, and obtained a reconveyance; and the conclusion cannot be easily resisted, that in suppressing, not the papers, indeed, but the facts which they disclose, the complainant took the chances of profiting by the ignorance of the heirs of Allen, and the loss of the evidence of their rights resulting from lapse of time. I do not by any means intend to say that, even in a court of conscience, it is in all cases incumbent on the plaintiff to assist his adversary in making out his case. When the transactions are recent and the actors in them living, the plaintiff in equity may well forbear to state facts which may militate against his own title, knowing that his adversary is cognizant of them, and may avail himself of them in his defence. But where, as in the case at bar, the original parties are all dead but the plaintiff himself, the willful suppression of important facts, of which his adversaries can have no personal knowledge, is a fraud which deserves the severest animadversion of the court. But however reprehensible such conduct may be, it cannot vitiate the original contract between the parties, which must, as I have already said, for reasons stated elsewhere in this opinion, be treated as a valid and executed contract, founded upon a sufficient and valuable consideration. The remaining inquiries are in reference to the case made by the cross bill of Allen's heirs and the answer of Vint: are the plaintiffs, heirs of John Allen, entitled to demand specific execution of the contract of re-sale, of the 6th of April, 1812? If not, what is the measure of relief to which they are entitled?

First, then, in relation to the prayer for specific execution. A bill for specific execution of a contract is not entertained in equity as a matter of right, but it is addressed to the discretion of the court; not, indeed, to its arbitrary and capricious discretion, dependent upon the mere pleasure of the judge, but to that sound and reasonable discretion which governs itself, as far as it may, by general rules and principles; but, at the same time, which grants or withholds relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. On this account, it is not possible to lay down any rules and principles which are of absolute obligation and authority in all cases. Story, Eq. Jur. § 472. Let us see, then, the terms of the particular contract sought to be enforced here, and the circumstances under which the aid of this court is invoked to compel its execution. There is no ambiguity in the terms of this agreement. It is an executory contract, by which Vint agrees, in consideration of $14,450.63, to be paid to him by Allen, to make over and convey to the children of John and Hannah Allen, born and to be born, one-half of all the interest which Vint acquired by the conveyances from Allen and wife, of the 16th of November, 1810, and from Samuel King and wife, of January 1st, 1811. It is further agreed that Allen and Vint shall contribute equal portions of the expenses to be incurred in the prosecution of suits for the recovery of the estate, but that until the payment by Allen to Vint, of the stipulated purchase money, Vint shall not be compelled to convey the moiety thus sold to the children of John and Hannah Allen, and that if Allen should fail to pay the purchase money to Vint, for the period of five years from the date of the contract, the agreement shall be void and of no effect. On the day following the execution of this agreement, Vint executed his receipt to Allen for $11,600, in part payment of the purchase money, and there is no evidence in the cause of any other payment being made by Allen, unless the payment of the residue may be reasonably presumed after so great a lapse of time. But I am of opinion that the insolvency of Allen, which is abundantly established by the depositions of several witnesses, from a period anterior to the date of this contract until his death, completely repels any such presumption.

There has not, then, been a full performance by Allen of the contract on his part, and the question to be decided on this branch of the case is, do the heirs of Allen occupy a position here, entitling them to demand a specific execution of the contract on the part of Vint, by a conveyance of the moiety of the estate held by him, under the deeds from Allen and wife, and from Samuel King and wife? By reference to the terms of the contract, we perceive an express stipulation, that if Allen did not pay the purchase money within five years from the date of the contract, the contract itself should be void and of no effect. As the whole purchase money was not paid within the prescribed period, according to the strict terms of the contract, it became void. Was time, then, of the essence of this contract? If it was, this court ought not to decree ts specific execution at the suit of a party who has failed to comply with it within the period prescribed by its terms; if not, specific execution may be decreed, though there has not been full performance of the contract on the part ot the party seeking its enforcement. Time is not generally deemed in equity, to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. 2 Story, Eq. Jur. § 776. Ordinarily, the non-payment of money by a stipulated day, is not, per se, sufficient to defeat the claim of a party to specific execution of the contract, since interest will compensate the defendant for the delay, and equity relieves against forfeitures, whenever it can make adequate compensation. The case of a mortgage well illustrates the doctrine of equity on this subject. The general intention of the parties in entering into such a contract, being a mere security for money, equity, looking rather to this general intention than to the

strict terms of the mortgage deed, relieves against the forfeiture by allowing the defaulting debtor to redeem, on condition of his paying interest upon the debt, so long as the payment of the interest has been withheld. In this and all similar cases, interest is deemed a full compensation to the creditor, but where the object of the contract is a sale, and not a mere security for a debt, and the parties have expressly stipulated that unless payment of the purchase money be made by an ascertained day, the executory contract shall be null and void, there is no room for speculation as to the intention of the parties. They must be held to mean what they have clearly expressed, and to compel a conveyance by the vendor at the suit of a vendee who had not paid or tendered the purchase money according to the terms of the contract, would in truth be, not the enforcement of the contract between the parties, but the assumption of authority by a court of equity to make a contract for the parties which they have not made for themselves. "I do not see, therefore," says Baron Alderson, in a similar case, "why, if the parties choose, even arbitrarily, provided both of them intend so to do, to stipulate for a particular thing to be done at a particular time, such a stipulation is not to be carried literally into effect in a court of equity. This is the real contract. The parties had a right to make it; why, then, should a court of equity interfere to make a new contract, which the parties have not made? It seems, to me, therefore, that the conclusion at which Sir Edward Sugden, in his valuable treatise on this subject has arrived, is founded in law and good sense." Opinion of Alderson, B., cited in a note to 2 Story, Eq. Jur. § 776. I think, then, that the parties here have chosen, by the express terms of their contract, to treat time as of its essence, and that this court has no power to decree its specific execution. But if this were doubtful, there are obvious considerations why the court, in the exercise of that sound discretion to which such bills are always addressed, should refuse to render any such decree. The party seeking the specific execution of a contract, must himself be guilty of no laches. In the language of the books, he must show that he has proceeded without unreasonable delay, and that he has been "ready, desirous, prompt and eager to perform the contract." This consideration would be fatal to the pretensions of plaintiffs who bring their bill more than a quarter of a century after the date of their ancestor's contract. The impolicy and injustice of entertaining such bills after a great lapse of time, and the consequent changes wrought in the relations of the parties, and of the subject of the contract could not be better illustrated than by the circumstances attending the case at bar. At the date of this contract, the extent of the interest of Vint in the estate of William King, assuming that both his deeds were valid, was involved in very great doubt. It depended upon the construction to be afterwards placed by the courts on the will of William King, and on this subject conflicting views were entertained by the most learned lawyers. But even if there had been no controversy on this point, there was a strong probability that some of the limitations of the will might become vested, by the happening of some one of the contingencies, on the occurrence of which the resulting trust in the heirs at law would be divested and defeated. The state of things then existing had wholly changed when this cross bill was filed. The defeat of that resulting trust had then become, if not absolutely impossible, certainly altogether improbable. To decree specific execution under such circumstances would be to place the vendee and his heirs on more favorable ground than they would have occupied if they had shown themselves "ready, desirous, prompt and eager to perform the contract." A court of equity will never allow a party to derive an advantage from his own laches. On the whole, I am well satisfied that the heirs of John Allen, the complainants in this cross bill, do not occupy a position entitling them to demand of John Vint, specific execution of his contract with their ancestor, and that this prayer of their bill must be denied.

But it is equally clear, that the alternative prayer of the bill that the contract be rescinded, and the purchase money paid by Allen, be refunded by Vint, must be granted whenever the party entitled to receive it is before the court. That party is the personal representative, and not the heir of John Allen, and he is not a party to this suit. There cannot, therefore, be a decree for a payment of this money until the personal representative is before the court, and until he is made a party; it might seem premature to decide any other question in reference to this fund. But as the parties beneficially interested in the question are already in court, I deem it not irregular to state my views in reference to the decree which it will be proper to render when the personal representative is formally made a party. For what sum, then, should a decree be ultimately rendered in favor of the personal representative of Allen against Vint's representatives? This is a question on which I have felt great embarrassment and difficulty. It is insisted, on the one hand, that a decree should be rendered for $11,600, the sum expressed in the receipt from Vint to Allen, of April 7, 1812, with interest from that date. On the other, it is denied that the sum of money expressed in the receipt, or any part thereof, was paid. The execution of the receipt being admitted, it must certainly be regarded as prima facie evidence of the payment (3 Starkie, Ev. 1273, 1274); and the question arising here is, has the presumption of payment which the law raises from the execution of the receipt been repelled by the evidence in the cause? In his answer to the cross bill, Vint denies that the money was in fact paid, and avers that the sum specified in the receipt was compounded in part of two large items, viz: nine of the bonds given by Vint to Samuel King, which were surrendered to him by Allen, each for

$600, payable in instalments at a future day, and a draft of J. & W. Allen, on John Jett, for $2,333, which proved to be wholly unproductive. The bonds and draft are both produced by Vint, with his answer. If the allegations be true, Vint would, of course, be entitled to a credit against his receipt, of these amounts. But no discovery is sought in the cross bill from Vint, whether he had in fact received the sum specified in the receipt, and the above recited allegations of his answer, not being responsive to the bill, are not evidence that can avail the respondent. We must look, then, to the evidence in the cause, other than the answer of Vint, to determine whether the presumption of payment has been successfully repelled. The notorious insolvency of Allen, at the date of this receipt, and his consequent inability to pay any considerable sum; the fact of the possession of the bonds by Vint, which he had previously given to Samuel King for the purchase money of his interest; the reduced circumstances of Vint, after as well as before the date of the receipt; and the possession of the draft on Jett from J. & W. Allen, bearing even date with the receipt, are all circumstances tending to prove, either that the sum specified in the receipt was not paid at all by Allen, or that it was not paid in money. These circumstances are calculated to throw a deep shade of suspicion upon the bona fides of the whole transaction, but are not deemed sufficient to warrant me in pronouncing, with the imperfect lights now before me, the whole transaction to be fraudulent and fictitious. In this state of obscurity and indefiniteness of the evidence in the cause, I shall direct proper issues to be made up and tried by a jury, to determine the question whether any, and if any, what payments were made by John Allen to John Vint, in part execution of the executory contract of sale between those parties of April 6, 1812; and whether the nine bonds produced by Vint were delivered by Allen to him, and whether the amount appearing due by them constituted part of the sum of $11,600 specified in Vint's receipt; and lastly, whether the draft for $2,333, purporting to have been drawn by J. & W. Allen in favor of Vint on John Jett, was delivered to Vint by Allen in part payment of the sum specified in the same receipt, and whether it was paid by Jett or no?

The remaining question for consideration is the claim of the personal representative, widow and heirs of Daniel Sheffey, against the heirs of John and Hannah Allen. The representatives of Sheffey by their cross-bill insist: (1) That they are entitled to the one-fifth of one-eighth of the estate of William King, deceased, in virtue of the reservation made in favor of Daniel Sheffey by the deceased from John Allen and wife to John Vint, of November 16, 1810. (2) That they are entitled to payment of a bond for $600, bearing date January 1, 1811, executed by John Vint to S. King, and assigned by John Allen to Daniel Sheffey. (3) That they are entitled to payment of the residue of sundry debts, evidenced by a deed of trust executed by John and William Allen to Benjamin Estill, in trust to secure the payment of said debts to Daniel Sheffey, bearing date August 30, 1811. These demands will be severally considered.

1. The deed from John Allen and wife to John Vint, of the 16th November, 1810, contains a reservation in favor of Daniel Sheffey, in the following words: "One-fifth part of the interest of the said John Allen and Hannah, his wife, either as heirs or by purchase from Samuel King, without the specific legacies, being reserved as a compensation to Daniel Sheffey, Esq., for his labor and trouble as counsel employed to recover such part of the estate of William King as shall descend to said John Allen and Hannah, his wife, either as heirs of the said William King or by purchase as aforesaid from Samuel King. The portion of the estate of the said William King hereby intended to be conveyed to the said John Vint being one-eighth part of the estate which may descend to his heirs." I have already stated my opinion to be, that the deed from Allen and wife to Vint was to be construed as conveying the whole of the one-eighth part of the estate of William King which descended to the female grantor, Hannah. The reservation in the deed must, therefore, be held to apply to the one-fifth of the one-eighth of William King's estate, amounting to one-fortieth of the whole estate, which the deed states by way of recital to have been previously purchased by John Allen of Samuel King. No deed from Samuel King to John Allen conveying this fractional interest is produced. The deed from S. King and wife to Vint recited that such conveyance had been made, and those two recitals constitute the only evidence in the cause of its execution. The heirs of S. King and J. Allen are both made defendants in the cross-bill filed by the representatives of Sheffey, and in presenting my view of this cause I shall assume that the first, and all claiming under them, are estopped by the recital in the deed of Samuel King from denying the execution of the recited deed, and that the heirs of Allen are estopped from denying that the reservation in the deed of their ancestor created a trust in favor of Daniel Sheffey, which a court of equity might enforce by compelling a conveyance. This hypothesis is most favorable to Sheffey's representatives, and concedes to them all that has been claimed on their behalf. The trust thus arising presupposes the existence of a contract between Allen and Sheffey as the foundation of the trust; the contract itself is not produced, and the administrator of Sheffey has made affidavit that he has made diligent search for it among the papers of the intestate, but without success. In order to determine the character

of this contract, we must refer to the reservation in the deed from Allen and wife, which I have quoted above. The reservation of the one-fortieth part of the estate is made "as a compensation to Daniel Sheffey, Esq., for his labor and trouble as counsel employed to recover such part of the estate, &c." The clear conclusion deducible from this language is, that a contract had been made between the parties, whereby Allen had stipulated that, in consideration of professional services to be rendered by Sheffey in successfully asserting the title of Allen and wife as heirs-at-law to one-eighth of the estate of William King, the one-fortieth of said estate should enure to the benefit of Sheffey. I say successfully asserting, because unless the effort was successful, the fund or subject from which Sheffey's beneficial interest was to arise would itself fail. The estate, then, must be recovered before any beneficial interest would enure to Sheffey. It presents the common case of a contract between counsel and client for a contingent fee. The consideration of the contract was the recovery, through the learning and ability of the counsel, of the proportionate share of the estate which the law was supposed to have cast by descent upon the wife of the other contracting party, as one of the heirs-at-law of William King. Was the contract performed by Daniel Sheffey? The record of the chancery suit instituted at Staunton, in 1809, by Daniel Sheffey, on behalf of Allen and wife, and of Samuel King, against the personal representatives, widow and the other heirs-at-law of William King, is exhibited as part of the cross-bill filed in this cause by Sheffey's representatives. The bill of the complainants in that suit, drawn by Daniel Sheffey, bears unquestionable evidence of the sagacity, acuteness and learning of that eminent lawyer. It was insisted that the devise to William King, son of James, on condition of his marrying a daughter of William and Rachel Trigg, and in trust for the issue of said marriage, was too remote and uncertain, and therefore void; that the subsequent contingent limitations were also void, for the same reason; and that all the limitations of the will, except those for the benefit of the testator's wife and other specific legatees, having failed, the estate descended to the testator's heirs-at-law, as in cases of intestacy. This construction of the will prevailed with the chancellor, and in 1816 an interlocutory decree was pronounced, declaring "that under existing circumstances, as disclosed in the supplemental bill and answers, the inheritance of the testator's real estate does not pass by said will, but descends to those who are entitled thereto by law." It is a most singular fact, that after obtaining so strong an expression of the chancellor's opinion in favor of the rights of his clients, Mr. Sheffey failed to prosecute the case to a final decree. The last order in the cause was made in 1817, and in 1821 it was struck from the docket, and no subsequent effort was made to have it reinstated. Nor do we find any evidence in the record that Mr. Sheffey ever afterwards appeared as counsel for his original clients. In the action of ejectment subsequently brought, on the law side of this court, by William King, son of James, against Findlay & Mitchell, Mr. Sheffey appeared as counsel for the defendants, who had a common interest with the other heirs-at-law of William King, the elder. The lessor of the plaintiff recovered judgment, and the case was carried by writ of error to the supreme court. Mr. Sheffey argued the cause before that tribunal on behalf of the plaintiffs in error. The supreme court affirmed the judgment of this court, thus deciding that the will of William King the elder invested William King the younger with the legal title to the estate, but expressly waiving the decision of the question whether he took any beneficial interest in it. The original defendants in the action of ejectment applied for and obtained from this court an injunction restraining the lessor of the plaintiff from enforcing his judgment at law. The bill alleged that though the legal title was in William King, he was a naked trustee for the heirs-at-law, and had no beneficial interest in the estate. The other heirs-at-law were made defendants, and partition was prayed among them of the real estate of William King. This bill, too, was drawn by Mr. Sheffey, and its preparation was one of the last acts of his distinguished professional career. It was filed in 1830, and its author died very shortly afterwards. It was strongly insisted by the able counsel for his representatives, in their argument at the bar, that though Mr. Sheffey had abandoned the chancery suit instituted at Staunton for the special benefit of Allen and wife, and of Samuel King, yet that he had by no means abandoned their cause, and that he had as effectually served them in the subsequent suits referred to above, as if he had appeared specially as their counsel; and that as the suit for partition brought by him has resulted in the establishment of their title to partition as heirs-at-law, he has virtually fulfilled his contract with them, and his representatives are entitled to reap the long deferred reward of his services. It is certainly of little consequence in a court of equity, which regards substance rather than form, whether Mr. Sheffey recovered the estate for these clients, in the avowed character of their counsel, or in the character of counsel for other parties having a common interest in them, and standing in the same relation to the subject of partition, provided it was equally his purpose to serve them both. But the record abundantly proves that in abandoning their suit in the state chancery court at Staunton, Mr. Sheffey abandoned, and intended to abandon the cause of his original clients and his contract with them also. He believed that Hannah Allen and Samuel King were unnat-

uralized aliens, and this fact is distinctly avowed in the bill for partition filed by him just before his death! There can be no doubt that Mr. Sheffey died under the firm conviction that no title by descent had been cast upon his former clients in consequence of their alienage, and he avowed that for this reason, their children who were born in Virginia, and not themselves, were heirs at law of William King. They were accordingly made defendants in the suit brought for partition. It was not known till long after Sheffey's death, that the father of Hannah Allen and of Samuel King was a naturalized citizen of the United States; and we have seen that the naturalization of Thomas King operated by virtue of the act of congress of 1802, the naturalization of his minor children who were in the United States when the act of congress took effect. If the title, then, of those children as heirs at law of their half brother William King has at length been established, the result is due to causes other than to the efforts of their former counsel in their behalf. The unfortunate misapprehension under which that counsel labored with regard to the rights of these persons, satisfactorily accounts for his abandonment of their suit, and I am constrained to say that, in my judgment, it is none the less fatal to the pretensions of his representatives that his course was dictated by an ignorance of facts which seems generally to have prevailed, and which was probably shared by the parties most interested in the question.

2. The claim of the representatives of Sheffey to have a decree for satisfaction of the bond for $600, executed by Vint to Samuel King, and assigned by John Allen to Sheffey, may be disposed of in a summary manner. The assignment of the bond constituted Sheffey a mere creditor at large, of Vint. No judgment was ever obtained or suit prosecuted by Sheffey, either against Vint, the obligor, or Allen, the assignor of the bond. Nor is any sufficient reason assigned for failing to prosecute a suit at law. It is averred in the bill, that after the assignment, Vint being a resident of Tennessee, the bond was sent by Sheffey to an attorney in that state, for the purpose of having it collected, but that Vint being supposed to be insolvent, no suit was ever brought upon it. Without a judgment at law binding the lands of the debtor, equity has no jurisdiction to entertain the bill of a creditor filed to set aside a fraudulent conveyance of the debtor's lands, or to enable the creditor to reach the mere equitable estate of the debtor. The judgment lien is the necessary foundation of the equitable jurisdiction in either case, and equity lends its aid to make that lien effectual whenever it cannot be enforced by execution at law. I will not here examine the cases involving this familiar doctrine, but will content myself with referring to two treatises on equity where the cases are reviewed, and the doctrines of equity on this subject are fully discussed. 2 Rob. Prac. 18, 19, 47, 48; 2 Story, Eq. Jur. § 1216b. It is clear, then, that no decree can be rendered in favor of Sheffey's representatives against the obligor Vint, for the amount of this bond. Nor have they a demand against the representatives of the assignor Allen, which can be asserted here. A brief view of the relation between the assignor and assignee of a chose in action, will make this manifest. The law implies mutual contracts between the parties, from the mere fact of assignment. On the part of the assignee, it implies an engagement to prosecute the demand against the maker or obligor with due diligence, and nothing short of the prompt prosecution of the demand to judgment and execution will, ordinarily, satisfy the requirements of the law so as to give the assignee recourse against the assignor. A suit against the maker is not, indeed, in all cases, a necessary prerequisite to fix the liability of the assignor, as where the maker is notoriously insolvent, and perhaps, too, where he resides beyond the jurisdiction of the courts of the state. Drane v. Scholfield, 6 Leigh, 386. The contract implied on the part of the assignor is, that if the assignee proceeds with due diligence, and yet fails to make the demand against the maker effectual, the assignor will refund to the assignee the price paid for the chose; but even here, the foundation of the assignee's right being but a simple contract, it must be prosecuted within five years, or it will be barred by the statute of limitations. Now, assuming that the notorious insolvency of the obligor Vint, and his residence in another state, were, either of them, sufficient to dispense with the necessity of a suit against him in order to fix the liability of the assignor, the assignee's demand was not prosecuted at law at all, nor here, within the period prescribed by the statute of limitations, which, having been pleaded here, constitutes a bar to a recovery.

3. The claim to satisfaction of the debts due by John Allen to Daniel Sheffey, to secure which, the deed of trust of August 30th, 1811, from John and William Allen, was executed, except so far as they were reduced by the application of the proceeds of sale by the trustee Estill, is liable to the same objection that, with reference to that residuum of debt, Sheffey was a mere creditor at large. The bill is not filed for the purpose of removing obstructions to the title of any property conveyed by that deed, but to enable the plaintiffs to subject the equitable estate of John Allen in a different subject. This claim is deemed invalid for another reason. The deed of trust of August 30th, 1811, was executed, not by John Allen alone, but by John and William Allen jointly, conveying property held jointly by them, to secure the payment of debts due by them jointly. William Allen, or his representatives, are not made parties to this suit. This should have been done for non constat, but that the debts have

been satisfied by him. Waiving, therefore, all objections to this claim arising from the staleness of the demand, I am of opinion that equity has no jurisdiction to grant the relief sought.

Upon the whole case, I am of opinion that the plaintiffs in this cross-bill, the representatives of Sheffey, are not entitled to the relief which they seek, and that their bill be dismissed with costs.

A decree was rendered in conformity with this opinion.

Case No. 16,951.

In re VINTON.

[7 N. B. R. 138.] [1]

District Court, D. Rhode Island. July 13, 1872.

BANKRUPTCY — DISCHARGE — CONSENT OF CREDITORS.

Where the proceeds of a bankrupt's assets exceeded the amount of the claims proved against his estate, but after the payment therefrom of costs and expenses the amount remaining may not equal fifty per centum of said claims, *held*, that the bankrupt was not entitled to a discharge under the amendatory act of July 27, 1868 [15 Stat. 227], unless the assent of a majority of his creditors, in number and in value, were shown.

[Cited in Re Waggoner, 5 Fed. 917.]

In bankruptcy.

KNOWLES, District Judge. The question arising upon this application is in short this: Is a bankrupt entitled to a discharge, when (as is the fact in this case), although the gross assets realized by his assignee exceeded the amount of the claims proved against the firm of which he was a member, the nêt of said assets proved insufficient to pay a dividend of fifty per cent. upon said claims? I am not aware that in this district, or indeed, in this circuit, this question has before been raised. It has, however, arisen in other districts, as appears from reported cases, to some of which it may be well here to refer. In support of a negative answer may be cited opinions of Nelson, J., of the Minnesota district, in Re Freiderick [Case No. 5,092]; In re Graham [Id. 5,661]; and an opinion of Blatchford, J., of the New York district, in Re Webb [Id. 17,314], and in support of an affirmative answer, an opinion of Hopkins, J., of the Wisconsin district, in Re Kahley [Id. 7,594], where in his reasons for dissenting from the views of Nelson, J., are presented with a fullness and clearness that leaves little or nothing to be said by those of his brethren of the bench who shall adopt his construction of the act of July 27, 1868, amendatory to the bankrupt act [of 1867 (14 Stat. 517)]. He holds and rules that the clear intention of the amendment was to relieve the bankrupt of the costs and expenses of the proceedings. If the estate realised a sum equal to fifty per cent., he should be discharged, whether it went to the payment of costs and expenses or to his creditors. "We must presume," he argues, "that congress meant to make some change in favor of the bankrupt," and adds, if the construction which he deprecates is adopted, the bankrupt is "effectually deprived of any substantial benefit or advantage conferred upon him, or intended to be given him by the amendment." The argument of the learned judge strikes one as almost or quite conclusive, until the amendatory act is subjected to a more searching analysis than it seems to have received at his hands. The law, as originally enacted, is as follows: "And, in all proceedings in bankruptcy, commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per cent. of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge." 14 Stat. 533. The amendatory act of July 27, 1868 (15 Stat. 227), was as follows: "In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per cent. of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as a principal debtor, and who shall have proved their claims, be filed in the case, at or before the time of the hearing of the application for discharge." Now, under the original act, it was requisite that the bankrupt's estate or assets should pay fifty per cent. of the amount of claims proved against it, irrespective of the nature of the claims (as preferred, and to be paid in full, or unpreferred), and irrespective also of the character in which the debts were contracted by the bankrupt (whether as principal debtor, or as an endorser, surety or guarantor); while the amendment, it is seen, radically changes the law in these particulars, while it also in effect postpones its operations for a period of six months. Under the original act it is manifest that the net assets are the assets to be estimated. Are we to assume that under the amendment gross assets, and not net are referred to? If only by thus construing the act could we find that the bankrupt is favored or benefited by the amendment (as is argued by Hopkins, J.), we might feel constrained to adopt his construction. But this, it is apparent, is not the fact. Under the amendment, no matter what the amount of the preferred claims (as debts to employés), and no matter what the amount of claims proven by holders of endorsed or guaranteed paper,—if his assets are equal to fifty per cent. of the debts proved against him as principal debtor, the bankrupt is entitled to his discharge.

On the whole I incline to adopt and follow the ruling of Nelson, J., and accordingly decline to grant the discharge prayed for, unless the certificate from creditors contemplated by the statute shall be filed by the petitioner, within a reasonable time.

[1] [Reprinted by permission.]

VINTON (UNITED STATES v.). See Case No. 16,624.

VIOLA, The (BARTLETTE v.). See Case No. 1,083.

VIOLET (SMALLWOOD v.). See Case No. 12,962.

Case No. 16,952.

VIOLETT v. PATTON.

[See Case No. 10,839.]

Case No. 16,953.

VIOLETT v. STETTINIUS.

[5 Cranch, C. C. 559.] [1]

Circuit Court, District of Columbia. March Term, 1839.

CARRIERS OF GOODS—FREIGHT—LIABILITY OF CONSIGNEE.

If the consignee, of property sent by a common carrier, demands and receives it before it reaches its ultimate destination, he is liable for the full freight.

Replevin, for ninety kegs of butter. The case agreed was in substance this. On the 27th of December, 1837, one Saughenbaugh, at Pittsburgh, in Pennsylvania, received from the plaintiff's agent, ninety kegs of butter, weighing 5,738 pounds gross, which he promised in writing to deliver in good order in Georgetown, D. C., to E. Lyons, or order, within sixteen days, he paying to Saughenbaugh $1.75 per 100 pounds carriage, for the same. The plaintiff's said agent at Pittsburgh gave the following writing to Saughenbaugh: "Mr. Saughenbaugh will deliver ninety kegs of butter, weighing 5,738 pounds, unto E. Lyons, of Georgetown, D. C., for which you will receive $1.75 per 100 pounds carriage. William B. English. Pittsburgh, December 26th, 1837." Saughenbaugh transported the butter to Baltimore, by wagon, and there, on the 11th of January, 1838, turned it over to the Baltimore and Ohio Railroad Company, to be transported the remaining distance to Georgetown, receiving at the same time from the company's agent $94.94, as the pro rata freight, allowing $5.47 for freight by the railroad cars to Washington, and drayage thence to Georgetown, and assigned to the company his claim and lien for freight. On the 12th of January, 1838, the butter was transported to Washington, and there remained in the store-houses of the company, in the charge of the defendant, the company's agent, through inadvertence or some misunderstanding, until the 22d of January, 1838, when the plaintiff [Robert G. Violett] claimed and offered to receive it there. The defendant [Samuel Stettinius] offered to deliver it there, or at Georgetown, on receiving the full stipulated freight, amounting to $100.41, but the plaintiff refused to pay any thing, and replevied the butter on the 22d of January, 1838. There had been no decline in the price of butter in Washington, or Georgetown, between the 11th and 22d of January, but there had been a decline of a few cents in Alexandria, where the plaintiff resided. If, on this statement, the plaintiff should be entitled to recover, judgment was to be entered for the costs. If the defendant should be entitled to recover the freight, or any part thereof, judgment was to be entered accordingly for the defendant.

R. S. Coxe, for plaintiff, contended that no freight was earned, as the goods were not carried to their place of destination; and that Saughenbaugh could not transfer his lien to the railroad company; and that the company could not recover freight, because they had delayed the butter, so that the sixteen days were passed. He cited Jeremy, Carr. 63, 83, 84; Story, Bailm. 320, 328, 359; 3 Kent, Comm. 209; Sheels v. Davies, 4 Camp. 119.

C. Cox, contra. The carrier had a lien for his freight. The railroad company were his agents, and he did not lose his lien by the transfer of the goods to his own agent. The plaintiff has his remedy against Saughenbaugh for damages by the delay, if he has suffered any. Jeremy, Carr. 17, 161; Boone v. Eyre, 1 H. Bl. 273, in note a; Sheels v. Davies, 4 Camp. 119; Pow. Cont. 267. The plaintiff demanded the butter at Washington, and offered to receive it there.

CRANCH, Chief Judge. I am of opinion that as the plaintiff claimed and offered to receive the butter in Washington, on the 22d of January, 1838, the defendant was entitled either to the whole freight, or freight pro rata. I think the whole, because he offered to deliver the butter either in Georgetown or Washington, at the option of the plaintiff, if he would pay the freight; but he refused to pay any freight at all. The delay was a proper subject of a claim for damages by the plaintiff against Saughenbaugh. The plaintiff might have refused to receive the butter. He might have abandoned it, and brought his action against Saughenbaugh; but having claimed it, and offered to receive it at Washington, he cannot lawfully resist the claim for freight.

THRUSTON, Circuit Judge, concurred.

Verdict for the defendant for the freight.

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

Case No. 16,954.

VIOLETTE v. BALL.

[2 Cranch, C. C. 102.] [1]

Circuit Court. District of Columbia. June Term, 1814.

SLAVERY—RIGHT TO FREEDOM.

A slave does not acquire a right to freedom by being sent from Washington to Virginia for sale, and, not being sold, brought back after eight or nine months' absence.

Petition for freedom [by the negro Violette against Henry W. Ball].

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

THE COURT (THRUSTON, Circuit Judge, absent) refused to instruct the jury that the petitioner was entitled to freedom by being sent from the city of Washington to Virginia for sale, and, not being sold, brought back to the city, after an absence of eight or nine months.

Case No. 16,955.

VIOLETTE v. TYLER.

ENGLISH v. SAME.

[2 Cranch, C. C. 200.] [1]

Circuit Court, District of Columbia. April Term, 1820.

ATTACHMENT—DUTY OF MARSHAL—PRIORITIES.

1. When the marshal has several writs of attachment put into his hands, he must return all the property as attached on each of them.

2. Quære, whether the writ which first came to his hands, or the writ first levied, has a preference; or whether the attaching creditors shall come in pari passu.

There were several writs of attachment at law. Violette's was the first which came to the hands of the marshal. English brought his afterwards, and broke into the house and showed the goods to the marshal, who attached them on Violette's writ as well as English's, and so returned them.

Mr. Swann, for English, claimed the priority, because he had first shown the goods. The law is not the same as upon an execution which binds the goods from the delivery of the writ to the marshal. English is entitled to the benefit of his diligence.

At the last term the court was divided upon this question. (THRUSTON, Circuit Judge, absent.) At this term it came on again.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion that the marshal ought to return both writs levied upon the whole property found; and CRANCH, Chief Judge, was of opinion that the first writ which came to the hands of the marshal had the preference. THRUSTON, J., was of opinion that all the attaching creditors should come in pari passu. MORSELL, J., was of opinion that the attachment first levied had priority, but that, as both were simultaneously levied, the distribution should be pari passu.

Case No. 16,956.

VIRDEN et al. v. The CAROLINE.

[6 Am. Law Reg. 222.]

Circuit Court, D. Delaware. Oct., 1857.

SALVAGE COMPENSATION — TUGS MAINTAINED FOR SALVAGE PURPOSES.

1. Where a steam tug is kept constantly employed during the winter, on a dangerous station, and at a heavy expense, for the express purpose of rendering salvage and towage service to vessels in distress, her owners are entitled to the full remuneration usually awarded to salvors who peril life and property, though the particular salvage service may not have been actually accompanied by much danger or labor.

2. A brig was caught and damaged in the ice in Delaware Bay, and, from the nature of her injuries, could only be rescued by the removal of her forward cargo. This was done (and it was not otherwise possible) by and with the assistance of a steam tug stationed at the breakwater. Part of the cargo thus removed was transhipped to the tug, and the brig afterwards towed by her into port. The court decreed to the owners of the tug, one-half the value of the cargo transhipped, and four per cent. of that of the vessel and remaining cargo.

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

This was a libel for salvage, by [Henry Virden and others] the owners of the steam tug America, and came up on an appeal from the decree of the district court, awarding the sum of $650 to the libellants for salvage services to the brig Caroline and cargo [case unreported], and from which decree the libellants appealed, upon the ground of inadequate remuneration. The vessel salved was lying at the breakwater, at the mouth of the Delaware Bay, on the first day of February, A. D. 1857, and upon that day the services were performed. The day following, the steam tug was obliged to go to New York for fuel, and upon her return, a few days afterwards, completed the salvage by towing the brig to New Castle. The vessel and cargo were valued at about twenty-one thousand dollars.

Rodney & Bayard, for libellants.

Mr. Bradford, for claimants.

TANEY, Circuit Justice. This is a claim for salvage, and the testimony in the case clearly establishes that the brig was in great peril, and was rescued from danger by the libellants. The only question open to dispute, is the amount of compensation to which the salvors are entitled. And this is one of those questions in which it is often so difficult to come to a satisfactory conclusion, and upon which different minds will often form different judgments. There is no rule of law, nor any fixed rule of judicial discretion, by which the compensation can be exactly measured. The principle is, that the salvor is entitled to an adequate reward, according to the circumstances of the case. But the material circumstances in each case will be found, in some respects, peculiar to itself, and to differ from all others. The peril in which the property is placed, its character and value, the danger and labors of the salvors, their expenses and skill, and sacrifices of time or money necessarily made, are all to be considered, and in no two cases are, perhaps, precisely the same. The sum allowed in one case can, therefore, furnish no precedent for a like allowance in another. And we can gather nothing more upon this question, from the reported cases, than the gen-

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

eral policy by which courts of admiralty have been governed, and that policy undoubtedly is to deal liberally with salvors, in order to encourage exertions and sacrifices to rescue life or property from the dangers to which it must always be liable in maritime pursuits.

In the case before the court, the brig was evidently in imminent peril, and required immediate aid. She was at the breakwater, in the Delaware Bay, on the 1st of February last, exposed to the heavy floating ice with which the river was then filled. Her starboard bow or lumber port had been stove in, at the latter end of the ebb tide, by the heavy ice that came down the river, and it was absolutely necessary, for the safety of the vessel, that it should be repaired and strengthened before the next ebb tide; for the pilot on board of her (who is a witness called by the claimants) states that, if it had not been so repaired, the ice would probably have struck her bow port again on the next ebb tide, and sunk the vessel. The injuries it had already received made it incapable of resisting the blows and pressure of the heavy bodies of ice which came rapidly down the river when the tide was ebbing. The larger part of the injured port was under water, and the vessel was leaking from the injury, but not so badly as to cause any apprehension of immediate danger on that account. She was easily kept free by a single pump. But in order to repair the damage, and protect the vessel from the ice, it was necessary to raise her bow high enough to bring the whole port above water, and this could not be done without discharging a large part of her forward cargo. As soon as the pilot in charge of the brig discovered the danger, he applied to a schooner anchored near him to come alongside, and take off so much of the cargo as it was necessary to remove. But the master of the schooner declined complying with the request, saying that his own vessel was leaking, and he had but one anchor. And, upon receiving this answer, he immediately hoisted a signal of distress; and the steam tug came to his assistance. She was alongside of the brig as soon as she could make her way through the floating ice; and upon learning from the pilot the situation of the brig, the captain of the steam tug immediately placed ten hands on board to assist in lightening her by discharging her forward cargo. Her deck load forward, consisting of heavy hogsheads, weighing 1600 or 1700 pounds, and imbedded in ice on the deck, and on that account requiring great force to move them, were thrown overboard. Coffee and other merchandise were taken from the hold and placed on board of the steam tug; and portions of the forward cargo moved aft. By these means, the bows of the brig were in two or three hours raised so high that the whole of the port was out of water, and was then repaired and made safe under the direction of the pilot—the steam tug laying by, at his request, until the work was completed, and the port made safe; and as soon as the river was in a condition to make it safe to do so, the brig was towed by the steam tug to New Castle in safety; and the portion of the cargo taken on board the steam tug at the breakwater, and which had remained on board, was delivered to the agent of the claimants. So far, then, as concerns the property saved, it was a case of imminent peril, in which a total loss of vessel and cargo would probably have occurred, with danger of life, but for the prompt assistance of the steamboat. And, judging from the whole evidence, the court is not satisfied that any part of the property rescued from danger would or could have been saved in any other way. It is true, the pilot of the brig says that, if he had received no assistance from any quarter, he could have saved the vessel and residue of the cargo, by throwing overboard, with his own crew, the deck load which was thrown over after the arrival of the steamboat, and also the goods and merchandise which were transferred to the steamboat; and that he would have done this with his own crew and boat, and then repaired the damaged port. But the weight of the testimony is adverse to the opinion of the pilot. It evidently was essential to the safety of the vessel that the heavy hogsheads on the forward part of the deck, which contributed so much to press the bows of the vessel down in the water, should be removed. Her head would not rise so as to reach the injured part until this was done. And it appears from the testimony, that those heavy hogsheads were so firmly fastened to the deck by the ice, that there was great difficulty in moving them, when ten men from the steam tug were added to the crew of the brig, and all were united in the effort. The first attempt, even with all this force, failed, and they were obliged to resort to a different tackle from the one first tried, before the object could be accomplished. No attempt had been made to move them, until the additional force from the steamboat was on board; and the court is satisfied from an attentive consideration of the whole testimony, that if the attempt had been made by the crew of the brig, without any other aid, it must have failed. The captain had left her five days before the disaster happened. There was no one on board but the pilot, mate, three seamen, and the cook; and if with this comparatively weak force they had attempted, by sawing down the bulwarks, to put these heavy hogsheads overboard, the attempt would most probably have resulted in serious injury to the vessel, or to the persons engaged in the work. It is possible, and barely possible, that hands might have been sent in boats from the other vessels if there had been no steamboat to assist her. But if this had been done, it must have been done obviously at great risk of life and property. There were thirty-seven vessels in sight.

They were all more or less in danger from the ice when the tide was running, and no one could foresee at what moment the danger would come upon them. During the brief period of slack water, between the tides, there were occasionally times when boats from some of the vessels might safely come to the brig. But no one could foresee how soon the floating ice might prevent their return, or render it exceedingly hazardous. Besides, every vessel was necessarily constantly on its guard, and might at any moment need the presence of its whole crew to save itself, and the pilot of the brig himself states the difficulties and dangers which would have attended relief in this mode from other vessels, and says that "every crew ought to be at home when the ice is running." The relief, therefore, if given by boats from other vessels, would have been at the hazard of the lives of those employed, and increased the risk of the vessels to which they belonged. No such relief was offered, nor is a single witness produced from any other vessel who says it could or would have been given. And the captain of the Powhattan, who came on board after he saw the steam tug alongside, thought it prudent to engage the steam tug to take him back to his vessel, in case the floating ice should block up his return, or render it hazardous to his boat. It is manifest, therefore, that if relief had come from boats dispatched from other vessels, the relief would have been afforded at such risk of life and property as would entitle the salvors to the most favorable consideration of the court in awarding them compensation. And even with all this hazard and risk, the property transferred to the steam tug must have been thrown overboard and utterly lost. For it was clearly impossible for any other vessel to have gone alongside of the brig. This fact is positively stated by the engineer of the steamboat, and he is fully confirmed by every witness examined from other vessels which were lying around her, and witnessed the whole scene. It took the steam tug, with all her advantages, one hour to reach her, although the distance was only about five hundred yards, and she was occasionally obliged to back from the weight and pressure of the ice in her way.

It is urged, however, by the claimants, that the steamboat encountered no danger, and consumed but little time in rescuing the brig and cargo from the peril in which it was placed. This is true. But it must be remembered that the steam tug had by the prudent foresight of her owners, and at a heavy expense, been prepared to render such services promptly and without much danger to herself or her crew. She was strongly built, well manned, and placed at the breakwater in the Delaware, where it was well known many vessels must be detained at this inclement season, and would be constantly in danger from the winds and the ice. She was kept there at a heavy daily expense, and with her crew constantly exposed to severe weather, but yet always in readiness to go to the aid of a vessel in distress. It is the well-established policy of courts of admiralty to remunerate liberally salvors who risk life and property, or suffer hardships in rescuing a vessel or cargo when in danger of perishing. And I cannot perceive any reason why a salvor should be entitled to less, who expends his money in preparing a vessel by which the service can be rendered with less risk, and keeps her at the place where danger is anticipated, at a heavy daily expense, in order that assistance may be promptly rendered when the emergency shall arise. The reason assigned for a liberal allowance in the one case, applies with equal force in the other. And, in my judgment, the salvors are entitled to the same measure of compensation that the court would have deemed just, if the vessel had been rescued by the boats of the surrounding ships, amid the hazards which such an enterprise on their part would evidently have brought with it. The situation of the America in this case was unlike that of a steamboat accidentally passing at the time of the disaster, which turns out of her way for a short distance, and delays her voyage for a few hours, in order to afford the necessary relief. Her sacrifice of time and labor would be small. But here was a daily heavy expense, and she was always prepared, at the point of danger when assistance was needed.

Entertaining these views of the case, I think the sum awarded by the district court is not an adequate compensation for the service rendered. I am aware, as I said before, that upon this question there is no certain and definite rule to guide the court, and different minds will unavoidably come to different conclusions. It is, therefore, the practice of the appellate court, where its opinion approximates to the one entertained by the court below, not to disturb its judgment, although it may not fully concur in the propriety of the sum awarded. But where it is otherwise, it is undoubtedly the duty of the appellate tribunal to decide the case upon its own judgment as to the rights and just claims of the parties. [Post v. Jones] 19 How. [60 U. S.] 160. And dealing with the case according to the conclusions of fact which I have hereinbefore stated, and the principles which admiralty courts have been accustomed to apply to such cases, I think that, for the portion of the cargo which was transferred to the steamboat, the salvors are entitled justly to one-half its value. This portion was destined to certain destruction, if the steam-tug had not been there, and come to the relief of the brig. For if she could have been saved by her own crew, or by boats from other ships, this part of her cargo must have been thrown overboard to lighten her near the bows, and it was evidently impracticable for any other vessel but a steamboat to come alongside and take it off. In cases of derelict, where there has been any hazard in saving it, the one-half has been most commonly allowed. And in this case the property could not by any possibility have been saved if this steam-tug had not been placed at the breakwater, and kept there

at the expense of the owners, ready to interpose the moment the brig hung out the signal of distress. It presents at least as strong a case for compensation as that of a vessel found abandoned at sea, for without the aid of the steam-tug the loss was not merely highly probable, but absolutely certain and inevitable.

As relates to the vessel and the rest of the cargo, I feel more difficulty in coming to a conclusion. They were undoubtedly saved by the steam-tug, and upon the principles already stated she is entitled to as high a rate of compensation as would have been allowed to the boats of the other ships. And taking all the circumstances into consideration, and the towage of the vessel afterwards to a port of safety, it appears to me that about four per cent. of the value saved would not be more than a fair and adequate compensation. I do not mean to rest this part of the opinion upon any rule of percentage applicable to cases of this kind. I look rather at the sum which that percentage will produce, and compare it with the value of the services rendered. Nor shall I enter into any nice calculation as to the precise amount which these allowances will produce. The judgment is necessarily founded upon estimates, and there can be no exact mathematical calculation fixing precisely the first amount. But looking to the whole case, in all the circumstances, as it appears on the record, I am of opinion that the libellants are justly entitled to seventeen hundred dollars ($1,700) as compensation for the salvage services rendered to the brig, and shall decree accordingly.

VIRGIN, The (UNITED STATES v.). See Case No. 16,625.

Case No. 16,957.

The VIRGINIA.

[3 Biss. 48, [1] 3 Chi. Leg. News, 329.]

Circuit Court, S. D. Illinois. June Term, 1871.

SALVAGE—STRANDED MISSISSIPPI STEAMER.

1. Where a steamer, stranded in the Mississippi river, employs another less powerful one to assist in getting her off, it is the duty of the former to see that there are no obstacles or dangers in the place where the proposed movement is to be made.

2. Where, by the joint efforts of both steamers, the stranded steamer is got off, the general direction and control of the movement being with her, she is liable for the loss of the other steamer, wrecked in the manœuver, and also for the services rendered.

3. The smaller steamer not having supplied the sole motive power, does not, under such circumstances, run the risks of salvage service.

Appeal from decree of district court [of the United States for the Southern district of Illinois], on a libel filed by owners of the steam ferryboat Missionary against the steamboat Virginia for services and damages for loss of vessel.

Green & Gilbert, for libellant.
Allen, Mulkey & Wheeler, for respondent.

DRUMMOND, Circuit Judge. The Virginia, while on a voyage from St. Louis to New Orleans, in the fall of 1868, ran on a "log heap" in the Mississippi river, a few miles below New Madrid. She struck with her bow and thus lay fast with her stern up stream. After several ineffectual efforts to get off by lighting and by the use of the engines, a message was, on the evening of the 24th of October, sent to Cairo for assistance, and on the morning of the 25th the Missionary, in answer to the message, arrived and rounded to on the starboard side of the Virginia in a reverse position,—the bow of the Missionary being up stream. They were thus fastened together side by side, the stern of the Missionary and the bow of the Virginia being nearly opposite to each other. They were, however, of very unequal length. The Virginia was of considerable size and power,—two hundred and twenty-eight feet long, eight hundred and ninety tons burthen, and had on board at the time she struck four hundred and fifty tons of freight. The Missionary was one hundred and thirty-eight feet long and about one hundred tons burthen.

After the arrival of the Missionary, about sixty tons of freight, more or less, were removed from the Virginia to the Missionary. It was then resolved that another effort should be made to get the Virginia off. The undisputed facts are, that the two steamers were fastened together in the manner stated, steam raised on both, and the engines of each put in operation at about the same time; the Virginia was thus backing and the Missionary trying to go ahead. Very soon both started, and the result was that the Virginia got off the "log heap" and the Missionary ran on a snag, stove a hole in her bottom, and shortly after sunk and became a loss, except as to some part of her machinery.

The libellants claim that the captain of the Virginia took entire control of the Missionary and that the former is liable for the loss as an act of negligence, as well as for the value of the services rendered. On the other hand it is insisted the Missionary was under the management of her own officers and men, and took the ordinary risks incident to a salvage service. The two steamers were fastened together by the joint act of the officers and men of both. The co-operation of the Missionary in removing the Virginia from the "log heap" was with the consent and acquiescence of the officers of the Missionary. Webb, the quasi captain of the Missionary, and Kauffman, the engineer, agreed to assist by the action of the engines in getting the Virginia off. But this seems to have been the extent of the aid given by the Missionary. The general direction and control of the movement was with the Virginia. If it

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

be conceded the service of the Missionary was a salvage service, which is apparently the footing upon which the libellants seek to place it, then it involved the ordinary risks of that kind of service, and no more. It may be admitted that if a steamer, in trying to save a stranded vessel by its own motive power, is lost or injured by the movement, it is one of the necessities of the service, and is a risk assumed as such. It is because as well of the peril to the vessel or property saved, as the risk to the salvor, that courts of admiralty allow more than a quantum meruit compensation. If the Missionary had in this case been the sole motor, a more rigid measure of responsibility would have attached. And the case must turn mainly on this: Whose peculiar duty was it, under the circumstances, to foresee and guard against the possible consequences of success in the effort which was about to be made? The Virginia had employed the Missionary to aid in the relief without any special contract as to the terms on which it was to be affected. The former was many times larger and more powerful than the latter, and in case of motion, even though lashed together, would substantially control the Missionary. It was, therefore, the duty of the Virginia, in a special manner, to explore the spot that might be passed over in the movement proposed to be made, and to see that there was no obstacle in the way which would be likely to cause disaster. The fact that the officers of the Missionary acquiesced in the demand made for the assistance of the engines, did not make them responsible farther than for the consequences necessarily growing out of such consent. If the case had been reversed and the Virginia had been lost, it could scarcely be maintained, in the absence of willful fault on the part of the Missionary, that the latter would have been liable for the loss, or even for an apportionment of the loss. 2 Pars. Shipp. & Adm. 263. The Virginia had been on the "log heap" more than a day, and had had every opportunity for examination; in fact, had sounded, in order to ascertain the depth of water. The Missionary was employed by the Virginia to perform a special service—to aid in moving the latter from the "log heap." If the assistance rendered had been that of lighting only, there can be no doubt it would have been the duty of the Virginia to take reasonable care of the Missionary, and the Missionary, in such case, could scarcely be held accountable for the dangers of navigation; and the fact that the officers of the Missionary merely assented to the action of the engineers cannot change the rule. Webb, on the Missionary, gave notice to the captain of the Virginia of the approaching danger. It is asserted the warning was not heard, but it at least shows that some of the parties foresaw the peril of the movement—something which the Virginia ought also to have foreseen and guarded against. The evidence shows that if proper vigilance and prudence had been used by the Virginia, the disaster might have been prevented. The open snags could have been seen, the hidden ones discovered.

No great stress is placed upon the admissions of the captain of the Virginia, to the effect that the loss might be paid as soon as ascertained, because that was nothing more, at most, than an admission that the Virginia was liable for the loss, a question of law under the facts of the case.

The district court allowed five hundred dollars as the value of the services rendered, and four thousand dollars for the loss or damage. [Case unreported.] I shall not give any interest on the decree of the district court, but will affirm the decree as the decree of this court for that amount as found of the present date.

Case No. 16,958.

VIRGINIA v. RIVERS.

[Nowhere reported; opinion not now accessible.]

VIRGINIA, The (ALBERTI v.). See Case No. 141.

VIRGINIA, The (BINFORD v.). See Case No. 1,412.

Case No. 16,959.

VIRGINIA v. DULANY.

[1 Cranch, C. C. 82.] [1]

Circuit Court, District of Columbia. April Term, 1802.

CRIMINAL LAW—COSTS—DISCONTINUANCE.

A prosecutor liable for costs upon an indictment for a misdemeanor, has no right to withdraw the prosecution without the consent of the attorney for the United States.

Indictment [against Daniel Dulany] for assault and battery on J. D. Westcott. I. V. Thomas's name was indorsed as prosecutor and liable for costs.

Mr. Jones, for defendant, stated that Westcott was satisfied and wished, with the consent of Thomas, that the defendant might be allowed to confess judgment for costs only.

Mr. Mason, attorney for the United States, objected on the ground that it was a prosecution in the name of the commonwealth, and no private prosecutor could compound, or interfere in the business.

THE COURT decided that the prosecutor had no right to withdraw the prosecution, and refused to permit it to be done without the consent of the attorney for the United States.

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

Case No. 16,960.

VIRGINIA v. EAKIN.

[1 Cranch, C. C. 83.] [1]

Circuit Court, District of Columbia. April Term, 1802.

CRIMINAL LAW—INFORMATIONS—DISCONTINUANCE.

An information at the suit of the commonwealth of Virginia may be discontinued before appearance of the defendant.

Information for retailing spirituous liquors. In September, 1799, the presentment was made in the court of hustings, and summons issued to show cause why an information should not be filed, returnable to December, 1799. In July, 1800, the defendant being called, failed to appear, and his default was recorded, and the court ordered an information to be filed. In September, 1800, the information was filed, and a summons served on the defendant to answer it. At January term, 1802, the causes depending in that court having been by law transferred to this court, the defendant being called, failed to appear, and a capias was ordered returnable to this term, upon which the defendant was taken and recognized to appear. No process appears to have issued, and no proceedings had after September, 1800, until January, 1802. It was urged, for the defendant, that there had been a discontinuance.

Mr. Mason, for the commonwealth. The United States are always in court. In Virginia no cause can be discontinued. Rev. Code, 90. A summons was served on the defendant to show cause why an information should not be filed. He was in court by virtue of that summons.

THE COURT decided that the case had been discontinued, notwithstanding the act of Virginia, p. 90, and ordered the capias to be quashed.

KILTY, Chief Judge, contra.

Several other cases were dismissed on the same ground.

VIRGINIA v. EVANS. See Case No. 16,969.

Case No. 16,961.

VIRGINIA v. GORDON.

[1 Cranch, C. C. 48.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

GRAND JURY—INDORSEMENT OF NAME OF WITNESS ON PRESENTMENT.

The indorsement of the name of the witness by the grand jury on the presentment, is prima facie evidence that it was made upon his testimony.

Information for retailing liquors, &c.

The witness, Michael Stieber, testified that he bought liquor of the defendant [Robert Gordon] about three weeks before he gave evidence to the grand jury who found the presentment upon which this information was filed; and that he never gave evidence before them against the defendant but once.

Mr. Mason, for the United States, offered to prove the time of his being sworn to the grand jury by the record of the presentment, which states it to be made on the information of Michael Stieber, the present witness.

On considering the act of 1795 making it a part of the duty of the grand jury to indorse on the presentment the name of the person on whose information it was found, THE COURT permitted the record to go in evidence to the jury to prove the time when the witness testified to the grand jury.

MARSHALL, Circuit Judge, doubting.

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

Case No. 16,962.

VIRGINIA v. HOOFF.

[1 Cranch, C. C. 21.] [1]

Circuit Court, District of Columbia. July Term, 1801.

CRIMINAL LAW—ARREST OF JUDGMENT.

If the information upon a by-law state that the penalty accrued to the commonwealth, when, by charter, it accrued to the town, the judgment must be arrested.

Information [against Lawrence Hooff], for keeping a slaughter-house in the town of Alexandria, contrary to a by-law of the corporation.

THE COURT arrested the judgment on the ground that the information stated that the penalty accrued to the commonwealth. By the act of incorporation of Alexandria, all penalties for breaches of by-laws were to be for the use of the town, and to be levied by distress and sale of the offender's goods.

Case No. 16,963.

VIRGINIA v. HOWARD.

[1 Cranch, C. C. 61.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

CRIMINAL LAW—MUNICIPAL BY-LAWS.

No information or indictment will lie upon a by-law of the corporation of Alexandria.

Information [against Beale Howard], for keeping a slaughter-house in Alexandria, contrary to a by-law of the corporation.

Special verdict. Motion in arrest of judgment. This prosecution was commenced in the court of hustings, of Alexandria.

Mr. Simms and E. J. Lee, for defendant.

The offence is not indictable, and no information will lie where an indictment will not. As much strictness is required in an information as in an indictment. No indictment will lie but for a public offence. This is only an offence against the by-law of a corporation. 4 Bac. Abr. 654; 2 Inst. 131, 163. No indictment will lie on a by-law. Rex v.

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

Sharples, 4 Term R. 777. Corporate powers are of a private nature. The trustees of an academy, or of a library, or of an insurance company have power to make by-laws, as well as the corporation of Alexandria, and yet it will hardly be contended that an indictment would lie for a breach of one of those laws. The charter of Alexandria gives all penalties of by-laws to the use of the town. The person to whom the penalty is to accrue, is the only person who can prosecute for the offence. The commonwealth of Virginia had no right to call upon the defendant for this penalty. A penalty of a by-law may, in all cases, be recovered by action of debt or assumpsit.

Mr. Mason, contra.

Because an action of debt or assumpsit will lie, it does not follow that an information will not. An information will lie, in many cases, where an indictment will not. There is a difference between private and public corporations. The act of incorporation of Alexandria is a public act. The court of hustings was a part of the corporate legislature. This court is now sitting here, in these cases, as a court of hustings. If a private act be referred to in a public act, the former becomes a public act. 3 Inst. 230.

Mr. Simms, in reply.

The act of assembly of Virginia, which incorporates the town of Alexandria, is itself a private act; and surely a by-law of a corporation, deriving its powers from a private act, can never rise to a public act. Although the court of hustings was a part of the corporate legislature, yet they were bound to decide agreeably to the principles of the common law. No case can be found of an indictment on a by-law.

At April term, 1802, the judgment was arrested; THE COURT being of opinion that no indictment or information would lie on a by-law of the corporation of Alexandria.

Case No. 16,964.

VIRGINIA v. LEAP.

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

Circuit Court, District of Columbia. April Term, 1801.

CRIMINAL LAW—ARREST OF JUDGMENT.

If upon a special verdict it does not appear that the offence was committed before the filing of the information, the judgment must be arrested.

Information [against Jacob Leap] for selling spirituous liquors contrary to the act of assembly of Virginia, 26th December, 1792, § 4 (Pleasant & Pace's Ed. of 1803, p. 203).

Mr. Simms, for defendant, moved in arrest of judgment, because it did not appear by the verdict that the fact was committed before the information was filed; and in support of his motion cited 2 Hawk. P. C. 334, and 4 Burrows, 2471. The verdict found the defendant guilty of retailing spirituous liquors in the month of March, without naming the day, and expressly found that there was no evidence of his retailing liquors on the day laid in the information. The information was filed in the same month of March. He admitted that the jury may find a general verdict, although the fact be not proved to have been done on the day laid in the information; but if the jury find specially, the court are bound to take notice of the fact as found.

Mr. Mason, for the United States. The day is not material. 2 Hawk. P. C. 335, § 81. A different day may be proved. 1 Hale, P. C. 361; 3 Inst. c. 104, Syer's Case, 230; Gilb. Ev. (Lofft, Dublin Ed. 1795) 870. The time laid in an indictment may be falsified to avoid a forfeiture.

THE COURT arrested the judgment on the ground that it did not appear by the verdict that the fact was committed before the information was filed.

VIRGINIA v. RIVERS. See Case No. 16,958.

Case No. 16,965.

VIRGINIA v. SMITH.

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

Circuit Court, District of Columbia. July Term, 1801.

INFORMATIONS—AMENDMENT.

An information may be amended by stating that the penalty accrued to the town instead of the commonwealth.

Information [against John Smith] for keeping a slaughter-house in Alexandria contrary to a by-law of this corporation.

Mr. Mason, for the United States, moved for leave to amend the information, by stating the penalty to accrue to the town of Alexandria, instead of the commonwealth. He stated it to be every day's practice, and cited 2 Hawk. P. C. 348; Rex v. Wilkes, 4 Burrows, 2527, 2566.

Mr. Simms and Mr. E. J. Lee, for defendant, agreed that informations might, at common law, be amended in the same manner as declarations, but contended that the amendment now proposed was such an one as could not be made in a declaration at common law. The amendment intended was matter of substance. 1 Bac. Abr. 102; Cope v. Marshall, Sayer, 234.

An amendment, alleging a new right of action, was refused. 1 Cromp. Prac. 105. A declaration against executor in debet and detinet shall not be amended. 1 Bac. Abr.

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

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

97, 98. An amendment ought not to be made after the term next after the filing of the declaration. 1 Wils. 149; 1 Cromp. Prac. 105. After plea no new count can be added. Sayer, 97, 151, 172; 1 Cromp. Prac. 106. In the case of Rex v. Wilkes, Lord Mansfield said no amendment in matter of substance ought to be made. The reason why he permitted an amendment in that case was, that the defence was not altered, nor the charge varied. If the amendment would make any difference in the judgment, it ought not to be admitted. The proposed amendment changes the parties.

Mr. Mason, in reply. The practice has been relaxed since the time of the authorities read by Mr. Lee. The proceedings in civil suits may be amended at any time before trial. The question, to whom the penalty is to accrue, has nothing to do with the offence, nor does it alter the plea. 2 Hawk. P. C. 397. The conclusion from the case in Hawkins is, that when a man is convicted of the offence, and the forfeiture incurred, if the judgment state the forfeiture as accruing to a wrong person, the judgment may be corrected. In the cases of King v. King and King v. Charlesworth, in Burrows' Reports, the amendments were of substance. Rex v. Holland, 4 Term R. 457, 458.

[See Case No. 16,967.]

KILTY, Chief Judge, and CRANCH, Circuit Judge, allowed the amendment to be made.

MARSHALL, Circuit Judge, contra. The grounds upon which the court allowed this amendment were, that it was not in a matter of substance. An information is in the nature of an indictment. The object is the punishment of the offender. The fact, therefore, is the substance of the charge, and the person to whom the benefit is to accrue is immaterial. It differs from an action of debt brought by the commonwealth for the penalty. There the right of action is in consequence of the clause designating to whom the penalty shall accrue. It is part of the plaintiff's title; and, if by law, the penalty did not accrue to the plaintiff, he could not recover. But, here the offender ought to be convicted whether the penalty accrue to the commonwealth or not.

Case No. 16,966.

VIRGINIA v. SMITH.

[1 Cranch, C. C. 46.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

INTOXICATING LIQUORS—ILLEGAL SALES.

The day of selling spirituous liquors is immaterial if proved to be within twelve months before filing the information. All the acts of selling before the filing of the information are parts of the same general offence of selling without license.

Information [against S. Smith] for selling spirituous liquors without license on the 10th August, 1798.

On the motion of Mr. Mason, attorney for the United States, THE COURT instructed the jury that the day is immaterial if proved to be within twelve months before filing the information; being of opinion that every act of selling before the filing of the information is part of the same general offence of selling.

Special verdict. Venire facias de novo awarded

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

Case No. 16,967.

VIRGINIA v. SMITH.

[1 Cranch, C. C. 47.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

MUNICIPAL CORPORATIONS—BY-LAWS OF ALEXANDRIA.

The by-laws of 1784 apply to the subsequent addition made to the town of Alexandria by the act of 1797.

Information [against John Smith] for keeping a slaughter-house within the limits of the town of Alexandria, contrary to a by-law of the corporation passed in 1784. The place where the slaughter-house was kept was not within the limits of the town at the time of passing the by-law, but was added to the town by an act of assembly of Virginia in 1797.

Mr. Mason, for the commonwealth, contended that when a new part is added to a town it becomes subject to all the existing laws of that town. The act of assembly of 1797 is express that such new part should be subject to the same regulations as the old.

Mr. Simms, for defendant. A penal law must be construed strictly. In the by-law of 1784, the word limits refers to the then existing limits, and the effect is the same as if it had said that no person should keep a slaughter-house between the Potomac and St. Asaph street, which was then the boundary of the town. If Maryland should be added to Virginia the penal laws of Virginia would not apply to Maryland.

Mr. Jones, on the same side. If a country, by cession or conquest, becomes annexed to another, it remains subject to its old laws until altered by its new sovereign.

Mr. Mason, in reply, was stopped by the court, who instructed the jury that the by-law of 1784 was in force in the addition to the town, and applied as much to that as to the original limits.

Special verdict. Venire facias de novo awarded.

[See Case No. 16,965.]

VIRGINIA v. TURNER. See Cases Nos. 16,970 and 16,971.

VIRGINIA v. WISE. See Case No. 16,972.

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

Case No. 16,968.

VIRGINIA v. ZIMMERMAN.

[1 Cranch, C. C. 47.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

CRIMINAL LAW—ARGUMENTS OF COUNSEL—JURY.

1. In a criminal prosecution, the court will not permit counsel to argue a point of law to the jury which has been decided by the court.

[Cited in U. S. v. Cottom, Case No. 14,873.]

2. If the jury, after having retired to consider of their verdict, return into court to re-examine a witness, neither party will be permitted to ask any question of the witness, nor to make any motion to the court in the presence of the jury.

Information for keeping a slaughter-house within the limits of the town of Alexandria, contrary to the by-law of 1784.

In the trial of Virginia v. Smith [Case No. 16,967], yesterday, for the like offence, the court decided that this by-law was in force in the addition to the town made by the act of 1797.

Mr. Jones, for the defendant, after informing the jury that they were constitutional judges of the law as well as of the fact in criminal cases, was proceeding to argue the same point of law before the jury, when

THE COURT stopped him, and said that the court having decided that point of law, he must not argue it before the jury.

See U. S. v. Cottom [Case No. 14,873.]

CRANCH, Circuit Judge, contra, observed that he held it to be an important point in favor of the liberties of the people that the jury, in criminal cases, had a right to decide the law as well as the facts. And if they were to decide the law, it seemed to follow that they had a right to hear the arguments of counsel upon the law; especially as the opinion of the court was not given in this, but in another case, before a different jury.

The jury having retired, asked leave to come again into court and re-examine the witnesses, which THE COURT permitted them to do; but informed the bar that in such cases neither party has a right to ask questions or to make any motion to the court in the presence of the jury.

Case No. 16,969.

VIRGINIA v. EVANS et al.

[1 Cranch, C. C. 581.] [1]

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

COMPETENCY OF WITNESSES—ACTION FOR USE OF COUNTY.

1. In an action for the use of a county, inhabitants of the county are competent witnesses for the plaintiff. The principal obligor is a competent witness for the sureties, upon a collateral issue, where the defendants plead separately in an action upon a bond with a collateral condition. And so one surety is a competent witness for another surety; but the sureties are not competent witnesses for the principal.

2. If a witness be surety for costs, the court will permit other security to be substituted, so as to remove the interest of the witness.

[This was a suit by the governor of Virginia, for the use of Loudon county, against Evans and others, his sureties.]

Debt on a bond conditioned to perform covenants respecting the building of a bridge at the county charge, in the county of Loudon, in Virginia.

Mr. Taylor and Mr. Youngs, for defendant, objected to an inhabitant of Loudon county as a witness, on account of his interest.

Mr. Swann, contra. The witness is not directly interested, or if he has any interest it is too small, and remote. See Rex v. Carpenter, 2 Show. 47; Gilb. Ev. 240; The Weavers of Norwich's Case, Trials per Pais, 329; Alexandria v. Brockett [Case No. 181], in this court, November term, 1807.

THE COURT (DUCKETT, Circuit Judge, absent), CRANCH, Chief Judge, having some doubt, admitted the witness, with leave to move for a new trial, if the verdict should be for the plaintiff.

THE COURT admitted also, as a witness, Mr. Lyons, an inhabitant of Loudon county, and one of the county commissioners who contracted with Evans for the bridge.

Mr. Taylor and Mr. Youngs, for the defendant, objected and took a bill of exceptions.

The three defendants, Evans, Lewis, and Thomas, pleaded severally, and the defendants' counsel offered Evans as a witness for Lewis and Thomas.

Mr. Swann, for the plaintiff, objected that it is a joint suit.

Mr. Taylor. The plea is, that the articles are not the same to which the bond alludes, and Evans is competent to prove that fact on that issue.

THE COURT (DUCKETT, Circuit Judge, absent) admitted Evans as a witness for Lewis, on the issue as to the identity of the articles of agreement, and referred to the cases of Harper v. Smith [Case No. 6,092], July, 1808, in this court, and Riddle v. Moss [Id. 11,809], in this court, and Pawling v. U. S., in the supreme court of the United States, 4 Cranch [8 U. S.] 219.

The jury not being able to agree at July term, 1809, were discharged, and the cause was continued.

This cause having again come to trial,—

Mr. Swann, for plaintiff, offered Joseph Smith as a witness.

Mr. Youngs, for defendants, objected, that Mr. Smith owned two or three acres of land in Loudon county. If plaintiff obtains judgment, the amount will go to alleviate the county taxes. Objection overruled.

John Evans, the principal obligor, and John V. Thomas, one of the sureties, were offered as witnesses for Richard Lewis, another of the sureties.

E. J. Lee, for plaintiff, objected that they are

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

joint defendants, and although they have pleaded severally, they are interested. This court at the last term, allowed Evans to be a witness, upon what was erroneously supposed to be the opinion of the supreme court in the case of Pawling v. U. S., 4 Cranch [8 U. S.] 219. That court did not give an opinion on that point.

Mr. Youngs, contra. The witness is clearly chargeable, let the suit against Lewis go one way or the other. The verdict, whether against or for Lewis, will not be evidence for or against Evans.

Mr. Swann, in reply. If one defendant can swear for another, there is no chance of justice.

THE COURT said, they had in several cases decided that one joint obligor may be a witness for another when they plead separately. As to one swearing for another, perjury may be committed in any case; but the question is, whether there is such an interest as to disqualify the witness. The principal has no interest to exonerate his sureties, because he himself is liable at all events, either to the governor of Virginia, or to the sureties. But the sureties are not witnesses for Evans, because if they can prove he has performed all the articles of the agreement they discharge themselves.

John V. Thomas, another of the sureties, was examined in behalf of Lewis on the issue joined by the other surety, Lewis, but not on the issue on the part of Evans. The plaintiff's counsel objected, but the objection was overruled.

Mr. Thomas Swann, who was surety for the costs, was offered as a witness on the part of the plaintiff. This was objected to by the defendant.

E. J. Lee offered to become surety for the costs, which had accrued or may accrue, and moved that Mr. Swann may be discharged, to which the court assented, and such an order having been made, Mr. Swann was permitted to testify.

Thomas Davis, another of the sureties, was examined in behalf of Lewis and Thomas, but not of Evans.

Verdict for the defendants, Lewis and Thomas, on the issues joined on their part; and for the plaintiff on the issues joined on the part of Evans the principal.

Case No. 16,970.

VIRGINIA v. TURNER.

[1 Cranch, C. C. 261.] [1]

Circuit Court, District of Columbia. Nov. Term, 1805.

PAYMENT—NONNEGOTIABLE ORDER.

An order payable out of a particular fund, and not negotiable, is not payment of a preceding debt.

Debt on official bond as town-sergeant; breach, non-payment of fees put into his hands to collect for Bedinger; general replication and issue.

A copy of a list of fees, dated 5 May, 1800, with Turner's acknowledgment, was produced. At the bottom of the list was the following order:

"Sir:—Pay Mr. Russel, out of the sale of negroes, fifty dollars, and return Groverman's note. Charles Turner. 26th December, 1801. Wm. Turner."

Mr. Youngs, for defendant, prayed the court to instruct the jury, that if they should be of opinion, from the evidence, that Russel was the authorized agent of Bedinger, and that William Turner was the deputy-sergeant under Charles Turner, and that the order had remained in the hands of Russel, from its date to this day, then the order was a payment, unless the plaintiff can show that he has used due diligence to get the money from William Turner, and failed.

THE COURT refused to give the instruction, because it was not a bill of exchange, and being payable out of a particular fund, was not negotiable; and there is no evidence of the terms or conditions on which it was received by Russel, nor that it was agreed to be received by Russel on any terms; and it being merely an order by the principal on his deputy, is no more than an order on himself.

[See Cases Nos. 16,971 and 16,972.]

Case No. 16,971.

VIRGINIA v. TURNER.

[1 Cranch, C. C. 286.] [1]

Circuit Court, District of Columbia. March Term, 1806.

SHERIFFS—LIABILITY OF SURETIES.

The sureties of a sheriff in Virginia are not liable for officers' fees, unless the account of the same shall have been delivered to the sheriff for collection before the first of March, according to the act of assembly of December 19, 1792, p. 219, § 11.

Debt on sheriff's bond; plea, conditions performed; replication, that on the 5th of May, 1800, one Bedinger, clerk of Berkley county, put into Turner's hands, to be collected and accounted for according to law, tickets of fees due to Bedinger as clerk amounting to $175 and 32 cents, for which fees Turner was bound to have accounted before the first of September ensuing, and to have paid over to Bedinger, which he did not do. To this replication there was a general rejoinder and issue, and verdict for the plaintiff.

FITZHUGH, Circuit Judge. By Laws Va. p. 217, § 7, no fees are payable until there shall be produced to the person chargeable, an account in writing, &c.; by section 11, the clerks shall annually, before the first of

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

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

March, deliver to the sheriff their accounts of fees, &c.; by section 12, the sheriff is to receive such accounts and collect, &c., from the persons chargeable, and if such persons, after the said fees shall be demanded, shall refuse or delay to pay till after April 10th, in every year, the sheriff may distrain; by section 13, the sheriffs shall, "on or before the last of May" (afterwards 1st September) "annually, account with the clerks for fees put into their hands to collect pursuant to this act."

The law then obliges the sheriff to account, on or before 1st September, for fees put into his hands before 1st March, but these fees were not put in before the 1st March. Therefore, by that law, he was not bound to collect or account for them before the 1st September, the not doing which, is the breach assigned. The replication, indeed, charges that he never accounted, but the condition of the bond is, that he shall account at such times as are limited by law; if no time is limited, there can be no breach of that part of the condition. The fees not being put into his hands before 1st March, he was not bound to receive the list, or if he did, he was not bound (because he had no power) to collect. If collected, it was by him as a private person, and not in his official character; and if, after collecting, he had refused to pay, it was no breach of his official duty so as to charge his sureties. The replication, therefore, does not assign a breach of the condition of the bond; the issue was immaterial, and the judgment must be arrested.

[See Cases Nos. 16,970 and 16,972.]

Case No. 16,972.

VIRGINIA v. WISE et al.

[1 Cranch, C. C. 142.] [1]

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

SHERIFF'S BOND—EVIDENCE.

1. In debt on a sheriff's bond, his return upon an execution that he had satisfied the plaintiff, is not evidence for the defendants. Upon a breach assigned in not paying money received upon a fi. fa. the plaintiff must prove that the sheriff received the money before the return day of the execution.

2. If the plaintiff produce the return as evidence of the receipt of the money, it is also evidence of the payment of it to the plaintiff, it being so stated in the return.

[Suit by the governor of Virginia against Wise and others, sureties of C. Turner, town-sergeant.]

Debt, on the official bond of the town-sergeant. The breaches assigned were in not paying over to the plaintiff money received upon sundry executions.

THE COURT refused to suffer the defendants to produce in evidence the return of the town-sergeant upon the executions, in which he stated that he had satisfied the plaintiff.

THE COURT also, on the motion of Mr. C. Lee, for the defendant, instructed the jury that the plaintiff must prove that the sergeant received the money before the return day of the execution; because after that day he had no authority to receive it.

Mr. Taylor, for plaintiff, offered the execution-book as evidence of the return of the execution, and of the receipt of the money by Turner, and insisted that the word "satisfied" was a part of the return, which he was not authorized to make.

But THE COURT instructed the jury that if the return was produced as evidence of the receipt of the money, it must be also admitted as evidence of the payment over to the plaintiff.

[See Cases Nos. 16,970 and 16,971.]

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

VIRGINIA & G. H. WATER CO. (COLE SIL. MIN. CO. v.). See Cases Nos. 2,989 and 2,990.

Case No. 16,973.

VIRGINIA & M. STEAM NAV. CO. v. UNITED STATES.

[Taney, 418.] [1]

Circuit Court, D. Maryland. April Term, 1840.

STEAMBOATS — INSPECTION OF BOILERS — ACTION AGAINST CORPORATION—CORPORATE NAME—WAIVER—ADMIRALTY JURISDICTION.

1. The proper construction of the act of congress of the 7th July, 1838 [5 Stat. 288], in relation to steamboats, is, that more than six months must not elapse after one examination of a steamboat's boilers, before another is made.

2. In a proceeding under that act, against a steamboat, to recover the penalty incurred by carrying goods and passengers, without having had her boilers inspected within the preceding six months, the corporation owning the vessel appeared as claimants, by the name of "The Virginia and Maryland Steam Navigation Company," but their correct corporate name was "The Virginia and Maryland Steamboat Company;" the decree of the district court was, "that the owners of the steamboat Jewess forfeit and pay to the United States the sum of $500, one-half to the use of the informer; and that the said steamboat, her tackle, apparel and furniture be sold," &c.: *Held*, that as the corporate owners of the steamboat had voluntarily appeared as claimants, the corporation, under the name by which it appeared (even though the wrong one), were parties to the suit, and no objection could be taken to the decree for want of process against them.

3. But that the decree, so far as it was against the owners, was erroneous, by reason of the form of the proceeding.

4. The penalty imposed by the act of congress could not be recovered from the owners, in an admiralty proceeding, by libel.

5. The mode of recovering the penalty from them, prescribed by the 11th section of the act, was by suit or indictment, according to the forms of the common law.

6. So far as it directed a sale of the vessel, the decree was correct.

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

Appeal from district court of the United States for the district of Maryland.

In admiralty.

John Glenn, for appellant.

N. Williams, U. S. Dist. Atty.

TANEY, Circuit Justice. This is an appeal from the decree of the district court, in a proceeding under the act of congress of 7th July, 1838, in relation to steamboats. A libel was filed by the district attorney of the United States, in the district court, on the 17th of June, 1839, charging that the steamboat Jewess, belonging to the district of Baltimore, transported goods and passengers from Baltimore to Norfolk, without having had her boilers and machinery examined within six months preceding that time, whereby the owners of the steamboat (who were unknown to the district attorney) had forfeited the sum of $500, one-half to the informer; and for which sum the said steamboat was liable. The libel then prays that the said vessel may be seized, condemned and sold, and the proceeds brought into court to be distributed according to the practice of the court and the act of congress.

Upon this libel, process was issued, in the usual form, against the vessel, and she was accordingly seized by the marshal; whereupon, the Virginia and Maryland Steam Navigation Company appeared in court, and put in their claim and answer, denying that the Jewess had transported goods or passengers, without having had the boilers and machinery inspected once in every six months.

Upon the hearing in the district court, at September term, 1839, it was decreed by the court, "that the owners forfeit and pay the sum of $500, and that the steamboat be sold, and the proceeds brought into court to pay the said forfeiture and costs; the residue, if any, to be subject to the future order of the court." [Case unreported.]

It appears from the testimony, that the boilers and machinery were regularly inspected 8th December, 1838, and that there had been no subsequent inspection before the 15th June, 1839, at which time, goods and passengers were transported, as detailed in the libel.

Two objections have been taken to the decree: (1) That the time had not elapsed within which the owners were bound to have the inspection made: (2) That the decree is against the owners of the Jewess, as well as against the vessel, and that in the form of the proceedings adopted by the district attorney, the penalty imposed upon the owners cannot be recovered.

There is no foundation for the first objection. The argument on the part of the claimant is, that the words used in the act of congress, in relation to the times of inspection, mean that the said inspection should be made once in each half year; and that, if an examination is made once in each six months of the year thus divided, whether it be early in the period of six months, or late in it, the law is complied with and no penalty incurred.

The words of the law require the examination to be made "at least once in every six months," that is to say, more than six months must not elapse after one examination, before another is made. This is evidently the meaning of the words used in the law; there must not, at any time of the year, be a period of six months within which an examination has not been made. The construction of the claimants would defeat the object of the law; for, according to that construction, the two examinations in the year might be made within a week of each other (the first near the end of the first half year, and the second near the beginning of the second half year), and the boat might continue running for more than eleven months without any examination of her boilers and machinery. Neither the words nor the objects of the act of congress countenance such a construction.

The second objection presents a question of more difficulty. Undoubtedly, no decree can be had against the owners personally, or as a corporation, unless they are made parties to the proceedings in the character in which they are to be charged. They are not made parties by the libel, either individually or as a corporation, and no process was prayed for or issued against them; but the Jewess is the property of the corporation, which is the appellant in this court; and that corporation appeared in the district court, and voluntarily became a party to the proceedings there, and was heard in the defence. It is true, they appeared by a wrong name, their true name being "The Virginia and Maryland Steamboat Company;" but the error they have made in their corporate name, will make no difference, for by appearing by the name of "The Virginia and Maryland Steam Navigation Company," they admit that to be their name, and under that name the corporation is a party to the suit; and having voluntarily appeared, no objection to the decree can now be taken on account of the want of process against them.

But the strong objection to that part of the decree, which imposes the penalty on the corporation, arises from the form of the proceeding in which the decree is made. The penalty of $500 cannot be recovered from the owners, in an admiralty proceeding by libel; the mode of proceeding, in order to recover the penalty from them, is by suit or indictment, proceeded in according to the forms of the common law: this is the mode of proceeding provided for in the eleventh section of the law of congress; and in the form adopted by the district attorney, no judgment or decree for the penalty can be obtained against the owners of the boat.

The decree of the district court is errone-

ous, therefore, in this respect; but, so far as it directs the sale of the vessel, the decree is correct; for the penalty for which the boat is liable, may be recovered by a proceeding in rem against her, without any proceeding against the owners, or any decree against them; the case of The Palmyra, 12 Wheat. [25 U. S.] 14, is conclusive upon this point.

The decree of the district court must, therefore, be reversed; but this court, proceeding to give such a decree as ought to have been given in the district court, will order the Jewess to be sold, and the proceeds brought into court, to be distributed according to law.

VIRGINIA & T. R. CO. (TYSON v.). See Case No. 14,321.

VIRGINIA BONDS (UNITED STATES v.). See Case No. 16,626.

VIRGINIA COAL & IRON CO. (BRANT v.). See Case No. 1,814.

VIRGINIA FIRE & MARINE INS. CO. (COHN v.). See Case No. 2,970.

VIRGINIA FIRE & MARINE INS. CO. (DOOLEY v.). See Cases Nos. 3,998 and 3,999.

VIRGINIA FIRE & MARINE INS. CO. (LEVY v.). See Case No. 8,304.

VIRGINIA GOLD CASES. See Case No. 16,335.

VIRGINIA PROTECTION INS. CO. (KELLY v.). See Case No. 7,677.

Case No. 16,974.

The VIRGINIA RULON.

[13 Blatchf. 519.] [1]

Circuit Court, E. D. New York. Aug. 16, 1876.

WHARFAGE—LIEN—ADMIRALTY JURISDICTION.

1. Under the statute of New York (Act May 21, 1875; Laws N. Y. 1875, p. 482) fixing the rates of wharfage to be paid by vessels, a vessel which makes fast to two distinct landing places must pay accordingly.

[Distinguished in The City of Hartford, Case No. 2,751.]

[Cited in Walsh v. New York F. D. Dock Co., 77 N. Y. 454.]

2. If she leaves a wharf without paying the wharfage due, she becomes liable, under said statute, to pay double the rates established by the statute.

3. The added amount is not a penalty, but is a wharfage rate, and the statute gives a lien on the vessel for the entire sum, including the added amount.

[Cited in The J. F. Warner, 22 Fed. 345.]

4. Such lien is enforceable in admiralty against the vessel.

[Cited in The J. H. Starin, Case No. 7,320.]

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

In admiralty.

Beebe, Wilcox & Hobbs, for libelants.

D. & T. McMahon, for claimant.

HUNT, Circuit Justice. On the 9th of October, 1875, the schooner Virginia Rulon made fast to and used the pier at 35th street, on the North river, New York, and continued to be made fast to the said pier until the 15th of October, when she left. The said vessel was, at the same time, and for the same time, made fast to the bulkhead adjoining to said pier, belonging to L. R. Roberts. She was loaded with lumber, and, in discharging her cargo, she made use both of said pier and said bulkhead, landing a part thereof over her bow on the bulkhead and the larger part over her side on the pier. She left said pier without paying, or tendering the payment of, wharfage. There was due for such wharfage, before she left the pier, the sum of $26.40.

The statute of New York (Act May 21, 1875; Laws 1875, p. 482) fixed the rate to be paid by a vessel "that uses or makes fast to any pier, wharf or bulkhead." This supposes that a vessel uses but one only of these conveniences for discharging her cargo. If she finds it for her interest to use more than one, she may do so, and must pay accordingly. A large vessel may find it much to her interest to use at the same time several piers or bulkheads. Indeed, her great size may compel her to cover the space of and use several at the same time.

In this case, the Rulon not only made fast to two distinct landing places, but actually made use of both for unloading her cargo, discharging a part upon the pier and another part upon the bulkhead. If the labor usually done in ten days is compressed into five days, there seems nothing unreasonable in the suggestion, that a compensation for ten days' service should be paid. The same is true of the use of two wharves for five days instead of the use of one wharf for ten days. The claim of the owner both of the pier and of the bulkhead seems to be reasonable, and in accordance with the statute. I think the vessel is liable to both.

The statute further provides, that "every vessel that shall leave a wharf," &c., "without first paying the wharfage or dockage due thereon, after being demanded," "shall be liable to pay double the rates established by this act." In this case the wharfage was demanded by the authorized agent of the libellants, and was not paid. Neither was it tendered to either of the parties claiming it. The "vessel" thereupon became and is "liable to pay double the rates established by this act." Instead of being $26.40, the wharfage rate thereupon became and was $52.80.

It is objected that there is no lien for the wharfage, which can be enforced in this court, and, especially, that there is no lien for the increased amount. By the statute already quoted, the "vessel" is specifically made liable for double the amount of the wharfage. In other words, this increased amount is made a lien or incumbrance upon the vessel. The declaration, that the vessel shall be liable for the amount, is an imposition of a lien for that purpose. The use of the word "lien" is not essential to the creation of a lien. When this vessel departed

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

without paying the amount of $26.40 then due, there became payable the sum of $52.80, not as a penalty, but as wharfage rates. The "vessel" became liable to pay this sum, and it became a lien for wharfage under the statute. The case of The Lottawanna, 21 Wall. [88 U. S.] 558, holds that liens of this character may be enforced in the courts of admiralty of the United States. I think the judgment is right, and should be affirmed.

Case No. 16,975.

The VIRGO.

[7 Ben. 495.] [1]

District Court, E. D. New York. Nov., 1874.[2]

COLLISION OFF THE JERSEY COAST—SCHOONER AND STEAMER—IMPROPER CHANGE OF COURSE —FAILURE TO STOP.

1. A schooner, coming up the Jersey coast towards New York, came up into the wind and hove her lead, on seeing a light which proved to be the masthead light of the steamer Virgo coming down; the schooner thus showed a red light to the steamer and the steamer ported her helm to go astern of the schooner. The schooner then filled away again, directly across the new course of the steamer and a collision resulted. *Held*, that the schooner was in fault, no necessity for heaving the lead or changing her course, when the steamer was approaching, being shown.

2. The steamer was not in fault for not stopping when the schooner changed her course, the responsibility of stopping or going ahead being forced upon her by the false manœuvre of the schooner.

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

In admiralty.

Scudder & Carter, for libelants.

Sherwood & Howland, for claimants.

BENEDICT, District Judge. This action is brought to recover damages for injuries sustained by the schooner Speculator in a collision with the steamship Virgo, which occurred off the Jersey coast, on the night of the 11th of September, 1872. The steamer was at the time bound to the southward from the port of New York. The schooner was bound from San Blas to the port of New York. At the place of collision the Delaware light ship bore west by south, about 20 miles distant. The wind was easterly a good breeze; the night somewhat dark. The course of the steamship was south by west half west. The schooner was upon her starboard tack, sailing close-hauled upon the wind.

The evidence, although somewhat meagre and characterized by the absence of the testimony of important witnesses, discloses clearly that, when the steamship came within seeing distance of the schooner's lights, the schooner was displaying towards the steamship a red light. It is supposed by the advocate of the schooner, and no doubt correctly, that this was owing to the fact that the schooner came up into the wind at the time the masthead light of the steamship was seen, when the lead was thrown, because, as the mate says, he thought the light might be a light on shore. The steamship, of course, could not know what was transpiring on board the schooner, and her right as well as her duty was to act upon the assumption that the course of the schooner was correctly indicated by the red light which she displayed towards the steamship. The course thus indicated by the schooner's light, was across the course of the steamship from starboard to port. The steamship, naturally and properly, therefore ported to pass astern of the schooner, and she would, by this means, have avoided her had the direction indicated by the red light been maintained. But the schooner, after heaving the lead, filled away again upon the wind, and then presented her green light to the steamship, taking a course directly across the course which the steamship had taken upon seeing the red light. Such action on the part of a sailing vessel, in the presence of a steamship in the night, is negligence. No good reason is seen for heaving the lead when it was done, and, if such necessity existed, and it was also necessary to come into the wind for that purpose, it was not necessary, but highly improper, again to fill away across the course of a steamship then approaching, whose course was plainly visible. I have no difficulty, therefore, in holding the schooner in fault. The only question in the case is, whether the steamship was not in fault for not stopping in time to allow the schooner to cross her bows, notwithstanding the fault of the schooner in being upon that course. No effort was made to stop the steamer until the blow, but the evidence does not convince me that this was a fault. It is not shown that the distance between the vessels, at the time the schooner filled away, was sufficient to enable the steamship to avoid her by stopping. The sudden change of the schooner's direction cast upon the pilot of the steamship the responsibility of instantly deciding whether he would be most likely to clear her by going ahead or by stopping. Upon the evidence I cannot say that it was then possible to avoid her in any way; and if it could now be seen that the schooner would have been cleared by a few feet, had the steamship stopped instead of going ahead, I should still be unwilling to hold the steamship responsible for an error of judgment in a determination thus forced upon her by a false manœuvre on the part of the schooner. I must, therefore, dismiss the libel, and with costs.

[On appeal to the circuit court the judgment of this court was affirmed. Case No. 1,831.

[For a decision granting libellants' motion to file new security for value, in the circuit court, see Case No. 16,976.]

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

[2] [Affirmed in Case No. 1,831.]

Case No. 16,976.

The VIRGO.

[13 B'atchf. 255.] [1]

Circuit Court, E. D. New York. Feb. 19, 1876.

ADMIRALTY PRACTICE—STIPULATION FOR RELEASE —INSOLVENCY OF STIPULATORS— NEW SECURITY.

1. On a libel in rem, in the district court, against a vessel, the vessel was there discharged, on a stipulation for value. The libel was dismissed, and an appeal was taken by the libellant to this court. Thereafter the stipulators for value became insolvent, and the libellant moved, in this court, that the claimant file new security for value: *Held*, that the motion must be granted, and that the court had the power to require the claimant to furnish new stipulators, and to enforce such requirement.

[Cited in The City of Hartford, 11 Fed. 91.]

2. The effect of the appeal was to leave the libellant with the same rights in respect to stipulators as if no decree had been rendered.

3. The absence from the general admiralty rules of the supreme court, and from the rules of this court, of any provision for the case of insolvent stipulators in actions in rem, furnishes no reason for not affording the relief sought.

[Cited in Empresa Maritima a Vapor v. North & South American Steam Nav. Co., 16 Fed. 505.]

4. Part of the obligation which a claimant in an action in rem assumes when he receives at the hands of the court property in its custody, by substituting therefor personal security, by way of a stipulation for value, is to maintain his stipulation good, in the matter of the sureties.

[Cited in U. S. v. Ames, 99 U. S. 42; The City of Hartford, 11 Fed. 91; The Haytian Republic, 8 C. C. A. 182, 59 Fed. 478.]

In admiralty.

Scudder & Carter, for libellant.

John Sherwood, for claimants.

BENEDICT, District Judge. This is a motion on the part of the libellant to compel the claimants to file new security for value, the stipulators who gave the stipulation for value in the district court, upon which the vessel was there discharged, having become insolvent. In the district court the libel was dismissed. [Case No. 16,975.] From that decree an appeal has been regularly taken by the libellant, and the cause has been duly transferred to this court, where it is now pending, upon appeal.

The claimants do not deny the insolvency of the stipulators for value, but object to being required to furnish new stipulators, upon the ground, first, that, by the decree of the district court, the libellant was found not entitled to recover any sum, which decree, it is said, absolves the claimants from liability, until reversed. But, such is not the effect of a decree made in the district court, from which an appeal is duly taken. On the contrary, the appeal renders the decree inoperative, and leaves the libellant with the same right, in respect to stipulators as if no decree had been rendered.

It is also objected, that neither the admiralty rules of the supreme court, nor those of the circuit court, provide for the case of insolvency of stipulators for value, in actions in rem. As to this objection, I remark, that, although it be true that the admiralty rules of the supreme court appear to be confined to actions in personam, it is competent for the court below to adopt rules not in conflict with the general admiralty rules of the supreme court, in regard to matters not covered by those rules. This has often been held, and, accordingly, the rules of the district court in this district, and also in the Southern district, have provided for the case of insolvency of stipulators in actions in rem. The absence from the general admiralty rules, of any provision for the case of insolvent stipulators in actions in rem, furnishes, therefore, no reason for not affording the relief here sought. Nor does the absence of any rule in the circuit court furnish such reason. The case has not been provided for in the rules of the circuit court, doubtless, because cases requiring such a rule in the circuit court are so rare, the present being the first one which I have known of. But, in the absence of a rule, the court has power to remedy the omission by order made in the cause.

Again, it is contended, that the stipulation for value given in the district court upon the discharge of the vessel, becomes a substitute for the vessel, and the sole substitute, from which it is argued, that no power exists to require any other or additional security; and the absence of any provision in the rules for cases in rem is referred to as indicating an absence of such power. But, while the stipulation for value is a substitute for the vessel, it is not the sole substitute, in such a sense as to forbid any change. If it were so, additional security could never be required when once the vessel is released; and yet the right to require additional sureties to the stipulation in the district court is declared by the rules of the court. This power has been exercised without question where one stipulator has desired to be released and another substituted, in the district court. This right has not been disputed in the district court, and, if it exists at all after the release of the vessel, it exists as well after an appeal as before, and as well when the surety has become insolvent as when a new stipulator is desired to take the place of another. I doubt not, therefore, that it is proper to say that part of the obligation which claimants in actions in rem assume, when they receive at the hands of the court property in the custody of the court, by substituting therefor personal security, by way of a stipulation for value, is to maintain their stipulation good, in the matter of the sureties.

In the present case, therefore, the libellant has the right to ask the claimants to fulfil that obligation, by furnishing new stipulators in place of those conceded to be insolvent, and, in case of their failure so to do, to

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

ask that their defence be stricken out, or the performance of their obligation be otherwise enforced.

VIRGO, The (BRENNAN v.). See Case No. 1,831.

VIVIAN, The ALICE. See Case No. 197.

Case No. 16,977.

The VIVID.

[3 Ben. 397.] [1]

District Court, E. D. New York. Sept., 1869.

ADMIRALTY PRACTICE—BONDING—FREIGHT.

Where several libels had been filed against a vessel, to recover amounts exceeding her value, and the owners applied to have her discharged, on their giving one stipulation in the amount of her value, *held*, that the amount of the freight was not to be included in the stipulation.

This was an application on the part of the claimants of the vessel, against which several libels had been filed, to recover amounts in all exceeding her value, to have the vessel discharged from all the claims, on their giving one stipulation in her value. The libellants claimed that the amount of the stipulation to be given should be equal to the value of the vessel and the freight.

Wm. D. Booth, for libellant.

Ruggles & Felt, for claimant.

BENEDICT, District Judge. The libellants are not entitled to have the freight included in the stipulation, there being no proceeding against the freight. The claimants may have an order directing publication of notice, as heretofore required in the case of Place v. The City of Norwich [Case No. 11,202], and the hearing on the petition must await the return of the order of publication.

[See Case No. 16,978.]

Case No. 16,978.

The VIVID.

[4 Ben. 319; [1] 14 Int. Rev. Rec. 163.]

District Court, E. D. New York. Oct., 1870.

DAMAGE TO CARGO—UNSEAWORTHINESS—EVIDENCE—PROTEST—SURVEY.

1. A bark was loaded with sugar and molasses in Porto Rico, and lay in the harbor apparently right, but was found, one morning, to have seven feet of water in her hold. Her cargo was discharged, and she was re-caulked above her copper, and the cargo which had not been destroyed was re-shipped, and she brought it to New York, where libels were filed against her to recover for the loss and injury to the cargo. The defence was set up in the answers, that a heavy swell on the night in question had opened her seams, and broken the pipe which led to the water closet, and thus admitted the water, so that the loss was occasioned by a peril of the sea. The witnesses for the bark, while they testified to the heavy rolling of the vessel, testified also that no water came in through the seams. *Held*, that this discrepancy between the answer and the evidence in behalf of the bark, together with the fact that the broken water-closet pipe was not discovered till after the arrival of the bark in New York, and that the protest made no mention of any heavy sea or heavy rolling of the ship, threw discredit upon the evidence of the rolling.

2. When goods are lost by the vessel, on which they are shipped, springing a leak while at anchor in a harbor, the shipowner must show some stress of weather, or other circumstance, sufficient to account for such a leak in a vessel of ordinary strength.

3. On the evidence, no such cause for the leak was shown in this case, and the leak was caused by the unseaworthy condition of the bark.

4. The rules of evidence in courts of admiralty are not as stringent as in courts of common law.

5. Where a copy of a protest was offered in evidence, without any proof of its correctness as a copy, but it was proved that a protest was made at the time and place where the copy purported to have been made, and that it was signed by the mate of the bark, and the mate, though called as a witness in court, was not asked in relation to the truth of the copy, and did not dispute it, *held*, that the copy was admissible in evidence.

6. A copy of a survey, not purporting to have been made by any one connected with the vessel, was excluded as evidence, no witness able to prove or disprove its correctness being called, or shown to be within reach.

In admiralty.

Wm. D. Booth, for libellants.

Ruggles & Felt and E. C. Benedict, for claimants.

BENEDICT, District Judge. These actions are brought to recover of the bark Vivid the value of certain sugars, shipped on board that vessel in Ponce, Porto Rico, to be transported to New York under bills of lading in the ordinary form, and which were destroyed under the following circumstances: The bark, a vessel ten or twelve years old, having been absent from New York without repairs for about a year, was loaded in Ponce for New York with a cargo consisting of 505 boxes of sugar, 130 hogsheads of molasses, and 30 tons of lignum vitæ wood. Her loading was completed on the 4th day of June, 1869, when at nightfall she lay at anchor in the harbor, ready for sea, drawing fifteen feet of water, and apparently tight. The next morning, at daylight, she was found to have some seven feet of water in her hold. The pumps were set to work; but it was found necessary to discharge all the cargo between decks before the leak was got under. It was then determined to recaulk her, and accordingly the whole cargo was discharged, the vessel caulked above her copper. and the portion of the cargo not destroyed by the water which had come into the vessel was reladen, and the bark proceeded with it to New York, where she arrived in safety without further damage. The value of the sugars thus destroyed amounted to about $35,000, while the value of the vessel is but about $2,000. This loss, as far as the value of the vessel will go towards it, the libellants now seek to recover, upon the ground that the vessel, when she was loaded in Ponce, was unsea-

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

worthy, and the loss solely attributable to her weak condition. The defence is that, on the night of the 4th of June, after the cargo was in, the vessel was caused to roll and labor heavily in the trough of the sea, by reason of a heavy swell which arose, whereby the seams of the vessel were opened, and the pipe leading from the water closet to the outside of the vessel broken, and thus the water was admitted, which dissolved and destroyed the sugars; and it is accordingly insisted that the loss is attributable solely to a peril of the sea. To prove this defence, the claimants have introduced three witnesses, the mate and the steward of the bark, and a shipwright who examined her after she arrived in New York. The mate and steward both testify to a heavy sea on the night of the 4th of June, and that the bark rolled heavily in it—as the mate says, so heavily that he was afraid for his masts, and put rolling tackle on his main yard. The mate, steward and shipwright likewise testify to the good condition and tightness of the vessel when the cargo was taken in; and the shipwright proves that, on repairing the vessel in New York, the water-closet pipe was found partly torn away from the flange, where it is fastened to the outside of the vessel; which point was below the water line as the bark was first loaded in Ponce, but was not below that line on the voyage to New York.

Of this evidence, a necessary part for a successful defence is that which goes to prove an excessive rolling of the bark in a heavy sea on the night of the 4th of June. But this part of the claimants' evidence is rendered doubtful, and open to the suspicion of being at least highly colored, by the other portion of the testimony of the same witnesses in regard to the condition of the vessel, wherein they all declare that no water was taken in through the seams of the vessel. This declaration is made emphatically; and, upon such evidence standing alone, it might have been inferred that the breakage of the water-closet pipe was the cause of the leak, and the vessel accordingly discharged from responsibility, upon the ground that a vessel able to endure without any other injury such a sea as the mate describes, when loaded as this vessel was, was manifestly seaworthy. And yet, in contradiction of this testimony, the answer is found to aver that the vessel's seams were opened, and water thus admitted to the cargo. The shipwright is wrong then when he swears that the condition of the oakum, when he examined it in New York, showed that water had not passed through the seams. And if the seams were opened, as the answer admits, it is difficult to understand how the mate and steward could have examined the vessel's seams as carefully as they describe, without finding places open. It is also probable that the break in the water-closet pipe, which was first discovered in New York, had not occurred at the time of the leak, as it would hardly have remained undiscovered when the vessel was surveyed and caulked in Ponce, after the leak, if then in existence.

The doubt thus cast upon their account of the heavy sea, which the mate and steward describe, is greatly strengthened by the fact, that the protest makes no mention whatever of any heavy sea at the time of the leak, and does not allude to any heavy rolling of the ship as the cause of the leak. Such an omission in a protest is significant; for, to use the language of Judge Hopkinson (Davis v. The Seneca [Case No. 3,650]), "in protests, the seas are always mountain high, and the wind never less than a hurricane." I can conceive no reason for omitting from a protest any allusion to the fact which is now claimed to have been the cause of the loss, and to have made a protest necessary. Against witnesses thus in conflict with the answer upon a material point (the master of the vessel not being produced, or his absence accounted for), three marine inspectors are produced by the libellants, who examined the bark after her arrival in New York, when she had sustained no injury since the leak in Ponce, who declare her to have been unfit to sustain such a cargo, and unseaworthy. She was extensively repaired before any rate could be given her, and then the rate was A 2¼. The condition of the timbers and planks of the vessel, as described by these witnesses, confirms the opinion which they express; and they are to some extent corroborated by the testimony of the shipwright, called by the claimants, who, while he says that no water could come through the seams, is far from being satisfied that the tear discovered in the water-closet pipe would account for the quantity of water the bark made. Upon a careful weighing of this testimony, I am of the opinion that the claimants have failed to show any stress of weather sufficient to cause the leak in question, had the bark been reasonably tight and staunch above her copper; and, in the absence of such proofs, it is the reasonable inference, that the loss arose from the insufficiency of the vessel. There was, at the time, no wind of any consequence; the vessel was in a harbor, and at her anchorage. She, doubtless, was able to carry a moderate cargo, but when filled to the depth of fifteen feet with sugar and molasses, she was unable to endure, without opening her seams, what I conceive to have been no more than an ordinary occurrence, such as any vessel would be expected to endure.

The law requires of the shipowner a vessel reasonably calculated to endure the ordinary strain of the navigation in which she is engaged. If his vessel be reasonably sufficient for the voyage, he is not to be held liable, by showing that a stouter ship would have outlived the peril (Macl. Shipp. p. 459); but when goods are lost by his vessel's springing a leak while at anchor in a harbor, he must show some stress of weather, or other circumstances sufficient to account for such a leak in a vessel of ordinary strength. The effort to show this, in the present case, has failed to satisfy my mind, and I must, accordingly, hold the vessel liable for the loss in question.

In arriving at this conclusion, I have attached some importance to the fact, that the

protest omits any allusion to any heavy sea, and I must, therefore, add my decision upon the question of evidence, which was raised by the objection of the claimants to the introduction of the protest in evidence. The document offered is not the original protest, but is simply a paper purporting to be a copy of a protest, and it is not accompanied with any proof of its correctness as a copy. Upon this question of evidence, I remark that, because of the great distinction which prevails between the description of causes which come under the cognizance of the courts of admiralty and those of the common law (Dr. Lushington, in deciding the case of The Peerless, 1 Lush. 41), the strict rules of evidence, applied in the courts of common law, often lose much of their force when invoked in a court of admiralty. Courts of admiralty are courts requiring dispatch, and the questions of fact brought before them often arise out of occurrences transpiring upon the sea, where time and opportunity of record are often wanting, where ledgers and letter-books are not kept, and where the living witnesses present are likely to be as floating and as unstable as the element itself on which they live; and often the transaction in question has taken place in a foreign or out-of-the-way place, in the presence of strange laws and customs, and among ignorant and sometimes barbarous men. It is, therefore, no uncommon thing for these courts, in cases where justice will be advanced thereby, to receive some descriptions of testimony never admitted in other courts—which can the more safely be permitted in these courts, because the whole case is before a single judge, supposed to be able to weigh with care and deliberation all portions of the evidence, and to determine the true significance of the attending and corroborating circumstances, and because, in admiralty, the first decision of the questions of fact is never conclusive, but is always subject to review, in the light of additional and explanatory testimony, which may be produced in the appellate court. Although questions of evidence rarely appear in the decisions of admiralty courts, illustrations of this feature of admiralty procedure are not wanting among the decided cases. The case of The Peerless, above referred to, is one where Dr. Lushington speaks of courts of admiralty as admitting in evidence "affidavits sworn almost in every way—before justices of the peace, commissioners of clearances, &c., &c., even evidence not on oath, as where, according to the custom of some of the states in the north of Europe, the original evidence was not taken on oath, but the person giving it undertook to make oath afterwards, if required." The case of The Estrella, 4 Wheat. [17 U. S.] 306, where hearsay testimony was admitted as such, is another illustration; so, also, the case of The Helgoland, Swab. 496, where the execution of a bottomry bond was held proved, on simply the seal of the consul. Likewise, the case of The London Merchant, 3 Hagg. Adm. 396, where a copy of an entry of a protest before a notary—the protest not having been sworn to or extended—was admitted on the certificate of the notary that it was a true copy. The copy protest offered in evidence here appears to me admissible, as within the spirit of the cases above cited. For, on its face, it appears to be a veritable copy of a protest, and there is no adequate motive to induce the fabrication of such a document, nor is a fabrication suggested. Moreover, it is in proof that a protest was made at the time and place where this copy purports to have been made, and that it was there signed by the mate of the vessel; and, more than all, that same mate was before me as a witness on the stand, called by the claimant, and could have disputed the verity of this copy protest, but he was not asked in relation thereto. In view of this latter circumstance, I am justified in considering the copy produced to be correct, and I admit it in evidence, leaving the party objecting to show its incorrectness, by a commission to Ponce, or otherwise, if so advised.

Copy surveys were likewise sought to be read in evidence, but they stand upon a different ground. They do not purport to be made by any one connected with the vessel, and no witness able to prove or to dispute their correctness, as copies, has been called as a witness, or shown to be within the reach of the claimants. Besides, it has been adjudged that surveys are not evidence of the facts stated therein. Watson v. Insurance Co. of North America [Case No. 17,284]; Cort v. Delaware Ins. Co. [Id. 3,257]. I therefore reject the copy surveys; but, upon the protest, and other evidence in the cause, as before stated, I adjudge the libellants entitled to recover. Let decrees be entered accordingly, the form to be settled before me on notice.

[See Case No. 16,977.]

Case No. 16,979.

VOCE v. LAWRENCE.

[4 McLean, 203.] [1]

Circuit Court, D. Illinois. June Term, 1847.

DEPOSITIONS—ADMINISTRATION OF OATHS—CERTIFICATION—MISNOMER.

1. A judge of a court, having a right to administer oaths, may administer them in any county in the state.

2. He certifies that a deposition was taken before him, etc. Now a deposition is not properly so called, which is not signed by the deponent. The signature being on the deposition, it was not essential that the judge should certify the fact more particularly as to the signature, than that the deposition was taken before him, and written by him.

3. A mistake in the name of the plaintiff or defendant, aforesaid, referring to him as plaintiff

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

or defendant, the name being truly stated in the title, is no ground for rejecting the deposition.

4. The distance, as proved, is more than one hundred miles from the place of taking the deposition, to the place of trial.

[This was a suit by William R. Voce against G. Lawrence.]

Lincoln & Goodrich, for plaintiff.
Butterfield & Collins, for defendant.

McLEAN, Circuit Justice. Under the rule of court, certain objections are made to the mode of taking and certifying depositions, before the jury are sworn: 1st objection. "Because John L. Stevens, a judge of the county of Orange, took the depositions in Palermo, in the county of Oswego." This fact is proved by affidavit. The act of congress provides that "depositions may be taken before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of any county court of common pleas, or of any of the United States." 2. Because the officer taking said depositions does not certify the distance that plaintiff resided, from the place where the deposition was taken. 3. Because in the deposition the cause is stated by a wrong title. 4. Because the distance is not stated to the residence of the defendant and his attorney, from the place where the deposition was taken. 5. Because the deposition of Jennings, the officer, does not certify that the witness signed it. 6. The same objection is made to the deposition of Wm. B. Burt.

In regard to the first objection, as to the residence of Judge Stevens being in a different county from that in which the deposition was taken, it does not show that he had not power to take it. He was judge of a county, and, as such, had power to administer oaths, any where within the state, although his judicial functions may have been limited to the county of Orange. He is a judge within the act of congress, as authorized to take the deposition.

The distance that plaintiff and also his attorney resided from the place of taking the deposition was such, as proved, as to supersede the necessity of giving personal notice of taking the deposition, under the act of congress [1 Stat. 73]. And this disposes of the second and fourth objections.

The third objection is, that the name of the plaintiff was erroneously stated, in the deposition. The word Anderson was used instead of Voce in the body of the deposition, but this caused no uncertainty, as reference is made to the plaintiff—his name being correctly stated in the title of the case. "Anderson, the above plaintiff," could not mislead any one.

In the fifth objection it is urged that the officer does not certify that the witness signed the deposition. And the same is stated in the sixth objection. The judge certifies that the preceding deposition was reduced to writing by him and that he was not counsel or attorney for either of the parties to the said suit, and that he was not interested in the event thereof. The case [Bell v. Morrison] 1 Pet. [26 U. S.] 355, is relied on by the defendant. The certificate in that case stated "that the witness, being cautioned and sworn to testify the whole truth, did subscribe the foregoing and annexed deposition, after the same was reduced to writing by him in his own proper hand," was rejected, because it was not testified or proved that the deponent wrote the deposition in presence of the justice. The fact of writing the deposition, in the above case, it seems, was not proved. Great strictness in the proceeding under the act of congress, is required. Indeed, some of the cases have been carried so far as to be rejected by the common sense of every reader. Still, as the procedure is an ex parte one, the act should be strictly construed. Within the meaning of the act there can be no deposition which is not signed by the witness; and the officer in the above case certifies that the deposition was reduced to writing by him. The whole, then, was done in his presence, and the signature of the witness is on the deposition. Now, unless we presume against the integrity of the officer, the witness signed the deposition. It was his signature that made it a deposition. Without it, it was not a deposition. And the officer certifies the deposition was taken before him. The objection is overruled.

There is another objection, because, the order to take the deposition of Lucy Owen, required it to be taken on the 13th of June, and the oath of the defendant was not administered until the 17th of the same month. This does not affect the taking of the deposition.

Objections overruled.

Case No. 16,980.

VOCKE v. YAEGER.

[3 Biss. 300.] [1]

Circuit Court, N. D. Illinois. June, 1872.[2]

BILL TO ESTABLISH SET-OFF.

[This was a suit by Vocke, assignee of the Germania Mutual Insurance Company, against Yaeger.]

In this case, founded on essentially the same state of facts and tried at the same time [with Sawyer v. Hoag, Case No. 12,400], Rosenthal & Pence, for assignee, cited the following authorities: Curran v. Arkansas, 15 How. [56 U. S.] 304; Wood v. Dummer [Case No. 17,944]; Hightower v. Thornton, 8 Ga. 493; Nathan v. Whitlock, 3 Edw. Ch. 215, 9 Paige, 152; Vose v. Grant, 15 Mass. 505; Richards v. Insurance Co., 43 N. H. 263; Briggs v. Penniman, 8 Cow. 387; Slee v. Bloom, 19 Johns. 456; Dudley v. Price, 10 B. Mon. 84; Ward v. Griswoldville Manuf'g Co., 16 Conn. 593; Henry v. Vermillion R. Co., 17 Ohio, 187; Barry v. Merchants' Exp. Co., 1 Sandf. Ch. 280; Lawrence v. Nelson, 21 N. Y. 158; Hillier v. Alleghany Mut. Ins. Co., 3 Pa. St. 473.

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

[2] [Affirmed in 17 Wall. (84 U. S.) 610.]

These cases [Sawyer v. Hoag, Case No. 12,400, and Vocke v. Yaeger, Id. 16,980] were heard and taken under advisement at the same time with Hitchcock v. Rollo [Id. 6,535], and Drake v. Rollo [Id. 4,066], and the bills dismissed by DRUMMOND, Circuit Judge, and BLODGETT, District Judge, on the grounds stated in the opinions in these cases. The cases are now pending in the United States supreme court.

The supreme court affirmed the decree of the court below in above cases; opinion filed Dec. 22, 1873. Sawyer v. Hoag [17 Wall. (84 U. S.) 610].

Case No. 16,981.

In re VOGEL et al.

[9 Ben. 498; [1] 8 N. B. R. 165.]

District Court, S. D. New York. May 30, 1878.

INVOLUNTARY PETITION—WITHDRAWAL OF CREDITOR—INTERVENTION OF ATTACHING CREDITOR.

1. A creditor who had joined in a petition against debtors, moved for leave to withdraw on the allegation that he joined in the petition at the request of the debtors, and was induced to do so by a misrepresentation on their part as to the nature of the claims of two of his co-petitioners. *Held*, that one of several creditors who has petitioned in bankruptcy has not the same right to withdraw from the proceedings that a plaintiff in a suit has to discontinue it.

2. That the alleged misrepresentation in this case, being made by the debtors, did not authorize the creditor, as against the other petitioners, to withdraw.

3. After the filing of a petition and the issue of an order to show cause, a creditor of the bankrupts proceeded with a suit then pending, obtained an attachment under which property of the bankrupts was seized, and obtained a judgment. He then applied to be allowed to intervene and contest the right to an adjudication. *Held*, that the creditor, notwithstanding his attachment and judgment, had only the rights of a creditor at large, and had no right to intervene.

[Cited in Re Lawrence, Case No. 8,133.]

[In the matter of Henry C. Vogel and Thomas A. Reynolds, alleged bankrupts.]

Walsh & Eckerson, for petitioning creditors.

Nelson Smith, for the moving parties.

CHOATE, District Judge. One of the creditors who joined in the petition against the debtors now moves for leave to withdraw on two grounds: First, on what his counsel calls the natural right of every plaintiff to discontinue his suit; and, secondly, on the ground that he joined in the petition at the request of the debtors themselves, and was induced to do so by a misrepresentation on their part as to the nature of the claims of two of his co-petitioners. It appears that since the filing of the petition, the creditor now moving to withdraw has obtained judgment on his debt. The motion must be denied. There is no analogy between this case and a suit at law or in equity where a plaintiff may discontinue on payment of costs, because he thereby can affect injuriously no interests but his own. The right does not exist where the defendant's rights would be impaired, as in case of a counterclaim by the defendant which would be barred by the statute of limitations if the discontinuance were allowed. Van Alen v. Schermerhorn, 14 How. Prac. 287. In this proceeding the other petitioners have rights to be protected. They have relied upon the joinder of this party with them as enabling them to maintain the petition. It may well be that if he had not joined they might have obtained another co-petitioner to take his place. If he withdraws the petition may fail, and intervening rights of other parties may deprive them of the benefit of this proceeding. Therefore the general right of a petitioner to withdraw without sufficient cause cannot be admitted. To allow it would put all these proceedings at the mercy of the caprice or self-interest of any petitioner who may be persuaded or bribed to discontinue. The fact alleged, that the petition was filed by collusion with the debtors, and was in fact their petition, is not available to the petitioner. Such proceedings are valid, though instituted with the consent of the debtors and by their assistance, and the petitioner will not be heard to say that his petition was not filed in good faith so far as he is concerned. There was not, on the proofs, any misrepresentation which induced the moving petitioner to join, that entitles him as against his co-petitioners to withdraw. If they had induced him by deceit to join, he might be allowed to withdraw. In re Heffron [Case No. 6,321]. But the alleged deceit was on the part of one of the debtors, and it does not appear upon the affidavits to have been a misrepresentation as to any matter of substance, nor intentionally false.

Another creditor of the alleged bankrupts who, since the filing of the petition, has obtained an attachment on the property of the debtors and a judgment, his debt being provable in bankruptcy, now moves, on the ground of the lien he claims to have acquired, to be allowed to intervene and contest the right of the petitioners to have an adjudication. This motion must also be denied. The bankrupt law provides (section 5024) that upon the filing of the petition and the issue of the order to show cause thereon, "the court may also, by injunction, restrain the debtor and any other person in the meantime from making any transfer or dispostion of any part of the debtor's property not excepted by this title from the operation thereof, and from any interference therewith." I think it is the obvious meaning and purpose of the statute that after the filing of the petition, and after the court shall in the first instance have determined that the proofs are sufficient to authorize the issue of the order to show cause, all interference with the property of the debtors on the part of other persons shall cease; and to carry out this policy and prevent vexatious attempts to obtain the property, this power to enjoin is expressly given. If, however, by reason of the fact that the petitioning creditors were ignorant of the pending proceedings of other creditors or otherwise, such other cred-

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

itors do interfere with the property, and attempt to get an advantage for themselves by attachment or levy of execution, the fact that they were not enjoined will not, as against the petitioning creditors, give them any rights whatever, under such attachment or levy. Their proceedings, so far as they are an interference with the debtor's property, are in violation of the statute, and void.

In this case the moving creditor, after the filing of the petition and the issue of the order to show cause, proceeded with a suit then pending, and obtained a warrant of attachment, under which goods of the debtor were seized by the sheriff, and he has since got judgment. He is not in the position of a creditor who at the time of the filing of the petition has a lien by attachment which would be avoided if the petition is sustained, and who is on that ground held to be entitled to contest the right of the petitioners to maintain the petition. On the contrary, he is simply in the position of a creditor at large, who, it has been repeatedly held in this district, has no right to intervene.

Case No. 16,982.

In re VOGEL.

[7 Blatchf. 18; 3 N. B. R. 198 (Quarto, 49); 1 Am. Law T. Rep. Bankr. 170; 2 Am. Law T. 154.] [1]

Circuit Court, S. D. New York. Sept. 27, 1869.

BANKRUPTCY — WHAT PASSES TO ASSIGNEE — REPLEVIN BY STATE PROCESS—DUTY OF CREDITOR.

1. Under the bankruptcy act of March 2d, 1867 (14 Stat. 517), all property of a bankrupt, in his actual possession at the time of the filing of the petition in bankruptcy, passes into the hands of the assignee the instant he is appointed.

2. Where property that was in possession of a bankrupt when he filed his voluntary petition, and was embraced in the inventory to such petition, as property assignable under the act, was afterwards taken by process in replevin issued from a state court, by a creditor who had sold it to the bankrupt, but claimed that, because of fraud, the title to it had not passed, the process stating that the bankrupt claimed to have purchased the property, and the bankrupt was adjudged such, and an assignee was appointed, *held*, in a proceeding instituted by the assignee against the creditor, that the creditor must restore the property or its value to the assignee, and that the proper remedy of the creditor was to apply to the district court for relief, or to institute a proper action against the assignee in the district court or in this court.

[Cited in Re Ulrich, Case No. 14,328; Re Irving, Id. 7,073; Re Litchfield, 13 Fed. 866; Lehman v. Rosengarten, 23 Fed. 642. Followed in Moran v. Sturges, 154 U. S. 2, 14 Sup. Ct. 1029.]

[Cited in Hanchett v. Waterbury, 115 Ill. 229, 32 N. E. 196.]

[In review of the action of the district court of the United States for the Southern district of New York.]

This was a petition for a review of an order made by the district court, in bankruptcy. [Case No. 16,983.] The bankrupt [Henry Vogel] filed his voluntary petition on the 5th of October, 1868. On the 6th he surrendered to the register a stock of merchandise. On the 7th he was adjudged a bankrupt. On the 6th, and also on the 10th, certain creditors of the bankrupt, who had sold to him a part of the merchandise, replevied it by process from a state court, on the ground that the purchase of the property was fraudulent and no title to it had passed. The property replevied on the 6th was taken from the store of the bankrupt. The property replevied on the 10th was taken from the register and against his protest. Assignees of the bankrupt were appointed. They petitioned the district court for a delivery to them of the property by the several creditors who had received it under the proceedings in replevin, or that such creditors be attached for contempt for taking the property from the possession and control of the district court. The creditors defended on the ground that they owned the property taken. The district court made an order that the creditors deliver to the assignees the goods replevied or pay their values within a time limited, and that, in default thereof, attachments issue for contempt. This was the order of which a review was sought by the creditors. The district judge (BLATCHFORD, J.), in his decision in the case, said: "Section 11 of the act provides that 'the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.' The same section provides that a warrant shall be forthwith issued to the marshal to publish and serve notices, stating, among other things, the issuing of the warrant, and that the transfer of any property by the debtor is forbidden by law. The 38th section provides, that the filing of a petition for adjudication in bankruptcy by a debtor in his own behalf, upon which an order of adjudication may be issued, shall be deemed and taken to be the commencement of proceedings in bankruptcy under the act. Such order is form No. 5. The 14th section provides that the assignment of the estate of the bankrupt, made to the assignee in bankruptcy, 'shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee.' The 15th section provides, that 'the assignee shall demand and receive from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of this act.' It is manifest, from these provisions, that when a voluntary petitioner in bankruptcy files his petition in due form, he becomes, eo instanti, a bankrupt, so far as any interference with the property named in his inventory is concerned, and that such property is thereby brought into the bankruptcy court, and placed in its custody and

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 3 N. B. R. 198 (Quarto, 49), and 1 Am. Law T. Rep. Bankr. 170, contain only partial reports.]

under its protection, as fully as if actually brought into the visible presence of the court. Being in the custody of the bankruptcy court, no other court, and no person acting under any process from any other court, can, without the permission of the bankruptcy court, interfere with it; and, to so interfere, is a contempt of the bankruptcy court. Peck v. Jenness, 7 How. [48 U. S.] 612, 625; Williams v. Benedict, 8 How. [49 U. S.] 107, 112; Wiswall v. Sampson, 14 How. [55 U. S.] 52, 66; Peale v. Phipps, Id. 368, 374; Taylor v. Carryl, 20 How. [61 U. S.] 583, 594–597; Freeman v. Howe, 24 How. [65 U. S.] 450; Buck v. Colbath, 3 Wall. [70 U. S.] 334. The property being in the bankruptcy court in specie, that court has ample jurisdiction conferred upon it by the bankruptcy act to adjudicate in regard to it. The question before this court now is, not who has the rightful title to this property, but whether the lawful possession of it by this court has been unlawfully interfered with. The 2d section of the act gives to this court jurisdiction of all suits at law or in equity which may or shall be brought, by any person claiming an adverse interest, against the assignee in bankruptcy, touching any property or rights of property of the bankrupt, transferable to or vested in the assignee. In this case, the plaintiffs in the replevin suits claim an interest in this property adverse to the interest claimed by the assignees. The property, if it was the property of the bankrupt, was transferable to and vested in the assignees. It was embraced in the inventory annexed to the bankrupt's petition, as property assignable under the act, and the processes issued in the replevin suits stated that the bankrupt claimed to have purchased the property. Three of the processes stated that the bankrupt was in possession of the property, and the two processes which were executed on the 10th of October, 1868, stated that the property was in possession of the bankrupt 'or his agents.' Under these circumstances, no matter what the ultimate decision may be as to the real title to the property, it was properly included by the bankrupt in his petition, and was surrendered by him into the custody of this court by the filing of his petition. It was urged that these replevin suits could be maintained under the 25th section of the act. That section provides, that, 'whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.' Under this provision, the property may be recovered from the possession of the assignee by an action brought in a state court before the commencement of the proceedings in bankruptcy, and to which the assignee is made a party under section 14, or by an action brought in the bankruptcy court, or in the circuit court for the same district, under section 2 of the act. But an action of replevin brought in a state court to recover specific property, after such property has been taken into custody by the bankruptcy court, is not, within the 25th section, a 'proper action.' In re Barrow [Case No. 1,057]. So far as the decisions in the cases of In re Wylie [Id. 18,109] and In re Noakes [Id. 10,231] conflict with this view, they seem to me to be unsupported by law. The learned judge who decided the latter case, in saying, in his opinion, that a party who claims as his own property in the possession of an assignee in bankruptcy, must seek redress by the appropriate remedy in the courts of the state, overlooks entirely the provision of the second section of the act and the principle of the decisions of the supreme court before cited. If the jurisdiction of the state court had first attached to this property by its process in replevin, this court would not disturb the possession of the state court, or of the plaintiffs under it. But, as was said by the supreme court, in Buck v. Colbath, before cited, where property is in the custody of a court, and 'under its control for the time being,' 'no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises.' 'A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source; but how much more disastrous would be the consequences of such a course, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit.'"

Charles H. Smith, for assignees.

Albert Van Wagner and Dubois Smith, for the other parties.

NELSON, Circuit Justice. The question involved in this case has been several times before me, not, perhaps, in the precise shape in which it is now presented, but involving substantially the same principle, and that is, whether or not all the property of a bankrupt, in his actual possession at the time of the filing of the petition in bankruptcy, passes into the hands of the assignee the instant he is appointed.

I have regarded the several provisions of the act of congress, that are specially referred to in the opinion of the district judge, as decisive

in favor of the affirmative of this question. The 38th section provides, that the filing of the petition shall be deemed and taken to be the commencement of proceedings in bankruptcy under the act; and the 14th section provides, that the assignment of the estate of the bankrupt, made to the assignee, shall relate back to the commencement of the proceedings in bankruptcy, and that thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in the assignee. Nothing can be more specific and decisive on the question, and there are no other parts of the act which, when rightly understood, vary the effect of these sections.

The proper remedy for the creditors, under the circumstances, was, to apply to the district court for relief, or to await the appointment of the assignees and institute a proper action against them in the district court or in this court. The petition for review is dismissed.

[See Cases Nos. 16,983 and 16,984.]

[See In re Gregg [Case No. 5,796]; Davis v. Anderson [Id. 3,623]; Stuart v. Hines [33 Iowa, 60]; Miller v. O'Brien [Case No. 9,586.][2]

Case No. 16,983.

In re VOGEL.

[2 N. B. R. 427 (Quarto, 138); 1 Chi. Leg. News, 210.][1]

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

BANKRUPTCY — VOLUNTARY PROCEEDINGS — PROPERTY VESTING IN ASSIGNEE—REPLEVIN BY CREDITORS.

1. When a voluntary petitioner in bankruptcy files his petition in due form, he becomes eo instante a bankrupt, so far as the property named in his inventory is concerned, and said property is in the custody of the bankruptcy court.

[Cited in Re Askew, Case No. 585.]

[Cited in brief in Weeks v. Prescott, 53 Vt. 69.]

2. Where the sheriff executed processes in certain replevin suits instituted by creditors of such a bankrupt, and took property in his possession, and set forth in his inventory, and delivered the same to claimants, *held*, that the action of the sheriff was unauthorized, and claimants ordered to deliver the property to the assignees in bankruptcy; or, if the same had been sold, to pay the value thereof to the said assignees, and attachment to issue in default thereof.

[Cited in Re Clark, Case No. 2,798; Re Lake, Id. 7,992; Re Brinkman, Id. 1,884; Re Dole, Id. 3,965; Re Ulrich, Id. 14,328. Approved in Re Steadman, Id. 13,330. Cited in Re Hufnagel, Id. 6,837; Re Irving, Id. 7,073.]

[Distinguished in Clifton v. Foster, 103 Mass. 235. Cited in brief in Leighton v. Harwood, 111 Mass. 69; Williams v. Merritt, 103 Mass. 187.]

[In the matter of Henry Vogel, a bankrupt.]

BLATCHFORD, District Judge. This is a case of voluntary bankruptcy. The petition was filed on the 5th of October, 1868, at noon. The petition is drawn according to form No. 1, and states, among other things, that the petitioner "is willing to surrender all his estate and effects for the benefit of his creditors," and that the verified Schedule B, annexed to the petition, "contains an accurate inventory of all his estate, both real and personal, assignable under the provisions of the bankrupt act." There is also annexed to the petition a verified schedule of the petitioner's debts. The following are named among such debts: To Bowers, Beekman & Co., of New York City, merchants, two thousand nine hundred and sixty-four dollars and ninety-one cents, debt contracted in New York City, in 1868, on open account for goods sold and delivered to the petitioner; to Thomas & Co., of New York City, merchants, eight hundred and seventy-eight dollars and sixteen cents, debt contracted in New York City, in 1868, on open account for goods sold and delivered to the petitioner; to Stanfield, Wentworth & Co., of New York City, merchants, one thousand seven hundred and eighteen dollars and seventy-eight cents, debt contracted in New York City, in 1868, on promissory note and open account for goods sold and delivered to the petitioner; to Kendall, Opdyke & Co., of New York City, merchants, three thousand three hundred and sixty-eight dollars and thirty-three cents, debt contracted in New York City, in 1868, on promissory notes and open account for goods sold and delivered to the petitioner; and to W. W. Huntingdon & Co., of New York City, merchants, one thousand two hundred and fifty dollars and eighty-eight cents, debt contracted in New York City, in 1868, on open account for goods sold and delivered to the petitioner. In the inventory of the petitioner's estate, Schedule B, to the petition, is the following item: "Stock in trade in my business of cloth, at No. 39 Murray street, N. Y., about eight thousand five hundred dollars." On the 6th of October, 1868, the petitioner surrendered as his property, to Register Dayton, the register to whom the case was referred, a stock of goods and merchandise situated in the petitioner's store, at No. 39 Murray street, in the city of New York. On the 6th of October, 1868, the sheriff of the city and county of New York, under process of replevin, brought against the petitioner in the superior court of New York, by the said Bowers, Beekman & Co., who claimed as owners, took from the said store of the petitioner goods and merchandise, being nineteen pieces of cassimere of the value of seven hundred and twenty-one dollars and fourteen cents, and delivered the same to said Bowers, Beekman & Co. The process to the sheriff in that case stated that the petitioner claimed to have purchased the said goods, but that he had obtained them fraudulently, and under the mere color of purchasing them. On the 6th of October, 1868, the said sheriff, under process of replevin, brought against the petitioner in the said supreme court by the said Thomas & Co., who claimed as owners, took from the said store of the petitioner goods and merchandise, being twenty-one pieces of cassi-

[2] [From 3 N. B. R. 198 (Quarto, 49).]

[1] [Reprinted from 2 N. B. R. 427 (Quarto, 138), by permission. 1 Chi. Leg. News, 210, contains only a partial report.]

mere, of the value of seven hundred and seventeen dollars and eighty-one cents, and delivered the same to the said Thomas & Co. The process to the sheriff in that case stated that the petitioner claimed to have purchased the said goods from the said Thomas & Co., but that said alleged purchase was procured by fraud on the part of the petitioner, and that no title to the said goods passed. On the 6th of October, 1868, the said sheriff, under process of replevin in the said supreme court by the said Stanfield, Wentworth & Co., who claimed as owners, took from the said store of the petitioner goods and merchandise, being thirty pieces of cloth, of the value of eight hundred and thirty-five dollars and twenty-seven cents, and delivered the same to the said Stanfield, Wentworth & Co. The process to the sheriff in that case stated that the petitioner claimed to have purchased the said goods from the said Stanfield, Wentworth & Co., but that the defendant obtained the same fraudulently and under the mere color of a purchase. On the 7th of October, 1868, the petitioner was duly adjudicated a bankrupt. On the 10th of October, 1868, the said sheriff, under process of replevin, brought against the bankrupt in the said supreme court, by the said Kendall, Opdyke & Co., who claimed as owners, took from the store of the bankrupt and from the said register goods and merchandise, being thirteen pieces of cassimere of the value of four hundred and sixty dollars and eighty-nine cents, and delivered the same to the said Kendall, Opdyke & Co. The process to the sheriff in that case stated that the bankrupt claimed to have purchased the said goods from the said Kendall, Opdyke & Co., but that such purchase was procured by fraud on the part of the bankrupt, and that no title to the said goods passed. On the 10th of October, 1868, the said sheriff, under process of replevin, brought against the bankrupt, by the said W. W. Huntingdon & Co., who claimed as owners, took from the said store of the bankrupt and from the said register, goods and merchandise, being eight pieces of cassimere and twelve pieces of cloth, of the aggregate value of six hundred and fifty-eight dollars and six cents, and delivered the same to the said W. W. Huntingdon & Co. The process to the sheriff in that case stated that the bankrupt claimed to have purchased the said goods from the said W. W. Huntingdon & Co., but that said alleged purchase was procured by fraud on the part of the bankrupt, and that no title to the goods passed. At the respective times, when the sheriff took the goods on the two occasions on the 10th of October, 1868, he was accompanied in each case by a person who professed to represent the plaintiffs in the process, which person selected and identified the goods called for by the process, and the register informed such persons at and before the times when the goods were taken, that he was in possession of them as register in bankruptcy; that he disputed their right to take the property, and that if they should do so it would be at their peril. Assignees in bankruptcy of the bankrupt have been appointed. They now present to the court a petition, setting forth the foregoing facts, that they have demanded from the five several parties before named, the goods so taken by the sheriff, but such parties have not delivered them to the assignees, and that the property taken in each case was the property of the bankrupt. The prayer of the petition is, that said parties be directed to deliver to the assignees the property so taken by them respectively, or that attachments for contempt issue against them severally for taking said property from the possession and control of this court. The only defence made to the petition, on the facts, is that the several plaintiffs in the replevin suits owned the property taken, and that it was not the property of the bankrupt.

It must be assumed, on the facts, that the goods replevied are a portion of the goods referred to in Schedule B to the bankrupt's petition, as the stock in trade in his business at No. 39 Murray street, N. Y., and as worth eight thousand five hundred dollars. The process in each one of the five cases states that the goods replevied were claimed to have been purchased by the bankrupt. The petition in bankruptcy has annexed to it the inventory of the bankrupt's estate, assignable under the act, and avers that he is willing to surrender all his estate and effects for the benefit of his creditors. Section 11 of the act [of 1867 (14 Stat. 521)] provides that "the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt." The same section provides that a warrant shall be forthwith issued to the marshal to publish and serve notices, stating, among other things, the issuing of the warrant, and that the transfer of any property by the debtor is forbidden by law. The thirty-eighth section provides that the filing of a petition for adjudication in bankruptcy by a debtor in his own behalf, upon which an order of adjudication may be issued, shall be deemed and taken to be the commencement of proceedings in bankruptcy under the act. Such order is form No. 5. The fourteenth section provides that the assignment of the estate of the bankrupt, made to the assignee in bankruptcy, "shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee." The fifteenth section provides that "the assignee shall demand and receive from any and all persons holding the same, all the estate assigned or intended to be assigned under the provisions of this act."

It is manifest from these provisions that when a voluntary petitioner in bankruptcy files his petition, in due form, he becomes eo instante a bankrupt, so far as any interference with the property named in his inventory is concerned, and that such property is thereby brought into the bankruptcy court, and placed in its custody and under its protection, as fully as if actually brought into the visible presence of the court. Being in the custody of the bankrupt court, no other court, and no person acting under any process from any other court, can, without the

permission of the bankruptcy court, interfere with it, and to so interfere is a contempt of the bankruptcy court. Peck v. Jenness, 7 How. [48 U. S.] 612, 625; Williams v. Benedict, 8 How. [49 U. S.] 107, 112; Wiswall v. Sampson, 14 How. [55 U. S.] 52, 66; Peale v. Phipps, Id. 368, 374; Taylor v. Corryl, 20 How. [61 U. S.] 583, 594–597; Freeman v. Howe, 24 How. [65 U. S.] 450; Buck v. Colbath, 3 Wall. [70 U. S.] 334. The property being in the bankruptcy court in specie, that court has ample jurisdiction conferred upon it by the bankruptcy act to adjudicate in regard to it. The question before this court now is, not who has the rightful title to this property, but whether the lawful possession of it by this court has been unlawfully interfered with. The second section of the act gives to this court jurisdiction of all suits at law or in equity which may or shall be brought, by any person claiming an adverse interest, against the assignee in bankruptcy, touching any property or rights of property of the bankrupt, transferable to or vested in the assignee. In this case the plaintiffs in the replevin suits claim an interest in this property adverse to the interest claimed by the assignees. The property, if it was the property of the bankrupt, was transferable to and vested in the assignees. It was embraced in the inventory annexed to the bankrupt's petition as properly assignable under the act, and the processes issued in the replevin suits stated that the bankrupt claimed to have purchased the property. Three of the processes stated that the bankrupt was in possession of the property, and the two processes which were executed on the 10th of October, 1868, stated that the property was in possession of the bankrupt "or his agents." Under these circumstances, no matter what the ultimate decision may be as to the real title to the property, it was properly included by the bankrupt in his petition, and was surrendered by him into the custody of this court by the filing of his petition.

It was urged that these replevin suits could be maintained under the twenty-fifth section of the act. That section provides that "whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant and his agent or attorney as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale." Under this provision, the property may be recovered from the possession of the assignee by an action brought in a state court, before the commencement of the proceedings in bankruptcy, and to which the assignee is made a party under section 14; or by an action brought in the bankruptcy court or in the circuit court for the same district, under section 2 of the act. But an action of replevin brought in a state court to recover specific property, after such property has been taken into custody by the bankruptcy court, is not within the twenty-fifth section a "proper action." In re Barrow [Case No. 1,057]. So far as the decisions in the cases of In re Wylie [Id. 18,109] and In re Noakes [Id. 10,281], conflict with this view, they seem to me to be unsupported by law. The learned judge who decided the latter case, in saying, in his opinion, that a party who claims, as his own, property in the possession of an assignee in bankruptcy, must seek redress by the appropriate remedy in the courts of the state, overlooks entirely the provision of the second section of the act and the principle of the decisions of the supreme court before cited. If the jurisdiction of the state court had first attached to this property by its process in replevin, this court would not disturb the possession of the state court, or of the plaintiffs under it. But, as was said in the supreme court, in Buck v. Colbath, before cited, where property is in the custody of a court and "under its control for the time being," "no other court has a right to interfere with that possession unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." "A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction, deriving their powers from the same source; but how much more disastrous would be the consequences of such a course, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit."

In the present case there is no difference in any legal aspect between the three takings of goods on the 6th of October, 1868, and the two takings of goods on the 10th of October, 1868, although those taken on the latter day were so taken in defiance of the expressed opposition of the register. The goods were all placed in the custody of this court on the 5th of October, 1868, and were in its custody when they were taken. The several parties must, within ten days from the entry of an order on this decision, deliver to the assignees the identical goods so taken, or, if such goods have been sold by them, they must, within the same time, pay to the assignees the several values of such goods as stated in the petition, and which values are not controverted, namely: Bowers, Beekman & Co., seven hundred and twelve dollars and fourteen cents; Thomas & Co., seven hundred and seventeen dollars and eighty-one cents; Stanfield, Wentworth & Co., eight hundred and thirty-five dollars and twenty-seven cents; Kendall, Opdyke & Co., four

hundred and sixty dollars and eighty-nine cents; and W. W. Huntingdon & Co., six hundred and fifty-eight dollars and six cents. In default thereof attachments must issue as prayed for.

[See Cases Nos. 16,982 and 16,984.]

Case No. 16,984.

In re VOGEL.

[5 N. B. R. 393.] [1]

District Court, S. D. New York. March 7, 1871.

EXAMINATION OF BANKRUPTS.

It is no sufficient excuse for not answering a question put to the bankrupt that he has already replied to it at a former examination held at the instance of some other creditor or the assignee.

[For prior proceedings, see Cases Nos. 16,982 and 16,983.]

On the examination of Henry Vogel, the bankrupt above named, pursuant to the order of the court made in the bankruptcy on the seventh day of January, eighteen hundred and seventy, hereto prefixed. The examining creditor appears by Foster & Thompson, Esqs., his counsel.

The bankrupt appears by Townsend, Dyett & Goldsmith, Esqs., his counsel.

The bankrupt does not attend in person. On motion of counsel for the examining creditor, the default of the bankrupt is entered. On application of counsel for the bankrupt, the proceedings on the foregoing order are adjourned to Friday, January twenty-first, eighteen hundred and seventy, at eleven o'clock a. m. The default of the bankrupt attends and submits to examination.

Friday, January twenty-first, eighteen hundred and seventy Present, the register, the examining creditor by his counsel, and the bankrupt by his counsel. Proceedings adjourned by consent to Monday, January twenty-fourth, eighteen hundred and seventy, at twelve o'clock m.

January twenty-fourth, eighteen hundred and seventy. The bankrupt appears in person and by Mr. Dyett. The said Henry Vogel having been sworn, on being examined testified as follows: "Question.—Your name is Henry Vogel? Answer.—Yes, sir. Q.—How old are you? A.—My age is thirty-four."

Adjourned, on application of examining creditor to Tuesday, February first, eighteen hundred and seventy, at twelve o'clock noon.

Present, the register. The examining creditor appears by Mr. Thompson. Adjourned, on application of bankrupt, on account of the absence of his counsel, to Thursday February third, eighteen hundred and seventy, at twelve m.

Thursday, third February, eighteen hundred and seventy, at twelve m.

Present, the register. The bankrupt in person and by his counsel. And the examination of the bankrupt is proceeded with as follows: "Q.—Where do you reside? A.—At one hundred and fifty-seven east sixty-fifth street."

Adjourned, by counsel, to Wednesday, fourteenth February, eighteen hundred and seventy, at three p. m.

Monday, twelfth February, eighteen hundred and seventy, three o'clock p. m. The further examination of the bankrupt is proceeded with as follows, by counsel for examining creditor: "Q.—In your last examination you stated your present place of residence. How long have you resided there? A.—Since the first of last May. Q.—Do you own the house, if not, who does own it? A.—I do not. Jacob Korn does. Q.—Have you a lease of that house? A.—I rent it. Yes, sir. Q.—Was the agreement to rent it to you in writing? A.—Yes, sir. Q.—When does the lease expire?" Objected to by counsel for the bankrupt, as immaterial. In the opinion of the register, the question should be answered. The bankrupt, by advice of his counsel, refuses to answer, on the ground that the question is irrelevant, because it appears that the lease was taken in May, eighteen hundred and sixty-nine, long subsequent to the date of the bankrupt's petition. "Q.—Are you a man of family? and if so, state the name of your wife, the names and ages of your children." Objected to, as the question was fully answered a year ago in one of the examinations of the witness. In the opinion of the register, the question should be answered. The bankrupt, by advice of his counsel, refuses to answer, on the ground that the question has been answered. "Q.—You have been in business on your own account, previous to the filing of your petition under the bankrupt law?" Objected to, on the same grounds as the last question. In the opinion of the register the question should be answered. The bankrupt, by advice of his counsel, declines to answer, on the ground that the question has already been answered. "Q.—Since you filed your petition in bankruptcy, have you settled with any of your creditors, or have any of the claims against you been bought up at your instance?" Objected to as irrelevant. In the opinion of the register the question ought to be answered. "A.—I have not settled with any of my creditors, nor has any of the claims been bought up at my instance. Q.—Has your brother bought any claims against you?" Objected to. In the opinion of the register, the question is relevant. The bankrupt, by advice of his counsel, refuses to answer. "Q.—Is your brother a creditor of yours, and if so, what claim does he hold against you?" Objected to as immaterial and irrelevant. The register decided that the question should be answered. The bankrupt, by advice of his counsel, declined to answer the question, and therefore, with his counsel, and by his advice, left the office of the register, the counsel for the creditor stating that he protested against the bankrupt leaving.

The undersigned, one of the registers of the district court of the United States, for the

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Southern district of New York, in bankruptcy, hereby certifies, that upon the examination of Henry Vogel, the bankrupt above named, under and pursuant to the order for the examination of the said bankrupt hereto prefixed, the objections on the part of the bankrupt to questions put to the bankrupt by the counsel for the examining creditors were made; the refusals by the bankrupt to answer questions put to the bankrupt by counsel for the examining creditors took place, and the proceedings were had before the undersigned, which are above recited and set forth and in the order and manner above set forth. Isaac Dayton, Register.

February 27, 1871.

The undersigned submits the following reflections upon the objections taken on the examination set forth in the foregoing certificate: The twenty-sixth section of the bankrupt act [of 1867 (14 Stat. 529)] entitles any creditor to an order for the examination of the bankrupt. The fact that one creditor has examined the bankrupt is not a reason for withholding the privilege from another creditor. In re Adams [Case No. 40]; In re Gilbert [Id. 5,410]. The assignee in bankruptcy and a creditor stand upon the same footing as to their rights, under this section of the statute. The particular province of the assignee is to examine the bankrupt as to the disposition, condition and amount of his property, and the debts due to and owing by him, so as to enable him to get in the assets. A creditor examines the bankrupt, not only for the purpose of discovering property, but more especially to elicit facts upon which objections to the discharge of the bankrupt can be alleged. A creditor therefore has, it is apprehended, under this section of the statute, the right to examine the bankrupt, although the assignee may have already examined him, nor where two creditors, or the assignee and a creditor, examine the bankrupt at different times, does the statute impose any regulations or restrictions upon the party, exacting the second examination because of the previous examination of the bankrupt, omitting all account of the right, which, under reasonable regulation, the examining counsel has on cross-examination, or on an examination in the nature of a cross-examination of testing the memory and veracity of a person under examination by putting questions previously answered, this statute would become of little or no practical efficacy if every creditor, on examining a bankrupt, should be required to investigate all previous examinations of the bankrupt, and so to shape every question as not to be liable to an objection that the bankrupt has answered that question on such previous examination. Each creditor must, without reference to anything which may have been done by any other creditor, be allowed to put his question in his own way, otherwise, the creditor first examining the bankrupt monopolises, perhaps, in a very large measure, the rights by the section of the statute in terms conferred upon all the creditors of the bankrupt. The time, manner and cause of the examination are to be regulated so as to protect the bankrupt from oppression, unnecessary annoyance and mere delay. In re Gilbert [supra]. But the bankrupt is asking, under the bankrupt act, at the hands of the court, a discharge from his debts. In view of the object for which he has invoked the statute, the bankrupt is not warranted in regarding it as oppressive or unduly annoying if every one of his creditors exercises his right under the statute of investigating the condition, affairs and dealings of the bankrupt, and ascertaining whether he has brought himself within the remedial provision of this statute, and is entitled to its benefit. In the judgment of the undersigned, therefore, the bankrupt was not, because of his having answered the same questions on a previous examination, exempted from answering the questions put to him by the counsel for the examining creditor on this examination.

It should be further considered that there was not before the undersigned on this examination any evidence that as a matter of fact the bankrupt had in the course of any previous examination answered the same questions which were put to him on this examination. The court clearly would not be justified in holding that the bankrupt should be excused from answering a question put to him by a creditor, upon the mere recollection of the register, as to what had taken place on a previous examination of the bankrupt. Supposing such previous examination to be before the court, on the second examination of the bankrupt, if the position taken by the bankrupt in the present proceeding is correct, the court would be obliged as each question should be asked to peruse that examination and inform itself as to all the questions put to and answered by the bankrupt on such previous examination, and to determine points sometimes nice and doubtful, and requiring for their decision, perhaps, a scrutiny of all the disclosures made by the bankrupt in the whole course of that previous examination, as to whether the questions on the two examinations are exactly the same and particularly whether the statements made by the bankrupt have been full, frank and explicit answers to such questions. The adoption of such a practice would be liable to lead to abuses and would be virtually a denial of the rights given to all the creditors of the bankrupt by the twenty-sixth section of the statute, and an examination so conducted instead of being a privilege to the creditors, would be alike to the court and to the examining creditors a most embarrassing and tedious labor.

The conduct of the bankrupt in the present case, in withdrawing from the office of the register, as stated in the foregoing certificate, was a contempt of the court. It has been in the hope that the bankrupt would recognize the extreme impropriety of his conduct on that occasion, and again attend before the register

for examination, that the preparation of the foregoing certificate has been delayed.

Isaac Dayton, Register.

BLATCHFORD, District Judge. I concur in the views of the register and the questions must be answered.

Case No. 16,985.

VOGLE v. LATHROP.

[4 N. B. R. 439 (Quarto, 146);[1] 4 Brewst. 253; 3 Pittsb. R. 268; 18 Pittsb. Leg. J. 106; 2 Leg. Gaz. 390.]

Circuit Court, W. D. Pennsylvania. Nov. 14, 1870.

BANKRUPTCY — FRAUDULENT PREFERENCES — CONFESSION OF JUDGMENT—JUDGMENT NOTES.

1. When a debtor confessed a judgment within four months previous to the filing of the petition against him, being at the time insolvent, and the creditor having reason to believe him so, though there was, as a consideration, a pre-existing debt: *Held*, to be in fraud of the bankrupt act [of 1867 (14 Stat. 517)], being in the category of acts prohibited in section 35.

[Cited in Haskell v. Ingalls, Case No. 6,193. Re Lord, Id. 8,503; Hall v. Wager, Id. 5,951.]

[Cited in Mathews v. Riggs (Me.) 13 Atl. 49.]

2. The fact that the judgment was taken as a collateral for the security, aggregate of several other judgments, regular and valid, and to facilitate their collection, does not affect their validity.

3. When one constituted attorney for the collection of a debt procured from the debtor a judgment note for the amount in his own name, and entered it, knowing that the debtor was insolvent, there being a clear intent to give a preference within the meaning of the act, though the fact of insolvency was not directly known to the real creditors, such knowledge is imputable to them and the judgment is invalid.

4. But where the note and warrant of attorney on which a judgment was founded, were given within four months before proceedings in bankruptcy, being the agreed security for a loan made at the time, and it conclusively appeared that the creditor had no reasonable cause to believe the debtor to be insolvent, though he knew him to be so at the time of entering the judgment, the judgment is valid.

5. Where the debtors confided to one of their creditors the secret of their embarrassment and insolvency, for the purpose of protecting their surety, and better securing the collection of the debts by the prompt seizure of their property in execution, and the creditor in consequence of this information immediately issued execution: *Held*, to fall within the provisions of the 35th section of the bankrupt act, and that the assignee was entitled to the property, or to the value of it.

In bankruptcy.

M'KENNAN, Circuit Judge. On the 24th of February, 1868, the plaintiff was duly appointed assignee of L. C. & M. Berry, who were adjudged bankrupts by the district court for the Western district of Pennsylvania, on the petition of their creditors. He has filed his bill in this court, praying that the defendant may be enjoined against proceeding upon certain judgments, held by him against the bankrupts, in Luzerne county, Pennsylvania, and that the property seized upon execution issued thereon may be delivered up to him; and the case has been heard on the bill and answer. The bill alleges, that the defendant is the owner of judgments entered upon warrants of attorney, to Nos. 61, April term, 1866; 301, January term. 1867; 302, April term, 1867, and 113, 173, and 174, January term, 1868; that he has caused executions to be issued thereon, and the stock in trade, as well as certain real estate of the bankrupts, to be seized and advertised for sale; that at the time said warrants were given, the notes accompanying them did not evidence the true amount of the indebtedness of the makers; that such indebtedness, if any existed, had been fully paid to the defendant; and that when said notes were executed, the defendant knew, or believed, or had some reason to know, or believe, or expect, that the said L. C. & M. Berry were in embarrassed circumstances, and were about to become bankrupt. All these obligations affecting the integrity of the defendant's judgments, are denied by the answer; and, as the plaintiff has not contested such denial, by any replication, its truth is to be taken as admitted, and the denied allegations as entirely unsustained. These judgments are to be treated, then, as free from the vice of inadequate or dishonest consideration, and as not subject to impeachment for any of the reasons above stated. The bill further alleges, that judgments in Nos. 113, 173, and 174, January Term, 1868, "were given when they, the said L. C. & M. Berry, were insolvent, or contemplated insolvency, and that the intent was to give a preference, or to defeat or delay the operation of the bankrupt law, of which the said D. N. Lathrop had full knowledge."

The object of the bankrupt act is to prevent all preferences by insolvent debtors, and to secure an equal distribution of their property among their creditors. By the 35th section of the act, it is enacted, that a preference by an insolvent debtor, in any of the modes enumerated, within four months after the filing of a petition by or against him, to any creditor having reasonable cause to believe such debtor to be insolvent, shall be void, and property acquired by means of such preference, or the value of it, may be recovered by the assignee in bankruptcy from the person receiving it, or to be benefited by it. Under this section, it has been repeatedly adjudged, that these elements must co-exist in the transaction from which a preference results, viz.: an intention to give a preference, the insolvency of the debtor at the time, that the creditor had reasonable cause to believe that such insolvency existed, and that such preference was given in fraud of the provisions of the bankrupt act. The confession of a judgment for a pre-existing debt, when the defendant is insolvent and

[1] [Reprinted from 4 N. B. R. 439 (Quarto, 146), by permission.]

the plaintiff has reasonable cause to believe it, is in the prohibited category, because, as a preference necessarily results from such confession, it is conclusively presumed that both parties intended such advantage to the creditor, and, therefore, to defeat the operation and effect of the act. A security, however, given for a consideration passing at the time, is not subject to such presumption, and is not, prima facie, invalid. Certainly, a judgment entered more than four months before proceedings in bankruptcy, on an attorney's warrant, executed concurrently with a loan of the sum represented by it, is free from all taint of illegality. On the 17th of December, 1867, proceedings were commenced against L. C. & M. Berry, under the involuntary provisions of the bankrupt law. On the 23d of November previous, the respondent was informed by one of them that they were insolvent, and thereupon obtained from them the confession of judgment, No. 113, January term, 1868, for four thousand four hundred and sixty-six dollars and eleven cents. This sum is the aggregate of the judgments and judgment notes above stated, and was taken to protect the security therein, to save costs, and better to secure the collection of said judgments, but with the distinct agreement that it was a mere auxiliary security. Under these circumstances the respondent very properly, on the 10th December, 1867, executed a full release of the judgment, which was afterwards entered on record. As by his own act, therefore, it has been annulled, it is unnecessary to deal further with it in this case. On the 26th December, 1867, the respondent procured from the Berrys a judgment note, in his own name, for six hundred and twenty-five dollars and thirty-seven cents, dated October 21, 1867, and entered it to No. 173, January term, 1868. This was really for a debt due to Geo. W. Brainerd & Co., which was in the charge of the respondent, as their attorney, for collection, and was so taken at their special instance and request. At the time the respondent had information of the insolvency of the debtors, and there was a clear intention to give the debt a preference within the meaning of the bankrupt law. That the fact of insolvency was not directly known to the real creditors, will not rescue the transaction from the operation of the law. Such knowledge is imputable to them, because it had been communicated to their constituted representative, who stood, in all the legal relations of the transaction, precisely in their stead. This judgment, must, therefore, be held to be invalid.

Judgment No. 174, January term, 1868, stands upon a different footing. Although the note and warrant of attorney, on which it was founded, were given within four months before the proceedings in bankruptcy, they were the agreed security for a loan made at the time, and it conclusively appears that the respondent then had no reasonable cause to believe the defendants to be insolvent; this knowledge was first obtained on the 23d of November following. True it is, that the judgment was not entered on record until the 30th of November, when the respondent knew that his debtors were insolvent, and that there is some conflict of opinion among the judges of the district courts as to the validity of a judgment entered under such circumstances. Can it be predicated of this state of facts that the warrant of attorney was executed with a view to give a forbidden preference, or that the creditor had reasonable cause to believe it to be in "fraud of the provisions of the bankrupt law?" I think clearly not; and I am unconvinced by any argument, that it is a sound construction of the bankrupt act to hold that a security free from any infirmity when it was made, was "given" in fraud of its provisions, or to defeat or delay its operation, because a subsequent exigency may have prompted the creditor to avail himself of the means of saving his debt, which the law authorizes him to stipulate for as an essential part of his contract. I would hesitate long to adopt such a construction when it would be followed by the anomalous consequence of a forfeiture of his security, by a creditor who was without fault. I cannot, therefore, adjudge this judgment to be void.

All the other enumerated judgments were confessed and entered, either before the bankrupt act, or before June 1, 1867, when it went into complete effect. Their validity has not been successfully sustained.

It was urged in argument, however, that the confession of judgment No. 112, January term, 1868, embodying the amount of these judgments as it did, under the circumstances stated in the answer, implants in them the fatal effects of that judgment. The argument is not sound, for the reason that the 35th section of the bankrupt law abrogates only the instrumentality by which a preference is sought to be obtained, and all interest or advantage acquired by its use. As soon as the respondent's attention was called to the questionable validity of that judgment, he promptly recalled the execution issued upon it, and before the filing of this bill, he annulled it by a release of record. Certainly he derived no advantage from it, and as it was merely an auxiliary security, he has himself dealt with it as exhaustively as this court could do. As before stated, these judgments, when they were taken, were free from any inherent element of illegality. They were entered of record, and the real estate of the defendants thereby became bound as a security for the payment. Entrenched in the laws of the state, these liens held the strongest position, and are entitled to like protection with every essential constituent of the contract out of which they sprung; they are expressly respected by the bankrupt act. Is it then a rightful, or intended, construction of the 35th section of the act to hold, that it declares to be absolutely void a judgment unimpeachable on any ground when it was "given," thereby working a dissolution of its lien, because of a subsequent abandoned and fruitless arrangement to facilitate its collection? In my apprehen-

sion such a construction is unwarranted either by the terms of the section or the spirit and object of this law. So far, then, as the lien of the judgments upon real estate is involved, they must be treated as valid.

Another question remains, which, although it is not raised by any direct allegation in the bill, may perhaps be regarded as presented with sufficient distinctness in the bill and answer to call upon the court to consider it. It involves the right of the respondent to hold a lien on the personal property seized under the executions issued on his judgments. By the 39th section of the bankrupt act, where any person, being bankrupt or insolvent, procures or suffers his property to be taken on legal process, with intent to give a preference to his creditor, or with intent to defeat or delay the operation of the act, and shall be adjudged a bankrupt, his assignee may recover back the property so taken, if the person receiving it had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent. Passive acquiescence in the seizure of his property in execution by an insolvent debtor, when he could prevent it by going into voluntary bankruptcy, has been held to be suffering it to be taken with intent to give a preference, within the meaning of this section. In re Black [Case No. 1,457]; In re Craft [Id. 3,316]; In re Sutherland [Id. 13,638]. But the facts here import more than inactive submission, if they do not amount to positive procurement on the part of the debtors. They confided to the respondent the secret of their embarrassments and insolvency, and thereupon gave him a judgment for the amount of other judgment indebtedness to him —several installments of which were not then payable—for the very purpose of protecting their surety and better securing the collection of the debts, by a prompt seizure of their property in execution. While this plan was abandoned by the respondent, upon his conceiving doubts of its efficiency, he immediately issued executions upon some of his other judgments, and caused them to be levied upon the personal property of the defendants. Is there any room for doubt, then, that the debtors were moved by an intent to prefer the respondent's debt, and that the respondent was prompted by the debtor's information to seek a preference by an exclusive appropriation of their personal property to his judgments? Such is the clear significance of all the circumstances. But, as the assignee might recover back the property seized, if it had been sold, the respondent cannot maintain the advantage thus apparently gained, and the property or its equivalent must go to the assignee.

Decree: This cause came on to be heard upon the bill and answer, and was argued by counsel; and thereupon, in consideration thereof, it is ordered, adjudged, and decreed as follows, viz.: that the judgment entered to No. 173 of January term, 1868, in the common pleas of Luzerne county, Penn., in the name of D. N. Lathrop, but for the benefit of George W. Brainerd & Co., against Leman C. Berry and Marion Berry, is void under the 35th section of an act of congress, entitled "An act to establish an uniform system of bankruptcy throughout the United States;" and that a perpetual injunction be granted to restrain the legal and equitable owners thereof, their agents or attorneys, from enforcing the same by execution; that judgments in the same court, entered to Nos. 61, of April term, 1866; 301, of January term, 1867; 302, of April term, 1867; and 174, January term, 1868, are not void, by reason of any of the matters in the complainant's bill of complaint alleged against them; and that the fund in the custody of the complainant, produced by the sale of the property of said L. C. & M. Berry, under the interlocutory order of this court, so far as the same accrued from the sale of real estate, be applied by said complainant, first, to the payment of the expenses of said sale of real estate and the costs of this suit, and second, to the judgments last above stated, in the order of their priority; and that the remainder of said fund, arising from the sale of personal property, be retained by said complainant, as assets in bankruptcy of said Leman C. and Marion Berry; and that either party may apply to this court hereafter, if necessary, touching the proper enforcement of this decree.

[In Hood v. Karper, Case No. 6,664, opinion by Cadwalader, J.: "We concur in opinion with the judge of the Northern district of Illinois, that the preference by means of a judgment note, is obtained not when the note with a warrant of attorney to confess judgment is executed and delivered, but when it is executed by the entry of the judgment. Golson v. Niehoff, Id. 5,524. The act of confessing the judgment is the debtor's act."] [2]

[See In re Campbell, Case No. 2,349, and Buchanan v. Smith, 16 Wall. (83 U. S.) 277.]

Case No. 16,986.

In re VOGLER.

[2 Hughes, 297; [1] 8 N. B. R. 132.]

District Court, W. D. North Carolina. Feb., 1873.

BANKRUPTCY — HOMESTEAD EXEMPTIONS — STATE LAWS—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

1. The act of congress of June 8th, 1872 [17 Stat. 334], giving to bankrupts the same exemptions as are allowed by the laws of the state in which they reside, so construed in connection with the laws of North Carolina on the subject, as that, in accordance with the decision of the supreme court of North Carolina, pronounced in the case of Hill v. Kesler, 63 N. C. 437, it was *held*, that the provisions of the state constitution, giving a homestead and other exemptions, apply to contracts existing before the adoption of the said constitution, as well as those made afterwards, and do not thereby violate the constitution of the United States prohibiting states from

[2] [From 3 Pittsb. R. 268.]

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

passing laws violating the obligation of contracts.

[Cited in Re McKenna, 9 Fed. 36.]

[2. Cited in Re Hall, Case No. 5,921, to the point that where homesteads have been duly allotted under the state law, and there is no fraud, such allotment will be recognized and allowed to bankrupts, under the bankrupt act.]

In bankruptcy.

[I, the undersigned register in bankruptcy, certify that the following questions arose, and were agreed to by Wm. S. Ball, Esq., attorney for Elias A. Vogler, and Thomas J. Wilson, attorney for Henry W. Fries, Esq., assignee of the estate of said bankrupt: First. Is the homestead and personal property exemption, provided for in article 10 of the constitution of North Carolina, to be regarded by the assignee as retroactive in its effect when he sets apart exempt property to a bankrupt, in this district? Second. Is the said E. A. Vogler entitled, in bankruptcy, to the real and personal property exemptions provided in article 10 of the constitution of North Carolina, or its equivalent in money derived from the sale of the said real and personal property, the same having been sold, and the proceeds of the sale thereof being now in the hands of the assignee?] [2] The petition herein was filed on the 13th day of May, 1871. Adjudication followed, and Henry W. Fries was appointed assignee, August 8th, 1871. Within twenty days thereafter he allotted to the bankrupt the property exempt under the then existing provisions of the bankrupt act of March 2d, 1867 [14 Stat. 517]. On the 30th of September, 1871, the said assignee filed a petition, praying for an order to sell the real estate of the said E. A. Vogler free from all incumbrances, and that the liens, if any, upon said property be transferred from said real estate to the funds in the hands of the assignee derived from such sale. The lands were, on the same day, directed by the court to be sold, and the proceeds thereof held as prayed for by assignee. The said lands were sold as ordered by the court, in the month of October, 1871, and there was received therefor, and is now in the hands of the assignee, an amount of money exceeding $1,000, the proceeds of said sale. There is also in the hands of said assignee an amount of money exceeding $500, the proceeds of the sale of personal property belonging to said E. A. Vogler. On the 8th day of June, A. D. 1872, there was approved an amendment to the 14th section of the bankrupt act of March 2d, 1867, by which a petitioner in bankruptcy is granted, in addition to the other exemptions enumerated in the said section, "such other property * * * as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt had his domicil at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by the exemption laws of such state in force in the year eighteen hundred and seventy-one." On the 31st day of December, 1872, the said Elias A. Vogler filed his petition asking for an order directing the said assignee to pay to him out of said moneys derived from the sale of his lands as aforesaid, $1,000, in lieu of the homestead, and $500, derived from the sale of his personal property as aforesaid, in lieu of the personal property exemption, provided in article 10 of the constitution of North Carolina, to which he says he is entitled under the said act of June 8th, 1872, amendatory of section 14 of the bankrupt act of March 2d, 1867.

Thomas B. Keogh, Register.

W. S. Ball, for bankrupt.
J. Wilson, for assignee.

DICK, District Judge. The laws in relation to homestead rights are of recent origin, and have given rise to frequent legislative and forensic discussions, and many conflicting judicial decisions. Time and much consideration will yet be required before the numerous questions arising out of the various statutes on this subject can be justly and satisfactorily settled by uniform legislation and adjudication in the several states. A humane and enlightened public sentiment gave rise to these various statutes, and they were intended not only for individual benefit but to secure an important public advantage. At the common law the lands and person of a debtor were exempt from execution for debts, as the principles of the feudal system upon which the government of England was founded required the lands and person of a tenant to be used for the security, power, and advancement of the kingdom. At a later period the demands and interests of an increasing commerce induced the parliament to pass various statutes de mercatoribus, by which the person and all the property of a trader might be taken in execution for a debt duly acknowledged. A subsequent statute gave to creditors the process of capias ad satisfaciendum against all debtors. The statute of elegit, however, only allowed the goods and chattels (excepting oxen and beasts of the plough), and a moiety of the lands of a debtor, to be taken and held until the debt was satisfied. Thus a homestead of a moiety of the lands and an exemption of beasts of the plough were at that early age of civilization allowed to debtors, and this continued to be the law of England until the statute 1 and 2 Victoria extended the elegit to all the lands of a debtor. Until within a recent period the statute law of this state subjected to execution the lands, person, and chattels of a debtor, and only a few articles of small value were allowed as exemptions to keep the debtor and his family from absolute starvation or dependence upon the charity of neighbors. This legislation and the natural greed of creditors necessarily had the effect of filling the country with families of paupers who were a burden instead of a benefit to the state. The constitution of this state, adopted in 1868, was the commencement of a new, more humane, and enlightened policy upon this subject. The results of the Rebellion had rendered a large

[2] [From 8 N. B. R. 132.]

number of our people bankrupt in fortune; and the convention of 1868 determined to insert a provision in our organic law, to preserve the liberty of an honest and unfortunate debtor, and secure a home for his family, and thus induce him to remain in our midst, and encourage and enable him by honest industry to assist in restoring wealth and prosperity to the state. Our feudal ancestors regarded the home and person of the citizen as belonging to the state, and necessary to its security, prosperity, and power. In allowing the homestead, and abolishing imprisonment for debt, except for fraud, the convention of 1868 adopted the same wise policy, but for a far higher object; not for the purpose of making the citizen a ready and efficient soldier in war, but to encourage and enable him to direct his intellect and energies in the arts of peace and the pursuits of industry, and thus contribute to national wealth, prosperity, and advancement.

It is a well-settled rule in the construction of constitutions and statutes, that the intent of the lawmaker ought to be ascertained from the circumstances of the times, and the purposes and remedies in view, and that the judicial department of the government ought to assist, as far as is consistent with a liberal construction of the organic law, in securing and advancing the purposes and remedies intended pro bono publico. The supreme court of North Carolina, in the case of Hill v. Kesler, 63 N. C. 437, has decided, "The provisions of the state constitution giving a homestead and other exemptions apply to pre-existing contracts, as well as to such as were entered into afterwards, and do not thereby violate the provision of the constitution of the United States in regard to the obligation of contracts." So far as this decision construes the meaning of the language of the constitution of the state the federal courts in this state ought to be governed by it as authority under the 34th section of the judiciary act of 1789 [1 Stat. 92]; but upon the question whether this homestead provision is in conflict with the constitution of the United States, as impairing the obligation of contracts, I have the right of forming my own opinions from the reasons, analogies, and authorities of the law. I was upon the supreme court bench, and concurred in the decision of Hill v. Kesler. I think it is well sustained by reason and high legal authorities, and I shall be governed by it in administering the law in this court unless it is overruled by some other federal court of superior jurisdiction. Where homesteads have been duly allotted under the state law and there is no fraud, such allotments will be recognized and allowed to bankrupts as proper exemptions under the bankrupt act. Where an allotment has not been made previous to the commencement of proceedings in bankruptcy, the homestead will be ascertained and set apart by the assignee under the directions of this court.

I will now proceed to inquire more fully as to the effect of the act of congress, of June 8th, 1872, amending the bankrupt law by including state exemption laws in force in the year 1871.

Congress has the power, under the constitution, to pass bankrupt laws and make all provisions which it may regard as necessary to carry out a system of bankruptcy. The purpose of a bankrupt system is to administer the estate of an insolvent person so as to do justice among all creditors by an equitable division of the assets; and then discharge the existing debts of a bankrupt, who in all respects has acted fairly and honestly in surrendering his property. This system is certainly founded in a wise and enlightened policy, as it frees an honest and unfortunate debtor from unexpected financial embarrassments which repress his energies, and from which he cannot extricate himself by reasonable exertions; and enables him to enter again into active business with new spirit and much wisdom learned from the experience of misfortune. He may thus become a good and useful citizen, and a character for honesty, industry, and intelligence will soon give him again employment and credit. If an insolvent person makes an honest surrender of all his property to his creditors, their debts in natural justice ought to be discharged, as they have no moral right to make the debtor a slave and demand the proceeds of his manual or intellectual labor, prevent him from educating and comfortably supporting his dependent family, and thus cause a serious injury to the state. These liberal and humane views as to the relations between creditors and honest insolvent debtors have, in the last twenty years, rapidly impressed themselves upon public sentiment, and form a striking feature in the enlightened and patriotic homestead legislation of a large number of the states of the American Union.

The several states have heretofore adopted systems of insolvent laws, but could not free the debtor from pre-existing debts, as they were prohibited by the constitution of the United States from making laws impairing the obligation of contracts. Now that imprisonment for debt, except for fraud, has been abolished by the organic law of most of the states, state insolvent laws furnish but little relief, as they strip a debtor of his property, leave upon him the burden of his debts, and thus continue him in a condition of poverty, inefficiency, and financial servitude. The very essence of a national bankrupt system, is the doing away with pre-existing contracts, the prevention of preferences among creditors allowed by the common law, the distribution of the assets of a debtor upon the principle that equality is equity among creditors, and the making of such reasonable exemptions of property to the bankrupt as will keep him from absolute poverty, give him some means to commence life anew, support and educate his family, and make him a good and useful citizen. Upon this subject there is no constitutional inhibition imposed upon congress, and it can exercise the full powers of sovereignty, and is only restrained by the broad principles of justice and enlightened statesmanship and the responsibility felt by its members to their constituents.

Among the exemptions made in the bankrupt act of March 2d, 1867, it was provided that such property should be retained by a bankrupt as was allowed in his state by exemption laws in force in the year eighteen hundred and sixty-four. Before that period a number of states had provided liberal homesteads for their citizens which were recognized and allowed in the courts of bankruptcy. The individual insolvency and necessities of a large number of citizens, caused by the misfortunes of the Rebellion, induced other states after the war to adopt homestead and exemption laws to protect many of their people from absolute financial ruin. Such laws would not afford the remedies demanded by the emergencies of the situation unless the homestead was secured against pre-existing debts, and a provision for that purpose was generally inserted in the laws upon that subject. This retroactive feature of such laws gave rise to much discussion in the courts, and some conflicts of judicial decision. To render the bankrupt law more just and uniform by giving the benefit of homestead exemptions to the citizens of the states which had passed such laws subsequent to the year 1864, to do away with constitutional objections and settle conflicting judicial decisions on the subject, congress interposed its sovereign power and gave effect to state laws upon the question by adopting the amendatory statute of June 8th, 1872. Congress would have had no other object in view in making such amendment than to include homestead exemptions made in the several states subsequent to the year 1864. The intent of congress is manifest, and its sovereign power over the subject is settled by numerous adjudications; and we think that we are justified in giving this remedial statute the widest latitude of construction which may be necessary to carry out the supreme legislative will. The constitution of North Carolina provides for a homestead; the supreme court, in a case involving the question, have decided that such provisions apply to pre-existing as well as subsequent debts; the act of June 8th, 1872, makes such laws a part of the bankrupt law so far as the citizens of this state are concerned, and will be recognized and enforced in the bankrupt courts of this district.

I have read with much care and interest the able, learned, and elaborate opinion of Judge Rives, in Re Wyllie [Case No. 18,112], and regret that we have decided differently some of the same questions involved in our respective cases. It was contended in the argument that independent of the act of June 8th, 1872, the homestead exemption in this state might be allowed under the clause in the bankrupt law which provides, "and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution, by the laws of the United States." The homestead under our state laws is exempted from levy and sale under execution. The act of congress of May 19th, 1828 [4 Stat. 278], provides that execution or other final process in the federal courts shall be the same as in the state courts, etc. This act applies to state laws in force at the date of said act, and at that time the homestead was not exempt from the executions of state courts. The same act provides that the federal courts, by rule of court, may make their final process conform to any changes afterwards made as to final process in the state courts. No rule upon this subject, that I am aware of, has been adopted by the federal courts of this state, since the adoption of the homestead provision in the state constitution; and I have been informed that homesteads have been sold under executions issuing from the circuit court of the district of North Carolina. I hold, therefore, that the homestead of the bankrupt in this case was not exempt under the clause of the bankrupt law above referred to, by virtue of the act of May 19th, 1828, as no rule to that effect has been adopted by the federal courts of this state.

The second issue certified to this court by the register presents a question of law which has been decided by Judge Rives in Re Wyllie, supra, and to that extent I concur in that decision. The real estate in our case was directed, by an order of the court, to be sold, "free from all incumbrance, and that the liens, if any, upon said property be transferred from said real estate to the funds in the hands of the assignee, derived from such sale." This sale did not convert the real estate out and out into personalty, and the proceeds of sale are to be regarded by the court as realty in adjusting liens and limitations upon the fund. The bankrupt act as amended June 8th, 1872, expressly provides that exemptions under state laws in force in the year 1871 "shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees, and in no case shall the property hereby exempted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act." The technical meaning of the word limitation, when applied to conveyances of property, is a qualification or restriction upon the estate conveyed. When there is an adjudication of bankruptcy the law takes the property of the bankrupt and conveys it to the assignee as a trustee, to be held and disposed of in such manner as will effect the objects of the statute. This trust estate of the assignee operates by way of relation back to the commencement of the proceedings in bankruptcy. The property remains in custodia legis until the rights of the bankrupt and of the creditors who prove their debts, and of creditors who hold any kind of lien, are all ascertained and adjusted. Where a debt is proved and allowed, the creditor is entitled to claim a share of the assets when a dividend is declared, but he has no vested interest in the property until such interest is designated and declared by the court. As no distribution has been ordered in this case, or absolute vested rights disturbed, and considering the evident intent of congress in passing the remedial statute of June 8th, 1872, we see no reason why this limitation in favor of the bankrupt may

not be extended by relation back to the commencement of the estate of the assignee, and exempt a homestead out of the fund which is still realty in contemplation of law.

The act of June 8th, 1872, as we have before remarked, is a highly remedial statute, and the remedy contemplated was to make just and uniform exemptions to all bankrupts, by allowing homesteads and exemptions provided by the state laws subsequent to the year 1864; and it would require a very strict construction of the statute to exclude from the intended remedy bankrupts whose petitions were filed before the passage of the statute, whose estates are undisturbed and under the control of a court, which, on this subject, can exercise the extensive, liberal, and beneficent jurisdiction of a court of chancery. It is a rule of construction universally agreed to, that a remedial statute is to be liberally construed, and that everthing is to be done in advancement of the remedy that can be given, consistently with any reasonable construction which can be put upon it. Potter, Dwar. 73. We admit that the general rule that no statute is to have a retrospect beyond the time of its commencement is well established both in English and American jurisprudence. "But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights already existing; and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare." Id. 164, note. This rule as to the construction of remedial statutes somewhat confines the powers of legislative bodies which are controlled by constitutional restrictions. In the case of lawmakers who can exercise the full powers of sovereignty (as the parliament, and congress on the subject of bankruptcy) this elementary rule is one of construction only, and must always yield when necessary to carry out the manifest purposes of the supreme legislative will. Even if we were of the opinion in this case that all the property of the bankrupt passed to the assignee which was not exempted by the act before the amendment of June 8th, 1872, we would still be inclined to hold that this court had such control of the assets before distribution was made as would authorize us to allow the bankrupt the benefit of such amendatory statute. The assignee is an officer of the court and the title of the property is conveyed to him by the court for the more convenient collection and distribution of the assets according to the purposes and provisions of the statute. The assignee has no individual interest in the property, and his title in no way affects the equitable rights of other persons; but he holds as a custodian of the law, until the court ascertains the legal and equitable rights of persons interested in the assets and orders a distribution to be made. Until such time, creditors proving debts have no absolute vested rights, and the court, after adjusting liens, may make a disposition of the assets, according to the rights of parties, under laws existing at the time distribution is ordered.

The proceedings in bankruptcy in this case were commenced in the year 1871, and at that time the bankrupt was entitled by the laws in force in this state to have exempted from execution or other final process a homestead not exceeding in value one thousand dollars and personal property to the amount of five hundred dollars. As the real and personal estate have been sold since that time under the order of this court above referred to, we are of the opinion that the bankrupt is entitled to an amount of money out of the proceeds of such sale, now under the control of this court, equal to the value of such homestead and personal property exemption, to be held according to his rights under the state laws. It is therefore ordered by the court that Henry W. Fries, Esq., assignee, deliver to the clerk of this court the sum of one thousand dollars out of the proceeds arising from the sale of the lands of E. A. Vogler, bankrupt, to be held by said clerk until the rights of creditors in the reversion of the homestead and the liens of judgment creditors can be ascertained and adjusted, and quitclaim deeds executed by said E. A. Vogler to the purchasers of said real estate. It is further ordered that Henry W. Fries, assignee, pay over to E. A. Vogler, bankrupt, the sum of five hundred dollars arising from the sale of his personal property, in lieu of the personal exemption allowed by the laws of this state. It is further ordered that Thomas B. Keogh, Esq., one of the registers of this court, proceed to ascertain and report the value of the reversion of said homestead estate, and the number and amount and nature of the judgment liens that exist against said estate, and prepare proper quitclaim deeds to be executed by the said E. A. Vogler to the purchaser of the lands sold by the said assignee.

Case No. 16,987.

VOGLER v. SEMPLE.

[7 Biss. 382; 11 O. G. 923; 23 Int. Rev. Rec. 112; 2 Ben. & A. 556; 9 Chi. Leg. News, 217; Merw. Pat. Inv. 249; 4 Law & Eq. Rep. 68.] [1]

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

PATENTS—RE-ISSUE—CLAIM AND SPECIFICATIONS—REMOVABLY HINGED TRUNK TRAY.

1. The general principle in all re-issues is, that there can be nothing given in the re-issue which was not in the original specifications or drawings, although some minor amendments have been at times allowed.

[Cited in Putnam v. Hutchinson, 12 Fed. 133.]

2. The claim must be for something so described in the specifications that any person of

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. Merw. Pat. Inv. 249, and 4 Law & Eq. Rep. 68, contain only partial reports.]

ordinary mechanical skill, or skill in the art covered by the patent, can, from the specifications, make a mechanism which will contain the claim.

3. The Plumer patent for a removably hinged trunk tray is an infringement upon the Vogler patent.

[Suit by Herman Vogler against Edward Semple for infringement of a patent.]

Munday & Evarts, for complainant.

N. C. Gridley, for defendant.

BLODGETT, District Judge. This is a bill in equity for an injunction, and an account of profits and damages for an alleged infringement of a patent granted by the United States to the complainant, January 11th, 1867, for an "improvement in trunks," being a re-issue of an original patent of the same substantial purport, dated October 6, 1874.

The answer denies the infringement, and also that complainant is the original and first inventor of the device set forth and claimed as new in his original and re-issued patent. Complainant's patent is for a removably hinged tray in the body of a trunk; the parts being so arranged and combined as to admit of the ready removal of the tray from the trunk, and yet so adjusted as to allow the tray to be turned up on its hinges, into or against the cover or top. This is accomplished by the peculiar form of the hinge—one leaf of which is permanently fastened to the tray, and the other so arranged as to be inserted in sockets, which are firmly fixed to the back wall of the trunk; the whole being so arranged as to admit of a ready removal of the hinged tray from the trunk, and so adjusted as to allow it an up and down play.

Three obvious advantages are obtained by this hinged removable tray: First, the ready removability of the tray from the trunk when desired; second, such a combination or arrangement as shall make the tray removable by a straight vertical lift, so as not to disarrange the contents; third, the free up and down play or movement of the tray, so that it will readily adjust itself to the pressure from the contents above or below—this latter is accomplished by giving such length to the loose or free leaf of the hinge as may be necessary to attain the result.

There is no evidence in the case that any one had ever so hinged a tray in the body of a trunk as to permit of its removal, or to give a tray the peculiar characteristics of complainant's device. In 1866, one Plumer obtained a patent for a tray removably hinged in the lid of a trunk. His original device, however, had none of the peculiar characteristics of complainant's tray. His claim was * * * "attaching the tray C to the upper portion of the trunk by means of slots and pins substantially as described." He does not describe a device capable of being applied to the body of a trunk, so as to produce a removably hinged tray like complainant's.

Between the issuing of the patent sued on and the commencement of this suit, one Romadka (who is defendant's vendor, and, as it was stated on the trial and not denied, is defending this suit), obtained an assignment of the Plumer patent, and has had a re-issue. And in this re-issue, dated March 21, 1876, he is allowed two claims: 1st. "A trunk provided with a removably hinged compartment tray." 2d. "A trunk and, in combination therewith, a compartment tray removably hinged by means of socket bearings D, attached to the trunk, and pins attached to the compartment tray, substantially as herein described, and for the purpose set forth."

The hinge described in the re-issue is the same as in the original. And while the first claim allowed in the re-issue is for "a trunk provided with a removably hinged compartment tray," yet there is no description or specification by which we are taught how to place a removably hinged tray in the body of a trunk. The whole description refers to placing the tray in the lid, and nowhere else.

It is well understood by all patent lawyers that the claim must be for something described in the specifications, so that any person of ordinary mechanical skill, or skill in the art covered by the patent, can, from the specifications, make a mechanism which will contain the claim. Now here is nothing, in this Plumer re-issue, which tells how to put a removably hinged tray in any part of the trunk, except the lid. It does not describe how it could be adapted to the body, nor any provision for any other hinge than the pintle and socket hinge. The general principle involved in all re-issues is, that there can be nothing given in the re-issue which was not in the original specifications or drawings, although some minor amendments have been at times allowed in the original specifications or drawings, for the purpose of more accurate and specific description. That is to say: the re-issue cannot be made to cover anything which was not in the original invention. The only purpose of a re-issue is to enable one who has, by a mistake or inadvertence, not taken what he was entitled to in his original patent, to obtain it. The re-issue was only intended to cover omissions of the patent office or of the inventor, in not claiming that to which he was entitled as an inventor. It therefore seems very clear to me that the defendant takes nothing for the purposes of this case by his re-issue. Indeed, it is hard for me to understand how the broad claim number one could have been allowed under the specifications in the original or re-issued patent, it being manifest that Plumer only intended to describe and patent a device for hinging a tray in the top of the trunk, by his particular pintle and socket hinge. This being all the proof as to prior use, I have no difficulty in arriving at the conclusion that the defense, for want of novelty, is not made out.

As to the question of infringement, the proof shows that defendant has sold a trunk with a removably hinged tray in the body of the trunk. His tray responds in a degree to all the peculiar

qualities of complainant's tray; that is, it is removably hinged, so as to admit of being taken out by a straight vertical lift; and is adjustable, in a degree, to the contents of the trunk above or below. He does not use the specific form of hinge described by complainant, but complainant does not confine himself to any particular form, reserving the right to adopt any hinge which will give the substantial results claimed for his device.

The question is: does complainant's patent protect him in the exclusive right to hinge a tray in the body of a trunk so as to secure the results obtained by his device, or is he limited to the special mechanical devices by which those results are obtained?

I am of opinion that, as there is no evidence that any one ever made a removably hinged tray in the body of a trunk, complainant is entitled to the broad claim allowed him in his patent, for: 1st. "In a trunk, and in combination therewith, a tray, removably hinged in the body of the said trunk, substantially as and for the purposes set forth." 2d. "In a trunk, a compartment tray, provided with the strap hinges in combination with sockets attached to the back and inside of the trunk body, substantially as described for the purpose of removably hinging the tray." That is to say: any device which secures substantially the same results as complainant's, by the same or equivalent mechanism, is an infringement on complainant's patent. The defendant does not use Vogler's strap hinge and socket, but in place of it he uses a hook and socket, or roller and socket—not the pintle and socket of Plumer, but a hook attached to the back wall of the trunk, and a roller fastened to the back and upper edge of the tray, so as to engage with and rest upon the hook; the two when in juxtaposition making a hinge which performs the substantial functions of complainant's hinge, except that for lack of the elongated strap it is more readily disengaged; but when the parts are together, it operates in all essential particulars as the equivalent of complainant's strap hinge. I am, therefore, of opinion that defendant's tray is, in all its material features as a removably hinged tray, an infringement of complainant's patent.

The defendant's hinge is, as above stated, a roller hook, or bar, projecting from the back of the tray, and lying parallel therewith, and a socket-like lip or catch fastened to the back wall of the trunk. The bar drops upon the lip to make the hinge. It will be readily understood, that upon lifting the tray, the parts of this hinge are separated at once; while in Vogler's strap hinge, the parts remain engaged until the strap is lifted entirely out of the socket. It is in effect the same as the Vogler, if you should cut off the Vogler strap very short. So that I can have no doubt that the defendant's method of hinging the tray is a method substantially equivalent to the Vogler method. And while Vogler may not be in a position to invoke the broadest doctrine of equivalents, yet he is in a position to invoke the doctrine to this extent, at least, that he is entitled to the method of hinging the tray in the body of a trunk by his mechanism, or any mechanism operating substantially like his, and which produces the same results.

The doctrine of equivalents in this respect has been elucidated very fully and clearly by the supreme court in [Fuller v. Yentzer] recently decided [94 U. S. 288, 299], and which went up from his honor Judge Drummond. The extent to which a patentee is entitled to invoke the doctrine of equivalents, is there very ably and clearly discussed; and I think I am entirely within the rule in that case, when I say that I have no doubt but that the defendant in this case has infringed upon the Vogler patent by the adoption of the hinge which is now before me.

There will be a decree for the complainant, with a reference to the master to take proof and report as to damages.

The opinion of Judge Drummond in the Tuck Creaser Cases will be found in Fuller v. Yentzer [Case No. 5,151.]

Case No. 16,988.

VOGLER v. SPAUGH et al.

[4 Biss. 288.] [1]

Circuit Court, D. Indiana. Jan., 1869.

CONFISCATION — PLEADING — PAROL EVIDENCE — CONTRADICTING OFFICER'S RETURNS.

1. Assumpsit on a note for $1010, executed by Robert Spaugh, Thomas Essex, and John Essex to the plaintiff. Plea, non-assumpsit. The defendants offered in evidence a record of the United States district court for the district of Indiana, showing a confiscation proceeding and sentence against the plaintiff concerning a note described therein as a note of $1000, executed to him by Robert Spaugh and John Essex, and showing that the last-named note had been seized by the marshal under proper process, confiscated by the court, and sold on a venditioni exponas by the marshal. The defendants offered to prove by parol that the latter was the same note sued on in this action. And the plaintiff offered to prove by parol that the marshal's return that he had seized the note was false; and that the charge against him of aiding and abetting the Rebellion, on which the sentence of confiscation is founded, was untrue. *Held*, that the plaintiff could not contradict the marshal's return by parol evidence.

2. The plaintiff could not contradict said record by proving that he never aided or abetted the Rebellion.

3. Parol evidence was inadmissible to prove that the note confiscated is the same note on which this suit is founded.

4. The said record of confiscation is conclusive upon the parties to this action as to all facts alleged in it.

5. Under the evidence in the case, the plaintiff was entitled to recover the amount of his note and interest.

At law.

Hendricks, Hord & Hendricks, for plaintiff.

M. M. Ray, for defendants.

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

McDONALD, District Judge. This case is submitted to the court for trial without a jury, pursuant to the 4th section of the act of March 3, 1865 (13 Stat. 501).

The action is assumpsit on a promissory note. Plea, the general issue.

The plaintiff produced in evidence the note sued on. It is as follows:

"1010. Hope, February 18, 1859. One day after date we or either of us promise to pay John Vogler or order one thousand and ten dollars, for value received, waiving all valuation and appraisement laws of the state of Indiana. Robert Spaugh. Thomas Essex. John Essex."

The defendants produced in evidence a record of the district court of the United States for the district of Indiana, purporting to be a proceeding by the government against "one promissory note for one thousand dollars, and John Vogler." By this record it appears that a libel in the name of the United States was filed in said court on the 30th of April, 1863, charging that John Vogler was then the holder of a note for one thousand dollars, executed to him by Robert Spaugh and John Essex "some time since;" that "said John Vogler was a person guilty of aiding and abetting an armed rebellion against the government of the United States;" and that said note had thereby become forfeited to the government, under the provisions of the act of congress of July 17, 1862 (12 Stat. 589). The libel prayed process, &c.

On the same day process on said libel was issued to the marshal. This process, after reciting the facts set forth in the libel, commanded the marshal "to attach the said note, and to detain the same in his custody until the further order of the court."

On the 2nd of May, 1863, the marshal returned this process with the indorsement, that he had "arrested the property within mentioned," and had made the proper citation, &c.

At the same time a summons in said cause was duly issued and served on Robert Spaugh and John Essex.

On the second day of June, 1868, Spaugh appeared to said action, and made oath in open court, that said note was made by him for borrowed money, on the 18th of March in the year 1859, or 1860, and signed by said John Essex; and that two hundred dollars ought to be credited on the note.

The record shows that, on due proclamation being made, June 6, 1863, a decree by default was rendered to the effect that "said note for the sum of one thousand dollars was forfeited to the United States; that a venditioni exponas should issue to the marshal, commanding him to sell at auction said one-thousand-dollar note, subject to said credit of two hundred dollars; and that the marshal, on such sale, should by certificate assign and transfer said note to the purchaser."

The record also shows that a writ of venditioni exponas was issued in pursuance of said decree; and that by virtue thereof the marshal, on the 16th of September, 1863, sold the note for seven hundred and fifty dollars to one David Long.

The defendant, Robert Spaugh, testified, that the note sued on was executed by him as principal, and by the other defendants, Thomas Essex and John Essex, as his sureties; that it is the only note he ever gave the plaintiff; that he was summoned in said confiscation case, and answered to that proceeding by attorney; that he was not present when the marshal sold the note under said decree of confiscation; that he furnished to James A. Butler seven hundred and fifty dollars, who with that sum procured one Long to bid off the note for Spaugh at the marshal's sale, which money Long paid on said bid, taking the marshal's receipt therefor; that he had no part in setting on foot said confiscation proceedings, and had no hand in it except as aforesaid; and the plaintiff is an old man, and is uncle to Spaugh.

The plaintiff then produced Mr. Biglow as a witness, who testified that, during the pendency of all said confiscation proceedings he was deputy to the marshal of the district of Indiana: that, as such, he performed all the marshal's duties in those proceedings; and that no actual seizure or possession of said note was ever made or had by said marshal or by any of his deputies at any time.

The deposition of the plaintiff was then read in evidence. In this deposition the plaintiff says that he is eighty-five years old, and has resided in North Carolina all his life; that said note was given for borrowed money, and was delivered to him about the time of its date, and was constantly in his actual possession in said state till the fall of 1867, when he sent it to Indiana for collection; that about the close of the Rebellion, he heard that the note had been confiscated; that he had no other notice or knowledge of the pendency of any proceedings against him for that purpose; that he gave no voluntary aid to said Rebellion; that he paid such taxes as he was compelled to pay, and none others; that from charitable motives, and with no view of aiding the Rebellion, he furnished some provisions to Confederate soldiers; that he fed and gave more victuals to Union soldiers, than ever he did to Confederate soldiers; and that he was an old Henry Clay Whig, and was utterly and heartily opposed to secession and the late Rebellion.

By several other depositions, the plaintiff abundantly proved that he gave no aid to the Rebellion, but was utterly opposed to it, and was a good Union man throughout the late war.

All this evidence, except the note itself, was given under objections, with the understanding that the court should disregard so much of it as should be deemed inadmissible.

The principal question in this case is whether the facts thus proved are a bar to this action. And this involves three subordinate questions: 1. Is the evidence offered to contradict the marshal's return in said confiscation proceeding admissible? 2. Is the evidence offered to contradict the allegations in said libel charging that

Vogler aided and abetted the Rebellion admissible? 3. Is the evidence offered to prove the identity of the note sued on with the confiscated note admissible?

I. Is the evidence offered to contradict the marshal's returns in the confiscation case admissible?

The plaintiff insists that an actual seizure by the marshal of the note was indispensable to the jurisdiction of the court pronouncing the sentence of confiscation. As this point is now before the supreme court, and as I think the present case does not turn on it, I shall leave it undecided.

The marshal's return in the confiscation case, as shown by the record, expressly states that he had "arrested" the note. This, I think, is equivalent to saying that he had taken actual possession of it. And the question is, can his return be contradicted in this collateral way? It is certain that in an action against a marshal for a false return, it might be contradicted by parol evidence. Such a return, however, when made becomes a part of the record, and has the same force and sanctity as any other part of it. Upon general principles, therefore, the marshal's return cannot be collaterally contradicted by any party to the record. He is estopped by it on the well-known rule that records estop parties and privies. This doctrine has been so often declared as to need no lengthy discussion. Hamilton v. Matlock, 5 Blackf. 421; Burger v. Becket, 6 Blackf. 61; Remington v. Henry, Id. 63; Lines v. State, Id. 464; Purrington v. Loring, 7 Mass. 388; Townsend v. Olin, 5 Wend. 207.

Indeed, as said confiscation case was a proceeding in rem, it may well be questioned whether the record does not estop, as well all men, as parties and privies. 1 Greenl. Ev. § 525.

On the whole, I think it clear that the evidence tending to contradict the marshal's return is inadmissible.

II. Is the evidence offered to contradict the allegations in said libel charging that Vogler aided and abetted the Rebellion admissible?

By the record in the confiscation case, it appears that Vogler was legally notified of the pendency of that proceeding; that, on due proclamation made, he was defaulted; and that, on hearing evidence, the court regularly pronounced sentence of confiscation. These proceedings necessarily involved a decision that Vogler had aided and abetted the Rebellion. On what principle Vogler, who was regularly a party to these proceedings, can now come forward and, in this collateral way, contradict this record, it is difficult to see. What I have said about contradicting the marshal's return, equally applies to this question. Whether Vogler aided and abetted the Rebellion, is res judicata. The record pronounces that he did. And that he cannot collaterally and by parol evidence contradict that record, is too well settled to admit a doubt. Hopkins v. Lee, 6 Wheat. [19 U. S.] 109; Miles v. Caldwell, 2 Wall. [69 U. S.] 35; Supervisors v. U. S., 4 Wall. [71 U. S.] 435.

III. Is the evidence offered to prove the identity of the note sued on with the confiscation note admissible? In other words, from all that is before me, must I conclude that the note in suit has been confiscated in the proceeding in rem referred to?

In the confiscation proceeding, the note is described as "a note of one thousand dollars, executed some time since" by Robert Spaugh and John Essex to John Vogler. The note in suit, as we have seen, is a note for one thousand and ten dollars, dated February 18, 1859, executed by Robert Spaugh, Thomas Essex, and John Essex, payable to John Vogler or order one day after date. Prima facie, these are not one and the same note. Robert Spaugh swears that the instrument in suit is the only note he ever executed to John Vogler. And the defendants insist that, from this evidence, I ought to conclude that the notes are identical; and that consequently the plaintiff cannot recover. If this premise is right, the consequence must inevitably follow.

But is it true that, from this evidence, I must conclude that the note confiscated and the note in suit are one and the same? I think it is not. I think I am bound to conclude that they are distinct and different notes. I suppose that I cannot permit that any parol evidence shall contradict the confiscation record. By a comparison of the note in suit with that record, it appears that the note sued on is for one thousand and ten dollars; and that the confiscated note was only for one thousand dollars; and that the former was executed by three persons, and the latter only by two. In all litigation the subject matter of the suit must be so described as to render its identity plain. Such description must be a part of the record; and it can no more be collaterally contradicted after judgment than any other part of the record. Suppose A sues B for land, and describes it as the south half of section one, and recovers judgment for it, can either of them afterwards be permitted to say that the suit was really for the north half of that section? In Mahan v. Reeve, 6 Blackf. 215, where, in a partition proceeding, the land was described as section 28 instead of section 23, it was held that even a court of chancery, in a direct proceeding for that purpose, would not correct the mistake.

The general rule already mentioned touching the absolute verity of records, is the same, as applied to the correction of supposed mistakes in them, as to any other attempts to contradict them.

I must therefore hold that the note sued on is not the confiscated note. On this holding the whole defense falls; and I must find the issue for the plaintiff, and assess the damages at the amount of the note and interest.

The case referred to as pending in the supreme court, and which holds that the marshal must take the note into his actual custody and control, is Pelham v. Rose, 9 Wall. [76 U. S.] 103.

VOGT, In re. See Cases Nos. 13,562, 13,563.

Case No. 16,989.

VOIGHT v. LEWIS.

[14 N. B. R. 543; 11 Phila. 511; 33 Leg. Int. 402; 9 Chi. Leg. News, 65; 11 Bankers' Mag. (3d S.) 481; 3 N. Y. Wkly. Dig. 421; 24 Pittsb. Leg. J. 54.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 26, 1876.

BANKRUPTCY — BROKERAGE BUSINESS — RIGHTS OF CUSTOMERS.

If the bankrupts, in addition to their other business, carried on a brokerage business, for which they kept a separate account and a separate bank account, a party whose bonds were sold is entitled to payment in full, if the amount in the bank is more than sufficient to pay all claims against the brokerage department.

In bankruptcy.

George M. Dallas, for complainant.

R. L. Ashurst, for defendant.

McKENNAN, Circuit Judge. If the fund in controversy did not belong to Jay Cooke & Co. at the time of their bankruptcy, no property in it passed to their trustee; and if they could not gainsay the right of the plaintiff to demand and recover it from the bank in which it was deposited, their trustee, who has to receive it, cannot now withhold it. Its origin is clearly established by the proof. It was the product of the sale, by Jay Cooke & Co., as the brokers of the plaintiff, of two thousand dollars of Reading Railroad general mortgage bonds, and it was received by them, not as their own or for themselves, but for the use and benefit of the plaintiff. Their relation to the plaintiff, then, was strictly fiduciary, and in virtue of it alone were they recipients and holders of the proceeds of the sale of his bonds. As the successors of Jay Cooke & Co., only their right to this fund passed to their trustee, and he took it, therefore, impressed with the same character, and subject to the same equities, which resulted from their relation to the beneficial owner of it. But it does not follow, from the fact that Jay Cooke & Co. received the fund in question in trust for the plaintiff, that he is entitled to the relief which he now seeks. This will depend upon whether they made any appropriation of it, so that it would not be individuated and its identity clearly traced. It is undoubtedly true that a trust fund which has been so intermixed with the money of the trustee that it cannot be followed, cannot be recovered specifically by the cestui que trust. But, as was said by Mr. Justice Strong, in Farmers' & Mechanics' Nat. Bank v. King, 57 Pa. St. 202, "It is undeniable that equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee, or agent, into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership." Even at law it has been decided that a principal might maintain an action to recover from a bank the proceeds of a discount of his own note which were placed to the credit of his agent, and which the bank, at the time of the dep[illegible]. had no notice did not belong to the agent. Frazier v. Erie Bank, 8 Watts & S. 18. But it is not essential to the effective assertion of a beneficial title to a trust fund that the fund shall be susceptible of separate identification. No more is required than proof of substantial identity. Money has no ear-mark by means of which it can be specifically identified. Into whatever form it may be changed, if it can be clearly traced, equity will rescue it from a wrongful appropriation, and give effect to the right of its real owner. An ear-mark is only a means of identification, but is not evidence of ownership. It "is not indispensable to enable a real owner to assert his right to property, or to its products or substitute. Evidence of substantial identity may be attached to the thing itself, or it may be extraneous. * * * But in regard to money, substantial identity is not oneness of pieces of coin or bank bills. If an agent to collect money puts the money collected into a chest where he has money of his own, he does not thereby make it all his own, and convert himself into a mere debtor to his principal. The principal may, by law, claim out of the chest the sums which belonged to him before the admixture." Farmers' & Mechanics' Nat. Bank v. King, supra.

Nor will the placing of a fund, received by an agent or a trustee, in an independent depository to his individual credit, even where it is mingled in the account with his own and the money of other trusts, work a confusion of these funds, and defeat the right of a beneficial owner. So it was held in Pennell v. Deffell, 23 Eng. Law & Eq. 460, and Mr. Justice Strong, in Farmers' & Mechanics' Nat. Bank v. King, referring to this case with decided approval, says of it: "It was a contest between an official assignee in bankruptcy and insolvency, and the executors of a prior deceased assignee, who had kept an account with bankers, into which he had paid his own money as well as moneys of the trusts. The accounts were not distinguished as official accounts, but were opened in the depositor's own name. There was nothing to show that he was not alone interested in the sums due from time to time from the bankers." Lord Justices Knight-Bruce and Turner, held that the assignee was entitled as against the executors of the depositor. The former said that "when a trustee pays money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust, as much and as effectually as the money so paid would have done had it specifically been placed by the trustee in a particular repository and so remained." There is much more in the case.

[1] [Reprinted from 14 N. B. R. 543, by permission. 3 N. Y. Wkly. Dig. 421, contains only a partial report.]

It is particularly to be noticed that the moneys of several distinct trusts were carried into the account; that the trustee's own money had been mixed with them, and that a rule was laid down for determining what belonged to the trusts, and what to the depositor.

Applying these principles to the facts proved in this case, the right of the complainants to the relief prayed for seems to be free from doubt. Jay Cooke & Co. were brokers, and their business of this character was carried on in a department which was specially in charge of one of their employees, and was distinct from the other departments of their business. Separate books of account were kept in it, in which were entered each transaction of the firm pertaining to the purchase and sale of stocks, bonds, and other securities on commission. All moneys arising from these operations were deposited in the Seventh National Bank in the name of the firm, and this amount was drawn upon exclusively to answer demands in the brokerage department. The proceeds of the sale of the complainant's bonds were carried into this account, and remained there at the time of the failure of the firm, at which time there was a balance to their credit, more than sufficient to pay the charges in the books against the brokerage department for moneys received and deposited in the bank.

Under these circumstances it cannot be gainsaid that the money received by Jay Cooke & Co. for the complainant's bonds entered into and constituted a part of the deposit in the Seventh National Bank. Its origin and amount are positively determinable, and it can, with like certainty, be traced into that account. On this point the clerk who had charge of the brokerage department testified: "I could take the records of sales and the deposit-book, and trace up the money of Mr. Voight: for instance, show that it had been deposited in the Seventh National Bank, and remained there."

The substantial identity of the complainant's money is thus completely established. It did not exist in its original form, and, therefore, could not be identified in specie; but the distinctiveness of its substitute is unquestionable. If it had been converted by its agents into a specific security, equity would lay hold of it and control its appropriation for his benefit—not because it could be individuated, but because it could be identified as the product of his property—and he was therefore to be treated as its rightful owner. This result will not be changed by the fact that it has been transmuted into the form of a credit in a bank in the name of the agents themselves. It may be, and has been, traced by extraneous evidence into the bank account as clearly as if a promissory note had been substituted for it. True, it is undistinguishable, in the face of the account, from other trust funds and moneys of the agents which were carried into the account; but as the complainant's proportion of this credit is definitely ascertainable, and so separable from that of the other beneficial owners of it, it will be administered by a court of equity as belonging to him, just as effectually as if the money which it represented had "specifically been placed by the trustee in a particular repository, and there remained." Pennell v. Deffell, sup'a.

Let a decree, therefore, for the complainant, according to the prayer of the bill, be prepared.

Case No. 16,990.

The VOLUNTEER.

[Brown, Adm. 159;[1] 1 Chi. Leg. News, 185.]

District Court, N. D. Ohio. Jan., 1870.

ADMIRALTY JURISDICTION—INLAND WATERS.

1. The admiralty has jurisdiction of a collision between a canal-boat and a tug engaged exclusively in harbor service and occurring upon navigable waters wholly within the body of a county.

[Cited in The Ella B., 24 Fed. 508; The St. Louis, 48 Fed. 313.]

[2. Where a tug towing a canal boat up the harbor at Cleveland by mistake gave to a descending tug a signal of two whistles, when she only intended to give one, and a collision resulted, *held*, that she was liable for damage occasioned thereby to her tow.]

This was a libel to recover damages to the canal-boat Fred. Wood, caused by a collision with the tugs Volunteer and Nichols, in the harbor of Cleveland, on the 7th of October, A. D. 1868. [It appears from the evidence, that on that day, the tug Volunteer engaged to tow the canal boat from Clark's dock up to the entrance of the Ohio canal; that in the progress up the harbor and river, the tug Nichols came in sight, going down the river with a tow; that at the proper time and distance, the Volunteer, which was going up on the left bank and west side of the river, blew two whistles, indicating that the tug Nichols should take the left side of the river. Under the harbor rules the ascending boat has the right to indicate, by signal or whistle, the side the descending boat shall take. On this occasion the Volunteer made a mistake, and whistled twice when she intended only one whistle. The Nichols obeyed the signal as was her duty, and steered for the left side. The tug Volunteer also continued her previous course, which was on the left or west side of the river, and of consequence the collision occurred to the tow of the Volunteer. It may be remarked here that the proof is satisfactory that the Nichols in her course to the left side, and as she approached the Volunteer, discovered that there was a mistake or blunder somewhere, slackened her speed, and was at the moment of the collision stationary or backing.] [2]

Willey & Cary, for libellant.
Canfield & Buckingham, for claimant.

SHERMAN, District Judge. The first question raised is, whether the court has jurisdic-

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

[2] [From 1 Chi. Leg. News, 185.]

tion in admiralty of those vessels used only in the harbor of Cleveland and within the body of a county in Ohio. It is claimed the only jurisdiction, if any, this court can exercise is by virtue of the act of congress of 1845 [5 Stat. 726], and that this act does not confer general admiralty jurisdiction over vessels navigating these lakes, much less over vessels only plying, as these vessels do, within the body of the county of Cuyahoga. This has been a much mooted question, and there has been much controversy on the subject, both in this country and elsewhere. It cannot be said that it is yet a well settled question either way. But so far as this district is concerned, it may be considered res adjudicata. In the Revenue Cutter Case [Case No. 11,713], it was, after an elaborate argument, and due examination and deliberation, decided by my predecessor, that, under the constitution and laws of the United States, admiralty jurisdiction did extend over the Lakes and their navigable waters. This decision has never been reversed, and the learned opinion then announced has never been answered or much controverted. I shall, therefore, adhere to it as the law of this court, until it is reversed or modified by the supreme court. The same may be said as to the admiralty jurisdiction over tugs and other vessels plying in the navigable waters and harbors of the Lakes, and used in the commerce carried on between the states bordering on the Lakes. It has been frequently decided that these vessels, though not actually employed in transporting freight and passengers to points and places outside of the state, yet are links of transportation necessary and indispensable to enable the commerce between the states to be duly carried on; and, therefore, they are properly subject to admiralty jurisdiction. Both of these tugs were used in towing vessels engaged in commerce between the states, in the harbor, and outside to their destination. The canal-boat injured was actually employed at the time in bringing a cargo to a vessel destined to Chicago or Detroit. The tugs and the canal-boat were all, therefore, links of transportation, and come within the uniform rulings of the courts bordering on the Lakes.

[2] [The next question is, did this collision, occur without the fault of the libellant? His canal boat was fastened, by stern and bow lines, and a line in the centre, to the tug Volunteer, for the purpose of being towed up to the mouth of the canal. The motive power as well as the directing power was in the tug. The libellant, as the captain of the canal-boat, nor his crew, had any power whatever over his boat, or its course or speed. While thus rendered powerless, and relying, as he had a right to rely, upon the reasonable skill and knowledge of the persons running the tug, a collision occurred, and he undoubtedly has a right to recover the damages sustained. It is difficult to say from the proof what the actual damages are. It is in proof that he paid for the immediate repair of the boat a bill of $56.85, but claims that it was only in part repaired. The amount necessary to fully repair it, and also the demurrage he is entitled to, is a matter of conjecture with him and other witnesses. It is therefore impossible to arrive at the exact amount of damages. I think that I would be doing no injustice if I fix the damage and demurrage at $250, and award him that amount and his costs. Should one or both of these tugs be made liable for this amount? It is not disputed that the first fault is in the Volunteer, in blowing two whistles, when only one was intended. It is further not disputed that the Volunteer continued in her course up the west of the river, notwithstanding her signal that she was going up on the east side. It also appeared that the Nichols obeyed the signal, as was her duty, and went down the west side, and, as the two vessels approached each other, and it was apparent that a collision would occur, the Nichols slackened her speed and finally stopped altogether, while the Volunteer kept up her former speed and made no successful effort either to slacken or stop. If she had made the same effort that was made by the Nichols no collision would have occurred. Having full control of the course to be taken by both tugs, having made the first mistake, and having shown no effort to correct that mistake, either by giving other signals or by slackening or stopping altogether, I am of opinion that she should be liable for the consequences of the collision. In view of the fact that the Nichols did come to a full stop when it was seen that a collision would occur, and that it was not her fault that she was going down the west side of the river, because she was bound by law and the harbor regulations to obey the signal given by the ascending boat, I think she was not in any way to blame, and should not be answerable for any of the damages. It is well settled in law, and by the usages of these Lakes, that when two vessels, propelled by steam, are approaching each other so that there is danger of collision, and confusion and uncertainty exists as to the course each is to pursue, that both must reverse their engines and come to a stop. If either vessel fails to do so she is in fault and is answerable for the consequences. The proof is satisfactory that the tug Nichols did comply with this rule. She reversed her engine and came to a full stop, while the Volunteer did not, but kept up her speed.] [2]

Such being the law of the case, and being satisfied from the evidence that the tug Volunteer was in the fault, the decree will be against her alone, for such damages as may be found, upon reference, that the canal-boat sustained. Libel dismissed as to the tug Nichols. Decree for libellant.

[See Case No. 8,260.]

[2] [From 1 Chi. Leg. News, 185.]

[2] [From 1 Chi. Leg. News, 185.]

Case No. 16,991.

The VOLUNTEER.

[1 Sumn. 551.] [1]

Circuit Court, D. Massachusetts. May Term, 1834.

ADMIRALTY JURISDICTION — MARITIME LIENS — FREIGHT UNDER CHARTER-PARTY—GENERAL AND SPECIAL OWNERS.

1. The admiralty has jurisdiction in cases of charter-parties for foreign voyages; and may enforce, by a proceeding in rem, the maritime lien for freight under a charter-party.

[Followed in Certain Logs of Mahogany, Case No. 2,559. Cited in Arthur v. The Cassius, Id. 564; House v. The Lexington, Id. 6,767a; Knox v. The Ninetta, Id. 7,912; The Panama, Id. 10,703; Thatcher v. McCulloh, Id. 13,862; The Zenobie, Id. 18,208; The Flash, Id. 4,857; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 420; Gloucester Ins. Co. v. Younger, Case No. 5,487; The Hendrik Hudson, Id. 6,358; The Maggie Hammond v. Morland, 9 Wall. (76 U. S.) 452. Approved in Vandewater v. The Yankee Blade, Case No. 16,847; The Hyperion's Cargo, Id. 6,987; The Illinois, White and Cheek, Id. 7,005; The Baracoa, 44 Fed. 103; Freights of The Kate, 63 Fed. 713.]

2. The general owner is owner for the voyage, notwithstanding a charter-party, if the vessel is navigated at his expense, and by his master and crew, and he retains the possession and management of her during the voyage; and especially, where he retains a part of the vessel for his own use.

[Approved in Certain Logs of Mahogany, Case No. 2,559. Reaffirmed in The Nathaniel Hooper, Id. 10,032. Cited in Perkins v. Hill, Id. 10,987; Kimball v. The Anna Kimball, Id. 7,772. Approved in The Aberfoyle, Id. 16. Cited in Raymond v. Tyson, 17 How. (58 U. S.) 60; Hill v. The Golden Gate, Case No. 6,491; Donahoe v. Kettell, Id. 3,980; Reed v. U. S., 11 Wall. (78 U. S.) 601; Richardson v. Winsor, Case No. 11,795; Leary v. U. S., 14 Wall. 611.]

[Cited in Swift v. Tatner, 89 Ga. 660, 15 S. E. 844; Adams v. Homeyer, 45 Mo. 553; Robinson v. Chittenden, 69 N. Y. 528; Sheriffs v. Pugh, 22 Wis. 276.]

3. By the general maritime law, there is a lien on the goods for freight, whether shipped under a bill of lading, or a charter-party. But that lien may be waived or displaced by any special agreement inconsistent with such lien. But it is presumed to exist, until such inconsistency appears.

[Cited in Shaw v. Thompson, Case No. 12,726; Perkins v. Hill, Id. 10,987; Raymond v. Tyson, 17 How. (58 U. S.) 60; Sears v. 4,885 Bags of Linseed, Case No. 12,589; Harris v. The Kensington, Id. 6,122.]

[Howard v. Macondray, 7 Gray, 519; Hatch v. Tucker, 12 R. I. 505.]

4. A stipulation for the payment of the freight ten days after the return of the vessel, is not necessarily inconsistent with such lien.

[Approved in Duncan v. Kimball, 3 Wall. (70 U. S.) 44. Cited in The Bird of Paradise v. Heyneman, 5 Wall. (72 U. S.) 556.]

5. By the maritime law, the ship is pledged to the merchandise, and the merchandise to the ship, for the performance of the contract of shipping.

[Cited in Dupont v. Vance, 19 How. (60 U. S.) 169.]

6. A clause in the charter-party, that the parties bind the ship and goods respectively for the performance of the covenants, payments, and agreements thereof, is a valid clause, creating a pledge or lien on the goods for such performance; and may be enforced against the goods by a detention by the ship-owner for the freight; and by a suit in the admiralty.

[Cited in Perkins v. Hill, Case No. 10,987. Distinguished in Webb v. Anderson, Id. 17,318. Cited in The Peer of the Realm, 19 Fed. 217.]

[Cited in The Keystone v. Moies, 28 Mo. 243.]

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

Libel in rem for freight, brought by Ezra Weston, libellant, against the proceeds of the cargo of the schooner Volunteer, for freight asserted to be due to the libellant, as owner of the vessel, and earned under a charter-party made by the libellant with Messrs. Bixby, Valentine & Co. on a voyage from Boston, (Massachusetts,) to Havana in the Island of Cuba, and back again to Boston. In the course of the voyage Messrs. Bixby, Valentine & Co. failed in business, and the proceeds of the outward cargo, then on board, were assigned to the claimants [Theophilus Parsons and others] as assignees for the creditors; and though the voyage was successfully performed, they decline the payment of the freight upon the grounds stated in their answer. The libellant, upon the arrival of the schooner at Boston, refused to deliver up the homeward freight without payment or security for payment of the freight. The parties then agreed to have the same sold, and the proceeds deposited as a substitute, subject to the same claims for freight and process as the cargo might be. The present libel was accordingly filed against the proceeds. The assignees filed a claim and answer denying the jurisdiction of the court, and the rights of the libellant to any lien for the freight; and praying a restitution of the same to them.

C. P. Curtis, for libelant.

Theophilus Parsons, for claimants.

STORY, Circuit Justice. This is the case of a libel in rem for freight earned under a charter-party, brought by the general owner of the schooner Volunteer against the homeward cargo, (the proceeds being substituted for it by consent of parties,) which the claimants assert a title to under an assignment of the charterers, who became insolvent in the course of the voyage.

Three questions have been made at the bar. First, whether the district court possesses jurisdiction, as a court of admiralty and maritime jurisdiction, over the cause. Secondly, who, upon the true interpretation of the terms of the charter-party, was the owner for the voyage. Thirdly, whether, upon the terms of the instrument, there is any lien on the homeward cargo for freight, supposing the ownership for the voyage to be in the libellant.

It is now approaching nearly to twenty years, since I had occasion to consider with laborious care and attention the nature and extent of the jurisdiction of the admiralty over maritime con-

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

tracts. De Lovio v. Boit [Case No. 3,776]. The conclusion, to which my mind then arrived, was, that the admiralty had an original, ancient, and rightful jurisdiction over all maritime contracts, strictly so called, (that is, such contracts as respect business, trade, and navigation to, on, and over the high seas,) which it might exert by a proceeding in rem in all cases, where the maritime law established a lien or other right in rem, and by a proceeding in personam, where no such lien or other right in rem existed. The courts of common law, it is true, had on various occasions denied, opposed, and sought to restrict this jurisdiction. But their decisions have been founded in no uniform principles or reasoning; and have been, if it may be so said without irreverence, more the offspring of narrow prejudice, illiberal jealousy, and imperfect knowledge of the subject, than of any clear and well-considered principles. These decisions have fluctuated in opposite directions at different periods; and the final results, unfavorable to the admiralty, have been in a great measure owing to a deference for the learning of Lord Coke, whose hostility to the admiralty, not to speak of his disingenuousness, entitle him to very little respect in such a discussion.[2] At all events, the contradictory nature of these decisions, and the state of the law on the subject at the time of the emigration of our ancestors, as well as the structure and jurisdiction of the vice-admiralty courts under their commissions, on that occasion seemed to me to require, that the jurisdiction of the admiralty in America should be reexamined, and established upon its true principles, and maintained upon its just original foundations. If, since that period, I had found reason in any subsequent researches to change these opinions, I should not hesitate on the present occasion to avow and correct errors; for the advancement of juridical truth is, and ever ought to be, far more important to every judge, than any narrow adhesion to his own preconceived and ill-founded judgments. But I am free to confess, that after every thing, which I have heard and seen in the intermediate period, whether in the shape of appeals to popular prejudices, or of learned and liberal arguments, or of severe and confident criticism, I have been unable to change these opinions. They remain with me unshaken and unrefuted. Whether it is fit, that the admiralty jurisdiction of the United States should be administered upon its just and original principles; or whether it should be bound down and crippled by the arbitrary limitations of the common lawyers; it is not for me to decide. I have no desire to extend its just boundaries, or, by any attempt to amplify its justice, to encourage usurpation. But, believing as I do, that it is a rightful jurisdiction, highly promotive of the best interests of commerce and navigation, and founded in the same enlightened wisdom, which has sustained the equity jurisdiction through all its earlier as well as later perils, I cannot consent to be the instrument of surrendering its powers, consistently with my own conscientious discharge of duty. Other persons with different opinions may concur in reducing it to a state of decrepitude, which will leave it neither dignity nor power; and I shall not scruple to obey their decisions, when they shall have judicially prescribed the limits, which I am bound not to transcend. But, although I am prepared to vindicate the admiralty jurisdiction over all maritime contracts, as matter juris et de jure, it is not my intention to do more than to affirm it in the present case, where the suit is founded upon a claim of freight under a charter-party for a voyage on the high seas. And, in the first place, I shall show what has been the claim of the admiralty itself in relation to this matter; and in the next place, how it stands or has stood upon the authority of adjudications at the common law.

In regard to the jurisdiction asserted by the admiralty over charter-parties, it can be traced back to the very earliest records of the court. We find from the records contained in the Black Book of the Admiralty, (a work of high antiquity and undoubted authority,) that as early as the second year of the reign of Edward the First, that monarch, with the assent of his lords, (ses seigneurs,) by an ordinance made at Hastings, expressly prohibited all seneschals and bailiffs of the lords of franchises on the seacoasts from taking cognizance of any pleas touching merchant or mariner, as well by deed as by charter of ships, obligations, and other deeds beyond twenty shillings or forty shillings in amount, upon penalty of prosecution therefor in the admiralty. And it was declared by the same ordinance, that every contract made between merchant and merchant, or merchant and mariner, beyond seas or within the floodmark, should be tried before the admiral, and not elsewhere. Clerke's Praxis, Roughton, pp. 143, 144, art. 28, cc. 20, 21; Id. p. 120, art. 17; Id. p. 130, art. 26; Prynne's Animad. pp. 111, 114–116; Id. pp. 83, 88, 90, 103, 123; De Lovio v. Boit [Case No. 3,776]. This ordinance was fully recognized and enforced by penal sanctions in the reign of Edward the Third. Id. The early commissions to the admiralty were conceived in terms so general and broad, as to include an ample jurisdiction in all maritime contracts. See Prynne's Animad. pp. 85, 118–122; De Lovio v. Boit [supra]. After the passage of the statutes of 13 Richard II. c. 5, and 15 Richard II. c. 3, whose prohibitions can by no just construction be applied to charter-parties made in foreign ports for foreign voyages, even if they can be applied (which I do not admit) to charter-parties made within the realm, for voyages on and over the high seas, or beyond seas, the commissions of the admiralty contained a proviso, that the admiralty should not

[2] The learned reader will find this subject much discussed in Prynne's very able expositions of Lord Coke's errors, in his Animadversions on the 4th Institute, c. 22, on the admiralty court. Prynne's Animad. pp. 75–133. See also Buller, J., in Smart v. Wolff, 3 Term R. 348; 2 Browne, Civil & Adm. Law, pp. 83–85, 100.

take cognizance of any contracts, pleas, or complaints, (quereles,) made or arising on land or water, within the body of any county.[3] Mr. Prynne (a most learned antiquarian) does not hesitate to affirm, that, from the time of passing these statutes down to the time, when Lord Coke, in the beginning of the reign of King James the First, commenced his hostilities against the admiralty jurisdiction, there is not to be found a single case, with the exception of Tooley's Case [12 Mod. 312] 36 Hen. VIII., which can in no correct view be deemed a decision on the point, (Prynne's Animad. pp. 76, 83), in which, upon maritime contracts made in foreign ports, any prohibition had ever been granted (Id. pp. 76, 77, 83, 84). And yet during all this period, he insists, that suits upon foreign charter-parties, and other foreign maritime contracts, were constantly brought and decided in the admiralty. Id. pp. 83, 84; De Lovio v. Boit [supra]. The admiralty did not, indeed, limit itself to foreign maritime contracts; but insisted upon maintaining jurisdiction over charter-parties for foreign voyages, and other maritime contracts, made within the realm, upon the ground, that the statutes of Richard never intended to touch or trench upon this ancient and well-founded jurisdiction. Sir Leoline Jenkins has expounded this subject with great clearness and force in his celebrated argument before the house of lords, in favor of the admiralty jurisdiction; and he applied it especially to charter-parties made within the realm, for voyages over or beyond the seas. 1 Sir Leo. Jenkins's Works, by Wynne, p. 6; Hall, Law J. p. 557. He is supported in this opinion by Zouch, Godolphin, and Exton; and by the constant claim and exercise of the jurisdiction by the judges of the court of admiralty down to his own times. See Zouch, Adm. pp. 98–102, 118; Godol. Adm. Jur. pp. 42, 44, 129, 132, 141; Exton, Mar. Dic. pt. 3, cc. 2–8. See, also, Id. pp. 321, 386. The language of the commissions, granted to the admiralty after these statutes were passed, proceeded upon the ground, that it was a rightful jurisdiction. Zouch has given us a transcript of the common form of these commissions, which he asserts to have been of one uniform tenor from the time of Queen Mary down to the time of Charles the Second. The language of these commissions gives authority "to hold conusance of pleas, &c., charter-parties, contractions, bills of lading, and all other contracts, which may any ways concern moneys due for freight of ships hired, or let to hire." Zouch, Adm. p. 92; De Lovio v. Boit [Case No. 3,776], note. The statute of 32 Hen. VIII. c. 14, also which, for the purpose, as it avows, of aiding the navigation and commerce of the realm, makes many special provisions in regard to charter-parties for voyages from London to foreign countries, and from the latter to London, expressly gave to the court of admiralty jurisdiction to entertain suits for negligent keeping of the merchandise shipped, and delays in the voyage, against the owner and master of the ship.[4] And yet Lord Coke, with singular disingenuousness, has wholly suppressed this clause in his statement of the statute; and has given to its provisions a false coloring, which cannot fail to mislead the reader. 4 Inst. p. 139.

In the next place, as to the doctrine of the courts of common law. It is true, that the jurisdiction asserted by the court of admiralty over charter-parties and maritime contracts, was not, after the statutes of Richard II., admitted by the courts of common law to be well founded. But it is equally true, that it was not uniformly denied by those courts. On the contrary, there are to be found various cases, where the jurisdiction has been directly or indirectly affirmed. See De Lovio v. Boit [supra]; Exton, Mar. Dic. pt. 3, p. 338, c. 7; Id. p. 352, c. 8; Id. p. 360, c. 9. The struggle, indeed, by the admiralty to maintain its ancient jurisdiction was constantly renewed, as often as the courts of common law sought to restrain it. This struggle was, about the middle of the reign of Queen Elizabeth, (in May, 1575,) brought to an issue by a complaint of the court of admiralty to the queen; and thereupon the judges of the king's bench, and the judge of the court of admiralty, came to an agreement on the subject, which is given at large by Prynne, and Zouch, and Lord Coke. 4 Inst. p. 134; Zouch, Adm. p. 14; Prynne's Animad. p. 98; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 365, 367, note. One of the articles of agreement is as follows: "It is agreed, that the said judge (of the admiralty) may have and enjoy knowledge and breach of charter-parties made between masters of ships and merchants, for voyages to be made to the ports beyond the seas, and to be performed beyond and upon the seas, according as it hath been accustomed, time out of mind, and according to the good meaning of the statute of 32 Hen. VIII. c. 14, though the same charter-parties happen to be made within the realm." This agreement remained in full force and operation until Lord Coke became chief justice of the court of common pleas, in the sixth year of the reign of James the First, when he granted a prohibition in a case of this sort. The subject was then brought before the king; and we have now the answer of Lord Coke and his

[3] Prynne's Animad. pp. 85, 118–122. Mr. Prynne has with great learning and ability endeavored to show from the petitions to parliament, on which the statutes of Richard the Second were grounded, that they were not intended to abridge the original jurisdiction of the admiralty; but to take away encroachments of the admiralty in regard to persons and things, which had nothing to do with maritime contracts or transactions on or beyond the seas. Prynne's Animad. pp. 77–85.

[4] The statute is given at large in the recent edition of the statutes, published by authority of the British parliament. Prynne, in his Animadversions (pages 121, 122), has given the proviso verbatim; and I have myself examined the statute in order to ascertain its correctness. See, also, Zouch, Adm. p. 106.

brethren given in answer to the articles of agreement on that occasion, in his 4th Institute, (page 134.) And what is the answer of Lord Coke to the agreement? He does not attempt to deny the genuineness or authority of the document in direct terms. But he uses the following language: "That for so much thereof as differeth from these answers, it is against the laws and statutes of this realm; and therefore the judges of the king's bench never assented thereto, as is pretended; neither doth the phrase thereof agree with the terms of the laws of the realm." It is incredible, that this supposed agreement should have been spurious. It was recorded (or reserved, as Prynne says) in the court of admiralty, and produced before the king by the then judge of the admiralty, as a genuine paper, containing the points of jurisdiction insisted on by the admiralty on one side, and the separate answers to each by the judges of the king's bench, on the other side.

The controversy was from that time renewed with unabated vigor on each side, and continued until the reign of Charles the First, when the subject was again brought before the king in council, upon the complaint of the admiralty; and the matters in difference between the admiralty and the courts of common law were several times heard and debated at large. At length, in February, 1632, certain articles were drawn up, read, agreed to, and resolved upon, by the king and council, and signed and assented to by the twelve judges of England, and the then attorney general, and entered upon the registry of the council. Prynne's Animad. pp. 100, 101; Godol. Adm. p. 157; Exton, Mar. Dic. p. 403; Zouch, Adm. pp. 122, 123; 2 Browne, Civ. & Adm. Law, p. 78; Hall, Adm. Intro. Jur. 24, D. To these articles of agreement Lord Coke's objection cannot apply, that they were never signed or assented to by the judges. The first of these articles is in these words: "If a suit should be commenced in the admiralty upon contracts made, or other things personal done, beyond the seas, or upon the sea, no prohibition is to be awarded." The second is: "If suit be before the admiral for freight, or mariners' wages, or for breach of charter-parties, for voyages to be made beyond the seas, though the charter-party happens to be made within the realm, so as the penalty be not demanded, a prohibition is not to be granted. But if the suit be for the penalty; or if the question be whether the charter-party were made or not; or whether the plaintiff did release, or otherwise discharge the same within the realm; this is to be tried in the king's court at Westminster, and not in his court of admiralty." The restrictions here insisted on, are of matters exclusively arising on land within the realm, and in no wise facts arising on the sea, or beyond seas.

It is difficult to conceive, how any case of jurisdiction could be more firmly and deliberately settled, than on such an occasion. The very circumstance, that it contained the opinions, and had the judicial assent of the judges of the realm, as well as of the king and his council, (an uncommon number being assembled for the purpose,) gives to it as great a sanction of authority in point of law, as any, which can be imagined. If the opinions of Lord Coke and his brethren at a former period are to be held of any authority, as evidence of the law; how much more weight ought to be attributed to such a solemn re-examination of the whole subject under such circumstances? I profess myself wholly unable to comprehend any grounds, upon which the conclusiveness of such an adjudication can be gainsaid or overturned. Sir Leoline Jenkins has remarked, that this act of council was the result of many solemn debates; and not the effect of artifice and surprise; that it was enrolled in the several courts of Westminster, as the resolutions of all the judges, and as a standing rule to be observed for the future; and that it was punctually observed, as to the granting and denying of prohibitions, until the late disorderly times, (the times of the commonwealth,) bore it down, as an act of prerogative, prejudicial (as was pretended) to the common laws, and the liberty of the subject. And he then adds, that it was not long before the usurping powers found it necessary, for the encouragement of trade and navigation, to make several ordinances confirming the jurisdiction. 1 Sir Leo. Jenkins's Works, Argument on Adm. Jur., 6 Hall, Law J. p. 568.

The learned judge is well warranted in these statements. There is a case of a libel for freight reported by Prynne, in which he was counsel, and which was finally decided by the house of lords upon appeal in 1645, in which the jurisdiction of the admiralty to maintain such a suit, was expressly affirmed, and a procedendo was awarded to the court of delegates, (in which the suit was then pending,) to proceed and decide the cause; and they accordingly did decide it in favor of the libellant, and he had execution for his debt and costs accordingly. Prynne's Animad. pp. 123, 124. (Mr. Prynne has given a copy of the judgment of the house of lords.) Here, then, we have the highest judicial authority of the realm asserting the same jurisdiction, which had been asserted by the twelve judges in 1632. In Scobell's Collection of Ordinances during the Commonwealth, we also find the act or ordinance, passed by parliament during the time of the commonwealth, on the subject of the jurisdiction of the admiralty. It was first passed in 1648, and was by subsequent ordinances made perpetual. But, though it was carried into full effect during the protectorate, yet upon the restoration of Charles the Second it was treated, like all the other ordinances of parliament during the commonwealth, as an act of usurpation, and therefore it then in a legislative sense expired. The ordinance expressly declares, among other things, that the court of admiralty shall have cognizance and jurisdiction "in all cases of charter-parties, or contracts of freight, bills of lading," &c. See Hall, Adm. Jur. 24, E.

It is most material to observe, that this affirmation of the admiralty jurisdiction over charter-parties in 1632 was about the period of the emigration of our ancestors; and the jurisdiction continued to be so held until 1660. So that it may be deemed to have been brought by them to this country, as a part of the then acknowledged common law of the land. But it is still more material to state, that the prohibitions of the statutes of Richard the Second, whatever may be their true interpretation, are by their very language and objects limited to the high court of admiralty, and its proceedings within the realm of England; and they do not affect to control the ancient jurisdiction exercisable by the lord high admiral elsewhere out of the realm; and never were applicable in terms to the vice-admiralty courts in the colonies. At least, I have never been able to find any decisive traces of such limitations, acknowledged or acted upon in the vice-admiralty courts. On the contrary, in all the forms of the commissions of the vice-admiralty courts, which have fallen under my observation, there is a most ample enumeration of jurisdiction in all maritime causes. Stokes, in his History of Colonies (page 166), has given a copy of the common form of the commissions of the vice-admiralty courts; and it is precisely in the same terms with all the others, which I have seen. It grants authority "to take cognizance of, and proceed in, all civil and maritime causes, and in complaints, contracts, offences, &c., pleas, debts, &c., charter-parties, agreements, suits, trespasses, injuries, &c., and business civil and maritime," &c.[5] So that, unless we are prepared to say, that these commissions issued by the crown from time to time to the vice-admiralty courts in the American royal provinces, as well as in the colonies generally, are to be treated as clear usurpations of authority, (which would be a bold proposition to maintain,) there seems every reason to hold, that the admiralty jurisdiction in the colonies and provinces was not affected by the statutes of Richard. Dr. Browne informs us, that, as late as 1764, a suit for freight was maintained in the vice-admiralty court of Gibraltar; and that down to his own day, (in 1800,) suits on charter-parties and by material-men were often brought in Ireland without any prohibition. In a very recent case (The Elizabeth, 1 Hagg. Adm. 226), which was a libel on a charter-party, originally brought in the vice-admiralty court at the Cape of Good Hope, an appearance was given to the suit under protest to the jurisdiction. 2 Browne, Civ. & Adm. Law, p. 122, note (74); Id. pp. 534, 535, 538. The commission contained authority, (as in common patents,) to take cognizance of charter-parties; and the protest was overruled, and a decree to pay the money into court was made; and it was paid into court accordingly; and an appeal was taken to the high court of admiralty. The appeal not being prosecuted, the appellate court pronounced the appeal to be deserted, and condemned the appellant in costs. This decree cannot be vindicated, except upon the supposition that the vice-admiralty court was, in the opinion of Lord Stowell, competent in point of jurisdiction to entertain the suit. It may be very different with the high court of admiralty in England. Under the torrent of prohibitions (Id. p. 85), which have been poured upon it in former times, it is indeed difficult to know, what construction ought to be put upon any of the terms of the admiralty commission. Lord Stowell is but too well justified in the remark made by him, in the spirit of uncomplaining, but conscious injustice, that "it is universally known, that a great part of the powers given by the terms of that commission are totally inoperative; and that its actual jurisdiction stands in need of the support of continual exertions and usage." The Apollo, 1 Hagg. Adm. 312, 313. And Dr. Browne is so little satisfied with the decisions made on the subject of the admiralty jurisdiction by the courts of common law during the reign of Charles the Second, that he does not scruple to say, "that if a party were to institute a suit in the high court of admiralty on a charter-party for freight, I do not see, how the court could refuse to entertain it; and I have some reason to think, that this my opinion is supported by very high authority." 2 Browne, Civ. & Adm. Law, p. 122. Who the high authority is, to whom he here alludes, we have no means of knowing, though it might perhaps be conjectured, that he alludes to Lord Stowell, then presiding in the high court of admiralty. However this may be, I for one cannot yield up my own judgment upon this subject, supported as it is by the clearest evidence of an ancient and well-settled original jurisdiction in the admiralty, by the assent and agreement of the twelve judges in 1632, and by the deliberate judgment of the house of lords in 1645, to later adjudications by any inferior tribunals, having nothing to commend them in the depth of the learning or reasoning, which they display, and built upon no consistency of principles. Having gone over this matter at large in De Lovio v. Boit [supra], I do not propose to re-urge the arguments there urged; and I content myself in conclusion by stating my deliberate judgment to be in favor of entertaining jurisdiction in the present case. Mr. Chancellor Kent has also expressed his decided opinion in favor of the jurisdiction (3 Kent, Comm., 2d Ed., 1832, p. 220, lect. 47); and my learned brother, Judge Ware, has supported it by great force of reasoning and depth of learning, in the case of Drinkwater v. The Spartan [Case No. 4,085].

The next question is, who is to be deemed owner for the voyage under the terms of this charter-party? The instrument begins in the common form; and after naming the parties, it proceeds to state, that it is witnessed, "that the said Weston, (the libellant,) for the consideration thereinafter mentioned, has letten to freight the whole of the said schooner with appurte-

[5] A similar commission, with similar terms of jurisdiction was granted to Governor Wentworth of the royal province of New Hampshire, in 6 Geo. III. There will be found a citation from it of a corresponding passage in De Lovio v. Boit [supra], note.

nances to her belonging, except the cabin, which is reserved for the use of the master, and what room is necessary under deck for provisions, wood, water, and cables, for a voyage from this port (Boston) to Havana in Cuba, and thence back to this city (Boston) where she is to be discharged, dangers of the seas excepted." It then proceeds to state, that the libellant covenants, that the schooner shall be tight, staunch, and strong, and be sufficiently tackled and apparelled for such a voyage; and that it shall be lawful for the charterers, as well at Havana as at Boston, to load and put on board, both under and on deck, a loading of such goods, as they shall think proper, contraband goods excepted; and the libellant is to pay all and every charge of victualling and manning the schooner during the voyage, and is to furnish the schooner victualled and manned; and the other charges, port charges, pilotage, &c., are to be borne by the charterers; and they are to make advances, not exceeding $100, to the master during the voyage. In consideration whereof the charterers agree to pay to the libellant, in full for freight or hire, at the rate of $400 for each and every calendar month, and so in proportion for a less time, as the schooner shall be employed in the voyage, from the 1st of December, 1833, "within ten days after her return to Boston, or in case of loss, to the time she was last heard of." And in conclusion it states, "To the faithful performance of all and singular the covenants, payments, and agreements the parties aforesaid, each to the other, do hereby bind themselves, their heirs, executors, and assigns, especially, the said Weston, the said schooner, and the said Bixby, Valentine & Co., the goods to be laden on board the said schooner, in the penal sum of $2,000 firmly by the said presents."

Such is the substance of the charter-party. And upon the construction of the terms of it, I cannot entertain a doubt, that Weston, (the libellant,) remained the owner for the voyage. The vessel was equipped, and manned, and victualled by him; and at his expense during the voyage; and he covenanted to take on board such goods in the voyage, as the charterers should think proper. The whole arrangements on his part in these respects sound merely in covenant. It is true, that in another part of the instrument it is said, that he has letten to freight, (which may seem to import a present demise or grant, and not a mere covenant,) the whole schooner for the voyage. But this language is qualified by what succeeds. And the whole schooner is not let; for there is an express exception of the cabin and certain portions of other room under deck. If the whole schooner, then, was not granted during the voyage on freight, how is it possible to contend, that the libellant did not still remain owner for the voyage? The master was his master, appointed by him, and responsible to him; the crew were hired and paid by him; and the victualling and manning were at his expense. He also retained the exclusive possession of a part of the vessel for the voyage, and the control and navigation of her during the voyage. Taking, then, the whole instrument together, it seems wholly inconsistent with the manifest intent of the parties, that the charterer should be the owner for the voyage. It appears to me, that this case is governed in all its circumstances by decisions, which have been made by the supreme court of the United States. In Hooe v. Groverman, 1 Cranch [5 U. S.] 24, under circumstances far less cogent and expressive, the supreme court held the general owner to be owner for the voyage, although in that case the whole tonnage of the vessel was let for the voyage. The case of Mascardier v. Chesapeake Ins. Co., 8 Cranch [12 U. S.] 39, is almost identical with the present in its leading circumstances. And the court there laid down the broad distinction in the following terms: "A person may be owner for the voyage, who by contract with the general owner hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. But where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered as a mere affreightment, sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership." Tried by this test, there cannot be a doubt, that the libellant remained the owner for the voyage. See also Gracie v. Palmer, 8 Wheat. [21 U. S.] 605, and Colvin v. Newberry, 1 Clark & F. 283. I am aware, that there are in the English cases some very nice distinctions, and perhaps some decisions not very easily reconcilable with each other. But it appears to me, that the current of authority in the courts of Westminster Hall ranges itself on the same side with the decisions of the supreme court, and with the decisions of the American state courts on the same subject. I do not go over the cases. Many of them will be found collected in Abbott on Shipping, and in the notes to the American edition of 1829 (pages 19–22, 173–178); in Holt's Law of Shipping (part 2, pp. 195, 196, § 15); and in the learned Commentaries of Mr. Chancellor Kent (3 Kent, Comm. 2d Ed. p. 137, lect. 45). See, also, Pickman v. Woods, 6 Pick. 251; Clarkson v. Edes, 4 Cow. 478; Christie v. Lewis, 2 Brod. & B. 416; The Master, &c., of Trinity-House v. Clark, 4 Maule & S. 288; Colvin v. Newberry, 8 Barn. & C. 166; s. c. on appeal, 1 Clark & F. 283. Some stress was laid, in the argument at the bar, on the fact, that the master received his letter of instruction from the charterers; and that the libellant gave him a copy of the charter-party only, and verbal orders to proceed accordingly. But I cannot perceive, how these circumstances vary, in the slightest manner, the legal predicament of the case. They are perfectly consistent with the libellant's remaining owner for the voyage.

The third and far the most difficult question is, whether there was a lien on the home-

ward cargo for the freight. In general, it is well known, that by the common law there is a lien on the goods shipped for the freight due thereon, whether it arise under a common bill of lading or under a charter-party. But, then, this lien may be waived by consent; and in cases of charter-parties, it often becomes a question, whether the stipulations are, or are not, inconsistent with the existence of the lien. For instance, if the delivery of the goods is by the charter-party to precede the payment or security of payment of freight; such a stipulation furnishes a clear dispensation with the lien for freight; for it is repugnant to it, and incompatible with it. On the other hand, where such payment, or security of payment of freight, is to be simultaneous or concurrent with the delivery, there the lien exists in its full force, and may be insisted on. See Abb. Shipp. pt. 3, pp. 173–178, c. 1, § 7. This doctrine is clearly established; and it especially formed the groundwork of the reasoning in Yates v. Railston, 8 Taunt. 293; Christie v. Lewis, 2 Brod. & B. 410; Tate v. Meek, 8 Taunt. 280; Saville v. Campion, 2 Barn. & Ald. 503; Faith v. East India Co., 4 Barn. & Ald. 630; and Gracie v. Palmer, 8 Wheat. [21 U. S.] 605.

The question, then, in the first place is, whether the present charter-party contains any stipulation incompatible with the notion of a lien; for otherwise it will clearly attach. The only clause bearing upon this point is that which provides for the payment of the freight "within ten days after her (the schooner's) return to Boston, or, in case of loss, to the time she was last heard of." This latter provision of this clause establishes the fact, that the payment of the freight was not in every event to be contingent on, or subsequent to, the delivery of the cargo; and the other clause by no means carries with it any implication, that the delivery of the cargo shall precede the payment of freight. By our laws the term of fifteen days from the arrival and report of the ship at the custom-house is allowed for the entry and discharge of the cargo; and in some cases twenty days is allowed. See duty collection act of 1799, c. 128, §§ 36, 56 [1 Story's Laws, 606, 622; 1 Stat. 665, 669]; Act 3d March, 1821, c. 180 [3 Story's Laws, 1819; 3 Stat. 640]. So that an unlivery may be rightfully postponed beyond the ten days after the return of the ship, when by the terms of the charter-party the freight would become due. It is quite remarkable, that the charter-party does not contain any stipulation for the delivery of the homeward cargo, or prescribe any time for its delivery. So that the parties are left afloat, as to this point; and their rights are to be disposed of by the general principles of law. The question, then, is, whether the claimants could by law insist upon a positive delivery within the ten days after the return of the schooner. I know of no principle of law, upon which that can be generally affirmed. The delivery must be within a reasonable time. But can that be deemed an unreasonable delay, which falls short of the time allowed by the statute law of the country for an unlivery of the cargo? Besides; on what ground can the court say, that the libellant, if the goods were unlivered, might not insist upon retaining them until the ten days were passed, or payment, or security for payment, of the freight was given? The parties have not stipulated for a delivery of the cargo within the ten days, or for any delivery at all without payment of freight. And in a case of mutual silence on each side on the point, there seems no ground for a court to say, that a detention for the freight under such circumstances would be inequitable or unreasonable. Lord Tenterden in his excellent work on Shipping (part 3, p. 177, c. 1, § 7) has deduced from the cases this general result; that the right of lien for freight does not absolutely depend on any covenant to pay freight on delivery of the cargo. But it may exist, if it appears, that the payment is to be made in cash or bills before or at the delivery of the cargo; or even if it does not appear, that the delivery of the cargo is to precede such payment. Now, in the present case, the latter is the very predicament, in which the charter-party leaves this matter. But the case does not rest merely upon this negative inference. There is an express clause in the charter-party, (as we have seen,) by which the parties bind themselves, the libellant his ship, and the shippers their cargo, to the faithful performance of all and singular the covenants, agreements, and payments of the charter-party. This is a common clause in charter-parties. It is borrowed from the general maritime law, by which the ship is bound to the merchandise, and the merchandise to the ship. Abb. Shipp. pt. 2, p. 93, c. 2, § 5; Id. pt. 3, p. 169, c. 1, § 6 (b); Id. p. 170, § 7; Cleirac, Us et Cout. de la Mer, p. 72. Cleirac lays it down in express terms; and it is specially declared in the ordinance of Louis the Fourteenth in 1681, which Valin treats on this point, as an affirmance of the general maritime law. Id.; 1 Valin, Comm. liv. 3, tit. 1; Des Charte-Parties, p. 629, art. 11. Lord Tenterden in commenting on this clause, after remarking, that this principle of the maritime law cannot be carried into effect against the ship in England, from a supposed defect of the admiralty jurisdiction, at the same time adds, that the owners may be made responsible by a special action on the case at the common law, or by a suit in equity. He does not, however, treat this clause as senseless, if it were capable of a specific execution. Abb. Shipp. pt. 2, pp. 93, 94, c. 2, § 5. In another place, commenting on the same clause, he states, as the result of the authorities, (which I shall immediately consider,) that the part of it binding the cargo is inoperative; and that the lien for freight is not derived from it; but is derived from some general principle of law, or some special contract. Certainly the lien is derived from some general principle of law, or some special contract. Id. pt.

3, pp. 170, 171, c. 1, §§ 6 (b), 7. But the question is, whether this very clause does not constitute such a special contract. I contend that it does; and that its clear and determinate meaning is, that the cargo shall be responsible (among other things) for the payment of the freight. The words are of this purport; they are sensible in the place where they occur; they are as much a part of the instrument as any other clause; and it was clearly competent for the parties to enter into such an agreement, if they chose so to do. If the instrument had expressly declared, that there should be no lien on the cargo for the freight, it cannot be doubted, that the stipulation would have been obligatory upon the parties. That was expressly decided in the late case of Small v. Moates, 9 Bing. 574, where the judgment turned upon this very point. Now, I profess, that I cannot perceive, what difference there is in legal construction between such language, and the language used in this charter-party. The shipper binds the cargo for the performance of his covenants and payments under it. And what is this but giving a pledge or lien upon the cargo for this purpose? If the party could not enforce that pledge or lien actively by a suit in rem, the clause at least furnishes him with a right to detain the cargo until his claim for freight is satisfied. And in the present case, where the parties have been silent, as to the delivery of the cargo without payment of the freight, the clause may, a fortiori, be insisted on to repel any presumption, that the parties had waived any lien on the cargo for the freight; for it would not then be bound for the payment. This right of detention under a contract was expressly recognized in Small v. Moates.

But let us now see, what are the authorities, upon which a different doctrine is maintained. The first case is Paul v. Birch, 2 Atk. 621, where the charterers had bound the goods to be put on board for the payment of the hire or freight; and afterwards became bankrupts. Lord Hardwicke gave full effect to the clause, as against the assignees of the bankrupts. But an attempt was made to charge the goods of third persons, who were shippers under the charterers, with the full amount of the hire or freight. This last claim was resisted; and Lord Hardwicke held these latter goods liable only to the extent of the freight payable to the charterers by the shippers. And this is in perfect coincidence with what is now the established law. See Christie v. Lewis, 2 Brod. & B. 410; Small v. Moates, 9 Bing. 574; Faith v. East India Co., 4 Barn. & Ald. 638. So that this case, as far as it goes, does in fact support, instead of impugning the doctrine. The other case is Birley v. Gladstone, 3 Maule & S. 205, where certainly a question did arise upon the meaning and effect of the stipulation now under consideration. The question there was, whether the owner of the ship was entitled to detain the cargo, not for freight generally, but for dead freight, that is, for the freight of goods not laden. The court held, that he was not. Lord Ellenborough on that occasion said, "The clause is not familiar to us in England, but has been imported from Pothier." (In this his lordship is certainly mistaken, for it had an existence centuries before.) "It is, like the charter-party, I believe, of French origin; and I know not, whether there may not be some immediate proceeding upon it in that country." Beyond question there is such a remedy in France. But charter-parties did not originate in the French law. They were known in other countries at as early, if not at an earlier period. He afterwards proceeded to say: "I do not say, that a court of equity might not afford a remedy to the party under the clause, though there does not seem to be any instance of its being done. But at law, what lien is there under it? &c. It is absurd to imagine, that this clause, which cannot be mutually obligatory, was intended to give a lien on one side, without the like remedy on the other, &c. There has been no remedy afforded under it in a court of law, and still less by means of actual lien, &c. This is not freight earned within the terms of the charter-party. It falls under the general covenants, either for damage, or for providing a full cargo. But the party cannot have this suppletory remedy by way of lien. It would be going too far to hold, that this clause gave him a lien for the non-performance of covenants." The other judges concurred with Lord Ellenborough; but their opinions proceeded on the same grounds as his, and throw no additional light on the subject. The effect, then, of this decision is, that the clause is wholly nugatory and inoperative; that it is vox, et prætera nihil. The course of reasoning, by which it is sustained, amounts to this, that because by the law of England an active remedy by a proceeding in rem is not provided for in all cases under the clause, therefore no passive remedy by way of lien at law can exist for either party; and that though the language of the parties, binding the property, is clear, they cannot intend it, because there cannot be a mutual remedy, and it would be inconvenient for them to have their property bound for the performance of covenants generally, sounding in damages. I confess, that I cannot understand the ground, upon which such reasoning is to be supported. Where words are sensible in the place, in which they occur in an agreement, they are to be presumed to be used to express the intention of the parties, and to constitute a part of their agreement. They are not to be declared a nullity, because in the opinion of the court they may lead to inconvenient consequences, which the parties, if they had foreseen, would have guarded against. Courts are to construe instruments, and not make them for the parties. Besides; there is nothing irrational, or in a large sense inconvenient in parties binding their property for the fulfillment of their covenants sounding in damages. If the parties here had respectively said, that the ship and the cargo should stand mortgaged as security for the due fulfillment of the covenants on each side; or that each should have a lien therefor; it

would be difficult to find any ground of law to overthrow such agreement. Indeed, the case of Small v. Moates, 9 Bing. 574, instructs us, that such a clause would have been obligatory, and would have created a lien. See, also, Gladstone v. Birley, 2 Mer. 402.

The case of Birley v. Gladstone was afterwards brought into chancery, in order to ascertain whether there was a lien in equity under the clause. It is reported in 2 Mer. 401. Sir William Grant denied any relief, upon the ground, that a court of law had already decided, that the clause created no lien; and that the same construction must prevail in equity as at law, since the lien, if any, was of a legal and not of an equitable nature. On that occasion the learned judge said: "A court of competent jurisdiction has decided, that neither law nor contract has in this case given any such right. And, without directly contradicting that decision, it is impossible for me to say, that the plaintiffs have a right, &c. It was asked, what effect the clause could have, if it gave no lien, either in law or in equity? A court of equity is not bound to find an equitable effect for a clause, merely because the construction a court of law has put upon it would leave it inoperative. In truth, it has been copied from foreign charter-parties with very little consideration of the effect, that might be allowed to it by the law of this country. I think it very probable, that in other countries it would have the effect of entitling the ship-owner to retain the cargo for every sort of demand, that would accrue to him under the charter-party. If that be not the effect of it, I do not see what other effect it can have. But as I am bound by the construction which it has received from a court of law, and conceiving that this is not a case in which equity can give a lien, that does not legally exist, I must dismiss the plaintiffs' bill." Now, in this language of the learned judge, (and a truly great judge he was,) I most heartily concur. I put upon the instrument the very construction, which he gives it; and if that be the correct construction, and be the agreement of the parties, where is the principle of the common law, which prohibits giving effect to it, at least by way of a lien or right of detention for the freight? I know of no such principle. And the learned judge was right in making the suggestion, that the court of king's bench did not deny, that such a lien might by the law of England be contracted for. If then the terms of the contract are plain; if they have in the maritime law a clear and determinate meaning; it seems to me, that it is the duty of the court to give effect to that meaning, and to save to the parties the very rights and remedies, which they intended, and the maritime law would give them, at least as far as those remedies are within the compass of the common law. I cannot, therefore, assent to the decision in the case of Birley v. Gladstone in 3 Maule & S. 205. It seems to me utterly unfounded in principle; and I cannot otherwise interpret the language of Sir William Grant, than as a disapprobation of it, although he felt himself bound by it. And I find, that the same view of the clause was taken by Mr. Chief Justice Parker in Pickman v. Woods, 6 Pick. 252, where, in delivering the opinion of the court, he says: "It is most usual (in charter-parties) to stipulate, that the goods are bound for the freight, or that freight shall be paid or secured on delivery; and in all such cases the lien is considered perfect, notwithstanding there are covenants in the charter-party for the payment of freight." Mr. Chancellor Kent manifestly maintains the same doctrine in his Commentaries, as a result growing out of, and in conformity to, the maritime law; and few judges have a better title than he to speak strongly upon questions of commercial and maritime law. 3 Kent, Comm. (2d Ed.) p. 220, lect. 47. See, also, the elaborate judgment of Judge Ware in Drinkwater v. The Spartan [Case No. 4,085], and The Rebecca [Id. 11,619], on the same subject.

My judgment, therefore, is, that the clause in question contains an express contract for a lien for the freight in this case; and that if it did not, still that it contains enough to repel any notion, that the delivery of the goods should precede the payment of the freight, or that the lien by the maritime law for freight was intended to be waived by the parties. The consequence is, that the libellant is entitled to a decree for the freight against the proceeds now in court. The decree of the district court [case unreported] is therefore affirmed with costs.

VOLUNTEER, The (ELLIOTT v.). See Case No. 4,398.

Case No. 16,992.

The VOLUSIA.

[3 Wall. Jr. 375; 19 Hunt, Mer. Mag. 80.][1]

Circuit Court, E. D. Pennsylvania. Sept. Term, 1862.[2]

RIGHTS OF WHARF OWNERS AT PHILADELPHIA.

In Philadelphia the owners of wharves have a right to use them for the unlading of their own vessels to the exclusion of others.

[Appeal in admiralty from the district court of the United States for the Eastern district of Pennsylvania.]

Lincoln & Co. were the lessees of a wharf on the Delaware, below Chestnut street, and proprietors of a line of Boston packets, that loaded and unloaded there. On a Saturday afternoon, 1847, one of their packets lying at the wharf, was covered by the Volusia, which lay alongside of her on the outside berth. The Volusia, with a cargo of fruit, had just arrived from Palermo. The Sulla, another of the line of packets, lay astern of, and at right angles with the packet at the wharf; with her head in. As the packet at the wharf was ready to sail, she swung out, stern foremost, and thus made a wedge-shaped vacancy between herself

[1] [Reported by John William Wallace, Jr., Esq., and here reprinted by permission. 19 Hunt, Mer. Mag. 80, contains only a partial report.]

[2] [Reversing Case No. 8,357.]

and the wharf, which presented an opening into which the Sulla was warped, and made fast to the wharf. As the departing packet swung out, she crowded the Volusia, of course, further from the place where she wanted to be, and effectually prevented her from occupying the inside berth, to cover and secure which she had placed herself at the outside berth. The harbor-master's aid was invoked by the consignee of the Volusia, who ordered the Sulla to give the wharf-place to the Volusia. Lincoln & Co. ordered the captain of the Sulla to retain his place. The harbor-master sued the captain of the Sulla before an alderman for disobeying his orders, and the alderman fined him $25. On the fine being imposed, the Sulla left the wharf, and the harbor-master ordered the Volusia to take it, which she did. Lincoln & Co. then gave notice to the consignee of the Volusia, that their charge for wharfage was $10 per day, which was $8 per day more than the ordinary rate. Payment at this rate being refused, they libelled the Volusia.

It was urged that by the custom of the port, the occupation of an outside berth covers the inside, and that the Volusia acted under the orders of the executive officer of the port, whose directions are obligations. It was answered by the libellants that such a usage, if proved to exist (which was denied), was contrary to reason, and therefore should be abolished; that a merchant might insist upon the use of the inside berth, as essential to the exclusive dominion of his property, while, if to protect it, he was obliged to keep off vessels occupying the outside berth, he would be making his own wrongful act, and one prejudicial to commerce, his justification; and that he could not, for that reason, be presumed to assent to the principle of such an usage, or to yield his acquiescence to the notion that because he did not order off the outside vessel, he thereby surrendered his rights to his own wharf inside; and that the orders of the harbor-master were like the orders of any other officer, obligations so far, and no farther than they were lawful commands.

The matter having been argued before the district court, that court announced the following as its conclusions: 1st. If a berth at any of the wharves be for the time occupied by a vessel, in which the owner or possessor of the wharf has an immediate interest, whether such a vessel be loading, discharging, or empty, no other vessel can claim a right to occupy that berth. 2d. If an adequate berth be vacant at any wharf it may be occupied at once with the owner's consent, otherwise the master or agent of the vessel must apply to the owner or possessor of the wharf for permission to occupy it, and if within twenty-four hours after such application the vacant berth is not filled by some vessel in which the owner or possessor of the wharf has an immediate interest, it may then be lawfully occupied for such time as the despatch of business may require, by the vessel for which the application was made. 3d. A vessel arriving from sea and desirous of discharging her cargo, may claim the inner berth at the wharf for a reasonable time, not exceeding six days, and may require vessels that are empty, or receiving freight, to take for the time the outer berth, unless between the 10th December and 1st March. 4th. The custom of the port gives a right to a vessel which has legally occupied an outer berth, to claim the next inner berth which she covers, whenever it has become vacant. 5th. The wardens of the port, represented by the master wardens and the harbor-masters, are the officers entrusted with the interpretation, application and enforcement of the legal and customary regulations of the port.

The district court, therefore (KANE, District Judge), dismissed the libel, ordering, however, the respondents to pay wharfage according to the accustomed rates; to wit: $2 a day. [Case No. 8,357.]

Mr. Waln, for libellants.
H. M. Phillips, contra.

After advisement, GRIER, Circuit Justice, for the circuit court, reversed the decree, announcing the rule of this port to be, that no vessel has a right to occupy a wharf without the permission of the owner, unless twenty-four hours' previous notice has been given of an intention to occupy a wharf, which was vacant when the notice was made.

VOLUSIA, The (LINCOLN v.). See Cases Nos. 8,357 and 16,992.

VOLZ (UNITED STATES v.). See Case No. 16,627.

Case No. 16,993.

In re VON BECK.

[See Case No. 17,002.]

Case No. 16,993a.

VON COTZHAUSEN v. NAZRO et al.

[See 15 Fed. 891.]

Case No. 16,994.

VON GLAHN v. VARRENNE et al.

[1 Dill. 515.] [1]

Circuit Court, D. Minnesota. 1871.

STATE INSOLVENT LAWS—ALIEN CREDITORS—DISCHARGE.

1. State insolvent acts are valid as to subsequent contracts between citizens or inhabitants of the state enacting the law; and a discharge of the debtor thereunder is as binding upon an alien creditor residing or domiciled in the state at the time when the contract was made and the discharge granted as it would be upon creditors who were naturalized aliens or native born citizens residing in the state.

[Approved in Letchford v. Convillon, 20 Fed. 611. Cited in Milliken v. Barrow, 55 Fed. 149.]

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

2. The grounds upon which the validity of state insolvent laws are sustained, discussed.

[Cited in Mather v. Nesbit, 13 Fed. 873.]

[Cited in Main v. Messner, 17 Or. 78, 20 Pac. 256.]

The present action is brought upon a judgment rendered September 20, 1858, in favor of the plaintiff and against the defendants in one of the state courts of Minnesota. That judgment was rendered upon a promissory note, dated St. Paul, Minnesota, December 17, 1856, made by the defendants Banfiel & Rice, and indorsed to the plaintiff by the defendant Varrenne. This judgment is regular, and was obtained upon personal service. Banfiel & Rice and Varrenne are all made defendants in the present action. Banfiel is not served; Rice, though served, makes no defence; but Varrenne files an answer pleading his discharge under the state insolvent law of Minnesota, which discharge was obtained subsequent to the rendition of the judgment upon which the plaintiff declares, but before the commencement of this action. To show the jurisdiction of this court in the present case, the plaintiff alleges in his complaint that, "On the 1st day of December, A. D. 1856, he (the plaintiff) was and still is a subject of the king of Hanover, in Germany, and an alien; that the said defendants, Charles R. Rice and Alfred Varrenne, during all that time have been and now are each citizens of the state of Minnesota, and the said defendant, Banfiel, is, and for a long time past has been, a citizen of the state of Wisconsin." The defendant Varrenne was discharged under the insolvent law of Minnesota, June 6, 1861. The present action was brought September 19, 1868. The parties waived a trial by jury, and submitted the cause to the court upon the pleadings, which, in substance, disclosed the foregoing facts, upon the record of the judgment on which suit is brought, and of the insolvent proceedings, and upon the following agreed statement of facts, namely: 1. That the plaintiff is now and ever has been an alien; but when the debt was created,—which was in the state of Minnesota,—on which the judgment in suit was obtained, and when said judgment was rendered, and also when said insolvent proceedings by said Varrenne were commenced, and also at the time he was discharged under those proceedings, the plaintiff, though an alien, was a resident of the state of Minnesota, and the said Varrenne was at said date a citizen and resident of said state. 2. That the said insolvent proceedings under the state law, and also the defendant's discharge thereunder, are regular; the plaintiff's debt was scheduled by the defendant; but the plaintiff became no party to such proceedings other than being made a party and notified by publication; he never appeared to said proceedings or received a dividend thereunder; and the question is, whether those proceedings, under these circumstances, are effectual against, or operate upon, the plaintiff.

Mr. Lampreys, for plaintiff.

R. B. Galusha, for defendant Varrenne.

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

DILLON, Circuit Judge. The debt from the defendant to the plaintiff was created in the state of Minnesota, in the year 1856. At that time, and down to the year 1858, when the plaintiff obtained his judgment against the defendant, in the courts of Minnesota, and down to the year 1861, when the defendant obtained his discharge under the state insolvent act, both of the parties to the suit were residents of that state, the plaintiff a resident alien, the defendant a resident citizen.

The proceedings in insolvency under the Minnesota act, and the defendants' discharge thereunder, are admitted to be regular, and if these proceedings and this discharge operate upon and bind the plaintiff, he cannot recover. Whether the discharge is a valid defence to the plaintiff's judgment is the question presented for our determination.

It is provided in the constitution that, "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States." By that instrument congress is also authorized to regulate commerce among the states, and the states are prohibited from passing laws impairing the obligation of contracts. Based upon these and other provisions of the constitution, it was at one time strongly argued that no state could pass any insolvent law; that is, any law which, without payment or satisfaction of the debt, and without the creditor's consent, discharged the debtor of his obligation to pay. The question had to be settled by the supreme court of the United States, and different phases of it were settled at different times.

In Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122, state insolvent laws were adjudged invalid as to pre-existing contracts. Subsequently came the great case of Ogden v. Saunders, 12 Wheat. [25 U. S.] 213, 1827. That case held that such laws were not unconstitutional, as respects subsequent contracts between persons of the same state. Mr. Webster, of counsel in the case last cited, made a very powerful argument against their validity, even to this limited extent. 6 Webst. Works (Little & Brown's Ed.) p. 24 et seq. The opinion that such laws are valid as to subsequent contracts between citizens of the state enacting the law, seems never to have had the approval of his judgment. Speaking of this subject, in the senate, as late as 1840, he said: "It is true that it has been decided that, in regard to contracts entered into after the passage of any state bankrupt law, between the citizens of the state having such law, and sued in the state courts, a state discharge may prevail. So far effect has been given to state laws. I have great respect, habitually, for judicial decisions; but it has nevertheless, I must say, always appeared to me that the distinctions on which these decisions are founded are slender, and that they evade, without answering, the objections founded on the great political and commercial objects in-

tended to be secured by this part of the constitution." 5 Webst. Works, 19. It is quite plain, I think, that the judgment of this great constitutional lawyer was against the validity of state insolvent laws, even as respects posterior contracts between persons resident in the state enacting the law. This opinion rested upon two main propositions: 1. That any law manifestly impairs the obligation of a contract, which (as all insolvent laws do) discharges the obligation without fulfilling it. 6 Webst. Works, 26. 2. That it is not true that existing laws enter into and become parts of contracts made thereunder so as to give them their obligatory force; but on the contrary, he contended that contracts derived their sacredness and obligation from universal and not merely statutory law; and that the constitution intended to protect all contracts, past and future, from invasion by state legislation.

Without pursuing the matter further, it is here sufficient to observe that the court decided against this reasoning, and established the validity of state insolvent laws as respects subsequent contracts made between citizens or inhabitants of the state. This result was reached upon the ground, largely, if not wholly, that every contract made in a state has relation to the existing law of the state, which, so to speak, becomes part of the contract, and since the insolvent law declares a right on the part of the debtor to be discharged from contracts thereafter made on certain terms, the exercise of such right cannot be said to impair the obligation of the contract. This reasoning of the court has been referred to because it will aid us in deciding the question presented in the case at bar.

It is now settled by the decisions of the supreme court—Ogden v. Saunders, supra; Cook v. Moffat, 5 How. [46 U. S.] 309; Boyle v. Zacharie, 6 Pet. [31 U. S.] 348; Baldwin v. Hale, 1 Wall. [68 U. S.] 223, 3 Am. Law Reg. (N. S.) 462, and note—that state insolvent laws are wholly ineffectual against non-residents of the state, even though the contract was, by its terms, to be performed in the state granting the discharge, unless, indeed, such non-resident creditor voluntarily becomes a party to the insolvent proceedings, or claims or accepts a dividend thereunder.

The cases below cited authorize the law relating to discharges under state insolvent acts, and the reasons for it to be thus stated, viz.: that the debt attends the person of the creditor, no matter in what state the debt originated or is made payable; that a creditor cannot be compelled by a state of which he is not a citizen or resident, or in which he has not his domicil, to become a party to insolvent proceedings therein; that such proceedings are judicial in their nature, so that jurisdiction over the person of the creditor is essential; that notice is requisite to jurisdiction in insolvent proceedings, and can no more be given in such cases than in personal actions where the party to be notified resides out of the state, and hence a discharge under a state insolvent act cannot discharge a debt due to a non-resident, unless the latter appears and voluntarily submits to the jurisdiction of the court by becoming a party to the proceedings, or claims a dividend thereunder. Baldwin v. Hale (1863) 1 Wall. [68 U. S.] 223, 3 Am. Law Reg. (N. S.) 462, and note by Judge Redfield; Ogden v. Saunders, 12 Wheat. [25 U. S.] 213; Boyle v. Zacharie, 6 Pet. [31 U. S.] 348; Cook v. Moffat, 5 How. [46 U. S.] 310; Suydam v. Broadnax, 14 Pet. [39 U. S.] 75. And see also the following decisions in the state and circuit courts: Hawley v. Hunt, 27 Iowa, 303; Donnelly v. Corbett, 7 N. Y. 500; Felch v. Bugbee, 48 Me. 9; Beers v. Rhea, 5 Tex. 349; Poe v. Duck, 5 Md. 1; Anderson v. Wheeler, 25 Conn. 603; Crow v. Coons, 27 Mo. 512; Pugh v. Bussel, 2 Blackf. 394; Beer v. Hooper, 32 Miss. 246; Woodhull v. Wagner [Case No. 17,975]; Byrd v. Badger [Id. 2,265]; 2 Story, Const. § 1300; Story, Confl. Laws, § 341; 2 Kent, Comm. 503; Kelley v. Drury, 9 Allen, 27, overruling Scribner v. Fisher, 2 Gray, 43, and following Baldwin v. Hale, supra. It being agreed that the discharge in question is regular, and it being settled that the insolvent law of Minnesota is valid as to contracts thereafter made in that state, and between citizens thereof, it is not seriously controverted, nor does it admit of doubt, that the defence relied on is effectual to bar the plaintiff's recovery, unless for some reason the plaintiff is not bound by the insolvent proceedings.

The only reason urged by his counsel why he is not bound thereby is, that though he was a resident of the state, both when the debt was created and the insolvent proceedings were had, he was not a citizen of it, but an alien or unnaturalized foreigner. In support of this position counsel refer to the language used by judges in some of the cases above cited. Thus in the leading case of Ogden v. Saunders, the second opinion of Mr. Justice Johnson (12 Wheat. [25 U. S.] 258) was concurred in on the general question, and settled the law therein. Curt. Dig. p. 114, § 4; Boyle v. Zacharie, 6 Pet. [31 U. S.] 348, 643; Cook v. Moffat, 5 How. [46 U. S.] 310; Baldwin v. Hale, supra, per Clifford, J. And the principle decided is thus stated by the judge just named: "That between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid as it affects posterior contracts; as against citizens of other states it is invalid as to all contracts." So in Hawley v. Hunt, supra, decided by the supreme court of Iowa, the judge delivering the opinion of the court said: "The settled law now is, that a non-resident and non-assenting creditor is not bound by the debtor's discharge under state insolvent laws, no matter where the debt originated or is made payable. In other words, the citizenship of the parties governs, and not the place where the contract was made, or where it is to be performed." The idea designed to be expressed, by the use of such language, is, not that state insolvent laws cannot operate infra-territorially upon all the people

or inhabitants or permanent residents of a state as well as upon native or naturalized citizens, but the thought intended to be conveyed is, that such laws can have no extra-territorial effect, so as to operate upon the rights of non-residents of the state.

In the case before the court the creditor was a permanent resident of the state. That was his domicil. He was subject to its laws. His debt was created there. His debtor was a citizen of the same state in which the plaintiff resided. He resorted to the laws of the state to enforce the collection of his debt, and it is under those laws and in its courts that he obtained the judgment now in suit. He continued his residence in the state until after the discharge of the defendant under the state law. If the plaintiff were not an alien, it is not denied that he would be bound by that discharge. No reason is perceived why he should have any greater contract-rights than a citizen of the same state. The grounds upon which the supreme court have sustained insolvent laws, viz.: that they are supposed to enter into subsequent contracts made within the state, and hence can only operate within the territory of the state, show that an alien resident in the state is as much affected by such laws as resident citizens of the state.

The lex loci governs, and that, in this case, is the law of Minnesota, and it is operative as to subsequent contracts upon all who reside or have their domicil in the state, irrespective of the fact of legal citizenship. Upon the admitted facts of the case, judgment must be entered in favor of the defendant, Varrenne. Judgment accordingly.

NELSON, District Judge, concurs in the foregoing opinion, and MILLER, Circuit Justice, who was present when the case was argued, but not when it was decided, agreed to the result.

Case No. 16,995.

Ex parte VON HOVEN.

[See Case No. 16,858.]

Case No. 16,996.

Ex parte VON HOVEN.

[See Case No. 16,859.]

VON LIND v. The WILLIAM SLATER.

See Case No. 13,382.

Case No. 16,997.

VON ROY v. BLACKMAN.

[3 Woods, 98.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1877.

WRITS—CONCLUSIVENESS OF RETURN—MATTERS OF OPINION—SERVICE OF SUBPŒNA.

1. The return of an officer touching any fact about which he was bound to make return, is conclusive on the parties to the suit and their privies.

2. The return of an officer of a fact which necessarily involves an opinion, is no exception to this rule.

3. It is the duty of a court to take notice of the sufficiency of the returns of its officers.

4. A return of a subpœna in equity which declared that the subpœna had been handed to a person at the domicile of the defendant, and who resided at said domicile, the defendant being absent, is not a sufficient return of service.

5. The return, where the service is by leaving a copy of the subpœna at the dwelling-house, or usual place of abode of the defendant, must show that the copy was handed to a member of or resident in the family of the defendant.

In equity. Heard on sufficiency of plea in abatement. The plea was as follows: "Mary B. Blackman, sued herein in her representative and individual capacity, now comes into court for the sole purpose of objecting to the sufficiency and legality of the service of the process by which the complainant [Frederick Von Roy] seeks to subject this defendant to the jurisdiction of this honorable court, and this defendant says that there has been no legal or sufficient service of the subpœna, or other sufficient process to compel her to appear before this honorable court; that true it is that the marshal has returned upon the subpœna issued to this defendant herein, that he served it on the 16th day of August, 1876, by handing the same to John W. Houston, a person above the age of fourteen years, at the domicile of Mrs. Blackman, in the parish of Carroll, Louisiana, four hundred and seventy-six miles from New Orleans; that defendant avers that at the time of said pretended service, to wit, on the 16th August, 1876, her domicile and usual place of dwelling, or abode, was in Mississippi City, in Harrison county, in the state of Mississippi; that her domicile and usual place of dwelling or abode was not, on August 16, 1876, in the parish of Carroll, in the state of Louisiana; that her domicile and usual place of dwelling or abode, for the last ten years, has been in the county of Harrison, state of Mississippi; that for the same period she has had no domicile or usual place of dwelling or abode in the state of Louisiana, and this defendant avers that said return is untrue; wherefore, the defendant prays judgment of this honorable court whether she ought to be made to make appearance and further defense to the said bill of complaint, and that she be hence dismissed at the cost of complainant, and for all general and equitable relief."

E. T. Merrick, Geo. W. Race, and W. H. Foster, for complainant.

John Finney and W. S. Finney, for defendant.

BILLINGS, District Judge. The complainant has set down the plea to be argued, and the question, therefore, is upon its sufficiency in law. It is alleged that the return of the marshal is false, and that the defendant is not estopped from urging this plea.

The authorities are numerous and weighty in

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

support of the proposition, that in the same case the parties cannot question the return of the officer: Benn. & H. Dig. tit. "Officer," subd. 5; Id. "Return of Officers;" Lawrence v. Pond, 17 Mass. 432; Com. Dig. tit. "Return," F, 2; Barr v. Satchwell, 2 Strange, 813; 2 Phil. Ev. (Ed. 1859, Cowan & Hill's Notes) 370; 3 Bouv. Inst. 190, § 2795; Cow. Treat. 335, art. 867; Goubot v. De Crouy, 1 Cromp. & M. 773; Putnam v. Man, 3 Wend. 202; Case v. Redfield, 7 Wend. 399; Evans v. Parker, 20 Wend. 622. I have endeavored to find cases which would support the proposition urged by the defendant, that where a fact involving an opinion was returned by the sheriff, there might be an exception to the rule that the return could not be denied. But the principle seems to be settled, that as to parties and privies, the return of the sheriff, as to any fact which he was bound to return, is conclusive. In Lawrence v. Pond, supra, the return was as to the qualifications of the appraisers of land taken on execution. In Goubot v. De Crouy, 1 Cromp. & M. 772, the return was "that the defendant was and yet is in the service of the Sicilian minister at the British court as a domestic servant." Busby moved to set aside the return on strong affidavits, showing fraud and collusion between the sheriff's officer and the defendant; that the defendant was in trade; that he had said he was endeavoring to get attached to the embassy; that he had been taken and collusively discharged by the officer. The court says: "We cannot interfere upon motion, your only course is by bringing an action against the sheriff for a false return." In Case v. Redfield, supra, evidence was offered that a copy of the attachment was not left at the dwelling-house, or last place of abode of the defendant, and it was excluded. In the case of Van Rensselaer v. Chadwick, 7 How. Prac. 297, the court seems to hold that the return of the sheriff is not conclusive, and may be contradicted. This would be in opposition to the other cases which I find, and they are so numerous that I have no doubt upon the subject. In the case of Earle v. McVeigh, 91 U. S. 503, I am satisfied that the decision, so far as it involves the question here presented, was based upon the ground that the impeachment of the return was in a second suit. The plea is therefore bad, since it traverses the return of the marshal in the same cause in which it is made.

The duty of the court to take notice of the return of its officers to its processes is undisputed. I shall, therefore, consider the question as to the sufficiency of this return of the marshal. The return is as follows: "Received August 10th, 1876, by the United States marshal, and on the 16th day of August, 1876, served a copy herein on Mrs. Mary B. Blackman, administratrix, individually, widow in community within named, by handing the same to John W. Houston, a person over the age of fourteen years, at the domicile of Mrs. Blackman, in the parish of Carroll, Louisiana, four hundred and seventy-six miles from New Orleans, and residing at said domicile, Mrs. Blackman being absent at the time of service." It is to be observed that the return states that the service was made by leaving a copy of it at the residence of the defendant, by handing the same to John W. Houston, who resided at said domicile. Equity rule 13 provides how service shall be made. It is as follows: "Service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house, or usual place of abode of each defendant, with some adult person who is a member, or resident in the family."

This return simply shows that Houston resided at said domicile. It does not state that he was a member, or resident in the family of the defendant. I think this defect fatal. Many persons reside in the same house with others who are not members or residents in the family of that other. A paper left with a member or resident of the family of a defendant, may well be supposed, in the ordinary course of things, to reach that defendant, but the presumption would be much lessened in case the service was made upon a possible stranger to the defendant, although he lived at the same house: Gorham v. Peyton, 2 Scam. 365. In the note to Story, Eq. Pl. p. 63, there is this observation, "The court will set aside writs for defective or wrong returns on motion," and reference is made to the case of Atkinson v. Taylor, 2 Wils. 117. In the case of Jobbins v. Montague [Case No. 7,329], the subpœna was served in New Jersey. The service was claimed to be irregular and without force, and was set aside on motion. In Lawrence v. Russell, 17 Pick. 388, there was a plea in abatement to the jurisdiction. The court say, "The plea is bad, but the court will not proceed in the suit, as it does not appear that the defendants, or any estate of theirs is within the jurisdiction of the court." In Arden v. Walden, 1 Edw. Ch. 631, the proceedings were dismissed for defective service, on motion. In Tingley v. Bateman, 10 Mass. 343, the defendant pleaded an abatement to the writ, that at the time of the service of the same, and long before and ever since, the plaintiff, defendant and supposed trustee, were all inhabitants of the state of Rhode Island. The court held the plea bad, because it did not give the defendant a better writ, but upon the authority of Lawrence v. Smith, 5 Mass. 362, and upon the ground that no sufficient service was returned with which the court could proceed to adjudge between these parties, they dismissed the action.

Let the entry be that the plea be adjudged bad, and, further, that upon the ground that no sufficient service has been returned, the court orders further proceedings to be stayed, until there is further proof of service, or an appearance in the cause.

VON SACHS (UNGEWITTER v.). See Case No. 14,343.

Case No. 16,998.

VON STADE v. ARTHUR.

[13 Blatchf. 251;[1] 22 Int. Rev. Rec. 267.]

Circuit Court, S. D. New York. Jan. 19, 1876.

CUSTOMS DUTIES—CLASSIFICATION—BRISTLES.

In the tariff acts, the article of bristles is separately classified, and is regarded as a different article from hair, and bristles are not included in the general words, "the hair of an animal."

[This was an action by Frederick W. Von Stade against Chester A. Arthur, collector of the port of New York, to recover duties paid under protest.]

Edward Hartley, for plaintiff.
George Bliss, U. S. Dist. Atty.

SHIPMAN, District Judge. The second section of the act of June 6, 1872 (17 Stat. 231), provided, that, on and after August 1st, 1872, the existing duties upon the articles which are enumerated in the section should be reduced ten per centum. The section specifies, among the enumerated articles, "all wools, hair of the alpaca goat, and other animals, and all manufactures wholly or in part of wool, or hair of the alpaca and other like animals, except as hereinafter provided." The question in this case is, whether the duty of fifteen cents per pound upon hogs' bristles was reduced by virtue of the act which has been cited.

Waiving the question, whether it was the intention of congress to reduce the duty upon the hair of all animals, whether such hair was used or not in the manufacture of textile fabrics, I am of opinion, that, in the tariff acts, the article of bristles is separately classified, and is regarded as a different article from hair. This will appear from the act of June 30, 1864 (13 Stat. 212), which prescribes a duty upon bristles of fifteen cents per pound, and upon hogs' hair of one cent per pound. The language of the Revised Statutes of 1874 (page 480) is "Bristles, fifteen cents per pound;" "hair of hogs, one cent per pound." The term "bristles" is used in the tariff acts to denote a separate and distinct article from hair, and the bristles are not included in the general words "the hair of an animal," but have a distinct classification.

Let judgment be entered for the defendant.

Case No. 16,999.

VOORHEES v. ALBRIGHT.

[2 N. J. Law J. 57.]

Circuit Court, D. New Jersey. 1879.

REMOVAL OF CAUSES — CONTEMPT PROCEEDINGS.

[Where a rule to show cause why defendant should not be attached for contempt for violating an injunction was granted by the state court before removal of the cause, *held*, that the federal court would remand the contempt proceedings while retaining the main cause for adjudication.]

Voorhees filed a bill in chancery against Albright to restrain him from disposing of certain mortgaged chattels. After answer, an order was made requiring an inventory of the goods, and enjoining the defendant from reducing the stock below its value when mortgaged. About a year after, no proofs having been taken, the complainant obtained an order for further examination of the stock, and that defendant show cause why an attachment should not issue against him for a violation of the injunction. Before the hearing of this rule, Albright filed a petition to remove the case to the United States circuit court, the parties being citizens of different states. A motion was then made to remand, on the ground that a cause could not be removed pending proceedings for contempt, nor as a mode of escaping the consequences of a breach of the injunction. The defendant insisted that his right to remove was absolute, and that the circuit court could deal with the alleged breach of the injunction, which he denied.

THE COURT held that the cause was properly removed, but that any alleged contempt of the court of chancery while the cause was in that court must be disposed of by that court; and an order was thereupon made remanding the proceedings for contempt, and retaining the cause itself for adjudication in the circuit court.

VOORHEES (BANK OF THE UNITED STATES v.). See Case No. 939.

Case No. 17,000.

VOORHEES v. FRISBIE.

[Nowhere reported; opinion not now accessible.]

Case No. 17,001.

VOORHEES v. BONESTEEL et al.

[7 Blatchf. 495.][1]

Circuit Court, E. D. New York. July 22, 1870.[2]

HUSBAND AND WIFE — SEPARATE PROPERTY OF WIFE—CARRYING ON TRADE—RIGHTS OF HUSBAND.

1. Under the laws of New York, as interpreted by the courts of the state, a married woman may own property of every description, in the same manner as if she were a feme sole. She may engage in trade, and her labor and her time are not the property of her husband. She may even employ the time and the labor of her husband in the business of using her capital in trade, and she may support her husband out of the profits of her business; but these facts will not make the business or its profits the property of the husband

2. A conveyance of property to a married woman, in fulfilment of an agreement made in good faith between her and the grantor, does not, under the laws of New York, entitle her husband to the property, even though labor and services performed by him formed a part of the inducements to the making of the agreement.

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

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[2] [Affirmed in 16 Wall. (83 U. S.) 16.]

This was a bill in equity, brought by the plaintiff [James C. Voorhies], as assignee in bankruptcy of John N. Bonesteel, to obtain possession of certain personal property alleged to belong to the estate of the bankrupt, and to be distributable in bankruptcy. The bill, after averring the proceedings in bankruptcy, and the appointment of the plaintiff as assignee, averred, that Sophia H. Bonesteel, who was the wife of the bankrupt, had standing in her name upon the books of the Nicholson Pavement Company of Brooklyn, 1,145 shares of the capital stock of that corporation, which were in truth the property of the bankrupt, and should have been included in the bankrupt's inventory, and delivered to the assignee, and applied to the payment of the debts of the bankrupt which had been proved, or were provable, in his proceedings in bankruptcy. The bill then proceeded to set forth the circumstances under which Mrs. Bonesteel became possessed of the stock in question, as follows: In the year 1866, one Jonathan Taylor was owner of a license from the patentee of the Nicholson Pavement to lay that pavement in Brooklyn, and, in that year, employed John N. Bonesteel to negotiate a sale of that license, and, through Bonesteel, did negotiate a sale to the firm of Page, Kidder & Co., of one-half of said license, for the sum of $10,000, and, in consideration of the services rendered by Bonesteel in negotiating that sale, and also for other services rendered by Bonesteel to Taylor, Taylor agreed to assign to Bonesteel the other half of that license. Thereupon, Taylor, on the 7th of December, 1867, by the direction of Bonesteel, and to vest in Mrs. Bonesteel the said one-half interest, and to vest in Page, Kidder & Co., the other half purchased by them, made an assignment of the whole license, conveying one-half to Mrs. Bonesteel and one-half to Page, Kidder & Co. Thereafter, Page, Kidder & Co., and Mrs. Bonesteel, and the members of the firm of William Smith & Co., to which firm Bonesteel had sold one-half of the interest so conveyed to Mrs. Bonesteel, organized the Nicholson Pavement Company, and, upon the organization of the company, and in consideration of the transfer to it of the said license, there was issued to said parties the whole capital stock, in the proportions of their interest in the license, Mrs. Bonesteel receiving, as the owner of one-fourth of said license, 1,150 shares of said stock, being one-fourth thereof, less 400 shares reserved for the working capital of the corporation. Then followed averments respecting other shares of the stock, and the right of Bonesteel to one-fourth of the 400 reserved shares, the right to all of which depended upon the same question. It was averred that Bonesteel did not include this property in his inventory, and that he, as well as Mrs. Bonesteel, denied the assignee's right thereto, and refused to surrender the same. The prayer of the bill was, that the court would decree the defendants to account for, and pay over to the assignee, all sums received by either of them by reason of said transfer of one-half of the interest in said license to Mrs. Bonesteel, and that the defendants might also be decreed to transfer to the assignee the stock of the Nicholson Pavement Company, held by them and each of them. The answer denied that Bonesteel ever owned, or was entitled to, the said one-half interest in the pavement license which was conveyed to Mrs. Bonesteel, or that it was transferred to her at his request, and averred that the said one-half interest, and the proceeds of the sale of one-half thereof to Wm. Smith & Co., and the stock in the Nicholson Pavement Company which was issued to and stood in the name of Mrs. Bonesteel, was and always had been the sole and separate property of Mrs. Bonesteel, and formed no part of the estate of, and was in no way liable to be conveyed to, the assignee, for distribution by him.

George W. Cotterill, for plaintiff.
John Winslow, for defendants.

BENEDICT, District Judge. The bill contains no allegation of fraud. The simple and only position taken by it is, that the one-half interest in the pavement license, which is conceded to be now represented by the stock in dispute, was conveyed by Taylor to Mrs. Bonesteel in trust for her husband, and is now held by her to his use.

This position is not supported by the proofs. There is no evidence to show that either Taylor, the grantor, or Mrs. Bonesteel, the grantee, or John N. Bonesteel, her husband, ever intended or supposed the property in question to be held by Mrs. Bonesteel in trust for her husband. On the contrary, the proofs show that the property was conveyed to Mrs. Bonesteel in pursuance of a prior agreement between her and Taylor, to the effect that she should have such an interest as her own, and that it was received by her without the suggestion from any source that it was to be other than her own separate property. So she has always treated it. She sold a part of the interest to Smith & Co., and received the purchase money herself, and disposed of it as her own. She assumed the position of a corporator in the Nicholson Pavement Company, and, as licensee, transferred the remaining portion of her interest in the license to that corporation. She received from that corporation the stock in question, which was issued to her as her separate property, and she has, in all respects, dealt with the interest in the license, and with the stock, as her own. Nor does the evidence show any participation by her husband in the avails of the property, or any assumption by him of any of the responsibilities attaching to his wife, either as licensee or corporator, or any claim on his part to be in any way directly or indirectly interested in the property in question. Upon the evidence presented, it would be vain to contend that Bonesteel could have maintained an action either against his wife, or against Taylor, to compel a transfer of the

interest in the pavement license to him, or to put him in possession of the stock which his assignee now claims. Indeed, the bill itself avers that Mr. Bonesteel denies that he ever had any right to the stock. How, then, can this plaintiff, who asserts no fraud, but simply asks to receive what Bonesteel, at the time of his bankruptcy, was himself entitled to demand, be adjudged entitled to this property, as property of the bankrupt, which should have been placed in the inventory and delivered with the assignment? Indeed, the position taken in the bill was not taken on behalf of the plaintiff upon the argument. On the argument, the case was treated as resting upon an allegation of fraud. It was claimed to have been proved that the consideration for the conveyance of the one-half interest in the pavement license consisted, at least in part, of the time and labor of John N. Bonesteel, an insolvent, furnished by him to Taylor; and it was claimed that, by reason of this fact, the court must adjudge the property to be held by Mrs. Bonesteel in fraud of the rights of the creditors of Bonesteel, and so transferable to the assignee. But the bill does not charge fraud, and, in the absence of fraud, it would not follow that the interest became the property of Mr. Bonesteel, if the facts were proved as claimed.

A conveyance by Taylor to Mrs. Bonesteel of property belonging to Taylor, in fulfilment of an agreement made in good faith, between Taylor and Mrs. Bonesteel, does not, under the laws of this state, entitle the husband to the property. Nor, would the additional fact —which is the most that can be well insisted, as the evidence stands—that labor and services performed by Bonesteel formed a part of the inducements which led to the agreement, make Bonesteel the equitable owner of the property, and entitle his assignee to a conveyance thereof. The circumstances, that Bonesteel was insolvent, and that he did render certain services in negotiating a sale of the other one-half interest in the pavement license to Page, Kidder & Co., are proper facts to adduce in support of an allegation of fraud; but they do not make the property conveyed by Taylor to Mrs. Bonesteel the property of Bonesteel.

I might, therefore, as I conceive, here stop, and dismiss the bill, for the reason that the case set up in the bill is not proved by the evidence; but, inasmuch as the case has been treated by counsel as presenting a question of fraudulent intent, and I have attentively studied the evidence in that aspect, I may, with propriety, add the result of my consideration.

Before adverting to the evidence in this aspect, it will be well to notice the changed position of married women under the laws of this state. According to those laws, as interpreted by the courts, a married woman may own property of every description, in the same manner as if she were a feme sole. She may engage in trade, and her labor and her time are not the property of her husband. She may even employ the time and the labor of her husband in the business of using her capital in trade, and she may support her husband out of the profits of her business; and neither the fact that she employs her husband, nor the fact that the labor and skill of the husband contributes to the success of the business, nor the fact that the husband and his family are supported out of the profits of the business, will make the business or its profits the property of the husband. Gage v. Dauchy, 34 N. Y. 293; Buckley v. Wells, 33 N. Y. 518; Knapp v. Smith, 27 N. Y. 277. Mrs. Bonesteel could, therefore, legally agree with Taylor for a transfer to her of an interest in the pavement license, in consideration of her services, and the license would be hers, if such were in reality the contract of the parties. She might even take it as a gift from Taylor, and hold it as her own. It does not follow, as a conclusion of law, from the fact that a conveyance is voluntary, that it is fraudulent. In this state, the question of fraud is made, by statute, a question of fact, and not dependent upon the absence of a valuable consideration. It is in view of this state of the law, that the circumstances attending the transaction in question must be considered. These circumstances are hardly in dispute. John N. Bonesteel had been for some years insolvent, without money or business. His family had been, for the most part, supported by means of advances made to Mrs. Bonesteel by her father, who is a wealthy man, and who, in 1866, advanced to his daughter about $3,000, to be used as a capital in a business to be conducted by John N. Bonesteel as agent of his wife. Bonesteel was so employed when his services in introducing the Nicholson pavement in New York City were sought by Jonathan Taylor, who then held a license to lay that pavement in New York City, Brooklyn, and other places. Accordingly, in the spring of 1866, Bonesteel began to devote time and labor to the Nicholson pavement in New York City, under an agreement with Taylor in respect to profits, which finally produced him, for these services, about $1,000 in money. But Mrs. Bonesteel was dissatisfied with the neglect of her business for that of the pavement, and made objection personally to Taylor, on the ground that her business would be given up without corresponding profit to her. Bonesteel also objected to proceeding without the consent of his wife, because of the fact that, for some time, the family had been dependent on her, and he was using her capital for her. Thereupon, Taylor, who, as licensee, was interested in every extension of the Nicholson pavement aside from the profits of any particular contract, and who knew that Mrs. Bonesteel was so connected by marriage as to be able to aid in bringing influential persons in Brooklyn to advocate the introduction of the pavement, gave Mrs. Bonesteel to understand that, if her objections were withdrawn, and her influence with Mr. S. B. Chittenden, of Brooklyn, who was her connexion and friend, thrown in favor of the pavement, he would give her an interest in the license to lay the pavement

in Brooklyn, and induced Mrs. Bonesteel to believe that, by proper exertion and the aid of her friends, the license for Brooklyn, which had hitherto been unused, could be made to realize a profit. In accordance with this understanding, Mrs. Bonesteel withdrew her objections, the commission business was given up, at some small loss to Mrs. Bonesteel, it would appear, and Mrs. Bonesteel brought her influence to bear upon her influential connexion with apparent success. It is true, that no conveyance was at this time executed to Mrs. Bonesteel, nor was the agreement made definite as to the portion which she was to have, but all the parties understood her to be interested to some extent, and Taylor swears that, in his mind, it was to the extent of one-third, but that, in the end, he made the portion one-half, upon consideration of the fact that a sale of his other one-half for $10,000 had resulted from the influence of Mr. Chittenden, her connexion. Mr. Chittenden is careful to say that he never made it a condition of his action that Mrs. Bonesteel should be interested in the license for Brooklyn; but, after he had satisfied himself of the merits of the pavement, he advocated it earnestly, and caused his newspaper to advocate it, and he understood Mrs. Bonesteel to be interested, and himself urged and insisted that she should have one-half of the license. Mr. Chittenden also advised Mrs. Bonesteel in regard to the sale of one-half of her interest after it was acquired; and he discounted for Mrs. Bonesteel the notes which William Smith & Co. gave her for the portion bought by them from her. Under these circumstances, on the 7th of December, 1867, Taylor made the conveyance which transferred the license to Page, Kidder & Co. and to Mrs. Bonesteel, in the proportion of one-half to each. These facts clearly appear, and I find nothing in the evidence to deprive them of their force, or to indicate that either Mrs. Bonesteel, or Mr. Taylor, or Mr. Chittenden, or Bonesteel considered the one-half interest as belonging to Bonesteel, or had any intention to deprive the creditors of Bonesteel of any rights, or to cover or conceal any property from them.

A further fact should be noticed as important in determining whether the transaction between Taylor and Mrs. Bonesteel was in truth what it appeared to be, or was a collusive device to defraud the creditors of Bonesteel, and that is, the nature and value of the property conveyed to Mrs. Bonesteel. It was simply an interest in a license to use a certain patented article in Brooklyn, on payment of a royalty to the patentee, and that article a street pavement, for which, in effect, there was but a single possible purchaser—the city. None of the pavement had been used by the city, and the value of the license, at the time of the arrangement with Mrs. Bonesteel, was, therefore, wholly conjectural, and entirely dependent upon the exertions to be thereafter put forth to commend the pavement to the public and the city authorities. No witness speaks of any sum fixed on as the value of the interest, but Mr. Chittenden says that he refused to give anything for it, and deemed it of very small value. It cannot, therefore, be said that, in the hands of creditors, as property to secure the payment of their debts, this interest would have had any value at the time of the arrangement with Mrs. Bonesteel. Nor can the alleged consideration received from Mrs. Bonesteel be claimed to be disproportionate in comparison with the property. Furthermore, Taylor was a stranger in Brooklyn, and it does not appear that he ever intended to do more than to sell his license. In fact, he did sell his whole interest for Brooklyn at an early day. The sale of one-half of the interest to Page, Kidder & Co. was, therefore, a great advantage to the interest held by Mrs. Bonesteel, for the buyers were dealers in coal, tar and lumber, and were able at once to engage in the business of laying the pavement, if the authorities could be induced to accept it. It is, therefore, entirely reasonable to suppose that Mr. Bonesteel, knowing of his wife's arrangement with Taylor, and the effect of such a sale upon her interest, should exert himself to bring about the sale to Page, Kidder & Co.; and the fact that he did so, is in no way inconsistent with the idea that the interest was, in good faith, the actual property of his wife. Nor could the fact that Mr. Bonesteel did so exert himself, work to the injury of Mrs. Bonesteel, by depriving her of a portion of the interest which she finally received in pursuance of the agreement made by Taylor some time before. These circumstances, when fairly considered in their real relations, do not appear to me to indicate fraud, and could not, in my opinion, justify the court in deciding, against the positive statement of Taylor, who has no interest in the controversy, and against the similar statement of both Mr. and Mrs. Bonesteel, that the object of the conveyance to Mrs. Bonesteel was to cover the property, and that the reason for making it was that Bonesteel was insolvent.

But, it is said that Mrs. Bonesteel herself swears that the consideration of the conveyance to her was the time that her husband had given to Taylor, and thus proves the transaction to have been a cover. But this answer of Mrs. Bonesteel to a single interrogatory should be taken in connection with the rest of her testimony, and, so considered, it is far from sufficient to justify the conclusion sought to be drawn from it.

Again, it is said, that the claim that any influence of Mrs. Bonesteel in favor of the pavement formed the consideration, is absurd, because, when Taylor conveyed one-half to her, he conveyed the other half to Page, Kidder & Co., and, therefore, could derive no benefit from her future exertions. But, the conveyance to Page, Kidder & Co. was long after the agreement between Mrs. Bonesteel and Taylor that she should have an interest, and, as Taylor swears, that sale for $10,000 was the result of his understanding with her. This seems to me reasonable and natural. Taylor wished to sell this license for Brooklyn. To make it marketable, he desired the influence of Mrs. Bone-

steel and her friends in urging the adoption of the pavement. To get rid of her opposition, and to secure her influence, he gave her one-half, and thus realized $10,000 in cash for the remaining one-half of a license which, up to that time, had proved valueless and unsaleable. That Bonesteel himself should labor to effect the sale to Page, Kidder & Co., and aid, to the extent of his ability, in advocating the pavement, is also natural, for he might foresee that the pavement business, if once started by those parties, would furnish him with employment, and enable him thereafter to contribute to the support of his family. Everything, therefore, which the proofs show him to have done in regard to the sale to Page, Kidder & Co., and to advance the pavement, is consistent with his statement that the license belonged to Mrs. Bonesteel and not to him.

When thus considered, the facts of the case explain the omission in the bill of any averment of fraud, and sustain the averment of the answer, that the property in question is not the property of Bonesteel, but, in truth and in fact, the separate property of Mrs. Bonesteel, bought in good faith by her from Taylor.

In closing this opinion, I have only to add, that the case has received my best attention, not only on account of its importance, but by reason of the fact that the transaction in question had been before considered elsewhere, and a different result arrived at, the proceeding being by a petition, which was subsequently set aside for informality. In re Bonesteel [Case No. 1,627]. The case here, however, is different from the one on petition, not only in the pleadings, but also in the proofs.

Upon the pleadings and proofs, as they stand before me, I cannot arrive at a conclusion favorable to the plaintiff, but must dismiss the bill.

[The case was taken by appeal to the supreme court, where the decree of this court was affirmed. 16 Wall. (83 U. S.) 16.]

VOORHIS, The SUSAN E. See Case No. 13,633.

Case No. 17,002.

In re VORBECK.

[1 Pac. Law Rep. 100.]

District Court, D. California. Feb. 28, 1871.

DISCHARGE OF BANKRUPTS.

[It rests in the sound discretion of the court to discharge a bankrupt, even where his application therefor was made more than a year from the adjudication of bankruptcy.]

[Cited in Re Lowenstein, Case No. 8,573.]

[In the matter of Fritz Vorbeck, a bankrupt.]

HOFFMAN, District Judge (orally). This was an application for a discharge in bankruptcy after the lapse of more than one year after the adjudication of bankruptcy. It is well settled that this may be granted,—that it rests in the sound discretion of the court to grant it or not, notwithstanding more than one year has elapsed since applicant was declared bankrupt. Debts were proved and assets were realized. The discharge is granted.

Cited in Re Wilmott [Case No. 17,778] N. D. N. Y.; Re Greenfield [Id. 5,775]; Re Martin [Id. 9,153]; and Re Canaday [Id. 2,377]; also, 2 N. B. R. 142.

Case No. 17,003.

VORE v. FOWLER.

[2 Bond, 294.] [1]

Circuit Court, S. D. Ohio. June Term, 1869.

JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP—RESIDENCE IN DISTRICT—SERVICE OF PROCESS.

1. Suit was brought, in the circuit court of the United States within the Southern district of Ohio, against the defendant by the plaintiffs, and the marshal of said district made a return to the writ that defendant was served personally. The declaration averred defendant to be a citizen of Ohio, and the plaintiffs citizens of Iowa. *Held*, that it was not necessary, to give jurisdiction to the court, that the declaration should allege the defendant to be a resident of the Southern district of Ohio.

2. A circuit court of the United States has jurisdiction, where the parties are citizens of different states, without reference to the division of a state into districts.

3. If the defendant is a citizen of the state, and process has been served in the proper district, the question of jurisdiction can not prevail.

[This was an action by Pierson Vore against Jacob Fowler. Heard on demurrer to the declaration.]

E. A. Guthrie and T. J. Gallagher, for plaintiff.

R. M. Corwine, for defendant.

LEAVITT, District Judge. This is an action on a promissory note for $1,000, given by the defendant, payable to the order of the plaintiff. The declaration is in the usual form, averring, as a ground for the jurisdiction of this court, that the plaintiff is a citizen of the state of Iowa and the defendant a citizen of the state of Ohio. The defendant has demurred to the declaration; one ground of which is, that the court has not jurisdiction, there being no averment that the defendant is a resident or inhabitant of the Southern district of Ohio. This averment is not necessary. The marshal of this district has made a return to the writ, that it was served personally by the delivery of a copy to the defendant. The return does not state that it was served within the Southern district of Ohio, nor was this necessary. The fact of service on the defendant implies that it was served in that district. By law, no authority is vested in the marshal to serve such process without the district for which he is appointed. The court must presume, in the absence of proof to the

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

contrary, that the marshal has acted within the scope of his authority, and that the writ was executed within this district.

The averment of the declaration, that the defendant was a citizen of the state of Ohio, is sufficient to give this court jurisdiction, without alleging that he was a resident or citizen of the Southern district. The constitution declares, that the judicial power of the United States shall extend "to controversies between citizens of different states; and the act of congress, defining the jurisdiction of the circuit courts, provides that it shall extend to all suits between a citizen of the state in which suit is brought and a citizen of another state. It requires only that the parties shall be citizens of different states to vest jurisdiction in a circuit court of the United States without reference to the division of a state into districts. It results, therefore, that if a party sued is a citizen of the state in which suit is brought, though not a citizen or resident of the judicial district in which he is sued, the court has jurisdiction. If a citizen of the state, and the process has been served in the proper district, the question of jurisdiction can not prevail. To this effect is the decision of the supreme court of the United States in the case of McMicken v. Webb, 11 Pet. [36 U. S.] 25. In that case the defendant was a resident and a citizen of the Western district of Louisiana, but sued and served with process in the Eastern district. There was a plea to the jurisdiction of the court, which the supreme court held could not be sustained. In that case, as in this, the averment was that the defendant was a citizen of the state; and the writ being served in the district in which suit was brought, the jurisdiction of the court was undeniable. The demurrer is overruled.

Case No. 17,004.

VORHIS v. FORSYTHE.

[4 Biss. 409.] [1]

Circuit Court, N. D. Illinois. March, 1864.

BREACH OF COVENANT—TAX DEED.

1. It is not a breach of the covenant of warranty of seizin to show a conveyance by the defendant's grantor subsequent to the conveyance to defendant; it should be alleged that there was a valid and subsisting title in the grantor at the time the deed was made, upon which the breach is alleged.

2. A judgment for taxes, sale, and tax deed, constitute a breach of the covenant, and it is not a good plea that the sale was not valid.

Action on covenants of warranty and seizin, and defendant demurs to breaches.

DRUMMOND, District Judge. In this case the defendant sold to the plaintiff certain lots in Peoria. The deed contained a covenant of warranty of seizin, of a good right to convey, and that the land was free from incumbrance. The plaintiff, on the ground that there was a breach of the covenants, has brought an action against the vendor upon the covenants that the vendor was lawfully seized of the premises and had a good right to convey, and that they were free from incumbrance, and has set forth various breaches of the covenants.

The first is that one Bogardus had a right of pre-emption on the land, and that having this right the land was purchased of the United States, and a patent was granted to him on the 5th day of January, 1838. This is claimed to be a breach of the warranty that the land was free from incumbrance. The plea alleges that this was only an apparent and not a real title in Bogardus. I think this is an answer to this breach, for the reason that it does not appear upon the face of this averment, that it was in itself, and necessarily, an incumbrance upon the land.

The ground taken by counsel is, that although the government of the United States may have conveyed the land to the party through whom the defendant claims, yet having conveyed it afterward to a third person and given a title of record, that constitutes an incumbrance. I do not think it follows that it is an incumbrance within the meaning of the warranty. The effect of it would be this, that if A granted land to B and afterwards granted it to C, that the grant of the land to C would be an incumbrance notwithstanding A had previously granted it to B. It must appear on the face of the declaration that it is necessarily a burden or incumbrance on the land. I do not think that appears, or if it does it is done away with, by the answer given to the breach.

Then, as to the other plea, I think that is also sufficient; that he had a good right to sell and convey the land. The allegation now is that the pre-emption title of Bogardus was, and still is, a valid title at law and in equity. The only question is whether this averment is sufficient to show that there was a valid subsisting and outstanding title. There is some doubt, perhaps, whether the true construction of it is that there was at the time a valid subsisting title in Bogardus. We are inclined to think that the pleader had better set forth in whom there was a valid subsisting title, so as to show that there was an outstanding title. If the necessary construction of this averment is that there was a subsisting title in Bogardus, then it would be good. In order to avoid all misapprehension, I think the pleader had better state that there was a valid and subsisting title in some person at the time the deed was made upon which the breach is alleged.

The other breaches in the declaration are substantially that the land was taxed by the state, that it was sold for the non-payment of the taxes, judgment obtained, and a deed executed. An objection was taken to the declaration on the ground that it was not averred that this tax sale was valid. The court overruled the

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

objection, for the reason that it appeared prima facie that it was.

The answer as put in now is that this was not a valid sale. Admitting that to be true, is it a bar to the action? It is claimed that a tax sale unwarranted by law, although it might be under a judgment followed by a deed, does not in point of fact constitute an incumbrance on the land within the meaning of the clause in the deed that it was free from all incumbrance. Did it in law constitute technically an incumbrance? I am inclined to think it did, because it appears to be a burden upon the land, and it is better to hold in this way and to allow the other questions to arise on a claim for any damages which the party is entitled to cover.

I think there is a good deal of learning on this subject and some conflict in the authorities, but it strikes me when a man buys a piece of land from another and the vendor warrants it free from all incumbrance, the true meaning of it is, that there should be nothing on the land, neither burden nor tax. Take the case of taxes. Now the tax may never ripen into a real incumbrance, and yet the courts have held it is a breach of that warranty which declares the land is free from incumbrance. Take the case of dower. It may never ripen into an incumbrance, yet the courts have held it a breach of the warranty.

The question comes up when a party seeks to recover on a breach of the warranty, whether there is any real damage or not, whether there has anything been given or paid for dower, or whether dower has been set apart, or whether taxes have incumbered or clouded the title and the party has been obliged to pay anything to free the land from the burden. Now it might happen in this case that the judgment and precept and the sale of the land for taxes might not be of such a character as to constitute a title. Most of us who have much experience in tax sales know that a great majority of them are invalid, and yet no prudent man would like to have such a burden as this stand upon his land, and he might feel it his duty to relieve it, and it would be competent for him to do so, or he might go into equity to relieve the land from this apparent burden. If obliged to do that I think there can be no doubt he might call upon the warrantor to respond to him in damages. I therefore hold that the pleas which aver that these sales which were made under the judgments were invalid, do not constitute technically a bar to the action, but it is still maintainable; but it is not necessary to hold that the rule would apply to a title set up without judgment or precept.

The second breach now states that a portion of this property covered by the deed was assessed for taxes; that it was sold under a judgment obtained for the non-payment of the taxes, and that a certain party became the purchaser, and a deed was made for the premises; and there is an averment that at the time of executing said covenant by said defendant one N. H. Burch was in actual possession of said lot, etc. This, I think, establishes prima facie that there was a valid subsisting incumbrance by showing that there was an assessment of the land for non-payment of taxes; that there was a judgment of a court, and that there was a precept, sale and deed; that there was a party actually in possession under that deed, claiming possession of the land. That, I think, is a breach of the warranty.

There is an objection to the third breach, and here the same remark applies. The only averment is that there was a deed executed to O'Gray, which deed was recorded, and that the record was a matter of public notoriety in the county of Peoria. What we want is that there should be an averment in this breach, alleging that there was an outstanding title in some person at the time the deed was executed.

The ninth and eleventh breaches are bad, for the reason that it does not affirmatively appear on their face that there was a valid subsisting incumbrance upon the property at the time the deed was executed.

NOTE. For a definition of incumbrances, and what are deemed such, see Rawle, Cov. (4th Ed.) 94 et seq.; 2 Greenl. Ev. § 242; Prescott v. Trueman, 4 Mass. 627. Right of dower, whether inchoate or otherwise, is an existing incumbrance amounting to a breach of this covenant. Rawle, Cov. 96, and note 4; Shearer v. Ranger, 22 Pick. 447; Porter v. Noyes, 2 Greenl. 22; Rumnells v. Webber, 59 Me. 488; Russ v. Perry, 49 N. H. 547; Carter v. Denman, 3 Zab. [23 N. J. Law] 260; Jeter v. Glenn, 9 Rich. Law, 376; Henderson v. Henderson's Ex'rs, 13 Mo. 151; Hatcher v. Andrews, 5 Bush, 561; McAlpin v. Woodruff, 11 Ohio St. 120. Even a possibility can be an incumbrance. Anon., Moore, 249 pl. 393; Haverington's Case, Owen, 6. The plaintiff must not merely negative the words of the covenant, but set forth an incumbrance in his declaration. Rawle, Cov. 114, and note 2; Marston v. Hobbs, 2 Mass. 433; Bickford v. Page, Id., 455; Mills v. Catlin, 22 Vt. 98; De Forest v. Leete, 16 Johns. 122; Shelton v. Pease, 10 Mo. 473. But it is advisable to set it forth only substantially, to prevent a variance. For illustrations see Foster v. Pierson, 4 Term R. 617; Dewall v. Craig, 2 Wheat. [15 U. S.] 45; Morgan v. Smith, 11 Ill. 200.

Case No. 17,005.

VOSE v. ALLEN.

[2 Am. Law Reg. 563; 12 N. Y. Leg. Obs. 100; 30 Hunt, Mer. Mag. 331.]

District Court, S. D. New York. Feb., 1854.[1]

AFFREIGHTMENT—BILL OF LADING—LOSS OF CARGO—DELIVERY—NOTICE TO CONSIGNEE.

1. A bill of lading was signed by the master of a bark at Belfast, acknowledging to have received 220 tons of pig iron, to be delivered at the port of New York. About fifty tons of the iron was lost at New York, while the bark was discharging her cargo, by the breaking and sinking of the pile wharf or bridge upon which the iron had been improperly placed; and for this loss the bark was libeled in admiralty. *Held*, that the iron was lost before delivery to the consignees by the carrier, and that by the terms of the bill of lading the bark was liable for such loss.

[1] [Affirmed in Case No. 17,006.]

2. The liability of a carrier under a bill of lading continues until the merchandise is safely delivered to the consignee at the port of discharge, or placed in such a situation there as to be equivalent to a safe delivery, and the carrier is not discharged of the custody of the goods until this is done.

[Cited in Kennedy v. Dodge, Case No. 7,701.]

3. In regard to foreign voyages, under a bill of lading in the usual form, the carrier is not bound to make a personal delivery of the merchandise to the consignee, but it is sufficient if he lands it at the proper wharf, and in the ordinary manner, and gives reasonable notice to the consignee thereof. Such landing, with such notice, is equivalent to a personal delivery.

In admiralty.

Benedict, Scoville & Benedict, for libelants.
Owen & Betts, for respondent.

INGERSOLL, District Judge. The libel in this case is filed by Francis Vose, Charles L. Perkins, and John B. Kettell, against Thomas Allen, the owner of the British bark Majestic, for the recovery of the value of a quantity of pig iron, shipped at Belfast, Ireland, by Ralston, Goodwin & Co., on board the Majestic, to be carried to the port of New York, and there, at said port, the dangers of the seas only excepted, to be delivered to the libelants or their assigns. About fifty tons of the iron, of the two hundred and twenty tons so shipped, was lost at the port of New York, while the Majestic was discharging her cargo, by the breaking and sinking of a pile wharf or bridge upon which the iron was placed when being landed from the bark, and the claim of the libelants is, that it was so lost before it was delivered to them by the carrier, according to the terms of the bill of lading executed at the time the iron was shipped at Belfast.

The bill of lading which bears date the 26th day of April, 1852, and was signed by the master of the Majestic, at Belfast, acknowledges that Ralston, Goodwin & Co. had shipped in good order on board the Majestic, then lying in the harbor of Belfast, two hundred and twenty tons of pig iron, to be delivered in the like good order at the port of New York, the dangers of the seas only excepted, unto the libelants or to their assigns, he or they paying freight at the rate stated in the bill of lading. The bill of lading is in the ordinary form, with the addition of the following clause, inserted in the margin thereof, namely—"Iron to be discharged by the consignees in five days after the vessel's arrival at New York, or pay demurrage of $25 a day after that time. The above clause means five working days from the time the vessel is ready to discharge."

The libelants claim that by virtue of this additional clause in the margin of the bill of lading, they have more rights in reference to the unlading of the iron than they otherwise would have had; that by this additional clause they had five working days, from the time the vessel was ready to discharge, to unload the iron themselves; that they had a right, by the stipulation contained in this additional clause, at any time within such five working days, to designate and select the wharf at which the iron should be discharged; that before the expiration of the five days the iron was lost; that the wharf at which the cargo of the Majestic was discharged was selected by the captain of the bark, without their concurrence; that they requested the captain to discharge at another wharf, which, though it was occupied at the time, would have been vacant before the expiration of such five working days; and that, therefore, no discharge of the iron at any wharf selected by the captain without their concurrence, within such five working days, although the captain may have given them notice of such discharge, would in law be deemed a delivery of the iron to them, according to the terms of the contract, as expressed in the bill of lading.

The necessities of the case, as I view it, upon the evidence as exhibited on the trial, do not require the expression of an opinion upon this claim as made by the libelants. The consideration of it, therefore, will be waived, and the case be considered as it would be, were not this additional clause appended to the bill of lading; and, in conformity with the claim of the respondent, that will be viewed as the contract of the parties, which is imported by a bill of lading in the ordinary form, governed by the same legal rules in its construction as would govern the instrument upon which the libel is founded, were not the additional clause appended to it.

In order to come to a correct result, it is necessary to ascertain what the facts in the case are; what the law is on the subject of the liabilities of common carriers of goods for hire—when they begin, how long they continue, and when they cease, or when the carrier discharges himself from the custody of the goods in his character of common carrier, and then apply such law to such facts in the case. The Majestic having, on the 26th of April, 1852, received at Belfast the 220 tons of pig iron for the purposes named in the bill of lading, soon thereafter sailed for her port of destination. She arrived in the harbor of New York on Sunday, the 20th day of June, of the same year. The vessel was consigned to Edmiston & Brothers, agents of the ship. The iron was consigned to the libelants. On Monday, the 21st of June, the captain of the Majestic reported himself to the libelants, and inquired of them where he was to discharge. The libelants sent their clerk to find a vacant berth. No berth vacant could be found on the North river below pier No. 39. The libelants requested that she might discharge somewhere between Washington Market and the Battery, and named piers No. 8 and No. 9; but neither of these piers was then vacant. The captain, on Tuesday, the 22d of June, hauled the vessel into pier No. 39, which was not between Washington Market and the Battery. On the 22d of June, Edmiston & Brothers wrote to the libelants, informing them that the Majestic was berthed at pier No. 39 North river, and was prepared to discharge her cargo, and re-

quested them to furnish them (Edmiston & Brothers) with a permit for the iron, that the vessel might commence landing it as early as possible. The custom house permit was furnished by the libelants and sent to Edmiston & Brothers on Wednesday, the 23d of June, and on Thursday, the 24th, the captain began to discharge the cargo. Pier No. 39 was about 300 feet long. The outer end of it, for about 40 feet, was solid. The remainder was what is called a bridge pier, built on piles. The vessel continued to discharge the iron on the pile part of the pier, until about 11 o'clock a. m. on Friday, at which time the first lieutenant of police, of the 5th ward, in which ward pier 39 was, observing a greater quantity of iron on the pier than he thought was safe, spoke to the assistant dock-master, and told him to go on board and order them to stop discharging. The assistant dock-master immediately went on board, and ordered those on board not to land any more iron on the pier. They for a time ceased. On the afternoon of the same day the dock-master noticed that they were again discharging, and being of opinion that the pier, with the quantity of iron then on it, was not safe, ordered those on board to knock off, and to cease discharging. Upon this order being given, those on board again stopped. On the morning of Saturday, the 26th, they again went to discharging the iron, and continued till about 11 o'clock, when, from the weight of the iron on the pier, the pier broke down, and the iron upon it was precipitated into the water, and about fifty tons of it totally lost. At the time the pier broke down, there were about 150 tons of the iron upon it, and placed in such manner that it caused the breaking of the pier. On Friday, the 25th day of June, in the forenoon, a written notice was sent to the office of libelants by Edmiston & Brothers, notifying them that the pier, upon which a portion of the iron had been discharged, was supposed to be in danger, and requesting them to remove it. After this notice, although none of the iron was removed from the pier, an additional quantity was discharged from the vessel and placed on the pier, until 150 tons had been there placed, when the pier fell. At the time the order was given, on Friday, to stop discharging, there were 70 or 80 tons of iron on the pier. Pier 39 was a well built pier, but the quantity of iron placed upon it, and the manner in which it was placed upon it, it being accumulated too much in one spot, caused the disaster by which a portion of the iron was lost.

There is some contradictory evidence in regard to a portion of the facts as above set forth, but the preponderance of testimony is such that there can be no reasonable doubt in regard to any of them. These facts being found, the next question is, what is the law on the subject of the liabilities and responsibilities of common carriers of goods for hire in a case of this kind; when they begin, how long they continue, or when they cease; or when the carrier discharges himself of the custody of the goods in his character of common carrier? These liabilities and responsibilities commence when the goods are placed on board the carrying vessel; they continue during the voyage, and until the goods are safely delivered to the consignee at the port of discharge, or are placed in such a situation at such port of discharge, as either by law or general usage is equivalent to such delivery to the consignee, and until they are either delivered to the consignee, or are placed in such a situation at the port of discharge, as is either by law or general usage equivalent to such personal delivery, the carrier is not discharged of the custody and safety of the goods, but is responsible for the same. It is claimed by the libelants that the iron, though safely carried to the port of discharge, was not at such port either safely delivered to them, or safely placed in such a situation as is, either by law or general usage, equivalent to such personal delivery.

The law and general usage in this country in regard to foreign voyages, or goods brought from a foreign country, seems now to be well settled, and appears to be this: that under a bill of lading in the ordinary form, the carrier is not bound to make a personal delivery of the goods to the consignee; but it will be sufficient if he lands them in a proper manner at the usual wharf or proper place of landing, and gives due and reasonable notice thereof to the consignee. Such landing, with such notice, is equivalent to a personal delivery to the consignee. Ang. Carriers, § 310. Such landing-place, in order to make it equivalent to a personal delivery, must be a proper place for landing, and the landing must be made in a proper manner. No unsafe landing-place can be a proper landing-place, and no unsafe mode or way of landing can be considered as a proper mode or way of landing the goods.

It has been sometimes claimed, when the question of the liability of common carriers has been presented before courts, that where the consignee is not the owner of the goods, but is a third person, the rule is a little different; and that in such a case the carrier, when there is no personal delivery, in order to make his responsibility cease, must not only land the goods in a proper place, and give due and reasonable notice thereof to the consignee, but that he must also, after the goods are unladen, secure them by housing or otherwise, if no consignee appears, or if he neglects or refuses to accept the goods. The district judge of the Southern district of New York, when the case of The Grafton [Case No. 5,655], was before him, decided, "that in a well settled course of trade, such as existed in New York, in relation to coasting vessels, the delivery of a cargo on the dock, with notice to its owners of the time and place of unlading them, placed the cargo at their risk, and discharged the vessel from liability. But that in case the cargo was addressed to a mere consignee, the vessel would be under the further obligation to secure the property, after it was unladen, if no consignee

appeared, or if he refused to accept the goods."

There are many good and substantial reasons why the carrier should be required to do more, where there is no personal delivery in the case, when the consignee is a third person, than should be required of him when the consignee is the owner of the goods. But waiving the consideration of the question whether a different rule exists in the one case from what exists in the other, I would consider this case as if the consignee were the owner of the goods. The carrier may not be bound under a bill of lading in the ordinary form to unlade his cargo at the place selected by the consignee. If, however, the carrier selects the place to land the goods, he must select a good and safe and proper place for landing them. What would be a good and safe and proper place for landing one kind or quality or quantity of goods, would not be a good and safe and proper place for landing another kind or quality or quantity of goods. Has, then, the carrier, in this case, done that which is equivalent to a personal delivery of the iron to the consignee? If he has safely unladen it in a safe and proper place, and in a safe and proper manner, and given due and reasonable notice to the consignee, then he has. If he has not, then he is liable for the damage which has been sustained by the loss of the iron, occasioned by the breaking of the pier upon which it was by the carrier placed.

On Friday, the 25th of June, at about 11 o'clock, a. m., about seventy or eighty tons of the iron had been discharged and placed on the pier. The assistant dockmaster, seeing that quantity on the pier and the manner in which it was placed, and that those on board were in the act of discharging more, and apprehending danger, notified the captain of the Majestic, not to discharge any more on the pier. For a time those on board the vessel stopped discharging. In the afternoon of the same day, however, they recommenced, when the dockmaster, apprehending danger, ordered them to stop. On the morning of Saturday, the 26th of June, they continued to discharge the iron on the pier, up to about 11 o'clock, when about 150 tons of it having been placed on the pier, the pier, from the weight of the iron upon it, broke down, and the iron was precipitated into the water, and a good portion of it, about fifty tons, was lost. The captain in his deposition says, that on Saturday they continued to discharge until the pier fell. The captain was warned of the danger, but persisted in overloading the pier, by which the pier broke. The pier was safe and proper for a certain quantity of iron, but not safe and proper for 150 tons placed on it in the manner that this iron was placed. For the quantity placed on the pier, in the manner in which it was placed, it was not safe, and therefore not a proper place. Of this the captain was notified before the danger had been encountered. The carrier, therefore, has not safely landed the iron in a proper and safe place, and in a proper and safe manner for the quantity that was discharged. He has not, therefore, done that which is equivalent to a personal delivery of the iron to the consignee; for, to do that, it is necessary that he should have landed it in a proper place, a place proper for the amount that was landed. By his not complying with the stipulation contained in the bill of lading, to safely discharge the iron in a proper place, the loss has happened, and he must be answerable for the damage which has been occasioned.

It is contended, however, by the respondent, that the claim for this damage is not such a claim as can be enforced in a court of admiralty; that the cause of action, if any exists, had its origin on the land; that the damage occurred by an act done on the land and not on the water. The claim which the libelants make is for damages for the violation, by the respondent, of a maritime contract, entered into by him to safely carry the iron from Belfast to New York, and there safely deliver it to the libelants. And the ground of complaint is, that it was not safely delivered. After the decision in the case of the Grafton, above referred to, it is not necessary to dwell on this point. That case was a libel in rem, filed in the district court, and upon a bill of lading for the carrying of a quantity of hemp from New Orleans to New York, and there safely delivering it to the libelants. After the hemp was discharged on the wharf, and not before, a portion of it was damaged by rain, and for that damage a recovery was had.

The decree of the court therefore is, that the libelants do recover the amount of the damage occasioned to the iron by the breaking of the pier, and that it be referred to a commissioner to ascertain and report what that damage is.

[Upon an appeal to the circuit court, the decree of this court was affirmed. Case No. 17,006.]

Case No. 17,006.

VOSE et al. v. ALLEN.

[3 Blatchf. 289;[1] 34 Hunt, Mer. Mag. 450.]

Circuit Court, S. D. New York. June 14, 1855.[2]

AFFREIGHTMENT—DELIVERY OF CARGO—LOSS BY OVERLOADING WHARF.

1. The master of a vessel is bound not only to select a customary wharf for the delivery of a cargo carried on freight, but the place selected must be fit and safe for its deposit, and it must be discharged with all proper care and skill.

[Cited in Kennedy v. Dodge, Case No. 7,701; Irzo v. Perkins, 10 Fed. 780; Devato v. Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. 516. Distinguished in The City of Lincoln, 25 Fed. 838, 839. Cited in The Mascotte, 2 C. C. A. 401, 51 Fed. 608.]

[Cited in brief in Michigan, S. & N. I. R. Co. v. Bivens, 13 Ind. 271.]

2. Where the consignee of a cargo of iron shipped on freight refused to have any thing to do with its delivery at the wharf where the master was delivering it, and the master overloaded the

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

[2] [Affirming Case No. 17,005.]

wharf, so that it broke down, and a portion of the iron was totally lost: *Held*, that the owner of the vessel was responsible to the consignee for the loss, on a libel in admiralty in the district court, the consignee having made advances on the consignment.

[Cited in Young v. Lehmann, 27 Fed. 385.]

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

This was a libel in personam, filed in the district court, against Thomas Allen, owner of the barque Majestic, to recover damages for the non-delivery of a quantity of pig iron. After a decree by the district court in favor of the libellants [Case No. 17,005], the respondent appealed to this court.

Erastus C. Benedict, for libellants.

Francis B. Cutting, for respondent.

NELSON, Circuit Justice. The iron in question in this case was shipped at Belfast, Ireland, by a house there, to this port, and consigned to the libellants. The ship was consigned to Edmiston Brothers, of this city, agents of the owner. The bill of lading was in the usual form, except a note on the margin, "iron to be discharged by consignees in five days after arrival of vessel at New York, or pay demurrage of $25 per day after that time." But this clause is of no special importance, in the view I have taken of the case. On the arrival of the vessel, she was reported by the master to the consignees of the iron, with a request for advice as to the place of discharge. They expressed a wish that she should discharge at some dock between Washington Market and the Battery, which was assented to, provided a vacant berth could be obtained. But, on inquiry, the nearest berth vacant to the place mentioned was pier No. 39, on the North river; which was accordingly assigned to the vessel by one of the harbor-masters. The consignees objected to the delivery at that place, and insisted that the vessel should postpone it till pier No. 8 or No. 9, lower down, should be vacated, which, it was understood, might be in the course of a few days. This was not assented to by the agents of the ship, and the master commenced discharging the cargo at pier No. 39. This pier is about eight hundred feet long; the outer end, for some forty feet, solid; the other part built on piles, called a bridge-pier. The iron was discharged on this part of the pier. The delivery was commenced on Thursday morning, June 24th, and continued, during the day time, till eleven o'clock the next day, when the dock-master, having noticed the quantity of iron on the pier, and being apprehensive it would give way under the weight, forbade the master's discharging any more of the cargo. The hands engaged knocked off for a time; but, in the afternoon, they again commenced the delivery, and continued until, again attracting the notice of the dock-master, they were forbidden the second time. They then ceased: but, the next morning, according to the weight of the proofs, they again commenced discharging, and continued till about eleven o'clock a. m., when the pier broke down, precipitating some one hundred and fifty tons of the iron into the river, about fifty tons of which have been totally lost. There were only some seventy-five or eighty tons upon the pier when warning of the danger was first given to the master. The master, at that time, gave notice to the consignees of the iron of the warning of the dock-master, and requested that they would remove it from the pier, which they neglected or refused to do.

The simple question in the case is, whether or not this discharge of the iron, under the circumstances stated, was, in judgment of law, a delivery to the consignees, according to the requirements of the bill of lading. I think not. Assuming that the master was justified, under the general custom and usage of this port, in discharging the iron at pier No. 39, on the neglect or refusal of the consignees to procure a different one, more satisfactory to themselves, within a reasonable time, the responsibility for a safe delivery at the place selected rested upon him. He was bound not only to select a customary dock or wharf for the delivery of such goods as his ship was freighted with, but the place selected must be fit and safe for the deposit of them, and the cargo must be discharged with all proper care and skill. A discharge of the cargo short of this would be an abuse of the right which the custom of the port extends to the owner or master, in cases where the consignee refuses to accept or to participate in the delivery.

Nor did the master exempt himself from any portion of this responsibility by giving notice to the consignees of the danger from overloading the pier in the discharge of the iron. They had refused to have any thing to do with the delivery at that place. The master, therefore, was left to discharge the iron there, if at all, at his peril, without their assent or participation. If the pier was found insufficient for the discharge of the whole of the iron, a portion should have been delivered at some other place, and notice given to the consignees. This was an obvious suggestion, after the dock-master had forbidden any further discharge upon the pier at which the vessel lay; or, what might have answered the same purpose perhaps, the iron might have been distributed over a larger portion of the pier.

An objection is taken to the right of the consignees to bring this suit, and also to the jurisdiction of the court below to entertain it. I am satisfied, however, that neither objection is well founded. The consignees were the proper parties to bring the suit, having made advances upon the consignment; and, as to the jurisdiction, it is the common case of a libel filed for the non-performance of a contract of affreightment. I think that the decree of the court below is right and should be affirmed.

VOSE (CANNON v.). See Case No. 2,386a.
VOSE (DEDEKAN v.). See Case No. 3,732.

Case No. 17,007.

VOSE et al. v. FLORIDA R. CO.[1]

Circuit Court, N. D. Florida. 1870.

RAILROAD COMPANIES—STATE AID—PAYMENTS TO SINKING FUND TRUSTEES—FLORIDA STATUTE.

[Under the Florida internal improvement act of January 6, 1855, §§ 2, 3, 12, the one-half of 1 per cent. which the railroad company, or its purchasers at foreclosure sale, are bound to pay annually to the trustees of the sinking fund, "on the amount of indebtedness, or bond account," is to be calculated upon the amount of bonds still uncanceled, and not on the whole amount of the original issue.]

[This was a bill by Francis Vose and others, trustees, against the Florida Railroad Company, to recover money alleged to be due to the sinking fund. Defendant demurred to the bill.]

BY THE COURT. The question in this case comes before the court upon a demurrer to the bill for want of equity, and for want of jurisdiction, from misjoinder of parties, and as shown upon the face of the bill. The object of the bill is to recover of the defendant the one-half of 1 per cent., semiannually, upon the bonds issued by the defendant, and purchased and canceled by the trustees of the internal improvement fund, with the proceeds of the sale of said railroad, made by the said trustees. It is admitted that the purchasers of the road, at that sale, have paid the one-half of 1 per cent. semiannually, upon the bonds remaining uncanceled, amounting to 228 since said sale; but it is contended that this defendant is also liable to pay to the said trustees, as a sinking fund, one-half of 1 per cent. upon the balance of the entire original issue of the first mortgage bonds. The warrant for such payment is alleged to be found in the act of the general assembly of the state of Florida, entitled "An act to provide for and encourage a liberal system of internal improvements in this state," approved January 6, 1855. The second section of that act provides that the trustees therein created shall receive and demand, semiannually, the sum of one-half of 1 per cent. on the entire amount of the bonds issued by the said railroad company. The third section provides that upon the failure of the railroad to pay the interest upon the bonds, and the sum of 1 per cent. per annum as a sinking fund, it shall be the duty of the trustees, after the expiration of 30 days from default, to seize and sell said road, —the proceeds of sale to be applied to the purchase and cancellation of the outstanding bonds issued by said company, or incorporated with the sinking fund. And the said section also provides that the purchaser at such sale shall be bound to continue the payment of one-half of 1 per cent., semiannually, to the sinking fund, until all the outstanding bonds are discharged. The twelfth section provides that after the completion of a road the company shall pay to the trustees of the internal improvement fund at least one-half of 1 per cent. on the amount of indebtedness or bond account every six months, as a sinking fund, to be invested by them in the class of securities named in section 2, or to be applied to the purchase of the outstanding bonds of the company; but it shall be distinctly understood that the purchase of said bonds shall not relieve the company from paying the interest on the same, they being held by the trustees as an investment on account of the sinking fund.

In order to determine what was the intention of the lawmaking power, the three sections above mentioned must be construed together. When the various clauses of the said sections are properly collected, the intentions of the legislature may be fairly, and I think clearly deduced. The second section of said act invests the trustees with power to receive and demand, semiannually, the sum of one-half of 1 per cent. (after each separate line of railroad is completed) on the entire amount of bonds issued by said railroad company, and invest the same, etc. This clause defines the power and duty of the trustees with regard to the semiannual collection of one-half of 1 per cent. upon bonds issued by any railroad company. The twelfth section defines the duty of the railroad company, and requires payment of one-half of 1 per cent., semiannually, on the amount of indebtedness, or bond account, which means indebtedness on bond account. The third section provides that, upon a failure on the part of any railroad company to pay the sum of 1 per cent. per annum as a sinking fund, it shall be the duty of the trustees, after 30 days from such default, to seize and sell the road and all its property for cash or additional approved security. If sold for cash, the proceeds to be applied to the purchase and canceling of outstanding bonds of said company, or to be incorporated with the sinking fund; provided, that in making such sale it shall be conditioned that the purchasers shall be bound to continue the payment of one-half of 1 per cent., semiannually, to the sinking fund, until all the outstanding bonds are discharged, under the penalty of an annulment of the contract of purchase, and the forfeiture of the purchase money paid in. Now, the question is, what was the payment of one-half of 1 per cent., to be paid to the sinking fund by the purchasers, to be continued to be paid upon? Certainly, upon the same indebtedness upon bonds which the company which issued them were bound to pay; and that is upon the indebtedness on bond account. It seems quite clear that the amount of indebtedness on bond account means upon bonds outstanding, as there can be no indebtedess remaining upon bonds which have been canceled. It follows, as a necessary sequence, that the Florida Railroad purchasers under the sale made by the trus-

[1] [Not previously reported.]

tees are liable to pay only one-half of 1 per cent., semiannually, upon the bonds outstanding; that is, upon two hundred and twenty-eight in number, calling for one thousand dollars each. This they have done. There is therefore nothing due from the said purchasers to the sinking fund, and no ground for either legal or equitable relief. It is also quite clear that if the law were otherwise the complainants, Vose & Wagner, could not be joined with the receiver in a bill to recover the deficiency. The court, having undertaken to administer a trust fund, will not permit any interference by any party. The action of the receiver is the action of the court itself.

[The cause was subsequently heard on motions for attachments, for contempt in disobeying injunctions, for appointment of receivers, etc. See Cases Nos. 17,008 and 17,011.]

Case No. 17,008.

VOSE v. INTERNAL IMPROVEMENT FUND.

[2 Woods, 647.] [1]

Circuit Court, N. D. Florida. May, 1875.

CONTEMPT — DISOBEDIENCE OF INJUNCTION — REHEARINGS — CONSENT DECREES — AUTHORITY OF ATTORNEY — EQUITY JURISDICTION — TRUSTS OF PUBLIC LANDS.

1. Where the trustees of the internal improvement fund of Florida were restrained by the order of the court from selling or disposing of any lands belonging to their trust, except in strict accordance with the act of the legislature prescribing their duties, and the exercise of judgment and discretion was required on the part of the trustees as to the true construction of their powers and duties under the act, and they answered under oath that they had done no act which they believed or supposed was in violation of any direction of the court, but had in good faith tried to obey the decree of the court, a motion to attach them, as for a contempt for disobedience of the decree of the court, was overruled.

[Cited in Re Cary, 10 Fed. 626.]

2. Neither a petition, nor an order of the court, for a rehearing, of itself stops proceedings under the decree, unless the court so specifically directs.

3. An attorney for trustees charged with a public trust, or one of such trustees acting as attorney for the others, has not the implied power to consent to a decree which has the effect of taking the trust out of the hands of the trustees, or of placing the execution of it, in whole or in part, in other hands.

4. Lands belonging to the public domain of a state which, by an act of the legislature, had been made a trust estate for the payment of certain bonds, and placed under the control of trustees appointed by law, were subject to the power of a court of equity to raise therefrom the money due and chargeable thereon, and the court could appoint its own agents to make sales thereof.

[Cited in Chaffraix v. Board of Liquidation, 11 Fed. 644.]

5. In such a case, the court has the power to compel the trustees who hold the legal title to execute conveyances for the lands sold by the agents of the court.

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

In equity. On the 6th day of January, 1855, the legislature of Florida, by an act of that date, vested certain public lands, including all swamp and overflowed lands belonging to the state, in the governor, comptroller, treasurer, attorney general and register, as trustees, to constitute an internal improvement fund, and to serve amongst other things as a guaranty of bonds to be issued by certain designated railroad companies for the purchase of iron rails and rolling stock. A certificate of guaranty was to be placed on the bonds of the trustees. In case the interest on these bonds, and one per cent. per annum for a sinking fund, were not paid by any of the companies, the trustees were authorized to take possession of and sell the road, the appurtenances and franchises of the company in default, and to apply the proceeds in purchasing the bonds issued by the company, or incorporating them with the sinking fund. The powers of the trustees were large and various. They were authorized to fix the prices of the lands, to make arrangements for draining them and to promote their settlement and cultivation by allowing preëmptions and other modes of encouragement. The Florida Railroad Company was one of the companies included in the benefits of this act, and issued a large number of bonds, which were duly indorsed by the trustees. No installments of interest or sinking fund were paid during the war. In November, 1866, the trustees seized and sold the road, and, with the proceeds of sale, purchased and canceled a large proportion of the outstanding guarantied bonds of the company. The complainant [Francis Vose] held a number of the bonds of the company which were not thus purchased. He filed his bill for relief against the trustees whom he charged with mismanagement of the trust funds, and against other parties and corporations whom he charged with complicity in such mismanagement by obtaining fraudulent purchases of the lands at nominal prices. He also prayed for an injunction and for the appointment of a receiver of the trust fund. [See Cases Nos. 17,007 and 17,011.] The court granted first an injunction, afterwards it appointed a receiver, and at a still later date it appointed three persons to act as agents for the trustees. The order of the court, allowing the injunction and making the appointments just stated, is fully set out in the opinion of the court which follows. The case came on for hearing on a motion to attach the trustees for disobeying the injunction of the court, and also upon a petition for a rehearing of the order of the court appointing the said agents of the trustees.

Henry R. Jackson and David S. Walker, for complainant.

Wm. Archer Cocke, Atty. Gen. Fla., and James M. Baker, for defendant.

BRADLEY, Circuit Justice. The first motion in this case is made by the complainant, for an attachment against the individual trustees of the internal improvement fund, as for

a contempt, which motion is based upon the charge that said trustees have violated the injunctions and decrees heretofore made in the cause. The defendants (the trustees aforesaid) have answered the petition for an attachment, distinctly and positively denying any intention to violate any injunction or decree in the cause, and averring that they have not done so, but that, whatever their predecessors may have done, they, the present trustees, have been guided by the opinion of their counsel, with a firm endeavor to comply with every injunction decree and order binding on them. This is the substance and effect of their several answers—not the precise terms in which they are couched. But the complainant, in rebuttal of these answers, relies on certain undisputed facts, which he alleges to be clear violations of the injunctions on the part of the defendants.

The injunctions which the trustees are charged with violating are based on several orders of the court heretofore made. The first was issued by Circuit Judge Woods on the 6th of December, 1870, among other things, enjoining the then trustees and their successors from selling or donating or disposing of the land belonging to the trust, otherwise than in strict accordance with the provisions of the act of 1855, fixing the price and allowing pre-emptions of the same in obedience to all the restrictions of the act; that they desist from selling said lands for scrip or state warrants of any kind, or for aught else than current money of the United States; that they desist from using or applying any of the moneys of the fund, except in applying them to the creation of the sinking fund under the act, or in payment of coupons, according as they properly belong to the one purpose or the other; and that they desist from paying the coupons in any other mode than in the order of their priority, fixed by the date of their coming to maturity, paying first such as first became due, and the others in the order in which they fell due; and that they desist from carrying out a certain agreement made with the Florida Improvement Company for the sale of one million one hundred thousand acres of land at ten cents an acre.

The second order relied on was made by District Judge Frazer on the 1st of June, 1872, whereby a receiver was appointed to receive and hold all the moneys and securities belonging to the trust fund, and these trustees were required to pay to the said receiver all moneys in their possession or control, and to deliver to him all securities or evidences of indebtedness belonging to said fund, and to pay to him, from time to time, all moneys which might come into their hands from the sale of land or any other source whatsoever.

The third order or decree relied on is the decree made by Circuit Judge Woods, December 4, 1873, which authorized Marcellus A. Williams, Samuel A. Swan and Hugh A. Corley, the agents of the trustees for the sale of the lands of the internal improvement fund, to sell said lands in such amounts and at such prices as would, in the exercise of their discretion, most rapidly procure the requisite means to discharge the indebtedness established by decree in the cause, and make the said agents responsible for all their acts in the exercise of this discretionary power, not simply to the trustees, but directly to the court, subject to injunction at any time by its order, and liable to punishment for contempt; and required the said agents to pay over to the trustees the money that might be received by them from sales, and to report the same to the receiver; and requiring the trustees to turn over the said moneys to said receiver monthly, with a monthly statement of account; the trustees to arrest the proceedings of the agents if, in their judgment, they were so exercising the powers vested in them as to jeopardize the interests of the state in the fund; it was also provided that all legitimate expenditures and compensation for services should be deducted by the agents from the moneys coming into their hands; and, in like manner, that all legitimate expenditures be retained by the trustees, before turning over the same to the receiver, subject, however, to exception and the approval of the court.

From this recital of the original injunction and the subsequent orders and decrees, it is apparent that it is somewhat difficult to define, except in a few specified particulars, what are the positive prohibitions imposed upon the trustees. That they are not to receive scrip or state warrants, or anything else than current money for the price of lands sold; that they are to apply the moneys of the fund only in aid of the sinking fund and payment of coupons; that they are to pay coupons only according to priority of maturity; and that they must pay to the receiver all moneys coming into their hands, after deducting necessary expenses, are directions sufficiently specific and clear; and these directions they insist that they have ever observed since their accession to the offices which they respectively hold. But the injunction not to sell or dispose of any lands belonging to the trust, otherwise than in strict accordance with the provisions of the act of 1855, is one which, in its very terms, involves the exercise of some judgment and discretion on the part of the trustees as to the true construction of their powers and duties under the act; and the implied duties which arise from the peculiar relation which they hold to the agents appointed to make sales of land are so inferential and uncertain that it is very difficult to designate any act or omission, which has been charged against them, as a violation of an order of the court.

It is charged that, in reference to the last decree, they have pursued an obstructive policy, first, in discharging the agents, as their agents, after they had been appointed agents by the court; second, in refusing to make deeds for lands sold by the agents; and, third, in refusing to give the agents scrip for small parcels of land called "floats," although they contracted

with other parties to give them such scrip. But it is just to say, that no injunction or decretal order has ever been made prohibiting them from discharging their agents, or requiring them to do either of the other things specified. It may be implied that it was expected of them that they should give deeds for lands sold by the agents; but no such order has ever been made. And, on their part, they give their reasons for not giving such deeds; they did not approve the sales made by the agents. If it be alleged that no right of approval or disapproval was reserved to them, it may very plausibly be said that their control and supervision over the acts of the agents were expressly confirmed by the decree itself in the clause which authorized them to arrest the proceedings of the agents, if in their judgment they were so exercising their powers as to jeopardize the interests of the state in the fund. As the greater power usually includes the less, they contend that it was reasonable for them to suppose that they had the lesser power, which they had always exercised, of judging of the expediency of particular sales and contracts for sale. As the trustees expressly swear that they have not done anything in the matters complained of which they believed or supposed was violative of any direction of the court, but were ever solicitous of carrying out the object which the court, by its decrees, had in view, namely, the raising of money by sales of land to pay off and discharge the indebtedness of the fund, and have desired and now desire to comply with the directions of the court, we do not feel called upon to adjudge them in contempt upon the vague charge of pursuing an obstructive policy.

It is further charged, however, that they have committed certain specific acts, which amount to a contempt. These acts may be arranged in two classes: First, making contracts for large sales of land at inadequate prices and not according to a scale of fixed prices as required by the act of 1855; secondly, paying moneys out for purposes contrary to those expressed in the original injunction. As to the first of these charges, it does appear that the trustees have made a contract with the Great Southern Railroad Company for a large sale of land, involving millions of acres, which would be void according to the decision of the supreme court of Florida, in the case of Trustees v. Bailey, 10 Fla. 112. By the decision in that case, neither they nor the legislature itself have the right to appropriate any part of the internal improvement fund to the promotion of any other schemes of internal improvement than those mentioned in the act of 1855, until the bonds issued to carry out the system therein mentioned have been paid, or placed on a safe basis of payment, as prescribed by the act. The trustees say that the benefits to be derived from the construction of the proposed railroad will more than compensate for the low and merely nominal price at which they are to have alternate sections of land. But, according to the doctrine of that case, this makes no difference; they are not to be the judges; the existing debts must be first paid before new ones can be created. If this view should be adopted by this court, it may be good cause for setting aside the said contract; but as the trustees allege that they have acted in good faith, and with a view to the best interests of state, and of the internal improvement fund itself, we do not think that they can be convicted of a contempt of this court. The court has never made any order depriving the trustees of the power to sell and dispose of the lands, but only enjoining them to sell in accordance with the terms and provisions of the act of 1855. But the act gives them large discretion, and authorizes them to have in view the encouragement of immigration, the drainage of swamp land and the development of the resources of the state. If the contracts already made with the holders of existing outstanding bonds are such as to preclude the trustees from exercising this discretion in all its original largeness, there is still sufficient room for difference of opinion as to the extent of their remaining discretion, to divest their acts of the character of contempts of court, until the court shall have explicitly declared what they shall or shall not do. The other contracts referred to do not admit of as much question as the one which we have considered; and we do not think, therefore, that any attachment for contempt should issue for this cause. As to the payments which the trustees have made for expenses and services of agents, salesmen, counsel, etc., their accounts are rendered monthly, according to a former decree, and are always subject to examination and exception, and may be allowed or disallowed by the court. The trustees contend that the expenses are all proper to be made, and there is no charge that they have not been actually made. They present no ground for attachment as for a contempt. The motion for attachment must be overruled.

We next come to the motion by the trustees for a rehearing, upon a petition filed by them on the 12th day of January, 1874, during the term at which the decree of December 4, 1873, which they desire to be reheard, was made. It sufficiently appears that the petition was filed in due time, and properly signed by counsel, and that no opportunity has since occurred for arguing the motion for rehearing. It is, therefore, in order to be heard at this time.

The defendants insist that the petition itself, proprio vigore, suspended all proceedings on the decree. But this is not the law. Expressly the contrary is laid down in Daniell, Ch. Prac., and other books. Daniell says: "It is an established rule that an order for a rehearing, or an appeal, does not stop the proceedings under the decree or order appealed from, without special order of the court." 2 Daniell, Ch. Prac. (3d Am. Ed.) 1547. Hoffman says: "Neither the petition for rehearing, nor the order itself, stops the proceedings under a decree. A special order must be obtained on application." 1 Hoff. Ch. Prac. 565, note. On the other hand, the complainant insists that the decree was a consent decree, and a rehearing cannot

be had thereon. The trustees, as soon as they heard of the decree, repudiated the authority of their attorney (Hon. W. A. Cocke), to enter into such a consent. It is insisted, however, that he, himself, being attorney general of the state, was one of the board of trustees, and occupying that position, had more than the usual authority of an employed attorney. We have great hesitation in acceding to the proposition that an attorney, or that one of several trustees, acting as such, has implied power in any case to consent to a decree which has the effect of taking the trust out of the hands of the trustees, or of placing the execution of it, in whole or in part, in other hands. And in the case of a public trust, like the one in question, the reasons for hesitation are still stronger. After due consideration of the subject, we are of opinion, that no such implied power exists; and therefore, without at present going into the reasons for our conclusion, we adjudge and decide that the decree, in this case, is open for consideration.

The grounds alleged for a rehearing are mainly that the trustees are statutory trustees, ex officio, appointed by the law, and clothed with many duties of a public and political character; and that the appointment of other persons to execute said trusts is incompatible with the duties to be performed; and, secondly, that private persons cannot be appointed by the court to make judicial sales of land.

In answer to the first of these objections, it may be said that the agents appointed by the court to make sales of land were not invested with the general trusts imposed by the statute on the ex officio trustees; but only with the power to sell lands for the purpose of raising the moneys due to the parties decreed to have claims against the same. If the lands belonging to the internal improvement fund may be at all subjected to the payment of the bonds secured thereby; if they are in truth a trust fund, inter alia, for the payment of those bonds, they are subject to the power of a court of equity to raise therefrom the money due and chargeable thereon. The question then arises, How shall the court effect their sale for the purpose? Can it only require the trustees to make sales, or may it effect the sales by other agencies? Suppose the trustees refuse to act, is the court without power to authorize a sale by other modes? It seems to us clear, that the court may employ its own accustomed machinery for the purpose of raising the money to satisfy the liens on the fund. And we are of opinion that a court of equity may appoint commissioners, receivers, or special masters or agents, in its discretion, to effect such sales. In our judgment, therefore, the appointment of the agents in question was neither illegal nor erroneous. The difficulty arises from the want of power in the agents to give good conveyances for the lands sold. But the court certainly has power to compel those who hold the legal estate to execute the proper conveyances. The trustees can be ordered to execute the necessary deeds. But as this is not an ordinary case, as great interests are affected, as the position of the trust is peculiar, and connected with the general interests of the state, and as the trustees are public functionaries, presumably interested with the duties imposed upon them for public and politic reasons, we do not feel disposed to adopt such a course as might be admissible in an ordinary case of private trust.

Upon consideration of the matter, we have come to the conclusion that whenever the agents for making sales shall have effected a sale, for which the trustees shall refuse to execute proper conveyances, they shall report the same to the court, and if the same shall be approved by the court after the trustees have had due opportunity to be heard, an order to the effect shall be made, and the trustees will be directed to execute the proper deeds. The case is a difficult one at best. It would be an absurdity to attempt to make a forced sale of such immense territories as might be required, at once, to raise the amount of moneys due, especially at this time of unusual financial depression. We feel bound to use a wise discretion in this matter, and whilst we feel bound to assist the bondholders in every practicable way to realize their arrears of interest in the shortest feasible time, we cannot entirely overlook the large interests which may be sacrificed by hasty and precipitate action.

An order will be made in conformity with the views now expressed, namely, that hereafter, in case the said agents for sale shall report any sales by them effected to the trustees, and the latter shall refuse to execute the necessary deeds therefor, the agents shall report the same to the court, which will hear the matters, and if the negotiation be approved, will confirm the sale, and direct conveyances to be made.

The complainant's counsel has applied for an order to pay out and distribute the money now accumulated in the receiver's hands. We see no objection to paying those who have registered their coupons according to the previous orders of the court, retaining the share of those whose coupons have not yet been properly verified, or have been rejected by the master, until further order. Ordered accordingly.

Case No. 17,009.

VOSE et al. v. MAYO.

[3 Cliff. 484.] [1]

Circuit Court, D. Maine. Sept. Term, 1871.

NEW TRIAL—PRACTICE—VERIFICATION OF MOTION—AFFIDAVITS — NEW EVIDENCE — COURT RULES—WAIVER OF OBJECTIONS.

1. Where a motion for new trial is founded on facts not within the knowledge of the presiding justice, and not appearing on his minutes, it must be verified by affidavit, unless compliance with that requirement is waived by the opposite party.

2. No affidavit of merits is required where the motion is properly addressed to the minutes of the presiding justice, as where the motion is to

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

set aside a verdict for error of ruling in the admission or rejection of evidence, or for refusing to instruct the jury as requested or for misdirection, or because the verdict was against law or against the evidence or the weight of the evidence.

3. The theory in such cases is that all the matters of fact alleged are within the knowledge of the presiding justice, or may be verified by reference to his notes.

4. Where the motion is founded upon alleged newly discovered evidence, or on the charge of misconduct by the opposite party or the jury in respect to the trial, it presents a preliminary question whether the facts are such as to make it the duty of the court to order notice to the opposite party and to direct how the proofs shall be taken.

5. In all such cases the motion must be in writing, and must, unless the requirement is waived, be supported by affidavit.

6. Affidavits of the witnesses to be examined cannot be considered a compliance with the twenty-second rule of the circuit court relating to motions for new trials based upon newly discovered evidence.

7. The purpose of the rule is that the allegation of newly discovered evidence may be verified by the oath of the party or his attorney.

8. Probable cause for the motion must be shown, unless waived, before the court can interfere and give notice to the other side or take any steps to prevent the prevailing party from applying for judgment on the verdict.

9. Where the motion is properly verified by the affidavit of the party, ex parte affidavits of the witnesses are enough to warrant an application for notice to the opposite party.

10. Such affidavits are not, without consent, admissible in the final hearing of the motion.

11. For that purpose testimony may be taken in open court in civil or criminal cases, by depositions [in civil cases] as provided by the acts of congress, or by interrogatories and cross-interrogatories, or, by consent, the court will, in its discretion, appoint a commissioner to take the testimony and report it to the court.

12. In this case both parties had acquiesced in the taking of affidavits of the witnesses to be examined, and the court therefore looked into the affidavits as if they had been admitted by consent.

13. The motion, however, was denied, first, because the evidence was not newly discovered within the legal meaning of the phrase; second, because that which was offered was within the reach of the party moving, at the former trial, and was merely cumulative.

14. Evidence offered, in order that the motion prevail, should afford a reasonable ground to conclude that it would be productive of a different result from the verdict once obtained.

[This was a suit by Francis Vose and others against Gideon Mayo.]

Motion for new trial.

N. Webb and J. D. & F. Fessenden, for plaintiffs.

A. A. Strout, for defendant.

CLIFFORD, Circuit Justice. Power to set aside a verdict before judgment and grant a new trial is vested in the circuit courts "in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law," and the correct mode of applying to the court for the exercise of that power is by a motion for new trial, which, under the rules of the circuit court in this circuit, must be made in writing, and must, unless the time is enlarged by leave of the court, be filed within two days after the verdict. Such a motion must assign the reasons for the application, and when the motion is grounded on facts not within the knowledge of the presiding justice, and not appearing in his minutes, it must be verified by affidavit, unless the requirement is waived by the opposite party. No affidavit of merits, however, is required when the motion is properly addressed to the minutes of the presiding justice, as where the motion is to set aside the verdict for error of ruling in admitting or rejecting evidence, or for refusing to instruct the jury as requested, or for misdirection, or because the verdict is against law, or against the evidence or the weight of the evidence, as the theory of the motion in all such cases is, that all the matters of fact alleged in the motion are within the knowledge of the presiding justice, or that they may be verified by reference to his minutes taken at the trial. Where the motion is for new trial on account of newly discovered evidence, or where the motion is grounded on the charge that the opposite party or the jury were guilty of misconduct in respect to the trial, the rule is different, as the motion in such cases presents a preliminary question whether the facts and circumstances disclosed are such as to make it the duty of the court to order notice to the opposite party, and to direct the mode in which the proofs shall be taken, and in all such cases the motion must be in writing, and must, unless the requirement is waived, be supported by affidavit. Johnson v. Root [Case No. 7,409]; Hill. New Trials, 393, § 35; Macy v. De Wolf [Case No. 8,933].

Two motions for new trial are filed in this case, neither of which is supported by the affidavit of the party filing the motion. They were filed by the plaintiffs, and are as follows: (1) That a new trial be granted because, as they allege, the verdict of the jury is against law and against the evidence in the case. (2) That a new trial be granted because, as they allege, they have discovered new and material evidence since the trial, not previously known to them, and they annex to the motion certain affidavits showing the nature of the evidence, and make the affidavits a part of the motion. Founded, as the present suit is, on two judgments previously recovered by the plaintiffs against the defendant, it will become necessary to refer to the causes of action set forth in the prior suits between these parties, in order that the exact nature of the controversy may be fully understood. Evidence was introduced showing that the plaintiffs agreed to sell to the Penobscot Railroad Company thirteen hundred tons of railroad iron and eventually to deliver the same to the company at Bangor, upon the conditions specified in the written agreement between the parties. Payment in cash for the amount of the duties was to be made by the company when the iron ar-

rived at the place of delivery, and the agreement was that the company should give to the plaintiffs their negotiable promissory notes for an amount equivalent to the value at the agreed price, with the addition of the extra cost of freight and insurance beyond the amount of such charges if the shipment was made to the port of New York, the notes to be given to the defendant and to be by him indorsed and to be made payable at a bank in New York City with interest as specified, in four months from the date of the arrival of the iron; and the further stipulation was that the title to the iron should remain in the plaintiffs with power to dispose of the same at public or private sale, in case the notes given for the purchase-money were not paid at maturity; that the company should also deposit with the plaintiffs as collateral security the first mortgage bonds of the company to double the amount of such notes, and also an irrevocable order upon the treasurer of the city of Bangor for an amount of the scrip of that city, to which the company was entitled, sufficient to cover the amount of the notes given for the railroad iron. On the same day, and as a part of the same agreement, John M. Wood, the contractor, the party interested, agreed with the plaintiffs for a specified commission, and other valuable considerations, "to indorse and become responsible to them" for the promissory notes given under that agreement. Pursuant to that agreement the notes were given by the company to the defendant, and were indorsed by him and the contractor as agreed, and it appears that the described bonds of the company to the amount of $146,000 were deposited by the company with the plaintiffs as collateral security for the payment of the promissory notes. Subsequently the iron arrived, but, the company failing to pay the notes, the plaintiffs took possession of the iron under the power reserved in the agreement, and sold the same, and commenced separate suits against the company and the defendant as first indorser.

These suits were commenced in Penobscot county, and they also commenced two suits in Cumberland county against John M. Wood, the contractor, as second indorser on the same notes. Judgments were recovered against the company and the defendant, who was sued in two actions. Two judgments against the defendant were rendered in favor of the plaintiffs in the supreme judicial court of the state at the January term of the court, 1859, holden at Bangor, within and for the county of Penobscot. Execution was issued in one for $23,440 debt, and $75.78 costs, and in the other for $8,576 debt, and $43.13 cost of suit, as appears by the executions introduced in evidence. Nothing was collected on the executions, and the present suit is an action of debt against the defendant founded upon those two judgments. Nine pleas were pleaded by the defendant, of which the first two were pleass of nul tiel record, which terminated in issues to the court. All that need be said upon that subject is that the issues under those pleas were found for the plaintiffs, and that the trial proceeded under the other issues in the pleadings. Much reference to the fourth, fifth, and sixth pleas is unnecessary, as they terminated in issues of fact, and the respective issues were found for the plaintiffs. Special attention must be given to the third, seventh, eighth, and ninth pleas, as the issues of fact in which they terminated were found for the defendant, and he is entitled to judgment on the verdict, unless the verdict should be set aside for some one of the causes assigned in the respective motions.

Payment of the judgments described in the declaration to the plaintiffs on the 1st of January, 1860, is alleged by the defendant in the third plea, which is denied by the plaintiffs in their replication. As inducement he sets up, in his seventh plea, the two suits commenced in Cumberland county against the contractor as second indorser on the notes, and alleges that they agreed with the defendant in those suits as an adjustment of all matters in dispute between the parties, that judgments should be rendered therein for $25,000 as damages in the aggregate, to be apportioned in those suits at the discretion of the plaintiffs, and that at the April term, 1860, of that court, they recovered judgment in one of those suits for the sum of $23,440 and costs of suit, taxed at $32.22, and that at the October term following they recovered judgment in the other suit for the balance, to wit, for the sum of $1,560 damages, and costs of suit taxed at $29.77, and he alleges that both of said judgments were subsequently fully satisfied and paid. Most of the facts set forth in the seventh plea are admitted in the replication, but the plaintiffs allege that a much larger sum was due to them than the $25,000 for which the contractor as second indorser gave them judgment, and they deny that the sums recovered were agreed to be received in full satisfaction of their judgments against the defendant, or that the judgments which they recovered against the contractor as such second indorser were ever fully paid, as alleged in the plea. Satisfactory evidence was introduced that the plaintiffs, after the recovery of the judgments described in the declaration, and before the present action was commenced, sold and assigned to Dennistoun, Wood, & Co. the judgments in question and the notes on which the judgments were founded, and the defendant alleged in his eighth plea, that the assignees subsequently, to wit, on the 1st of January, 1864, settled and adjusted the same with the two indorsers on the notes, and received in full satisfaction of the judgments the sum of $1,237.50, as more fully set forth in the eighth plea. In their replication the plaintiffs deny that they ever made the assignment as alleged, and they also deny that they did on the day named, or at any other time, settle and adjust the matter with the two indorsers, or that they ever received the sum specified in the plea or any sum in satisfaction of said judgments and notes. Full payment to the plaintiffs is also

alleged in the ninth plea, and the replication filed by the plaintiffs is substantially the same as that filed to the third plea.

Plenary evidence was introduced that the plaintiffs on the 7th of April, 1859, agreed with John M. Wood, that, if the parties to those notes or any of them should pay to them within ninety days from that date the full sum of $25,000, they the plaintiffs would receive the same in full satisfaction of all their claim, and that they would surrender to the party legally entitled thereto all bonds of the company held by them as collateral security, and that all claims and demands between the parties should be considered as settled and adjusted. Judgments in their suits against the contractor and second indorser had not been recovered, but the defendant in those suits on the same day agreed in writing that a default might be entered in either or both of those suits, and that judgment might be taken in either or both for an amount not exceeding $25,000 in the whole, together with legal costs, and the case shows that judgment for the plaintiffs for the sum of $23,440 was subsequently entered in one of those cases in pursuance of that agreement. They had a right to enter judgment on that day, but the evidence shows that an extension was granted by consent, and at the October term, 1860, they entered judgment in the other case for the sum of $1,560 and costs, making the full sum of $25,000 without including costs. Executions were issued on both judgments, and the whole of the smaller judgment and all of the larger, except the sum of $1,237 of costs and interest, were satisfied by levying the executions on the estate of the judgment debtor, who was the contractor and second indorser of the notes.

Just after the date of that agreement the plaintiffs became embarrassed, and made the assignment described in the eighth plea, including the original contract for the iron, the notes, all the judgments and the claim to the bonds given by the company as collateral security for the payment of the notes. Due notice of the assignment was served on the two indorsers of the notes and on the railroad company. By virtue of the assignment the persons named as assignees claimed to be the owners of the judgments recovered against the company, and the several judgments recovered against the indorsers of the notes. They also claimed to be the lawful holders and owners of the bonds deposited as collateral security, and on the 25th of October, 1861, they sold $96,000 of the bonds for $5,000, still holding $50,000 of the same, the balance of the amount deposited as collateral security. Insolvency prevented the company from proceeding with the enterprise, and the franchise and estate of the company were transferred to a new company as assignees. Negotiations ensued between the new company and the indorsers of the notes on one side, and the holders of the balance of the bonds deposited as collateral on the other, for the surrender of the balance remaining of the bonds. Those negotiations with the holders of those bonds were conducted by the other parties through their attorney, who was a witness in the case. His testimony and other evidence in the case showed that they refused to surrender the bonds until they were paid the sum of $1,237.50, which they insisted was a lien upon the bonds. Wood was to pay $25,000 on the 6th of July, 1859, but the executions were not levied on his real estate until the 3d of May of the next year, and they insisted that they had a lien for the intervening interest and costs, and the evidence showed that the attorney of the other parties paid that amount to the attorney of the party holding the bonds, and received the bonds for the benefit of the contractor and second indorser of the notes given by the original company. Discussion of the rulings or instructions of the court is not required, as the exceptions taken at the trial are waived, and no questions of the kind are raised in the printed arguments. Instructions on all the points involved in the case were given at the trial, and in the absence of any exceptions it must be assumed that they were correct.

Questions of fact in view of the circumstances are the only questions to be examined under the motion. Brief reference will be made to those which were deemed of most importance at the trial, and which have been most pressed in this hearing. They are as follows: (1) That neither the plaintiffs nor their assigns have received the full amount of these judgments, nor have they accepted a less sum in full discharge of the amount for which the judgments were rendered. Suffice it to say, there was testimony on both sides of those issues, and the court is quite satisfied with the verdict of the jury, which is all that need be said upon the subject. (2) That the $25,000 which the plaintiffs agreed to accept was not paid within the time specified in the agreement, which is a correct statement of the fact; but the circumstances in evidence tended very strongly to show that the delay was waived, and that the payments as made were accepted as a fulfilment of the terms of the agreement, and the court properly submitted the point with the evidence to the jury. Evidently they accepted the real estate, secured by the levying of the executions, as payment under the agreement, and the testimony showed, if the witnesses were believed, that the balance was subsequently paid to the attorney of the holder of the bonds, and that the plaintiffs or their senior partner received the benefit of the payment. Viewed in that light, it is unnecessary to examine the third and fourth propositions submitted by the plaintiffs, as it is quite clear, from what has already been remarked, that they cannot be sustained. Grant the fact to be so, still the plaintiffs contend that the verdict ought to be set aside, because they insist that the attorney who received the balance of the $25,000 had no authority to accept the amount, that he was the attorney of

the assignees and not of the plaintiffs, and that neither he nor the assignees at that time had any legal or equitable interest in the judgments in question. Full proof was introduced that the sum of $1,237.60 was paid to the attorney of the assignees while the bonds were in his possession, and he testified that the senior partner of the plaintiff's firm accepted the credit of the money. Whether he was the attorney also of the plaintiffs at the time the money was paid was left in doubt by the evidence, but there were facts and circumstances in the case tending strongly to prove the affirmative of the issue, and the point was properly one for the consideration of the jury. Certain legal questions were also discussed, but inasmuch as there were no exceptions, it is not deemed necessary to enter upon that topic.

New and material evidence, it is alleged, has been discovered since the trial, and the second motion is that the verdict may be set aside and a new trial granted on that account. Unaccompanied, as the motion is, by any affidavit of the party filing it, the practice of the court would hardly warrant the court in granting it without requiring the party to comply with the twenty-second rule of the circuit court, as the motion is obviously grounded on facts not within the knowledge of the presiding justice, and which cannot be verified by any reference to his minutes. Affidavits of the witnesses to be examined cannot be regarded as a compliance with that rule, as the purpose of the requirement is that the allegation that new evidence has been discovered since the trial may be verified by the oath of the party or of his counsel. Probable cause for the motion must be shown, unless the requirement is waived by consent, before the court will interfere and give notice to the other side, or take any step to prevent the prevailing party from applying for judgment on the verdict. Where the motion is properly verified by the affidavit of the party, ex parte affidavits of the witnesses to be examined are quite sufficient to warrant an application for notice to the opposite party, but such affidavits, except by consent, are not admissible in the final hearing of the motion any more than in the trial of an issue of fact to the jury. Testimony for that purpose may be taken in open court in civil or criminal cases, or by deposition in civil cases as provided in the acts of congress, or by interrogatories and cross-interrogatories as in other adversary proceedings between party and party, or by consent of parties the court in its discretion will, in a civil action, appoint a commissioner to take the testimony and report the same to the court.

Both parties, however, in the case before the court, have acquiesced in the course pursued by the plaintiffs. and the court, in view of the circumstances, has looked into the affidavits of the witnesses, as if the affidavits were admitted by consent, and has compared the statements of the affiants with the evidence given at the trial, and the court is of the opinion that the motion, assuming the proceedings to be regular, ought to be denied for several reasons: Because the evidence is not newly discovered, within the legal meaning of that phrase. Evidence of the kind, in order that it may afford a proper ground for a new trial, must be in fact new, and such as reasonable diligence on the part of the party offering it could not have secured at the former trial, and must appear to be material in its object, going to the merits of the case, and not merely cumulative and corroborative or collateral, and it must, in general, be such as ought to be decisive and afford reasonable ground to conclude that it would be productive of an opposite result. Hill. New Trials, 375; 1 Grah. New Trials, 463. Nothing, says the latter commentator, but a clear case of injustice, occasioned by means beyond the control of the party, and the reasonable certainty of correcting it by those means since brought to light and placed within the reach of the applicant, will answer the purpose Comment upon the affidavits to show that the case made does not fall within any reasonable application of that rule is unnecessary, as the proposition is too plain for argument. Howard v. Grover, 28 Me. 97; Handley v. Call, 30 Me. 9; Snowman v. Wardwell, 32 Me. 275. Apart from that rule, however, it is obvious that the evidence offered was within the reach of the party at the former trial, and is merely cumulative. Alsop v. Insurance Co. [Case No. 262]; Carr v. Gale [Id. 2,433]; Gardner v. Gardner, 2 Gray, 434; McLaughlin v. Doane, 56 Me. 289; Atkinson v. Conner, Id. 546. The correct practice in such cases is of great importance, as the same rule, except as to the mode of taking the testimony, applies in criminal as well as in civil cases, where the defendant is found guilty, whether the charge is treason, murder, or piracy, or whatever the offence may be, as defined in an act of congress.

Motion overruled. Judgment on the verdict.

Case No. 17,010.

VOSE v. PHILBROOK.

[3 Story, 335.] [1]

Circuit Court, D. Massachusetts. May Term, 1844.

EQUITY JURISDICTION — DEBT SOUNDING IN DAMAGES—REMEDY AT LAW—PLEADING—LEX LOCI CONTRACTUS — SET-OFF — JOINT AND SEVERAL DEBTS—PARTIES—LIENS—INTEREST.

1. Philbrook was a partner in the house of D. P. & Co. of Port au Prince, who were agents of Vose, and, as such, sold to one C., certain merchandize consigned to them by the said V. for which the said C. though solvent refused to pay, because of a private claim set up by him against D. one of the partners. The said firm afterwards consigned to V. an invoice of mahogany for sale, ordering the proceeds thereof to be pass-

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

ed to the sole credit of P. The said mahogany was accordingly sold, and V. subsequently died, having a balance due to him from the firm. After the death of P. his administratrix having brought an action at law to recover the proceeds of the sale, the administratrix of V. brought the present bill in equity, praying for an injunction to the said suit at law, and claiming a right by way of lien or set off on the said proceeds, to balance pro tanto the debt due from the said firm on account of the said C., and alleging that the debt from the said C. has not been collected, because of the negligence or misconduct of the firm. It was *held*, that the debt due from C. was not the debt of the firm, but a demand arising from malfeasance or nonfeasance and sounding in damages, and therefore, that no suit in equity was maintainable in respect of it, until it should be first reduced to a debt by a judgment against the firm or against the defendant.

2. Even were it a debt now due, it was contracted in a foreign country, of the laws of which the court could not judicially take notice, and as this case depended on the lex loci contractus, it should have been especially averred in the bill.

3. The rule of law, that several debts cannot be set off against joint debts obtains equally in equity, unless some peculiar equities intervene, which are not shown in the present case; and the partnership debt due from the firm must be set off against an individual debt due to P.

4. Where a bill in equity is brought to recover a debt against the estate of a deceased partner, the other partners are proper and necessary parties; and although when they are out of the jurisdiction of the court they may be dispensed with—yet this exception does not apply to cases (like the present) involving important rights of the absent partners, and especially not to cases where the facts are mainly in their knowledge, or where the circumstances occurred in the place where they are.

[Cited in Lawrence v. Rokes, 53 Me. 113.]

5. Quære, whether under the Revised Statutes of Massachusetts a set-off of a partnership debt can be made at law against a separate debt due to one of the partners except in cases of dormant partners; it certainly cannot be in equity.

6. A court of equity will not maintain a bill for redress in cases of loss or injury occurring to a principal from the negligence or misconduct of his agent. The appropriate remedy is at law for damages.

[Cited in Teft v. Stewart, 31 Mich. 372.]

7. The citizenship of the plaintiff and of the defendant should be stated in the bill.

8. The doctrine of lien is not applicable to the present case, because; 1st, the claim is one sounding in damages, which is not the subject of a penal lien; 2d, it is not a lien created in the course of the factorage transactions of V.; 3d, the claims are not between the same parties nor due in the same right.

9. Interest was due on the proceeds of the sale of the mahogany from the time when V. first claimed a lien or set-off upon them in virtue of the balance due from the firm up to the time of the judgment.

[Cited in Aurora v. West, 7 Wall. (74 U. S.) 105.]

Bill in equity. The bill in substance was as follows:—"Abigail G. Vose, of Boston, in said district, widow, in her capacity as administratrix of the goods and estate which were of Thomas Vose, late of said Boston, merchant, deceased, during his lifetime a citizen of the state of Massachusetts, brings this her bill against Mary J. Philbrook, of Winthrop, in the district of Maine, widow, in her capacity as administratrix of the goods and estate which were of Thomas Philbrook, late of the city and district of New York, merchant, deceased, in his lifetime a citizen of the said state of New York. And thereupon the plaintiff complains, and says, that in the year eighteen hundred and thirty-seven, and previously thereto, the said Thomas Philbrook, and one F. M. Dimond, of Bristol, in the district of Rhode Island, and one Maurice Dupuy, of Port au Prince, in the Island of Hayti, were merchants and copartners, at said Port au Prince, under the style of Dimond, Philbrook & Company, and were engaged in the transaction of commission business, and had theretofore acted as the factors and agents of the said Thomas Vose; and in the month of February, A. D. eighteen hundred and thirty-seven, as such factors and agents, had sold and delivered certain merchandise belonging to the said Thomas Vose, on a credit of thirty and sixty days, to one William Cole of said Port au Prince, merchant, for the sum of five thousand, one hundred and thirty-four dollars and forty-one cents. And the plaintiff alleges that the net proceeds of the sales made at that time, was the sum of four thousand, two hundred and twenty-one dollars, and nine cents, which was credited by them to the said Thomas Vose, on their books of account, and in a certain account current rendered by them to him under date of April fifth, 1837, and the balance of which account was carried forward and brought into another account rendered by them to him under date of July the twenty-first, 1837. That at the time of the making of said sale, and afterwards, and for a long time after said credit of thirty and sixty days had expired, the said Cole was possessed, and as the plaintiff is informed, has continued to this time to be possessed, of abundant means to pay for the merchandise so purchased by him of the said Dimond, Philbrook & Company, and ought to have paid the same; and if he had neglected to do so, ought to have been compelled by the said Dimond, Philbrook and Company, as faithful agents, to make payment thereof. That the said Cole had pretended to have some claim or demand against the said Dimond, in his capacity as consul of the United States, on account of some alleged misconduct on the part of one Swain, while acting as vice consul, on account of which he neglected to pay for the merchandise so sold to him as aforesaid, and claimed to appropriate the amount thereof to the payment of his claim against the said Dimond—but whether the said Dimond, Philbrook and Company consented to such appropriation, or resisted the same, this plaintiff is wholly ignorant. That in the month of October, 1837, the said Thomas Philbrook deceased, and the said firm was thereby dissolved, and the liquidation of its affairs was assumed by the said Maurice Dupuy; and at the time of such dissolution the said firm was indebted to the said Thomas Vose in the sum of five thousand eight hun-

dred and nine dollars and seventy cents, and that the said Thomas Vose, in his lifetime, and the plaintiff since his decease, have repeatedly requested the said Dupuy and the said Dimond to pay and adjust the said sum of money, but that they have wholly neglected to pay the same or any part thereof. That the said Dimond, Philbrook and Company did not give notice to the said Thomas Vose, that the said Cole had refused to pay, or had not paid the sums of money payable for the merchandise so sold to him as aforesaid, and that the said Thomas Vose, believing that the same were duly paid at maturity, and passed to his credit on account, made further consignments of merchandise to the said Dimond, Philbrook and Company, which he would not have made if he had been informed of the non-payment of the said sums, and of the claims of the said Cole; and that when the said firm was dissolved, no notice that the said sums of money had not been paid was given to the said Thomas Vose, and no notice thereof was sent to him, although the said Thomas Vose and the said firm during its continuance, and the said Maurice Dupuy afterwards, were in constant correspondence, until the eighteenth day of July, A. D. 1838, on which day the said Dupuy, in answer to a request from the said Thomas Vose, requesting a remittance of the sums due to him as aforesaid, wrote to him in the words following: 'The amount due you being in the hands of Mr. W. Cole, who has a claim against Dr. Swain, the vice consul, for $8,000, which has not yet been paid, is the reason of the delay in remitting you, but Doct. Swain has just returned from the U. S., with an assurance that the government will soon pay the claim, when we will collect from Cole and remit you.' That neither the said Thomas Vose in his lifetime, nor the plaintiff since his decease, have consented to any such arrangement, but have always resisted the same, and claimed to be entitled to the whole balance, due as aforesaid, inasmuch as the neglect of the said Cole to pay the sum due from him did not arise from insolvency or inability on his part, but in consequence of his pretended claim against the said Dimond, as answerable for the doings of the said Swain, and by reason of their neglect and delay to notify the said Thomas Vose of such refusal on the part of the said Cole, and thereby inducing him make further consignments to them for sale, which he otherwise would not have done. That the said Dimond and Dupuy are not within or subject to the jurisdiction of this honorable court, and cannot therefore be made parties to this bill, unless they should hereafter come within the jurisdiction, in which case the plaintiff prays process may issue to make them parties, but that the said Mary J. Philbrook, administratrix of the goods and estate which were of the said Thomas Philbrook, is within or subject to the jurisdiction of this hon. court, and that the goods and estate of the said Thomas Philbrook, in the hands of his said administratrix, are in equity subject to the payment of the claims and demands of the creditors of the said firm, and to the payment of the sum of money due from the said firm at the time of its dissolution to the said Thomas Vose, and now to the plaintiff as aforesaid, with interest. That in the month of July, 1837, and thereabouts, sundry letters were sent to said Thomas Vose, by the said Dimond, Philbrook and Company, and one E. C. Herwig, of said Port au Prince, concerning a certain invoice of mahogany, shipped at the same time through the said firm to the said Thomas Vose for sale on consignment, the proceeds of which, when sold, were to be placed to the credit of the said Thomas Philbrook; and the said invoice of mahogony was sold in December, 1837, and the proceeds thereof amounted to the sum of seventeen hundred and six dollars and fifty cents; that when the said sum became due and payable, the said firm and the representatives of the said Philbrook were indebted to the said Thomas Vose in a much larger sum of money, and that he had the right to retain the said proceeds in part payment of the larger sum due to him, whether the same were to be considered as the property of the said firm, or as part of the said Philbrook's separate estate. And the plaintiff alleges, that the said Thomas Vose, in his lifetime, and your plaintiff since his decease, have always claimed and insisted upon such right and equity, and had hoped, that the surviving members of the said firm, and the administratrix of the said Philbrook, would settle and account and pay over the sum of money which would remain due after deducting the proceeds of said mahogany. But now, so it is, may it please your honors, that neither the said Dimond, nor Dupuy, the surviving members of said firm, nor the said Mary J. Philbrook, administratrix of the goods and estate of the said Thomas Philbrook, though often requested, have paid to the plaintiff the sum of money due to her as aforesaid, but on the contrary, have neglected and refused so to do, and the said Mary J. Philbrook, in her said capacity, has instituted a suit at law, which is now pending in this court, against this plaintiff, in her capacity as administratrix of the goods and estate of the said Thomas Vose, in which she seeks to recover of the plaintiff, damages for the detention of the proceeds of said invoice of mahogany. The bill ends with a prayer that the said defendant may be restrained, by an injunction to be issued by this honorable court, against prosecuting her said suit at law against the plaintiff, and that she may be decreed to pay the plaintiff the sum of money which will be due to her, as administratrix of the goods and estate of the said Thomas Vose, from the said late firm, with interest, after deducting therefrom the proceeds of the said invoice of mahogany,—and that the plaintiff may have such other relief

in the premises as the nature of her case may require, and as to your honors may seem meet."

To this bill the following demurrer was put in:—"This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained, to be true, in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to so much of the said bill as seeks relief on account of a debt alleged to be due from the firm of Dimond, Philbrook and Company to said Thomas Vose, and for cause of demurrer showeth that the said complainant hath not by her said bill made such a case as entitles her in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in so much of the said bill. First, because the action at law mentioned, and sought to be enjoined in and by the said bill, is an action of assumpsit brought by this defendant as administratrix of her late husband, Thomas Philbrook, against the complainant as administratrix of her late husband, Thomas Vose, to recover the proceeds of sales of certain mahogany, consigned by the said Philbrook in his lifetime, to the said Vose in his lifetime; and the said bill and the exhibits which are made part thereof, show, that the said consignment was made by the said Philbrook, as of his sole and separate property, and without any reference to the state of any account between the house of Dimond, Philbrook and Company and the said Vose, and gave the said Vose no lien on the said mahogany or its proceeds, or right to detain the same, on account of any balance due from said house to him; and that the said mahogany was sold by the said Vose, and the proceeds thereof received by him, after the decease of said Philbrook. Second, because the said bill does not show, that the said Vose in his lifetime obtained, or that the said complainant has obtained any judgment against the said copartnership, in any court, foreign or municipal, for the alleged debt pretended to be due from the said house to the said Vose; and, without such judgment, the assets of the deceased partner's separate estate are not chargeable, in equity, with the payment of such claims against the copartnership as that described in and by said bill. Third, because the said bill does not show any impediment to a suit by the complainant against the foreign house, or the surviving partners thereof, or against the said Cole, in the courts of Hayti. Fourth, because the said bill does not show that any good claim, liquidated or unliquidated, now exists against the said firm, or either of the members thereof, in favor of the said complainant. Fifth, because the said bill shows that the pretended claim therein set forth is against a foreign house of trade, and the surviving partners are not made parties defendant therein, and therefore the court ought not to proceed to adjudicate upon such claim, and ought not to entertain the said bill, although the said surviving partners are alleged to be out of the jurisdiction. Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur to the said bill, and to all matters and things therein contained, and prays the judgment of this honorable court whether she shall be compelled to make any further or other answer to the said bill, and she humbly prays to be hence dismissed, with her reasonable costs in this behalf sustained."

F. G. Loring, for plaintiff.

G. T. Curtis and W. W. Story, for defendant.

STORY, Circuit Justice. This cause has been exceedingly well argued on both sides. Many important topics have been discussed, upon which it is unnecessary to express any opinion, as my judgment proceeds upon grounds far more limited and narrow. The bill is not only for an injunction to a suit brought by the defendant against the plaintiff in this court, but also for the payment of the balance of an account due from the firm of Dimond, Philbrook & Co. of Port au Prince in Hayti, to the plaintiff's intestate (Vose), the defendant's intestate (Philbrook), having been a partner in that firm. There is no suggestion in the bill, that the surviving partners are not solvent; and the main claim in the bill against the firm is for the amount of a debt due from one William Cole, of Port au Prince, for goods of the plaintiff's intestate, consigned to and sold by the firm, for and on account of the plaintiff's intestate, which debt the bill impliedly admits has not been in fact received by the firm; but has been detained by Cole, on account of a supposed demand, which he has against Dimond, one of the partners of the firm. The bill, in effect, charges (for it is not very expressive in its language, and on this very account is open to objection), that the debt due by Cole has not been collected, owing to the misconduct or negligence of the firm, when, as Cole is admitted to be solvent, it might have been punctually collected and remitted; and thereby the firm have made it their own debt. The accompanying documents referred to in the bill, and made a part of it, are relied on to explain the true nature of the transaction. The bill admits, that a consignment was made by the defendant's intestate (Philbrook), to the plaintiff's intestate (Vose), of a certain parcel of mahogany, on Philbrook's account, and to be placed to his credit, which was duly sold by Vose, and the proceeds are in the hands of the plaintiff, and she claims the right to deduct the same from the balance due from the said firm; in other words, she claims a right to deduct the same by way of set-off, or by way of lien, as chargeable with the payment of the debt of the firm due to her intestate. It does not appear from the actual structure of the bill, whether the defendant has taken out administration in Massachusetts, or whether there are any assets of her intestate here, capable of being applied to the discharge of the debts of the firm, or of

Philbrook; nor, indeed, is the citizenship of the plaintiff, or of the defendant, stated in the bill (see Chappelaine v. Dechenaux, 4 Cranch [8 U. S.] 305), as properly it should be. But these are, at most, mere formal omissions, which might easily be cured by an amendment, and therefore, not material to be considered by the court. I advert to them only as elements in cases of this nature, which might in certain aspects of this case, be of some significance.

The first question, which meets us upon the demurrer is, whether, upon the structure of the bill, the claim for the late debt is or can be treated, as strictly a debt of the firm, for which relief lies in equity against the defendant. If it were unequivocally stated to be a pure debt of the firm, and not a mere liability, founded in negligence or omission of duty, the demurrer would, by admitting the facts, clear away the difficulty. But the bill does not so state the case of a pure debt, but mixes it up with a supposed liability, grounded upon the agency; and the demurrer must be taken to admit only the facts as stated, and so far as they are well pleaded. If part of the present claim were a pure debt, and part were founded upon any negligence of the firm, they could not be mixed up together, without being open to the double objection of making the bill multifarious, as well as being founded in part upon a claim properly remediable at law. For it is perfectly clear, that a court of equity has no right to maintain a bill for redress, in cases of loss or injury occurring to the principal, by the negligence or omission of duty, of his agent. The appropriate remedy is at law for damages; a subject of which equity takes no direct cognizance, and deals with only as incidental to other relief. It appears to me, that the debt due from Cole has, in no just sense, become the debt of the firm, so as to be a matter of money due on account; but it is strictly a demand, arising from malfeasance, or nonfeasance, and sounds merely in damages. It appears to me, therefore, that no suit can be maintainable in equity, in such a case, unless the claim has first been reduced into a debt, by an appropriate judgment against the firm, or at least against the individual, against whom it is sought to be enforced in equity.

There is another circumstance arising upon the case, which deserves notice, and in respect to which the bill is silent. It is this, that even if the claim was a debt due by the firm, it was a debt contracted by the firm in Hayti, and that being a foreign country, of whose laws the court cannot judicially take notice, it cannot be affirmed by the court, that partnership debts are held to be joint and several in that country, although they now are in courts of equity in England and America. I may conjecture, that the law of Hayti, is the French law, in which each partner in a commercial partnership is liable in solido, for the whole debt, so that in effect, each is held jointly and severally liable therefor. This, however, in the French law, is confined to commercial partnerships, and does not apply to other partnerships; for in the latter, each partner is liable only for his visible share. Poth. de Société, notes 103, 104; Code de Commerce, art. 22. But still, as the court cannot judicially know, what the law of Hayti is, and it is a case which must upon this point be governed by the lex loci contractus, it ought to have been expressly averred in the bill, what that law is. However, for the sake of the argument, I will assume that the rule of the law of Hayti is the same as that of the common law; and also will assume, that the same rule prevails as to set-off by that law as prevails at the common law. Now, by the common law, it is well settled, that no set-off can be made of several debts, against joint debts of the contracting parties. And the same rule is followed in courts of equity, unless some peculiar equities intervene in the particular case, the rule being, that equity on this subject follows the law. So the doctrine was laid down in Vulliamy v. Noble, 3 Mer. 593, 618; and it was fully recognized in the supreme court of the United States at the last term, in the case of Dade v. Irwin's Ex'r, 2 How. [43 U. S.] 383, 390, 391. See 2 Story, Eq. Jur. §§ 1435–1437. I am not aware, that a different rule prevails either in the Roman law, or in the French law, as to this particular point, although the doctrine under the name of compensation is therein recognized to a much larger extent than in our law; for still, as a general rule, the debts must be between the same parties, and due in the same right; and in no just sense, is a partnership debt due in the same right as an individual and separate debt. The interests of the other partners may be essentially concerned in the matter, if the debt is due to them, and the interest of the separate partner sued may in like manner be concerned, if the debt is due by the partnership. It is upon this very ground, that in cases of partnership, where a bill in equity is brought to recover the debt out of the estate of a deceased partner, the surviving partners are necessary and proper parties; for they have an interest in taking the accounts. Thorpe v. Jackson, 2 Younge & C. Exch. 553; Wilkinson v. Henderson, 1 Mylne & K. 582, 589; and Burwell v. Mandeville's Ex'rs, 2 How. [43 U. S.] 560, 575,—are directly in point on this subject. See Poth. Obl. notes 628–633; 2 Story, Eq. Jur. § 1442. It is true, that where, as in the present case, the other partners are out of the jurisdiction, a court of equity may dispense with their being made parties; but then it is a matter, in the sound discretion of the court, whether under all the circumstances, it ought to do so or not; for if the case be one involving important rights of the absent partners, and a fortiori, if they are the only persons within whose knowledge the facts lie, and they are resident in the foreign country where the transactions took place, and are most material parties to explain them, it would be doing great injustice to affect the separate estate of the partner here with a claim, of the nature and character of which

his administrator could scarcely be presumed to have any knowledge or full means of establishing in proof. Even under the Revised Statutes of Massachusetts, if the laws of that state could govern the case, it seems exceedingly doubtful whether a set-off of a partnership debt can be made against the separate debt due to one of the partners, except in cases of a dormant partnership. Rev. St. 1835, c. 96, § 9. But if it can be done, it can be done only at law, and is not properly remediable in equity.

What has been already said, applies to a debt strictly so called; and a fortiori, if the claim be unliquidated, as the present claim is, adhuc sub judice, and not only in controversy, but resolutely controverted, there would seem to be the strongest reason to remit the plaintiff to the proper forum to litigate her right, I mean to the tribunals of Hayti, the country where the transaction took place; for there, and there only do they seem capable of being with all the attendant circumstances, properly adjusted and adjudicated. But it is sufficient to say, that the present claim is a mere claim of set-off, and the remedial justice is asked, not of a court of law, but of a court of equity. In such a case, some peculiar equity must be shown, to entitle the party to have her suit entertained. None appears to me, to be shown. On the contrary, the structure of the bill presents very mixed considerations, and involves as doubtful equities as could well be discussed in a court of justice. I have not thought it necessary to go into the consideration of the doctrine of lien, as applicable to the present case. It is not set up in the bill as a matter of lien; and if it were, it would not avail the plaintiff for several reasons. First, it is a claim sounding in damages, which is not a subject of a general lien. Secondly, it is not a lien created in the course of the factorage transactions of the plaintiff's intestate. Thirdly, it is a case where the proceeds were to be carried to the separate account of Philbrook; and fourthly, it is a case, where the claim is not strictly between the same parties,—the claim being founded upon a partnership transaction, and the debt due to Philbrook upon a separate and sole transaction. Upon these points nothing more is necessary than to refer to the authorities cited in Story, Ag. §§ 362, 364, 365.

Without going farther into the details of the case, my opinion is, first, that the claim of the Cole debt, set up in the bill, is not a liquidated debt due from the firm, and therefore, not a fit subject of set-off; and secondly, that a partnership debt is not, independent of other peculiar equities, entitled to be set-off in a court of equity, against a separate debt due to one of the partners. I am also of opinion, and accordingly direct, that interest be allowed upon the principal sum due from the second of March, 1838, up to the time of the judgment, that being the period when Thomas Vose, by his letter of that date. fixed the balance, and showed by that letter, that he intended to appropriate the amount as a set-off to the debt stated in that letter pro tanto. The bill in equity affirms this intent. The bill must, therefore, be dismissed with costs.

Case No. 17,011.

VOSE v. REED et al.

[1 Woods, 647.] [1]

Circuit Court, N. D. Florida. May, 1871.

EQUITY—PARTIES—CITIZENSHIP OF CORPORATION—PLEA TO JURISDICTION—RECEIVERS—CONTEMPT PROCEEDINGS.

1. In a suit brought in the circuit court of the United States, by reason of the citizenship of the parties, a corporation of the state, of which the complainant is a citizen, cannot be made a defendant.

2. If the same corporators, composing such corporation, become incorporated in the state where the suit is brought, the corporation thus formed may be made a defendant.

[Cited in Chicago & N. W. Ry. Co. v. Auditor General, 53 Mich. 91, 18 N. W. 586.]

3. A plea to the jurisdiction of the court must be pleaded by itself, and cannot be set up in the answer under rule 39, as an answer is an appearance and a waiver of a plea to the jurisdiction.

[Cited in Bland v. Fleeman, 29 Fed. 672.]

4. When it properly appears by the record that there is a party over whom the court has no jurisdiction, and who is not a necessary party to the proceedings, the bill will be dismissed as to that party, and retained as to the others.

5. The appointment of a receiver to take and preserve a trust fund is the exercise of a discretion in which all the circumstances are to be taken into consideration. Where the funds are in the hands of trustees, appointed by the legislature, who hold their trust ex officio, as high public officers of the state, and especially where one part of the trust involves duties of a public character, the court will be very reluctant to take the fund out of their hands, and will not do so except for the most cogent reasons, such as gross fraud and imminent danger of the trust fund. It will resort to every coercive means of compelling the trustees to perform their duty before resorting to this extreme measure.

[Cited in McGeorge v. Big Stone Gap Imp. Co., 57 Fed. 270; Wilder v. New Orleans, 67 Fed. 569.]

6. There is no doubt of the power of the court, as a court of equity, to award attachments for contempt in vacation. As an equitable tribunal, the court is always open.

7. Where parties have been guilty of a technical contempt, in violating an injunction, but declare on oath, that they were not aware of the violation, and submit to the direction of the court, they will be allowed to purge the contempt by undoing or reversing their acts, when it is practicable to do so.

[Cited in Mason v. Harper's Ferry Bridge Co., 16 W. Va. 888.]

At chambers. Application for an attachment, as for a contempt, and for the appointment of a receiver, on amended bill and answers of the several defendants and affidavits.

H. R. Jackson, H. Bisbee, Jr., and J. D. Pope, for complainant.

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

Peeler, Papy, L'Engle & Drew, for defendants.

BRADLEY, Circuit Justice. The legislature of Florida, by an act passed January 6, 1855, vested certain public lands, including all swamp and overflowed lands, belonging to the state, in the governor, comptroller, treasurer, attorney general and register, as trustees, to constitute an internal improvement fund, and to serve, amongst other things, as a guaranty of bonds to be issued by certain designated railroad companies for the procurement of iron rails and rolling stock. A certificate of guaranty was to be placed on the bonds of the trustees. In case the interest on these bonds and one per cent. per annum for a sinking fund were not paid by any of the companies, the trustees were authorized to take possession of and sell the road, appurtenances and franchises of the company in default, and to apply the proceeds in purchasing up the bonds or incorporating them with the sinking fund.

The powers given to the trustees were large and various. They were authorized to fix the prices of the lands, to make arrangements for draining them, and to promote their settlement and cultivation by allowing preëmptions and other modes of encouragement. The Florida Railroad Company was one of the companies included in the benefits of this act, and issued a large number of bonds which were duly indorsed by the trustees. No installments of interest or sinking fund were paid during the war. In November, 1866, the trustees seized and sold the road, and with the proceeds of sale purchased and cancelled a large proportion of the outstanding guarantied bonds of the company. The complainant held a number of the bonds which were not thus purchased. He filed his bill for relief against the trustees, whom he charged with mismanaging the funds, and against other parties and corporations whom he charged with complicity in such mismanagement by obtaining fraudulent purchasers of the lands at nominal prices. He also prayed for an injunction and the appointment of a receiver of the trust fund. An injunction having been granted in December, 1870, which, as the complainant states, was disregarded, he obtained an order to show cause why an attachment for contempt should not issue, and a receiver be appointed as prayed in the bill.

The case now came up on this order to show cause, and upon answers put in by the defendants denying fraud, and explaining the transactions complained of. But—

I. There was a question as to parties. One of the defendants in the original bill, alleged to have obtained a large fraudulent grant, was called "The New York and Florida Lumber and Land Improvement Company, a corporation created under the laws of New York, but designed to be located and to do business in the state of Florida, and actually located and doing business there." By an amended bill it was alleged that this corporation also exists as a corporation under the laws of Florida, under the name of "The Florida Improvement Company," the same persons who composed the former having associated themselves together and become incorporated under the acts of the assembly of the latter state. The first named corporation being, in law, a citizen of New York, could not be sued in the circuit court of the United States by the complainant, who is a citizen of that state; and the bill was dismissed as to it. The last named corporation the court held to be, in law, a citizen of Florida, being a corporation created by the laws of that state, though originally composed of the same individuals as the former. The company having filed an answer and, among other things, having therein pleaded the above matter to the jurisdiction of the court, it was held that this could not be done. The court (Bradley, Circuit Justice) said: This plea to the jurisdiction cannot be received in this way. A plea to the jurisdiction must be a separate plea. An answer is an appearance, and waives it. The company has applied to withdraw its answer and plead anew. This cannot be allowed. As the aim of the court is to do justice between all the essential and proper parties, it will not encourage pleas to the jurisdiction, the object of which is to postpone a judicial consideration of the controversy. When it properly appears by the record that there is a party over whom the court has no jurisdiction, and who is not an essential party to the proceedings, the bill will be dismissed as to that party, and retained as to the others. Accordingly the bill was dismissed as to one company and retained as to the other.

II. The next question is, whether the court will appoint a receiver? This is a matter always in the discretion of the court; but as a general rule a receiver will be appointed for the purpose of protecting the fund when the complainant has an equitable interest in the subject, and the defendant having possession of the property is wasting it, or removing it out of the jurisdiction of the court. But all the circumstances of the case are to be taken into consideration, and if the case be such that a greater injury would ensue from the appointment of a receiver than from leaving the property in the hands now holding it, or if any other considerations of propriety or convenience render the appointment of a receiver improper or inexpedient, none will be appointed. In this case the trustees having possession of the trust fund and property are public officers of the state and trustees ex officio. And it cannot with propriety be said that their appointment is a mere designatio personarum. The governor of the state, the treasurer, the comptroller, and other state executive officers are named trustees for a purpose. The state has a great interest in the trust. It is not merely to preserve the fund as a security for the payment of railroad bonds that the trust is created, but to provide for the drainage and reclamation of the lands, and their settlement and cultivation. These are political objects

of the most important character. To attain these objects they are authorized to grant preëmption rights for not more than a section of land to each settler. Increase of population and development of resources are primary elements in the prosperity of a state; and these, as well as railroad improvements, are made objects of the trust. Drainage, reclamation, development, immigration, are all of them objects of first national and state importance; and none of them will be likely, in the end, to depreciate the value of the pecuniary security afforded by the lands, whether for the payment of railroad bonds or anything else of like character.

Now these public and political objects of the trust make it extremely fitting that the chief executive officers of the state should administer the fund. And it must be a very strong case, indeed, which will induce the court to take the property out of their hands and put it into the hands of its own officers. The legislature has seen fit to intrust the chief officers of the state with these important duties, and it would show a great disrespect to this co-ordinate branch of the government for the judiciary, on light grounds, to displace these officers from the trust, and to put appointees of its own in their stead. If they are guilty of breach of duty, they can be enjoined; they can be made personally responsible; the fund can be followed in the hands of persons getting hold of it in a fraudulent manner. It would be very strange if the courts could not in some way secure the rights of parties having an interest in the fund, without removing from the trust those official personages to whose administration it has been intrusted by the legislature. The court will not shut its eyes to the fact that these officers are constantly being changed by the suffrages of the people of the state and the constituted power of appointment; and it would be very inconvenient and awkward for the court, by the appointment of a receiver, to withhold the property from the possession and management of new state officers, fresh from the confidence of the people, and against whom no charges of incapacity or want of integrity have been made. To my mind, it seems to be a case in which, if a receiver can be appointed at all, the appointment ought not to be made until every other remedy has been tried in vain. Besides, looking at the peculiar and important duties attaching to the trust, how could a receiver, how could a court, without the greatest embarrassment, administer the trust? How could the court take cognizance of the requirements of a vast political territory in reference to drainage, development, pre-emption and population? It would be a Herculean task for a court, or the receiver of a court to perform. I do not feel that I ought to take the trust fund out of the hands of the state officers, in this case, and place it in the hands of a receiver. The motion for a receiver is therefore denied.

III. The next question is, whether the defendants have been guilty of a contempt by violating the injunction granted by Circuit Judge Woods. A preliminary question is raised by the defendant, who contends that the court has no power to inquire into a contempt for disobedience to an injunction except at a regular term of the court. Whatever may have been the power of the court prior to the act of August 23, 1842 (5 Stat. 516), I have no doubt that since that statute the motion for an attachment on the equity side of the court may be made at any time. By that statute it is declared that the circuit courts as courts of equity shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits. An attachment is frequently necessary to expedite a cause, as for example, on the return of a subpœna, which the person subpœnaed refuses to obey. The 7th rule in equity declares that the process of subpœna shall constitute the proper mesne process in all suits in equity in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided in the rules, or specially ordered by the circuit court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court. If an attachment could not be issued, for example, to compel the attendance of a refractory witness, except in open court, the business of the court would be liable to be sadly impeded in cases of importance and great public feeling. I have no doubt that an attachment may be applied for in equity at any time, when there is occasion for the use of a writ.

We come then to the question, whether the defendants have violated the injunction, and so rendered themselves amenable to an attachment. The complainants by the petition allege that they have done so in several particulars which will be separately examined.

The sale of 300,000 acres of land, to E. H. Studwell, is alleged to be a direct violation of the injunction; I do not see how it can be seriously contended that it is not. If not a direct violation, it is at least a palpable attempt at an evasion, and must be treated as such. But as the defendants have, in their answer, stated that they acted in good faith, not supposing that they were violating the injunction, and that they desire to act in obedience to the views of the court, it will be proper to allow them an opportunity to retrieve the error which they have committed. I shall therefore order that an attachment do issue against them, unless on the first day of the next term of the court, a cancellation of the deed of Studwell be produced.

(A similar order was made with regard to the 100,000 acres conveyed to the Florida Im-

provement Company. But as to the remaining charges of violation of the injunction, the court, after an examination of the answers and affidavits, considered that they were not substantiated. The motion to dissolve the injunction was denied.)

As to the general powers of the trustees, and the degree of control which the court will exercise over them, the presiding justice remarked, in substance, as follows:

The discretion with which the law has invested the trustees on the management of the fund is very large, and so long as they act in good faith and not palpably in violation of their trust, the exercise of that discretion cannot be interfered with. It is their discretion, and not that of the court to which the state has intrusted the management of this important fund, consisting as it does, of the whole public domain of the state.

But if the trustees are not acting in good faith; if they are acting fraudulently, and in collusion with the donees and grantees of the various large grants which they have made, they will not only be personally liable to answer to the complainant and other bondholders similarly situated, for the payment of their bonds; but the fraudulent sales will be set aside, and the property sold will be followed by the court, and put up for sale at public auction; and any proceeds of sales which ought to be in the hands of the trustees, but which from their default or fraud, are not forthcoming, will also be followed in their hands, or in the hands of those who have them, and applied to the purposes of the trust. But the settlement of these questions is proper for the final hearing of the cause, after all the issues have been made, and after all the evidence is in.

[For a motion for an attachment for contempt for disobedience of the decree of the court, also for a petition for rehearing, see Case No. 17,008.]

Case No. 17,012.

VOSS v. BAKER.

[1 Cranch, C. C. 104.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

TRESPASS.

In trespass for breaking up a scow, if the defendant, knowing that a third person had committed the trespass, received from him the timbers and planks, knowing them to be the property of the plaintiff, he is guilty of the trespass. Quære.

Trespass for breaking up a scow. THE COURT instructed the jury that if the defendant, knowing that Tuel committed a trespass in taking and breaking up a scow of the plaintiff, received from Tuel the timbers and planks of the scow, knowing them to be the property of the plaintiff, which had been so taken, he is answerable in this action, being equally as guilty as Tuel.

MARSHALL, Circuit Judge, absent.

(This opinion was grounded upon the principle that in trespass there are no accessories; and that in a case where a person would be an accessory in felony, he will be a principal in trespass.)

Mr. Woodward, for defendant, moved the court to instruct the jury, that if they should be of opinion that the defendant did not receive the plank, &c., till after the action brought, he could not be liable in this suit, although the principal trespass was committed before the bringing of the action.

KILTY, Chief Judge, was inclined to give the instruction as prayed.

CRANCH, Circuit Judge, contra, that the act shall relate back to the time of the principal trespass. (Quære.)

Verdict for the defendant.

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

VOSS (BEALE v.). See Case No. 1,160.

VOSS (COOKE v.). See Case No. 3,179.

VOSS (FENWICK v.). See Case No. 4,786.

Case No. 17,013.

VOSS v. HOWARD.

[1 Cranch, C. C. 251.] [1]

Circuit Court, District of Columbia. July Term, 1805.

ASSAULT AND BATTERY—BEATING SERVANT.

In an action of assault and battery, for beating the plaintiff's servant per quod, &c. The plaintiff cannot recover without evidence of loss of service.

Assault and battery on plaintiff's servant, per quod, &c.

Verdict for the plaintiff, one cent damages, subject to the opinion of the court, on the following statement of facts, viz.: Joseph Cole, a mulatto slave, the property of a citizen of Maryland, hired himself, with his owner's permission, in the city of Washington, to Nicholas Voss, by the month; the said negro received the wages for his labor, and lived, not with Mr. Voss, but with his own wife, a free white woman, and came daily to his labor; that an affray and fight took place between the defendant and said Cole; that the defendant struck and beat the said Cole, but not so as to occasion any loss of labor to the said Voss. The declaration was a common count, in assault and battery, per quod servitium amisit.

The opinion of THE COURT was for the defendant. The loss of service is the gist of the action, and the statement admits that there was no loss of labor, which the court considered as synonymous with service. Judgment for the defendant.

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

Case No. 17,014.

VOSS v. LUKE.

[1 Cranch, C. C. 331.] [1]

Circuit Court, District of Columbia. Nov. Term, 1806.

ATTACHMENT OF WITNESS—AUTHORITY OF COURT.

This court has power to send an attachment into Virginia, for a witness in a civil cause, who resides within one hundred miles of the place of trial; and such attachment is to be directed to, and served and returned by, the marshal of Virginia.

[Cited in Woods v. Young, Case No. 17,994; Park v. Willis, Id. 10,716; Lewis v. Mandeville, Id. 8,326; U. S. v. Anon., 21 Fed. 768.]

Mr. Youngs, for defendant, moved for an attachment against witnesses who reside in Virginia, within one hundred miles of this place, and who have been summoned and failed to attend.

Mr. Jones, contra. The process of attachment is of a criminal nature, and not devised merely to bring a witness into court. Hammond v. Stewart, 1 Strange, 510; Wyatt v. Winkworth, 2 Strange, 810; Smalt v. Whitmill, Id. 1054; Chapman v. Pointon, Id. 1150. The courts of the United States are of limited jurisdiction in criminal as well as in civil actions. The power to issue a summons does not imply a power to issue an attachment, which is a mere criminal process, and effects the end of obtaining the attendance of the witness only collaterally. Before an attachment can be issued, it must be taken for granted that an offence has been committed; and if committed in this case, it was committed in Virginia, out of the jurisdiction of this court. Besides, no officer is bound to execute it, or can execute it. The marshal has authority only within his district. By the 27th section of the judiciary act of 1789 (1 Stat. 87), the power and duty of the marshal are only to execute, "throughout the district, all lawful precepts directed to him." But the party is not without remedy. The service of the subpœna raises a duty, and he may have an action against the witness for damages. The authority of a marshal to convey a prisoner from one district to another is only given, in a special case, by the 33d section of the judiciary act of 1789; and it must be by a special warrant for that purpose. If a person in Virginia has committed an offence here, the only mode of proceeding is, to apply to a judge or magistrate in Virginia for a warrant of arrest, and to the judge of the United States district court for another warrant to bring him here for the trial. The compulsory process, mentioned in the 8th amendment of the constitution, does not mean an attachment. That provision gives no right to punish by fine and imprisonment.

Mr. Youngs, in reply. The remedy by action would be of no avail. It would be uncertain whether any damages would be given, and if given, whether the party would be able to pay them. The marshal is bound to execute all lawful precepts, and, when executed, to return them. If he can begin to execute, he may finish.

CRANCH, Chief Judge. The questions, arising in this case, are: (1) Can the court issue an attachment of contempt, in any case, against a witness in a civil cause, for not attending according to summons? (2) If so, upon what evidence of contempt will the court issue it? (3) Can the court issue an attachment against a witness in a civil cause, who resides out of the district, but within one hundred miles of the place of trial? (4) If so, to what officer shall it be directed?

1st. There seems to be no reason to doubt the power of the court to grant an attachment of contempt against a witness for not attending according to summons. The disobedience of any lawful command of a court of record is, at common law, a contempt of the authority of the court; and for all such contempts the common law process is an attachment.[2] The common law being part of the law of Virginia, became part of the laws declared by the act of congress of the 27th of February, 1801 (2 Stat. 103), to be in force in this country. Hence, whatever powers are, by the common law, incident to a court of record, may be exercised by this court, unless restrained by statute; but so far from being restrained by statute, the power of punishing contempts, and particularly that of a witness refusing to attend according to summons, is recognized by the statutes of Virginia and of the United States. By the judiciary act of 1789 (1 Stat. 73), it is enacted, that "all the courts of the United States shall have power to punish, by fine and imprisonment, at the discretion of the said courts, all contempts of authority, in any cause or hearing before the same;" and in the 14th section of the same act, (page 81,) the power is given to issue all writs "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." An attachment is a writ agreeable to the principles and usages of law, and is necessary for the exercise of their jurisdiction as to contempts. It is also necessary in another point of view. The court cannot exercise its jurisdiction in common cases unless the testimony of witnesses can be had either by deposition or viva voce. If the witness in any cause is within one hundred miles of the place of trial, he cannot be compelled to give his deposition; and his deposition, if taken, cannot be used; and if his personal attendance cannot be had, the court cannot exercise its jurisdiction in that cause, and his personal attendance cannot be had but by an attachment. An attachment, therefore, is a writ necessary for the exercise of the jurisdiction of the court in the trial of causes, as well as in the punish-

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

[2] See the authorities cited in the note at the end of this case.

ment of contempts. By the act of congress of the 13th of February, 1801 (2 Stat. 89), which was in force on the 27th of February, 1801, one judge of the circuit court was authorized to hold a court for certain purposes, and to direct subpœnas for witnesses to attend the same, and the requisite process on the non-attendance of witnesses and jurors, and to award and issue process, and order commitment for contempts. And by the act of February 27, 1801, this court and its judges have the same powers which were given to the circuit courts by the act of February 13th, 1801.

But it has been said, in argument, that the act of Virginia of November 29, 1792, § 4, (page 278,) having imposed a penalty of 16 dollars upon a witness failing to attend, and having given the party injured a right to sue the witness for damages, contains an implied prohibition of any other remedy or process to compel his attendance. But the 7th section of the same act recognizes a compulsory process different from a subpœna. The words are, "any subpœna or process to require or compel the attendance of any witness, may be served or executed in the district, county, or corporation, where the said witness shall be found." This clause, as we understand it, ought to be construed reddendo singula singulis, so as to read thus: "Any subpœna to require, or process to compel, the attendance of any witness, may be served or executed (that is, the subpœna to require may be served, or the process to compel may be executed,) in the district, &c., where the witness may be found." Here, then, is a direct recognition, by the law of Virginia, of a "process" "to compel" the attendance of a witness, and which is to be "executed" on the witness wherever he may be found. The act of Virginia, section 4, is evidently intended to be a copy, substantially, of the 12th section of the statute of 5 Eliz. c. 9, which, in England, has never been construed so as to deprive the courts of the power of proceeding against a witness by attachment.

Taking it, therefore, as established, that this court has power to issue an attachment of contempt against a witness for disobedience to a summons, it is to be considered, 2d. Upon what evidence of contempt will the court issue it? It is laid down by Bacon, (1 Abr. 180,) that it may be awarded upon a bare suggestion; a fortiori, therefore, it may be issued upon the return of a sworn officer, who certifies that he has summoned the witness; and upon the record of the court, which certifies that, being called, the witness failed to attend according to the summons. And this is the usual practice of the courts in Maryland. What the practice has been in Virginia we are not informed. In New York it is not usual to grant an attachment in the first instance, (Jackson v. Mann, 2 N. Y. Term R. 92); and in England, it seems that the court has usually required an affidavit, and seldom grants an attachment without a previous rule to show cause. But in England the motion for an attachment is not made at nisi prius, but in the court at Westminster Hall; and the object is not to obtain the attendance of the witness, but to punish him for his contempt. In this country it is used as the means of compelling an actual attendance on the trial, so as to prevent a continuance of the cause to a subsequent term. If the witness, when brought in, clears the contempt on oath, he is discharged without fine. The return of the officer and the non-attendance of the witness, are certainly primâ facie evidence of a contempt of the process of the court; and the remedy by attachment is found to be productive of very little inconvenience, and that is far overbalanced by the promptness of the remedy. The affidavit of a party could be very little more satisfactory to the court than the return of the subpœna. We are therefore of opinion, that the practice heretofore adopted by the court is proper.

But the great question is, 3dly, can the court issue an attachment, in a civil cause, against a witness who resides out of the district, but within one hundred miles of the place of trial? The constitution of the United States (eighth amendment) declares, that in criminal prosecutions, the accused shall have compulsory process for his witnesses. What is compulsory process? Not a summons alone. No other compulsory process for witnesses is, or has been known, by the laws of England, or of this country, than an attachment of contempt. It is true, in criminal prosecutions, the government bind their witnesses over by recognizance; and, if they do not attend, their recognizances are forfeited; but this is not compulsory process; a man may choose to forfeit his recognizance rather than attend. On criminal prosecution, therefore, we take it for granted that the accused would have a right to attachment for his witnesses; and as, in such cases, depositions cannot be used, the attachment must, of course, run through the United States, because the constitution has guaranteed to him this right.

By the act of congress of March 2d, 1793, (1 Stat. 333,) subpœnas in criminal cases, may run from one district into any other; and in civil cases also to the extent of one hundred miles from the place of trial. Why should congress give the power to send subpœnas without giving the power of enforcing them? It would be a mere waste of time, and a means of bringing the authority of the court into contempt. Congress seems to have taken it for granted that it was sufficient to give the court the right to require the attendance of the witness, and that the usual and necessary power of all courts to compel obedience to their lawful orders, by attachment, was sufficient to enforce the subpœna. So far as a court has jurisdiction lawfully to command, it seems to follow that it has jurisdiction to cause its command to be respected. As it regards the attendance of witnesses in criminal cases, each court of the United States has jurisdiction over the whole United States; and, in civil cases, to the extent of one hundred miles. That such was the understanding of the legislature is evident from the provisions of the acts of congress. The judiciary

act of 1789, (1 Stat. 73,) authorizes the taking of the deposition of a witness who lives more than one hundred miles from the place of trial, "or who is about to go out of the district, and to a greater distance than as aforesaid." Why take his deposition if he lives more than one hundred miles from the place of trial? Because you cannot compel his attendance. Why not take his deposition if he is within one hundred miles? Because you may compel his attendance at the trial. Why not take his deposition if he is about to go out of the district, but not one hundred miles from the place of trial? Because you may compel his attendance. Why permit his deposition to be read if he has gone out of the United States, but not one hundred miles from the place of trial? Because you cannot compel his attendance. The same act declares that "any person may be compelled to appear and depose as aforesaid;" (that is, any person who lives more than one hundred miles from the place of trial; or is about to go out of the district and more than one hundred miles from the place of trial, may be compelled to appear and depose.) How compelled? "In the same manner," says the act, "as to appear and testify in court;" that is, as the same persons might be compelled to appear and testify in court, if they were within one hundred miles of the place of trial, although they should be out of the district; for you cannot take the deposition of a witness who is about to go out of the district, unless he is about to go more than one hundred miles from the place of trial; and if you do take his deposition, you cannot use it, says the same act, unless it shall appear to the satisfaction of the court that the witness is dead, or gone out of (not the district, but) the United States, or to a greater distance than as aforesaid from the place where the court is sitting. If this act of congress neither authorizes the court to compel the attendance of a witness who is out of the district, but within one hundred miles of the place of trial, nor allows his deposition to be read in evidence, the testimony of such witness may be entirely lost. But by not allowing his deposition to be read it is evident that congress intended to give the court power to compel his attendance. It has been said, in argument, that the power to issue a summons does not imply the power to send an attachment.

The expressions of the act of congress are that "subpœnas may run into any other district," &c. The words "may run" will perhaps bear a more comprehensive meaning than words containing a simple power to issue a summons to another district. But in either case, we think the authority to command the attendance of a witness necessarily implies a power to enforce that command. The means of enforcing it is an attachment, which is a common law weapon given to every court of record, and without which it would soon sink into disgrace and contempt. As far as the authority of the court extends, so far is that authority to be protected by the punishment of its contempt. It has been said that the contempt is an offence committed in another district, and therefore cannot be punished in this. But although committed out of the district, it was still within the jurisdiction of the court quoad hoc. As to the commanding and compelling the attendance of witnesses, the jurisdiction of the court extends to the distance of one hundred miles from the place of trial. It has been contended, also, that the court has no power to send criminal process out of the district; and in support of this proposition the first judiciary act of the United States (1 Stat. 73) has been cited; which provides that, if an offender be found in a district, other than that in which he is to be tried, he can only be arrested by a warrant issued by some authority within the district where he is found; and that the judge of that district shall issue, and the marshal shall execute, a warrant for the removal of the offender to the district where the trial is to be had.

This objection may receive the same answer as the last,—namely, that in the one case the court has jurisdiction, and in the other it has not. In the case of a criminal, this court is not authorized by law to command the offender, in another district, to attend the court in this. No jurisdiction, quoad hoc, is given. It has also been objected that no officer is bound to execute it, because the marshal of the district of Virginia is only bound to execute process within his district; and the marshal of the district of Columbia, within his district only; so that neither marshal has power fully to execute it. The answer to this objection is, that if the court has the power of compelling the attendance of the witness, its process is lawful. The act of congress, it is true, is peremptory that he shall execute throughout his district, &c., but it does not forbid him to finish an execution out of it; and his oath binds him to execute and return all lawful precepts to him directed, whether in or out of his district. For these reasons we have no doubt that this court has the power of compelling, by attachment, the attendance of witnesses who live within one hundred miles of the place of trial, although out of the district of Columbia.

The next question is—4th. To what officer shall the attachment be directed? Undoubtedly to the marshal of the district in which the witness lives. It is declared by the judiciary act of 1789, § 27 (1 Stat. 73), to be his duty "to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States," and he is bound by his oath not only to execute all lawful precepts directed to him, but also to make true returns; and that, without any restriction as to the district from which such precepts are to issue, or to which they are to be returned. If, then, it is lawful for this court to issue subpœna, commanding the marshal of the district of Virginia to summon a witness who lives in that district to attend the court in this, it is a lawful precept to him directed, under the authority of the United States, and he is bound to execute and return it. So if this court has the

power of compelling the attendance of such witness by attachment, the writ of attachment is equally a lawful precept to him directed, under the authority of the United States, and he is equally bound to execute and return it. The whole question is finally resolved into that of the power of the court to compel the attendance of the witness; for if the court has that power the process is lawful; and if lawful, the marshal is bound to execute and return it.

Upon the whole, therefore, we are satisfied that this court has the power to send an attachment into the district of Virginia, for the purpose of compelling the attendance of a witness, provided it appears by affidavit that the witness lives within one hundred miles of the place of trial; and we think the return of the marshal upon the subpoena, and the record of the default of the witness, and the affidavit as to residence, sufficient primâ facie evidence of a contempt, upon which to issue the attachment.

See also the case of Wellford v. Miller [Case No. 17,381], in Alexandria, July term, 1808.

NOTE. Attachment for contempt. 1 Bac. Abr. 180. It issues at the discretion of the judges of a court of record against a person for some contempt, for which he is to be committed; and may be awarded by them upon a bare suggestion, or on their own knowledge, without any appeal, indictment, or information; and this summary method of proceeding is certainly now established as part of the law of the land. See, also, 4 Bl. Comm. 284; Hammond v. Stewart, 1 Strange, 510; Wyat v. Wingford, 2 Ld. Raym. 1528; Chapman v. Pointon, 2 Strange, 1150; Bowles v. Johnson, 1 W. Bl. 36; Pearson v. Iles, 2 Doug. 560; Rex v. Plunket, 3 Burrows, 1329; Rex v. Ring, 8 Term R. 585; Tidd, Prac. 256; Respub. v. Oswald, 1 Dall. [1 U. S.] 323; Jackson v. Mann, 2 N. Y. Term R. 92; Stretch v. Wheeler, Barnes, 497.

VOSS (MOORE v.). See Case No. 9,778.

VOSS (MORGAN v.). See Cases Nos. 9,811 and 9,812.

VOSS (THOMPSON v.). See Case No. 13,979.

Case No. 17,015.

VOSS v. TUEL.

[1 Cranch, C. C. 72.] [1]

Circuit Court, District of Columbia. March Term, 1802.

BAIL—TRESPASS.

Bail required in trespass for cutting up a scow.

Trespass, for cutting a scow to pieces.

The plaintiff made affidavit that he had been informed and believed that the defendant with others had cut up and carried away his scow, and that it was worth one hundred dollars, and that he apprehended the defendant would leave the district upon the issuing of process against him, unless he should be held to bail.

THE COURT refused to permit the defendant to appear without special bail. MARSHALL, Circuit Judge, absent.

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

VOSS (UNITED STATES v.). See Case No. 16,628.

Case No. 17,016.

VOSS v. VARDEN.

[1 Cranch, C. C. 410.] [1]

Circuit Court, District of Columbia. June Term, 1807.

BREACH OF CONTRACT.

Upon an agreement to do certain brick work at twelve dollars a thousand, in a workmanlike manner, the plaintiff may recover, although part was not done in a workmanlike manner.

Declaration for work and labor. The plaintiff proved an agreement to do certain brickwork, in a workmanlike manner, at twelve dollars a thousand. The defendant proved that part of the work was not done in a workmanlike manner.

Mr. Caldwell, for defendant, prayed the court to instruct the jury that if they should be of opinion that the work was not done in a workmanlike manner, the plaintiff could not recover any thing.

But THE COURT refused. DUCKETT, Circuit Judge, absent.

Case No. 17,017.

VOWELL v. ALEXANDER.

[1 Cranch, C. C. 33.] [1]

Circuit Court, District of Columbia. July Term, 1801.

BILL OF EXCHANGE—INDORSEMENT—ACCEPTANCE.

1. In Virginia, debt lies by the indorsee of an inland bill, against the acceptor.

2. Judgment will not be arrested because the plaintiff's name is indorsed on the bill in blank.

Debt by indorsee against the acceptor of an inland bill of exchange.

Verdict for the plaintiff, and motion in arrest of judgment, 1st, because an action of debt will not lie; 2d, because it appears, by the plaintiff's indorsement on the bill, that he had parted with his right and interest therein. The plaintiff's name was indorsed in blank, not having been struck out at the trial.

Motion overruled, and judgment entered for plaintiff.

Case No. 17,018.

VOWELL v. BACON.

[4 Cranch, C. C. 97.] [1]

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

SEAMEN'S WAGES—LIEN—MASTER.

A master of a vessel has no lien for his wages, on goods consigned to his owners.

Trover, by the assignee of a bill of lading given by the defendant as master of the brig Numa, for sundry bags of money consigned to the owners of the brig.

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

The facts appeared to be, that J. & J. Harper, owners of the brig Numa, Ebenezer Bacon, master, shipped a cargo at Alexandria on board the brig, consigned to S. D. Harper, their super-cargo. After this shipment and before the return of the brig, J. & J. Harper failed, and assigned this outward cargo to the plaintiff, John C. Vowell, for valuable consideration, and assigned to the plaintiff the bills of lading of the return cargo.

The defendant, the master of the brig, refused to deliver up the bags of money unless the plaintiff would pay him his wages due by J. & J. Harper, and others, his owners.

Mr. Hodgson and Mr. Mason, for defendant, contended that he had a right to do so, and cited Downam v. Matthews, Prec. Ch. 580, and Godin v. Assurance Co., 1 Burrows, 489.

Mr. Taylor, contra. A master of a vessel has no general lien upon the consignments to his owners for a general balance of account due to him by them. There is no special lien; no advance upon the faith of those consignments. He was a common carrier. He was not intrusted with the property, except as a mere common carrier. A general balance of account cannot be set off in trover for specific goods. J. & J. Harper had complete control over the outward cargo in the hands of S. D. Harper, their super cargo and consignee, and they assigned to the plaintiff for valuable consideration, who thereby acquired the legal title. The consignment to S. D. Harper did not transfer the legal title to him. It only gave him a power to sell as the factor of J. & J. Harper. But it is unimportant whether the assignment of the outward bill of lading gave the plaintiff a legal title; he had an equitable right to it, and could have compelled the factor, S. D. Harper, to account for the proceeds, and if the legal title remained in J. & J. Harper they transferred it to the plaintiff.

THE COURT (nem. con.) was of opinion and so instructed the jury, at the prayer of the plaintiff's counsel, that the defendant had no right to detain the bags of money, against his bill of lading, for a balance of general account due to him by the owners of the vessel, who had assigned the bill of lading to the plaintiff for a valuable consideration.

Verdict for the plaintiff, $1137.75, with interest from the 24th of December, 1827.

Case No. 17,019.

VOWELL et al. v. COLUMBIAN INS. CO.

[3 Cranch, C. C. 83.] [1]

Circuit Court, District of Columbia. April Term, 1827.

GENERAL AVERAGE.

The charges of entering a harbor for repairs, the surveyor's bill, and port-charges, are items of general average, and are the subject of general contribution.

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

Case [by Thomas Vowell and others] on policy of schooner Mary, valued at $1500, for six months from the 29th June, 1824.

The question for the court was whether the charges of entering the harbor to make the repairs, the surveyor's bill, and port-charges, are items of general average, or are a part of the loss, for which the defendants are liable under the policy. Phil. Ins. 346, c. 15, § 4.

THE COURT (nem. con.) was of opinion that those charges were the subject of general contribution.

Case No. 17,020.

VOWELL v. LYLES.

[1 Cranch, C. C. 329.] [1]

Circuit Court, District of Columbia. July Term, 1806.

OFFICE JUDGMENTS—VACATING.

To set aside an office judgment, the court will not permit the defendant to plead specially, matter which may be given in evidence upon the general issue.

[Cited in Patton v. Violett, Case No. 10,839.]

Assumpsit against indorser of a promissory note.

Mr. Youngs, to set aside the office judgment, offered to plead, 1. Non assumpsit. 2. That the maker had, at the time of the institution of the suit, more property in his hands than would have discharged the debt. 3. That no consideration passed from plaintiff to defendant.

THE COURT refused to receive the two last pleas, because the facts, if they amounted to a defence, may be given in evidence under the general issue.

[See Case No. 17,021.]

Case No. 17,021.

VOWELL v. LYLES.

[1 Cranch, C. C. 428.] [1]

Circuit Court, District of Columbia. July Term, 1807.

PROMISSORY NOTES — LIABILITY OF INDORSER — PLEADING—SPECIAL DEMURRER—INDORSEMENT IN BLANK.

1. In an action in Virginia, by the indorsee against the indorser of a promissory note, if the maker is insolvent, it is not necessary that the plaintiff should have first sued the maker, although at the time of bringing the suit, the maker had in his hands. goods and chattels more than enough to pay the debt.

2. If the defendant indorsed the note to give it credit, no other consideration is necessary to support the action.

[Cited in McComber v. Clarke, Case No. 8,711.]

3. A special demurrer brings into question the substantial validity of the pleading of the demurring party.

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

4. A blank indorsement may be filled up at the bar, after the jury is sworn; and the indorsement so filled up is primâ facie evidence of a good consideration.

Assumpsit by indorsee against his immediate indorser of a promissory note.

1st Plea: That at the time this suit was brought G. N. Lyles, the maker of the note, had in his hands goods and chattels more than enough to pay this debt. Replication, that the said G. N. Lyles was at that time insolvent.

Special demurrer: 1st. Because the replication is no answer to the plea. 2d. Because it is a departure. 3d. Because the plaintiff has not demurred, nor joined issue.

2d Plea: That neither the defendant [W. H. Lyles], nor any person for him, ever received any value or consideration of any kind whatsoever, of or from the plaintiff, or any other person whatsoever, for or on account of the note of the said G. N. Lyles, or for or on account of the indorsement and assignment of the said note.

Replication, that the note was drawn payable to the defendant, and on the same day indorsed by him; and that such indorsement was made by him for the purpose of giving credit to the note; and that after the note was so indorsed, to wit, on the same day, it was, "for a fair and valuable consideration transferred and delivered to the plaintiff, who accepted and received the note so indorsed as aforesaid, as well upon the credit of the indorser aforesaid, as upon the credit of the maker, G. N. Lyles."

Special demurrer. 1st. Because the replication is no answer to the plea. 2d. Because it does not admit or deny that no consideration passed, &c., for the indorsement. 3d. Because it neither takes issue nor demurs to the defendant's plea.

3d plea, non assumpsit; and issue.

Mr. Youngs, for defendant, contended that he was not bound to show his pleas to be substantially good, upon his own special demurrer to the plaintiff's replication; and that the only question was whether the replication was bad.

PER CURIAM (nem. con.). If your pleas are substantially bad, the judgment must be against you upon your own demurrer. The first plea is bad in substance; it does not show the solvency of the maker; and is no answer to the charge of his insolvency, as alleged in the declaration.

Upon the second demurrer, THE COURT (FITZHUGH, Circuit Judge, contra) adjudged the replication to be good, inasmuch as it showed a good consideration. The indorsement being for the purpose of giving credit to the note, and the plaintiff having passed away a valuable property upon the credit so given to the note, a good consideration flowed from the plaintiff to the defendant.

On the trial of the issue of non assumpsit,—

Mr. Youngs, for defendant, objected to the note, with a blank indorsement of the defendant, being read in evidence, and also objected to the plaintiff's attorney filling it up at the bar after the jury was sworn.

But THE COURT (nem. con.) suffered it to be so filled up, and then read to the jury.

Mr. Youngs then prayed the court to instruct the jury in effect, that the plaintiff must prove a consideration by other evidence than the said indorsement, so filled up.

But THE COURT (FITZHUGH, Circuit Judge, contra) refused, and instructed the jury that the indorsement, so filled up, was primâ facie evidence of a consideration, and threw the burden of proof on the defendant. The defendant took a bill of exceptions, but did not prosecute a writ of error.

[See Case No. 17,020.]

Case No. 17,022.

VOWELL v. PATTON.

[2 Cranch, C. C. 312.] [1]

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

PROMISSORY NOTES—LIABILITY OF INDORSER—NOTICE.

When the indorser of a promissory note has a public office in town, at which he generally attends every day, and in his absence has a servant there to receive messages, &c., a notice put into the post office of that town, directed to the indorser, is not sufficient notice to charge him, without proof that he actually received it in due time, although the indorser's family reside five miles out of town, and the town post office is the nearest post office, and the one to which letters for him are generally directed.

Assumpsit [by John C. Vowell] against [James Patton] the indorser of Robert Munro's promissory note due at Georgetown, D. C., on the 3d–6th of the month. It was protested on the 7th, and notice sent to the Farmers' Bank of Alexandria on the same day. On the 8th, that bank put a notice to the defendant into the post office in Alexandria, in which town he (being the British consul) had a public office, at which he generally attended every day; and in his absence had a servant there to receive messages, &c. His family resided about five miles out of town, but the Alexandria post office was the nearest post office, and that to which letters directed to the defendant were generally directed, and at which he generally called daily for letters.

THE COURT (THRUSTON, Circuit Judge, absent) instructed the jury, that evidence of leaving the notice at the post office, was not sufficient evidence of notice, to charge the defendant; but that if the jury were satisfied by the evidence, that the defendant actually received the notice, on the day on which it was put into the post office, the notice was sufficient. The court, however, did not give any opinion whether the notice was in due time.

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

Case No. 17,023.

VOWELL v. THOMPSON.

[3 Cranch, C. C. 428.] [1]

Circuit Court, District of Columbia. April Term, 1829.

RIGHTS OF MORTGAGORS—MORTGAGE OF CORPORATE STOCK—POWER TO VOTE.

1. The mortgagor is, in equity, considered as the owner of the property until foreclosure or sale.

[Cited in State v. Smith, 15 Pac. 393.]

2. The mortgagor of stock in the Marine Insurance Company, until foreclosure or sale under the mortgage, is entitled to vote upon the stock at the election of directors, and the court will compel the mortgagee, or his trustees, to give a power of attorney to the mortgagor to vote at such election.

[Cited in Clarke v. Central R. & B. Co., 50 Fed. 343.]

[Cited in Hoppin v. Buffum, 9 R. I. 515.]

Bill in equity to compel the defendant [Jonah] Thompson to give the plaintiff [Thomas Vowell] a proxy or a power of attorney to vote at an election of directors of the Marine Insurance Company of Alexandria, upon 300 shares of the stock of that company transferred by the plaintiff to the defendant in trust as a collateral security for a debt due by the plaintiff to the bank of Alexandria; the plaintiff being in no default and the stock not forfeited, but still standing pledged for the debt, and the mortgagor entitled to the dividends. The cause was set for hearing on the bill and on the answer, which admits all the facts. The ground of relief, and the relief prayed, admit that none but legal stockholders can vote. The question is, whether, before forfeiture and foreclosure of the mortgage or sale, under the deed of trust, the mortgagor is not entitled to vote, and, for that purpose, to obtain a proxy or power from the trustee. This question was submitted without argument.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, absent).

In equity, a mortgagee is only considered as a trustee, and the mortgage is but a security for the money lent, and does not alter the thing it conveys. In the contemplation of a court of equity, nothing real passes to the mortgagee, and the mortgage conveys nothing in the land; neither dower, nor tenancy by the curtesy. Brydges v. Duchess of Chandos, 2 Ves. Jr. 433. Lands mortgaged to a testator do not pass under a general devise, by him, of his lands, but go to his executor, as personal assets. An equity of redemption is considered as an estate in the land, and may be devised or granted, and a husband may be tenant by the curtesy of it. In equity, the person entitled to the redemption is considered as the owner of the land; a mortgage in fee is considered as personal assets, and a foreclosure is considered as a new purchase of the land. Until foreclosure, the mortgagee is a trustee to the mortgagor, as to the inheritance. Casborne v. Scarfe, 1 Atk. 603, 605. If an advowson be mortgaged, and is absolute in the mortgagee, and the living becomes void, (vacant,) the mortgagee is entitled to present, he having the legal estate; but a court of equity will compel him to present such person as the mortgagor shall nominate. And the reason given is, that a presentation is gratuitous, and the mortgagee cannot account for any benefit from it, nor give any credit for it in account, upon a redemption. Croft v. Powel, Comyn, 609. So in the case of Amhurst v. Dawling, 2 Vern. 401, pending a bill to foreclose the mortgage of a manor, to which an advowson was appendant; the church having become void, the court granted an injunction in favor of the defendant, the mortgagor, to stay proceedings at law in a quare impedit, brought against him by the mortgagee. "For," says the court, "the mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt; and the mortgagee, therefore, in that case, until a foreclosure, is but in the nature of a trustee for the mortgagor." So, also, in Mackensie v. Robinson, 3 Atk. 559, Lord Chancellor Hardwicke was of opinion that the mortgagor of a naked advowson ought to nominate; and even doubted whether, if there were an express covenant in the mortgage that the mortgagee should present, it would not be void; and adjourned the case for further consideration. When the case came on again, "the mortgagee not being able to find any precedent in his favor, gave up the point of presenting; and an order was made that the mortgagor should be at liberty to present, and the mortgagee was obliged to accept of the mortgagor's nominee." And in the case of Jory v. Cox, Prec. Ch. 71, "the defendant was a mortgagee, and in possession; the plaintiff brought a bill to redeem, and had a decree accordingly. Before the account taken the church became void, and the mortgagee presented. Upon the plaintiff's petition, the chancellor ordered that he should revoke his presentation, and present such a person as the mortgagor, or his vendee, (for he had contracted to sell,) should appoint."

These authorities all show, that, until actual foreclosure or sale, the mortgagor is, in equity, considered as the owner of the property, and entitled to exercise all the rights which are not incompatible with the object of the mortgage, (the security of the debt,) unless restrained by the express terms of the mortgage. The analogy between the elective franchise and an advowson is very strong. The exercise of neither of those rights can contribute to the discharge of the debt, or diminish the security. The exercise of them, by the mortgagor, is not incompatible with the object of the mortgage. There seems to be no reason why a court of equity should not give the right of election to the mortgagor of the stock, as well as the right of presentation to the mortgagor of the advowson. And, in accordance with this idea, the

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

British statute of 7 & 8 Wm. III. c. 25, § 7, following the rule of equity, prohibits the mortgagee of the freehold, who is not in possession and receiving the rents and profits, from voting for members of parliament, and gives it to the mortgagor; and thus converts the equitable into a legal franchise.

It is suggested, in the answer, that the Bank of Alexandria (the creditor) is interested in the value of the stock, which depends very much upon the proper management of the business of the insurance company; and, therefore, they have a right to vote at the election. But the answer to this argument is, that the plaintiff is as much; and, if the stock is worth more than the debt, is more interested in the good management of the company than the creditor. The reason for and against his having the right to vote being, in this respect, equally strong, the general principle of equity must prevail,—that the mortgagor is to be considered as the owner of the mortgaged property, until foreclosure or sale.

We are, therefore, of opinion that the defendant should be ordered to give the plaintiff a power of attorney to vote upon the stock, until it shall be sold under the mortgage, or deed of trust. Decree accordingly.

Case No. 17,024.

VOWELL v. WEST.

[4 Cranch, C. C. 100.] [1]

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

SHIPPING—RIGHTS OF SUPERCARGO.

A supercargo has a right to retain for a general balance due to him by the owners, notwithstanding their assignment of the cargo and bill of lading to a trustee for the benefit of certain creditors.

[Cited in Luckett v. West, Case No. 8,593.]

Bill in equity by [John C. Vowell] the assignee of the cargo against [John West] the supercargo, who claimed to retain for a balance due to him by the assignors.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, absent). The facts of the case appear to be these: J. & J. Harper, on the 18th of May, 1827, shipped, on board the brig Sea Horse, for Rio Grande, a cargo of flour, &c., consigned to the defendant, who went out in the brig as supercargo, to be sold for account and risk of J. & J. Harper, at Rio Grande. The Harpers, on the 18th of June, 1827, about a month after the brig had sailed, having failed in trade, made a general assignment of their effects to the complainant, J. C. Vowell, in trust, to pay certain debts due to the United States, and others, and endorsed the bill of lading of this cargo, in the following words, namely: "For value received, and for the purposes mentioned in a deed of trust to John C. Vowell, executed by us this day, we hereby transfer to the said John C. Vowell all our right, title and interest in and to the within bill of lading, and the proceeds of the cargo mentioned therein. Alexandria, 18th June, 1827. J. & J. Harper." The cargo was sold by the defendant, at Rio Grande, in August, 1827, and the proceeds invested in a cargo for the Havana, where he arrived with it on the 6th of November, 1827, when the defendant first heard of the failure of the Harpers; at which time, their notes to the defendant, to the amount of $7,000 or $8,000, given for the purchase of flour, and which had been discounted at some of the banks, to the credit of the defendant, were due and unpaid, and the defendant was liable to the banks for the whole amount. He received information on the same day, that the Harpers had assigned their property; but he had no notice or knowledge that the assignment was to the complainant until the 20th of January, 1828, when he arrived in Alexandria. On the 21st of January, 1828, he paid and took up the notes of the Harpers, upon which he was indorser, (and which had all been protested previous to the middle of September, 1827,) and paid the balance of money remaining in his hands, of the proceeds of the cargo, to the order of the complainant.

The question is, whether the defendant has a right, as against the complainant, to retain so much of the proceeds as was due from the Harpers to him, at the time of his receiving notice of the assignment. If the Harpers had made no assignment, and had become insolvent, the right of the defendant to set off this claim in equity, could not be denied. Can the assignment affect his equity before notice? He was the factor of the Harpers, and if the outward cargo had remained in his hands, at the time of the notice, he would have had a lien upon it for his general balance, in case of the insolvency of his principals; a fortiori he had a right to set off the debt due from them to him, against the debt due from him to them. Drinkwater v. Goodwin, Cowp. 251; Hammonds v. Barclay, 2 East, 227; Lickbarrow v. Mason, 6 East, 20, note. We are, therefore, of the opinion that the complainant's bill ought to be dismissed.

See, also, Paley, Prin. & Ag. 109, 110, 115.

[See Case No. 8,593.]

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

VOWINKLE (HOSTETTER v.). See Case No. 6,714.

Case No. 17,025.

The VOYAGEUR DE LA MER.

[1 Spr. 372;[1] 20 Law Rep. 331.]

District Court, D. Massachusetts. Aug., 1857.

ADMIRALTY PRACTICE — PRODUCTION OF PAPERS.

1. Production of papers in admiralty.

2. Where a paper has been intrusted to the libellant for the benefit of both parties, the court, on motion of the respondent, will order its production before answer, its inspection being material, as where there is a bipartite agreement, and one part only is reduced to writing, and left in the hands of the libellant.

3. But where there was a contract, partly by parol and partly by letters, and one of the letters addressed to the libellant was in his possession, the court refused a motion by the respondent, for the production of the letter before answer.

This was a suit in rem, on a contract. The libel did not set forth or allude to any writing, as containing the contract. The claimants of the vessel, before filing their answer to the libel, moved that the libellants be ordered to produce, for their inspection, a certain letter written by the claimants' agent to the libellants. This motion was in writing, and accompanied by an affidavit, setting forth that the contract on which the libellants rely was never reduced to writing, in a separate instrument, but was to be ascertained, among other sources, by a correspondence between the libellants and the agent of the claimants; that one letter of this correspondence was essential to the full understanding of the contract, and that this letter was in the libellants' custody; that the claimants had no copy of it, and no means of ascertaining its contents; and that they could not fully and truly answer the allegations of the libel, without an inspection of the letter. The motion was resisted.

J. W. Hubbard and C. Houghton, for libellants.

R. H. Dana, Jr., for claimants.

SPRAGUE, District Judge. The researches of the counsel have found no precedent or decision in an admiralty court in this country, or in England, directly upon this point. It seems to be a novel motion in the admiralty. We must look at the analogous cases, in courts that proceed according to the course of the civil law, and to common law courts, especially the former, for light as to the principles upon which the decision should rest.

It is familiar practice in admiralty, for either party, after issue joined, to interrogate the other, for the purpose of obtaining evidence to be used by the interrogant. In equity, the same relief is obtained by interrogatories on the plaintiff's part, and by a bill of discovery on the part of the defendant. But this is a motion not to obtain evidence after issue, but for documents alleged to be necessary to enable the parties to make up an issue.

It is settled, as a general rule, that a party is not entitled to the production of an instrument before issue joined, where the instrument is not referred to, or counted upon, in the plaintiff's pleading. But it is contended that there are circumstances under which the courts exercise the power, and where justice requires its exercise. After examining the authorities referred to on each side, I have arrived at the conclusion that there is but one class of cases in which the courts ordinarily exercise this power; and that is, where the plaintiff is under an obligation to hold the instrument for the use of both parties. For instance, partnership articles or books of account, in a suit between partners, or where but one part of a bipartite agreement has been executed, and has been left with one of the parties; in short, where an instrument may be said to be left or held in trust. In such case, if it is the contract in litigation, it should be produced for inspection, whether declared on by the plaintiff in terms or not. As an authority for a more extended exercise of this power, I am referred to Princess of Wales v. Earl of Liverpool, 3 Swanst. 567, decided by Lord Eldon. This authority, though followed by the vice chancellor in one case,—Jones v. Lewis, 2 Sim. & S. 242,—has since been called in question, and held by Vice Chancellor Leach to be authority only on its exact facts. The defendant there asked for inspection of a note of hand, making affidavit that he believed it not to be genuine, and that an inspection would aid him in determining upon the nature of his answer. In New York, the courts of common law have passed orders for inspection, in favor of parties before pleadings closed, upon the authority of Princess of Wales v. Earl of Liverpool; and have extended the principle to cases, where by alleged accident, fraud, or mistake, one party has a document, which the applicant shows to be important to enable him to make his plea; but I think they have not kept within the reason or authority of the previously adjudged cases.

It is argued that this letter, being a part of the correspondence which constitutes the written contract, is the property of both parties, and is as much a trust for both parties, as if it were a formal written contract. I should perhaps sustain the motion, if it were made to appear that the whole contract was in writing, and this letter contained a portion of it, and that the residue of the writings containing the contract could be produced. But, in this case, it does not appear that the whole contract is in writing. On the contrary, it is said to be partly in writing. The nature of the contract may be left to be proved partly by parol, and even by circumstantial evidence. In such a case, I think there is no authority for requiring the production of this paper. It would be giving the defendants an advantage. They would

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

learn the extent of the knowledge or ignorance of the other side, as to the proofs of the contract; and, without first answering as to their best knowledge and belief, could frame their answers to meet the disclosures on one particular point. In case of a writing forming only a part of a contract, the court must have discretion, as to requiring the production of a paper or letter; and in the present case, I do not think I ought to grant the motion as it now stands. It presents the case of a contract declared on generally, to be proved partly by a correspondence and partly by parol, perhaps inferentially from circumstantial evidence, and open to counter proof, and a portion only of the correspondence called for. Motion denied.

VROW CHRISTINA MAGDALENA, The (JANSEN v.). See Case No. 7,216.

Case No. 17,026.

VUYTON v. BRENELL.

[1 Wash. C. C. 467.] [1]

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

EVIDENCE — ACTION FOR BALANCE OF ACCOUNT — SECONDARY EVIDENCE.

1. In an action to recover the balance of a settled account, and of certain bills of exchange accepted by the defendant; the defendant offered to prove that the plaintiff's intestate acknowledged himself to be indebted to the defendant on another account, which included the settled account, and upon which a larger amount was due than that claimed, which the intestate promised to pay. The court allowed the evidence to be given; as it was not offered to affect the settled account, but to establish a claim independent of it, and which the plaintiff's intestate promised to pay.

2. What will be deemed sufficient evidence to prove the loss of a promissory note, so as to permit evidence of its contents to be given.

[Cited in brief in Krise v. Neason, 66 Pa. St. 257.]

In this case, the following points were decided, which are not stated in the report:—

1. If the defendant has put in several pleas, he may withdraw one of them, without leave, at any time.

2. If there be a negative and affirmative plea, the plaintiff's counsel must begin and conclude on the negative issue; and the counsel for the defendant, in the affirmative: but both must, in the argument, confine themselves strictly to the issue they are discussing.

The jury were sworn, by consent of the parties, to try two actions; one for the recovery of a balance, agreed to be due on the 24th June, 1792, by a stated account; and the other, for the amount of certain bills of exchange drawn by the defendant, accepted and paid by the intestate of plaintiff. The plea chiefly relied on was, that of a set-off, of 100,000 livres, which greatly exceeded the plaintiff's demand. In support of this plea the defendant offered to prove, that at the time these transactions took place between the parties, who were citizens of, and residents in St. Domingo, and at the time of the settlement in June, 1792, the intestate acknowledged himself to be indebted to the said defendant in 100,000 livres, on account of a purchase of land in St. Domingo, from a Mr. Cardonnier, who had assigned this debt to the defendant. That the intestate agreed to pay that sum as soon as he could, after deducting therefrom the balance of their mercantile accounts, admitted to be due by the stated account.

This was objected to by Dallas & Levy, for plaintiff, as no evidence to explain, or alter the settled account, could be received, unless upon the ground of fraud, or mistake, and not in those cases, elsewhere than in equity.

BY THE COURT. The stated account relates only to the unsettled mercantile transactions between the parties, and as to that, evidence to explain or contradict it would be improper. But the defendant offers, by way of set-off, an independent claim for a debt assigned to him, which was not included in the stated account, but which, the intestate promised to pay, claiming only to deduct from it, the balance found due by the settled account. Evidence to establish this fact, does not violate the rule above laid down, and is clearly proper. The defendant then offered to prove, that after the massacre at the Cape and at Jeremie, in 1793, the intestate and the defendant fled, and arrived at Baltimore, where another settlement took place, and the intestate gave his note to the defendant, to pay the 100,000 livres, with interest, after deducting 48,000 livres, then found due to the plaintiff. That this note was, in 1795, sent by the defendant, with a power of attorney, to a Mr. Berthier of Jeremie, to recover. This evidence was objected to, unless the defendant should first prove the loss, or destruction of the note. This promise, if made, was at Baltimore, and is therefore barred by the act of limitations, and if so, the plaintiff may avail himself of it at the trial. The defendant, to prove the loss of the note given at Baltimore, produced witnesses who stated, that most of the town of Jeremie and the Cape were burnt. The deposition of Berthier stated, that he had received sundry documents from the defendant to recover debts, and amongst others, the promise of the intestate to pay 100,000 livres; that when he left St. Domingo, he delivered over these papers to Legros, an attorney, to pursue the claim, and that Legros had been assassinated.

BY THE COURT. This evidence does not sufficiently establish the loss of the paper. The defendant might have procured better evidence of it. He might, by a commission, have proved what became of Legros' papers; whether they were burnt, or destroyed. Evidence has been given, that when the negroes assassinated an individual, they generally destroyed his papers, and further, that it was not safe, for any

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

white person, to apply for papers belonging to any of the emigrant planters. But, certainly, the fate of Legros or his successor, and of the papers, might have been proved by a commission. Was his or their house burnt? Evidence of this might suffice, with the other facts in the cause.

Upon signifying this opinion, the defendant produced witnesses, who proved, that the papers of Legros, after his death, passed into the hands of Mr. Dallet, an attorney, who was massacred at the Cape, and that his papers were destroyed.

BY THE COURT. This is sufficient. The defendant may now prove the contents of the note.

Upon the evidence given of the note, the plaintiffs suffered nonsuits in both cases.

W.

WABASH AVE. BAPTIST CHURCH SOC. (O'NEIL v.). See Case No. 10,531.

WABASH NAV. CO. (CULBERTSON v.). See Case No. 3,464.

WABASH RY. CO. (TYSEN v.). See Case No. 14,315.

WACOUSTA, The (BARRETT v.). See Case No. 1,050.

Case No. 17,027.

Ex parte WADDELL.

[1 N. Y. Leg. Obs. 53; Betts' Scr. Bk. 87.]

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

BANKRUPTCY — TITLE OF ASSIGNEE — CREDITORS' BILL—RECEIVERS.

1. Where a creditor's bill has been filed, and a receiver has been appointed, to whom the debtor has executed a conveyance of his estate and effects, choses in action, &c., and subsequently the debtor applies for and obtains a decree in bankruptcy, no lien or security on the bankrupt's real or personal estate is created, but the estate and effects of the bankrupt vest in the general assignee.

2. The application for a delivery over by the receiver of the estate and effects of the bankrupt must be made to the court of chancery.

[In bankruptcy. Application by W. C. H. Waddell, the general assignee of John H. Coster, a bankrupt, to compel the receiver appointed in chancery at the suit of Charles A. Heckscher, a judgment creditor, in the state court, to deliver to such assignee the property and effects of the bankrupt in his hands.]

BETTS, District Judge. It is unnecessary to rehearse the facts in this case farther than to present the single point in controversy, which is, whether the choses in action, and effects of the bankrupt not subject to execution, pass to the general assignee under the decree of bankruptcy, or belong to the receiver appointed under a creditor's bill. On the first of February, 1842, Charles A. Heckscher, a judgment creditor, filed a bill in chancery, pursuant to the laws of the state of New York, against the bankrupt, and on the 9th of April obtained an order for the appointment of a receiver, and on the 25th of April a receiver was appointed by the court, to whom the bankrupt on the 27th of April assigned his choses in action, effects, &c. On the 16th of February this bankrupt presented his voluntary petition to this court, to be declared bankrupt, and a decree of bankruptcy, thereupon, was rendered, on the 30th of April.

The general assignee claims, that the estate of the bankrupt, as it was when his petition was presented, became vested in him, by force of the decree in bankruptcy, and the judgment creditor insists, that by virtue of his proceedings in the court of chancery, he acquired a prior lien on the property, which is preserved to him by the bankrupt act [of 1841 (5 Stat. 440)]. The proviso of the second section is "that nothing in this act contained, shall be construed to annul, destroy or impair, any lawful rights of married women, or minors; or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states, respectively, and which are not inconsistent with the provisions of the 2d and 5th sections of the act." It may be proper to observe, that the term "laws of the states," employed in the act of congress, is not to be understood as embracing the judicial decisions, or rules of the courts; but is limited to local statutes, and local usages of a fixed and permanent operation. Swift v. Tyson, 16 Pet. [41 U. S.] 18, 19. The statutes are, however, to be read in connection with the constructions of the highest local courts; such judicial exposition being regarded as becoming part of the acts by defining their true meaning. Bank of U. S. v. Daniels, 12 Pet. [37 U. S.] 32.

I regret to find the decisions of this court do not harmonize with the learned and forcible reasoning of the circuit court of the First circuit in respect to the import and application of the phrase "any liens" used in the proviso above quoted. The term has been understood and expounded here in several cases, as used in a familiar sense, and as comprehending all privileges and charges upon the thing recognized by local statutes, or long established usages of the principles of general law, and the court has not stopped to weigh the qualifications or restrictions English judges have been disposed to attach to the subject. In that view it has not been deemed important to analyze and collate the decisions of the Eng-

lish courts of law, to ascertain to what extent liens are recognized and upheld; there the act of congress, being understood to have direct reference to the law in this respect as it exists in the particular state, irrespective of the source from which it may have been derived. The common law decisions, it was thought, would therefore only supply evidence of the state law, in absence of any definite statute, or usages, existing in this state on the subject; or at most could be resorted to, but for illustration, or as an exponent of provisions, derived from, or familiar to the common law.

Judge Story, in his very able discussion of the subject,—Foster's Case [Case No. 4,960],—seems to regard the English rule as the controlling consideration, and to adopt the conclusion that, where there is no possession of the thing, actual or constructive, there can be no lien asserted in regard to it; and the logical tendency of the reasoning, if not the expressed result is, to deprive judgment creditors of priority of payment under the bankrupt act, out of the real estate bound by their judgments, there being no possession accompanying the lien claimed. Without the advantage of that decision to guide its judgment, this court had adopted a different conclusion with respect to the meaning and operation of the word lien. here employed by congress, and had accepted it as importing any charge fixed by law upon the property, or imposed by the party in consonance with existing laws and usages. Should this case, or any future one, present the point, so as to bring the views of this court in direct collision with the opinion of the circuit court of the First circuit, I should not assume to execute my own conclusions, but shall adjourn the point to the circuit court, having immediate supervision of the decisions of this court.

The question raised by this case is, whether the judgment creditor, by virtue of his proceedings in chancery, acquired a lien on the property and effects of the bankrupts, so as to prevent their vesting in the general assignee on the rendition of the decree of bankruptcy. The petition presented to the court as the foundation of the present motion, does not designate the property and effects of the bankrupt, which passed to the receiver by means of the chancery suit. On the argument, however, it seemed to be conceded that the property consisted wholly of effects not subject to execution, choses in action, credit, &c. &c. It has been decided by the judges of this court on an injunction bill filed in the circuit court, that the general principles of chancery law, will not sustain a creditor's bill, to secure, or act, upon property, not liable to execution at law; and also, on a review of the state decisions, the judge adopted the conclusion, that no doctrine was established in the state chancery upholding such jurisdiction, anterior to the passage of the Revised Statutes. Lamson v. Mix [Case No. 8,034]. But if the point has been definitely decided by the state courts in favor of the jurisdiction, such decision, within the rules declared by the supreme court [Swift v. Tyson] 16 Pet. [41 U. S.] 18, would not become a state law, and as such obligatory upon the courts of the United States. A bill filed by a judgment creditor, independent of the statute, to arrest his debtor's effects not liable to execution, and apply them in satisfaction of the judgment, would be regarded by this court as a void proceeding, and as creating no lien or right in respect to assets so proceeded against. U. S. v. Sturges [Case No. 16,414]; McFerran v. Jones, 2 Litt. (Ky.) 222.

The decision of the question of lien in this case must accordingly rest upon the provisions of the Revised Statutes of this state, and the construction given the act by the state courts. The act provides that a creditor situated as Heckscher is may file a bill in chancery against his judgment debtor, and any other person, to compel the discovery of any property, or things in action belonging to the judgment debtor, or money, &c., due to him, or held in trust for him, and to prevent the transfer, or the payment, or delivery, thereof, to the defendant, and shall have power to decree satisfaction of judgment out of such effects as shall be discoved by the proceedings in chancery, whether originally liable to execution or not. 2 Rev. St. pp. 173, 174, §§ 38, 39. It is very clear that the statute does not assume to act directly upon the assets of a judgment debtor, to bind them specifically in the way real or personal estate is bound by judgment and execution. A power is conferred upon the court of chancery, to entertain a suit of a special character, founded upon the equity therein designated. Whether this be an inherent or only a statutory jurisdiction of the court, the legislature has pointed out plainly its officers, and the method of its exercise, and the question is, whether it be a necessary incident to such suit, that the particular property, sought to be controlled, should be definitely bound by it from its inception. There are cogent considerations arising from the wording of the statute against this acceptation of its import: First, the action essentially looks to a disclosure of assets belonging to the judgment debtor, and not to the arrest of such as are patent and known, and accordingly the court is empowered "to compel a discovery." Until this discovery is made, the supposed lien must be floating and in abeyance, and is, moreover, to remain contingent, without anything to rest on, whilst the court is considering whether the property discovered can be made subject to the demand. A lien, ex vi termini, presupposes a definite object on which it acts; and, laying out of view other considerations, how can it be, in a legal sense, asserted that a lien can subsist on the indebtedness or liability of third persons to the judgment debtor, which the creditors' bill in this case seeks to have appropriated to the judgment debt? Second. When a discovery is made, the court has

power given to it to prevent a transfer of every description of property belonging to the defendant. This power would be unnecessary, if the property was already bound by the commencement of the action; nothing more would then be required than an order that the specific thing claimed by the lien should go to its satisfaction. But the tenor of the section manifestly denotes that the power is not conferred to uphold and effectuate a lien as such, but to detain every species of property and interest, tangible or equitable, where it may be operated upon when by the ultimate judgment of the court it shall be found liable to the applications sought for. Third. The fund or property is not necessarily allotted to the prosecuting creditor, after it is acquired by the receiver. The chancellor says, "The receiver is the officer of the court, and holds the fund subject to the equitable rights of all parties to be disposed of under the order of the court."

These suits are employed as inquisitions, acting upon a defendant or his supposed trustee by a searching scrutiny, to ascertain if, perchance, effects of the judgment debtor may not be brought to light. They are ordinarily merely experimental. The receiver may even be appointed before it is known that there is any property, and his office, when property is discovered, is nothing more than to collect and preserve it, pending the litigation. Bloodgood v. Clark, 4 Paige, 574. Even his appointment, therefore, does not indicate any devotion of particular property by the judgment of the court to the objects of the suit, nor does the commencement of a suit seem to be regarded in the state courts as settling the right of priority, as between different parties instituting these creditors' actions, but the matter is open to adjustment by the court upon the general equities subsisting in the cases, and established at the hearing. Osborn v. Heyer, 2 Paige, 342. This power of controlling, or disposing of the fund upon considerations of the equities of all parties, would seem to exclude the idea of a specific lien on it in favor of any one. This description of action will undoubtedly protect every subsisting lien of a judgment or execution creditor against subsequent assignments of the party, or those made by operation of law,—U. S. v. Sturges [Case No. 16,414],—and may aid such lien in rendering available under it, residuary trust interests, which could not be sold by the execution at law. McDermutt v. Strong, 4 Johns. Ch. 687. But that species of equitable jurisdiction and relief is widely different from one, which imposes an original lien on property by force of filing a bill merely. The act in terms in no way declares the existence of the suit shall have such effect, and the remaining inquiry is, has it been adjudged by the state courts that a creditor's bill, by force of the provisions of the statute, imposes a specific lien on the estate of the defendant, subject to the procedure? I find no such express adjudication nor any principle established that necessarily involves that construction of the act.

The chancellor seems to consider the rule to have been so declared by Lord Hardwicke. Beck v. Burdett, 1 Paige, 309. But it is clear that the English chancery regarded a creditor's bill as of no force, different from any lis pendens respecting a particular thing which will not be so suffered during such suit to be transferred to another, and taken out of the jurisdiction of the court. Edgell v. Haywood, 3 Atk. 356, 357.

And it is to be remarked that the observation of the chancellor in Beck v. Burdett must have been offered as a mere suggestion, because the decision was, that the complainant's bill did not bind the property in that case. The repetition of like language in Edmeston v. Lyde, 1 Paige, 639, 640, propounds no different doctrine; neither the facts nor the scope of the argument requiring more than the determination of the point whether a single creditor was entitled to the entire fruits of the action prosecuted by him, or if he must share them ex æquo bono with others, standing in equal relation with himself at law, to the judgment debtor; and both those cases were decided under the general law, before the Revised Statutes went into operation, and are not, therefore, to be regarded as any exposition of the act in question.

The term "lien" does not seem to be used in the New York or English cases, in a strict and technical sense, as denoting a fixed security in the thing, but rather to express a priority of right acquired by the prosecuting creditor over others, standing in other respects on legal and equitable equality with him. They regard the lis pendens as over-riding all subsequent transactions, and securing to the prosecuting creditor the enforcement of the remedies he might claim, had the estate or means of the debtor continued to the decree in the same situation they were when the bill was filed,—Hadden v. Spader, 20 Johns. 564; McDermutt v. Strong, 4 Johns. Ch. 687; Lucas v. Atwood, 2 Stew. (Ala.) 378; Mechanics' Bank v. Seton, 1 Pet. [26 U. S.] 309; 1 Story, Eq. Jur. 393, 396,—and accordingly speak of such operation of the suit as a lien. The distinction, however, between a right to priority of payment, out of a given fund, or particular property, and a specific lien thereon, is plainly recognized by the authorities, and is exemplified in the relation of the United States and their sureties to a public defaulter or a debtor, in particular cases, on revenue bonds, &c., [U. S. v. Hooe] 3 Cranch [7 U. S.] 73; U. S. v. Clark [Case No. 14,807]; U. S. v. Munroe [Id. 15,835]; Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386; U. S. v. Pacific Ins. Co., 6 Pet. [31 U. S.] 262; Harris v. D'Wolf, 4 Pet. [29 U. S.] 147; Conard v. Nicoll [Id. 291]; Beaston v. Farmers' Bank, 12 Pet. [37 U. S.] 102,—and in other instances of chancery jurisdiction; as the right of partnership creditors to payment out of partnership effects in cases of insolvency, before the private creditors of any separate

partner,—1 Story, Eq. Jur. 625,—and the converse in respect to separate creditors and separate effects of the partners; where the right to priority of payment out of the fund is maintained, although the cases explicitly declare that such parties have no lien. 6 Ves. 126; 11 Ves. 3; 17 Ves. 521. Chancery, in the ordinary exercise of its jurisdiction, will give efficacy to this prior right of payment by enjoining any transfer of the fund or property pendente lite (2 Story, Eq. Jur. 190, 192) in as ample a manner as is authorized by the state statutes. Comparing these familiar incidents of a chancery suit with the proceedings authorized under the state statutes, it would seem manifest that nothing was contemplated in the latter beyond placing the judgment on a like footing with suitors in that court, pursuing a similar remedy. If he does not come into court with a lien, by means of his judgment, or execution on property sought to be made available thereto by aid of equity, his suit enures to the creation of the lien no further than on any other original bill in the court, where superior diligence would be recognized as giving right to priority of payment. And there would seem to be no reason for extending by construction the operation of the statute in this respect, so as to confer a priority on this class of suitors, distinguishing them from other parties possessing precisely equal equities. In the absence of a clear and settled interpretation of the statute by the state tribunals giving it the effect demanded in the present case, I am no way inclined to execute it by innovating upon the established rules of chancery, or by imparting benefits under it to judgment creditors, beyond those administered by the accustomed laws of the court, to parties invoking its aid on grounds of like equity, and shall therefore, hold, that the creditor's bill in this case, created no specific lien on the property of the bankrupt, and that in consonance with the ordinary principles of the court, it only secured to the complainant a priority of payment out of the fund which may be ultimately adjudged liable to the debts of the judgment debtor. This, it appears to me, is the plain and sensible bearing of the spirit of the decisions upon the subject.

Chancellor Walworth seems to have hesitated and struggled in his own mind with the question, whether equity did not demand a pro rata distribution of the debtor's estate amongst his creditors pursuant to the course of chancery in similar administration, and in the end yielded the point to the exclusive advantage of the prosecuting creditor, upon consideration of his diligence and having incurred all the risk and expense of the prosecution. 1 Paige, 639. This privilege of priority of payment not only must yield to rules of equal distribution, established by positive law as a bankrupt, or insolvent law,—Lucas v. Atwood, 2 Stew. (Ala.) 378,—but is adopted by the courts in the absence of a bankrupt law, essentially with a view to approximate in degree to the equity of a code which devotes all the means of a debtor without regard to the character or situation of his interest to the payment of his debts. Hadden v. Spader, 20 Johns. 564.

I think, therefore, the judgment creditor in this case, has no rightful authority over the funds of the bankrupt, by means of this creditor's bill, which can withdraw them from distribution in subordination to the bankrupt act, and appropriate them exclusively to his own debts.

Nothing more is presented by the petition and motion for the decision of this court, than the general question, whether filing a creditor's bill in the state court of chancery constitutes a lien, or other security, on the effects of the bankrupt, valid by the laws of the state, and which by virtue of the last proviso of the 2d section of the bankrupt act prevents such effects passing to the assignee of the bankrupt. I am of opinion that it does not. I apply this decision in its broader sense, and hold, that such creditor's bill creates no lien, or security, on real or personal property, and do not, therefore, discuss the point, whether any other than tangible property can be brought within the saving of that proviso. The delivery of the effects and property over to the receiver, works no change that strengthens the right of the judgment creditor.

If no bankruptcy existed, the question would yet remain to be settled by the court of chancery on hearing, whether this property, or any part of it, was applicable to this judgment. That point has not been decided in the state court, and the property accordingly remains with the receiver as the depository of the law until the rights of all parties may be settled. I regard it of no consequence that the steps in the state court preceded a few days those in the bankrupt court, and that the creditor perfected an assignment to the receiver two days before the final decree in bankruptcy. It was no longer a race of diligence between competitor creditors, but the fiat of the act of congress interposed the paramount and conclusive rule of equality, shielding the property of the bankrupt from transfer or encumbrance after his bankruptcy, and dedicating it to the common use of his creditors. The decree of bankruptcy passes all rights of property of the bankrupt to the assignee instanter on its entry; and it has been uniformly held in the bankrupt courts, that every interest the bankrupt possessed when proceedings in bankruptcy were instituted passes to the assignee by force of the decree. This doctrine has been repeatedly declared in this court, and with great strength and fullness in the Massachusetts district. Ex parte Foster [Case No. 4,960]. The relief sought in this instance is an order on the receiver to deliver the effects in question to the general assignee. This application, as a mere motion, in my judgment ought to have been addressed to the court of chancery. The receiver is the officer of that court, and detains this property in that capacity. This court has,

on several occasions, declined to interfere with, and arrest, the property of a bankrupt pending his voluntary application and prevent its seizure on execution, or delivery in chancery to a receiver, on the ground, that, until a decree of bankruptcy, there was no exclusive power over the property vested in this court, and also that the state courts would be controlled in their proceedings by the act of congress, and would deny parties any advantages or remedies which might contravene the spirit of that law.

The appeal, in the first instance, to the court of chancery in cases like the present, to reclaim property under its custody, should be required no less after a decree in bankruptcy than before.

What might, previous to a decree, be only matter of precaution upon which the court of chancery would act with a view to existing and possible interests of all concerned, would, after a decree in bankruptcy, become ripened into a legal and vested right in the assignee and creditors which that court would be always ready to recognize and assist. It moreover comports more with the comity due from one independent tribunal to another, to refer to the action of each of those matters subject to its particular control, than for either to attempt to act coercively in respect to the other. A peremptory order upon the receiver in chancery, controlling him in the execution of his trust, would be in effect a mandate on the court; and I am not satisfied that the bankrupt act gives any such authority to this court, nor can I suppose, if the power is unquestionable, any occasion will ever arise in which its employment can become necessary. Should the court of chancery decline ordering the delivery of this property to the assignee, his remedy at law against the receiver would be in no respect barred or hindered thereby.

WADDELL (CUSHMAN v.). See Case No. 3,516.

WADDELL (MARTIN v.). See Case No. 9,169.

Case No. 17,028.

WADDINGTON v. BANKS et al.

[1 Brock. 97.] [1]

Circuit Court, D. Virginia. Nov. Term, 1805.

VENDOR AND VENDEE — TRUSTS — PARTNERSHIP REAL ESTATE—INDIVIDUAL EQUITIES.

1. The vendor of an estate, who has received the purchase money but retains the legal title, is a mere trustee for his vendee, and can avail himself of no act prejudicial to the trust.

[Cited in Felch v. Hooper, 119 Mass. 57.]

2. But, quære: Where a mercantile firm sells real estate, and receives the purchase money without making a conveyance of it to the purchaser, and several intermediate sales are made, and the last purchaser brings suit against the surviving partner to compel a conveyance of the legal title, will an individual equity acquired by the surviving partner against one of the intermediate purchasers, operate such an union in him of the legal and equitable titles as to give him a perfect title to the property to the extent of that equity, and thus prevent the court from decreeing that he shall convey the legal title to the last purchaser? The situation of the surviving partner, seeking to establish such an equity, would at least be delicate; he would be required completely to show the fairness of his transactions, and he would not be permitted, as against the purchaser of the equitable title, to derive any advantage from speculation or from money actually advanced with notice of the equity of the purchaser.

In equity.

MARSHALL, Circuit Justice. This is an application to this court to direct a trustee to execute a trust by selling property on which several different claims are asserted. Before such an order can be made, the court ought certainly to be satisfied of the title of the trustee. The lands conveyed in trust were originally part of a larger lot, the property of James Currie, by whom it was sold and conveyed to Hunter, Banks & Co. By Henry Banks, the agent and surviving partner of Hunter, Banks and Co. this lot was divided into smaller parcels, one of which was sold to Nelson, Heron & Co., and another to Fulwar Skipwith, who sold a part to F. Groves, who sold to John Stockdell. To Fulwar Skipwith no conveyance was made, nor is there any other evidence of the sale to him, than a bond executed by the said Skipwith with Henry Banks as security, which recites the sale made by Banks to Skipwith, and undertakes that Skipwith shall make a good title to Groves. This bond acknowledges the receipt of the purchase money from Groves, and is dated on the 29th of July, 1784. As it is not alleged that Banks had not received the purchase money from Skipwith, and as Banks has bound himself that a good title should be made to Groves, who is admitted to have paid a full consideration for the property, it will not be questioned that the whole equitable estate was in Groves, and that on application, a court of equity would have decreed Henry Banks to convey the legal estate to him also. This bond was afterwards assigned to John Stockdell, in whom the equitable estate was thereby completely vested. In February, 1788, Stockdell conveyed this lot with other property to James Brown in trust, to secure a debt to Alexander Donald, having previously mortgaged it to Young and others. On the 3d of December, 1789, Stockdell & Young and others, the previous mortgagees, united in a conveyance to Alexander Donald. This deed purports to be an absolute conveyance.

(On the second day of July, 1790, Alexander Donald executed a deed conveying the said property to James Brown, in trust, to convey it to such person as the said Donald should afterwards appoint. Donald subsequently, but before the institution of this suit, made a conveyance of the same to Daniel Call, in trust, to sell the same and pay the money arising from the sale to the plaintiff Waddington, and also directed Brown to convey the same to Daniel Call, in order to enable him to fulfill the last mentioned trust.)

Thus was the interest of Stockdell completely

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

vested in Donald, and if there were no other circumstances in the case, it would be unquestionable that the legal title, which still remained in Hunter, Banks & Co. was without a single equitable circumstance which could restrain a court of chancery from decreeing a conveyance from him to Donald. Against this equitable title, the defendant Banks relies on a counter equity, which is produced by a debt due to him from Stockdell, to secure which this bond was endorsed in blank by Stockdell, but they had been previously pledged to John Young, to whom Henry Banks says he paid £800 for the possession of this pledge and of the deed for another parcel of the same lot which had been also purchased by Stockdell. Having thus united an equity to his legal title, he relies upon that legal title to secure the debt due to him from Stockdell, and also to secure the money paid to Young.

In examining this claim, a difficulty presents itself at the very threshhold. To give it efficacy, there must be a union of the equitable and legal title. But in this case the equitable claim is in Henry Banks, and the legal title in Hunter, Banks & Co. I have not inquired whether the circumstance of Henry Banks, being the surviving partner of Hunter, Banks & Co., will have any influence on the case, because that fact does not appear, and because, from any thing that is yet shown in the papers, I should not deem the inquiry essential. But it is material to inquire what was the relation between Henry Banks and Stockdell, when the rights of Donald and of Banks accrued? The vendor of an estate, who has received the purchase money, but retains the legal title, is certainly a mere trustee for his vendee, and can avail himself of no act prejudicial to the trust. I believe this position is correct. If gentlemen think it is not, I will with much pleasure hear them upon it. Presuming it for the present to be correct, I shall proceed to consider the case as if Mr. Banks was a trustee, holding the legal estate in trust for the purchaser of the equitable title. I will not determine what the law in such a case would be, if Mr. Banks had advanced money to Mr. Stockdell, under a stipulation that he might retain the lien upon the estate to secure the repayment of that money. Perhaps the agreement would be carried into effect. But I have no hesitation in saying, that the situation of a person so circumstanced is delicate, the fairness of his transactions must be completely made out, and he will not be permitted, as against the purchaser of the equitable title, to derive any advantage from speculation, or from money actually advanced with notice of the equity of the purchaser. Mr. Banks then, would be required to show at what time he acquired the bonds he holds, what were the circumstances under which they were acquired, and what sum of actual money was advanced for them. The whole proof would be upon him.

When I look for the proof on these points, I find none which favours the claim of Mr. Banks. His own answer, if it were evidence, does not furnish them. He does not state these particulars, and it would be necessary that he should state them, in order to make out a case which the court might inquire into. The proofs in the cause lead to an opinion destructive of his equity. The most material paper is the original bond to Skipwith, in possession of Mr. Banks, with a blank endorsement. On the 22d of February, 1788, this bond was assigned to Young and others, to whom a mortgage of the premises was executed on the same day. This assignment was afterwards erased. It cannot be presumed, that this erasure was made, or the bond delivered up, until the mortgage was satisfied. In June, 1790, proceedings were instituted on this mortgage in the high court of chancery, and a decree of foreclosure and sale of part of the property was obtained. The sale was made in November, 1790, and the debt of Young was satisfied. The report, however, was not made to the court. Of these proceedings against the property, Mr. Banks was bound to take notice. He was, therefore, bound to know that the claim of Young was satisfied, and that he had no power over the bond. The bill filed in 1790, states a sale, it is presumed, of this property to Alexander Donald, with the consent of the mortgagees, and on the 3d of December, 1790, a conveyance was made in pursuance of that sale. Of this sale, Mr. Banks cannot be presumed to have been ignorant. He does not state himself, to have been ignorant of it. Without inquiring into other circumstances, the possession of Donald bound him to take notice of it. If Young, after joining in the conveyance to Donald, has given up the bond to Banks, he has been guilty of a gross fraud, which would merit the severest animadversion of the laws. But be this as it may, I must consider Mr. Banks as a trustee, who, after notice of the equitable transfer of the estate, endeavours to defeat the rights of the purchaser. I can, therefore, perceive no ground on which to sustain his claim. Respecting the lot sold to Nelson, Heron & Co., there can be still less question, because the legal estate is not in Henry Banks & Co., and the prior equity is in Donald. The rights of Dr. Currie cannot be decided on, he not being party to this suit. I can only inquire whether Mr. Banks can retain for him. There can be, I think, no case or principle stated, which would enable him to pursue a purchaser who has paid the purchase money for his land, although, at the time of paying the purchase money, he had notice that Currie was unpaid. His claim rests upon the ground of contract. I am inclined to think, from the bill in Young's suit, that a part of the purchase money is not credited. Currie may claim for that after the whole debt from Stockdell to Donald is satisfied.

DECREE: The decree which was rendered in this case, after reciting, that in the opinion of the court, the defendant, Banks, had no equity against the plaintiff, either in his own right, or as a partner of, or representing Hunter, Banks & Co., directs the defendant Banks, to "deliver up to the plaintiff, the bond of Fulwar Skip-

with and Henry Banks, to Francis Groves, and by the latter assigned to the said John Stockdell, in the proceedings mentioned: that he also deliver up to the plaintiff, the deed amongst the exhibits from the said Banks to James Heron, and by him assigned to the said Stockdell: that the said defendant, Banks, convey and release to the said defendant, Daniel Call, in fee simple, all his right, claim, interest, and estate, either in his own right, or as a partner of, or representing, Hunter, Banks & Co., in the lands, houses, and tenements mentioned in the said bond from Fulwar Skipwith, to the said Francis Groves;" and further directs three special commissioners, appointed by the court, to sell the same, and pay the proceeds of sale to the plaintiff.

NOTE. As to the light in which secret liens are regarded in equity, see Bailey v. Greenleaf, 7 Wheat. [20 U. S.] 46; Moore v. Holcombe, 3 Leigh, 604; Duval v. Bibb, 4 Hen. & M. 113. In Bailey v. Greenleaf [supra] in which there was an actual conveyance of the legal title, the court said, that the lien of the vendor for purchase money remaining unpaid, if in the nature of a trust, was a secret trust; and, although to be preferred to any other subsequent equal equity, unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity, connected with such advantage. They, therefore, refused to support the secret lien of the vendor, against a creditor of the purchaser, who was a mortgagee. It would seem a fortiori, that a secret equity, subsequently acquired, could not be sustained against a bona fide purchaser, without notice. See. also, 2 Rob. Prac. 180–182.

WADDINGTON (TURNER v.). See Case No. 14,263.

WADDLE (WATTS v.). See Case No. 17,295.

WADE (HOWE v.). See Case No. 6,777.

Case No. 17,029.

WADE v. MATHEWS.

Circuit Court, N. D. New York. June 30, 1851.

COURT RULES—COSTS—FOLLOWING STATE COURTS — EFFECT OF CHANGES.

[Cited in Law, Jur. 278, to the point that the federal courts, by equity rule No. 25, adopted the fee bill of the highest court of any state as such fee bill existed in 1842; and that changes and alterations made since 1842 in any of such fee bills by changes of the law or practice of any such state did not apply to or govern the practice in the federal courts.]

[Nowhere reported; opinion not now accessible.]

WADE (MATTHEWS v.). See Case No. 9,292.

WADE (UNITED STATES v.). See Case No. 16,629.

Case No. 17,030.

WADE v. WADE.

[1 Wash. C. C. 477.] [1]

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

ADMINISTRATORS—LIABILITY FOR INTEREST.

Interest on money in the hands of the administrator, is not chargeable, when the same is retained in the hands of the administrator, until a suit shall determine the right of the claimant thereto.

This action was brought to recover one-sixth part of the personal estate, of which the intestate died possessed; and many depositions were read, to prove the plaintiff, and five others, his brothers and sisters, being in England, to be the brothers and sisters of the intestate, of the half blood, and his next of kin. The estate consisted of two bond debts, due to the intestate at his death, one of which had been paid, and part of the other. The defendant had resisted the payment, doubting the relationship of the plaintiff, and preferring to have that point judicially ascertained; but he promised to pay, if that should be done. The plaintiff claimed one-sixth of the principal, and interest of the bonds, which constituted the estate, from their date to the present time; except upon such parts as had been paid, upon which he did not claim interest from the time of payment, as the money was retained by the defendant, only with a view to ascertain the plaintiff's right to it. It was objected, that the verdict ought not to be for the uncollected part of the bond.

WASHINGTON, Circuit Justice, stated to the jury that if they were satisfied that the plaintiff is one of the brothers of the intestate, he is entitled to recover one-sixth of the principal and interest of these debts; but as the plaintiff waived interest on the sums collected, from the time they came into the defendant's hands, in consequence of the doubts he entertained of the relationship, they might deduct the interest on those sums. It does not appear from the evidence, that the uncollected bond had ever been put in suit, nor does it appear that the obligor was at any time, or is now, unable to pay. The defendant has been administrator for some years, and told the witness, that if the plaintiff established his title, he, the defendant, must make the obligor pay up.

Verdict for plaintiff, for one-sixth, principal and interest, according to the charge of the court.

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

Case No. 17,031.

WADLEIGH v. VEAZIE.

[3 Sumn. 165.] [1]

Circuit Court, D. Maine. May Term, 1838.

JURISDICTION OF FEDERAL COURTS—PLEA IN BAR—PENDENCY OF SUIT IN STATE COURT—CONFLICT OF JURISDICTION.

1. It is not a good plea in abatement to a suit in the circuit court of the United States, for the recovery of land, that another action, in which the present defendant is plaintiff, and the present plaintiff is defendant, is pending in the state court, for the recovery of the same land.

[Cited in White v. Whitman, Case No. 17,561; Loring v. Marsh, Id. 8,514; The General Custer, 10 Wall. (77 U. S.) 218; The Prince Albert, Case No. 11,426; Stanton v. Embrey, 93 U. S. 554; Brooks v. Mills Co., Case No. 1,955; Hughes v. Elsher, 5 Fed. 264; Latham v. Chafee, 7 Fed. 522; The Tubal Cain, 9 Fed. 837.]

[Cited in Wilson v. St. Louis & S. F. Ry. Co., 108 Mo. 588, 18 S. W. 289; Smith v. Atlantic Mut. Fire Ins. Co., 22 N. H. 27; Knaus v. Jenkins, 40 N. J. Law, 291; Wood v. Lake, 13 Wis. 91.]

2. To sustain a plea of the pendency of another action, it must be generally shewn, that the two actions are by the same plaintiff against the same defendant, and founded on the same cause of action.

[Cited in Seymour v. Malcolm McDonald Lumber Co., 7 C. C. A. 593, 58 Fed. 961.]

[Cited in King v. Chase, 15 N. H. 15.]

3. Quære, where the plaintiff is the same and the cause of action the same, whether there is any case, where the defendant must not be the same in the two suits, in order to sustain the plea.

4. In cases of concurrent jurisdiction in the state court and the circuit court of the United States, the latter has no discretionary authority to stay, or control the suit, or to refuse jurisdiction in order to prevent a collision between the two courts.

[Cited in Loring v. Marsh, Case No. 8,514; Wilmer v. Atlanta & R. A. L. Ry. Co., Id. 17,775.]

[Cited in Kittredge v. Emerson, 15 N. H. 279.]

This was a writ of entry for certain land situate in Orono, in the county of Penobscot. The tenant put in a special plea in abatement of another action pending, as follows:—Because the said Veazie, the defendant, heretofore and before the commencement of the plaintiff's action, to wit, on the thirty-first day of October, in the year of our Lord one thousand eight hundred and thirty-six, sued out his writ from the clerk's office of the court of common pleas of the state of Maine for the county of Penobscot, against the said Jesse Wadleigh and one Ira Wadleigh and James Purrington, in which said writ the said Veazie declared against said Jesse, Ira, and James in a plea of land, wherein said Veazie demanded, against said Ira, Jesse, and James, a certain tract of land with the appurtenances, situate in Orono, in said county of Penobscot, containing about five acres, &c., &c., which said writ was duly served upon said Ira, Jesse, and James, and said writ and suit were duly entered at and in said court of common pleas, to which the writ was returnable at its then next session holden at Bangor, within and for said county of Penobscot, on the first Tuesday of January, in the year of our Lord one thousand eight hundred and thirty-seven, and that thereupon and thereby said Veazie impleaded said Ira, Jesse, and James in said court; and the said Veazie avers, that the land demanded in this suit and in the declaration of said Jesse is the same land demanded in the writ and declaration of said Veazie as aforesaid, as by the record thereof in the same court remaining appears. And that the said Samuel Veazie, the now defendant, and the said Jesse Wadleigh, the now plaintiff, are the same persons that are named in the said writ and declaration of said Veazie, and not other or different. And that the plea aforesaid of said Veazie against said Ira, James, and Jesse yet remains in said court of common pleas undetermined and yet pending, and this he is ready to verify. To this plea there was a demurrer and joinder in demurrer.

Kent & Sprague, for the plea.

Mr. Rogers, against the plea, and for the demurrer.

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

STORY, Circuit Justice. The sole question arising in this case is, whether the pendency of another action, in the state court for the recovery of the same land, in which the present defendant is plaintiff, and the present plaintiff is defendant, at the commencement of the present suit, is a good plea in abatement to this suit. I must say, that I know of no such plea at the common law; and there is no pretence to say, that any such plea is provided for by the laws of the United States. In all cases, in which the pendency of another action is pleadable at the common law to the second suit, two things must generally concur; first, that the second suit should be by the same plaintiff against the same defendant; and secondly, that it should be for the same cause of action. The latter doctrine is universally true; for the plea is founded, as was said in Sparry's Case, 5 Coke, 61, upon the maxim, "Nemo debet bis vexari si constet curiæ, quod sit pro una et eadem causa." And unless the plaintiff be the same, the cause of action cannot be the same; since a grievance, or wrong, or injury to a plaintiff, sought to be redressed in one suit, can never be the same grievance, wrong, or injury, which the defendant in that suit seeks as plaintiff to redress in another suit. The wrong done to A exclusively can never, in any propriety of language, be called the same wrong done to B exclusively, though it may arise from the same identical act. An action for an assault and battery brought by A against B, for which he seeks damages, cannot be the same cause of action as an action for an assault and battery brought by B against A, though it may arise out of the same transaction; for the injury to A is not the injury

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

to B. I am aware, that upon the other point there is some apparent diversity in the authorities. All of them agree, that the plaintiff must be the same; for otherwise the cause of action cannot, in a just, legal sense be the same. But some of the authorities hold, or incline to hold, that if the plaintiff is the same, and the cause of action is the same, the defendants need not be the same in each suit. Thus, it has been said, that a suit in trespass by A against B may be pleaded in abatement of another suit for the same trespass against B and C; at least, it may be pleaded by B. The case of Bedford v. Bishop of Exeter, Hob. 137a, and Rawlinson v. Oriett, Carth. 96, may be cited on this point. But perhaps these cases are distinguishable; or at all events may require farther consideration. But I give no opinion on the point raised in them, because unnecessary upon the present occasion. See Com. Dig. "Abatement" (F) 24; Bac. Abr. "Abatement" (M).

In the present case, it is impossible to say that the cause of action is the same. It is true, that the land in controversy in the present action is the same as is in controversy in the other action pending in the state court of Maine. But the causes of action are not the same. In the action in the state court, Veazie is the demandant; and in the present action he is the tenant. In the former Veazie complains of a disseizin done to himself; in the latter, he is charged as being guilty of a disseizin of the present demandant, and consequently as a disseizor. The grievance, therefore, complained of in these actions cannot with any propriety of language be affirmed to be the same. The disseizin of A cannot ever be said to be in a legal sense the disseizin of B; and, a fortiori, it is impossible to say that both parties are disseizors by the same act, when each insists that he is disseizee. The gravamen, then, in these actions is not, and cannot be, the same; and therefore the plea is upon its very face repugnant and unmaintainable.

But it is suggested, that this court possesses a sort of discretionary authority in cases of this sort, where there is a concurrent jurisdiction in the state court and in this court, to interfere to prevent a collision of jurisdictions and a conflict of decisions as to the title to the land. I know of no such authority. If the parties are rightfully before this court in a case within its jurisdiction, however unpleasant it may be to entertain a suit here, in regard to which there may possibly be a diversity both of verdict and judgment from those given in the state court, I know not, how that is to be avoided. I should deeply regret such an occurrence; but still I am not aware, how the court can escape from its duty, in any case, which congress has confided to its jurisdiction. If a plaintiff should bring an ejectment in a state court, and should recover and be put into possession, and then the defendant, being a citizen of another state, should bring an ejectment in the circuit court of the United States, in the same state, to recover back possession of the land, I know of no power in the circuit court to stay, or control the suit, or to refuse jurisdiction over the cause. Yet, in such a case, there may be directly conflicting verdicts or judgments on the same title. The case has often occurred; and may in the future, as in the past, occur again. It is one of the unavoidable difficulties growing out of our complex system of government. The objection, if it has any force whatsoever, is aimed, if not at that system, at least at the propriety of allowing any concurrent jurisdiction whatsoever over the same subject-matter in the state courts and in the United States' courts. Which courts, in such a conflict, ought to be invested with exclusive jurisdiction, is a point with which I do not intermeddle. Perhaps it will be found, upon full examination, that there is great weight of argument on each side of the question, if a reconstruction of the constitution, and its competency to administer entire justice for the whole Union, as well as for its several parts, were the topic of discussion. But this is not the time or the place for such a discussion. "Ad constitutam diem tempusque non venitur."

The district judge concurs in this opinion; and, therefore, let a respondeat ouster be awarded.

WADSWORTH (ARDREY v.). See Case No. 512.

Case No. 17,032.

WADSWORTH v. TYLER.

[2 N. B. R. 316 (Quarto, 101); 2 Am. Law T. Rep. Bankr. 28; 1 Chi. Leg. News, 139.] [1]

District Court, D. Connecticut. Dec., 1868.

BANKRUPTCY—PREFERENCES—TRANSFER OF PROPERTY TO CREDITOR IN PURSUANCE OF PRIOR AGREEMENT.

1. In an action of trover brought by an assignee in bankruptcy against a creditor, to recover the value of certain property transferred by the bankrupt to him within four months preceding the adjudication of bankruptcy, it not being shown that a preference of creditors or a fraud on the act was thereby intended, and that the transfer was made in pursuance of an agreement entered into long before, *held*, that the assignee could not recover.

[Cited in Re Gregg, Case No. 5,797; Marble v. Fulton, Id. 9,059; Re Jackson Iron Manuf'g Co., Id. 7,153.]

[2. Advances made in good faith to a debtor carrying on business, upon security taken at the time, do not violate either the terms or policy of the bankrupt act.]

[Cited in Darby v. Boatman's Sav. Inst., Case No. 3,571; Tiffany v. Boatman's Sav. Inst., 18 Wall. (85 U. S.) 389.]

[This was an action by Winthrop M. Wadsworth, assignee in bankruptcy of Robert R. Treadwell, against Edwin S. Tyler.]

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[1] [Reprinted from 2 N. B. R. 316 (Quarto, 101), by permission. 1 Chi. Leg. News, 139, contains only a partial report.]

SHIPMAN, District Judge. This is an action of trover to recover the value of certain articles of personal property, among which was a quantity of anthracite coal. The property originally belonged to the bankrupt, and the assignee claims that the title passed to him by virtue of the proceedings in bankruptcy in this court against Treadwell, but alleges that the defendant has converted them to his own use. The usual demand and refusal have been proved. The defendant admits the taking, and justifies on the ground that the title was lawfully vested in him before the proceedings in bankruptcy were commenced. This admission, however, only covers a quantity of coal which constituted the bulk of the property converted, and certain book accounts. Treadwell has been put into bankruptcy upon petition of his creditors, under the act of congress, approved March 2, 1867 [14 Stat. 517], and the plaintiff appointed assignee. From the proofs it appears that Treadwell went into the business of buying and selling coal at Middletown, in this state, in the spring of 1866. At the commencement of his business he received assurance from the defendant, who is his brother-in-law, that he would, from time to time, render him assistance, which he did by trusting him for coal sold, advancing him money, and endorsing his notes, whereby Treadwell became lawfully indebted to him. At the outset of the business there was an understanding entered into between them, that Treadwell should give an absolute bill of sale to the defendant of the stock of coal on hand in the yard where Treadwell carried on the business, together with all book accounts due him for the sale of coal in Middletown, where all his sales were made. The object of the bill of sale was understood between the parties to be for the purpose of enabling the defendant to take possession of the property at any time he chose, in order to protect himself for advances made, credit entered, and liabilities incurred, on account of Treadwell. The business was commenced in April, 1866, but no bill of sale was executed till the 16th of January, 1867, when, as the course of the business of Treadwell was not satisfactory to the defendant, he insisted upon having the bill of sale made and delivered to him, which, from the cancellation of the stamps affixed thereto, appears to have been done on the 22d of January, 1867, though the date of the instrument is the 16th. Treadwell continued the business in his own name down to the 22d of June, 1867, when, from his neglect to properly attend to it, it became quite apparent to the defendant that the only safe course was for him to arrest it by taking the property into his own hands and closing it up, in order to protect himself. He therefore sent an agent to Middletown, and took possession of the coal on the day last named. Both at the time the bill of sale was executed and delivered, and at the time possession was taken under it, Treadwell's indebtedness to the defendant exceeded the value of the property taken. The defendant was also responsible for a still further sum, as endorser on Treadwell's paper. There is not sufficient evidence to prove that the defendant had reason to suppose that Treadwell was indebted to other parties, and I find, as matter of fact from the evidence, assuming the burden of proof to be on him, that he had no reason to suppose that such was the case, until after the 22d of June, 1867. He well knew, however, that Treadwell was insolvent, using that term in its largest sense, for the latter owed him not only more than he could then pay, but more than his whole assets were worth, if disposed of under the most favorable circumstances and at their full value. Treadwell, however, both at the time of the execution and delivery of the bill of sale, and at the time of his surrender of the property to the defendant under it, not only knew that he was hopelessly insolvent, but that he owed at least one creditor other than the defendant, a large sum; and he well knew when he made the transfer (which included all his assets except a few articles of trifling value), that the effect would be to prefer the defendant as a creditor. The suit is brought not only to recover the value of the coal and book accounts, but also the value of a safe, and certain articles of office furniture. The bill of sale only included the coal and book accounts, and the defendant has never taken possession nor assumed control over the other articles. Some time after taking possession of the coal, the defendant obtained from Treadwell a transcript of some of the accounts on the books, and proceeded to collect them. At this time he well knew that there were other claims against Treadwell, and I find, as matter of fact, that he both knew at that time that Treadwell was insolvent, and that he sent him these accounts to collect for the purpose of preferring the defendant as a creditor to that extent, in fraud of the bankrupt act. The defendant is, therefore, liable to the trustee for the amount so collected, but not in this form of action. For the value of the safe and office furniture he is not liable, as they have never been in his possession, nor has he assumed any control over them. On the 11th day of September, 1867, Treadwell was declared a bankrupt by the judgment of this court, upon the petition of another creditor, who has filed a large claim against his estate. The plaintiff was duly appointed and qualified assignee, and after demand of the property in question and refusal by the defendant, he has brought this suit to recover its value.

In addition to the facts already found, I find further that the value of the coal taken by the defendant on the 22d of June, 1867, was two thousand and twenty-one dollars and fifty cents, and that he took the same in good faith under his bill of sale, to secure as far as it would go his own debt, and to protect himself from the consequences of Treadwell's mismanagement and improvidence in his business, and not from any design to defraud other creditors; though, in fact, his appropriation of the coal must have the effect, if sustained by the court, to deprive them of their debts, as it will leave the estate substantially without assets. A jury was duly

waived, and the case tried to the court. The facts found raise a question of law, and though the amount in controversy is not large, the principles involved are of considerable importance. This question is now to be disposed of. As already stated, Treadwell has been adjudged a bankrupt by this court upon the petition of one of his creditors. The petition was filed on the 4th day of September, 1867, and the adjudication made on the 11th day of September, 1867.

The question presented is whether the transfer of the coal to the defendant on the 22d of June, 1867, under the circumstances, was valid or not, as against the title set up by the assignee. This, under the facts found, depends upon the construction to be given to a part of the thirty-ninth section of the bankrupt act. This section relates to proceedings in involuntary bankruptcy, and after reciting those acts of the debtor which shall be deemed acts of bankruptcy, including transfers of his property with intent to give a preference to one or more of his creditors, provides that "if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so conveyed, sold, assigned, or transferred contrary to this act, provided the person receiving such payment or conveyance has reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy." If this passage is applied according to its literal terms to the present case, the question under consideration will be easily solved, for it is found as a fact that the defendant knew that Treadwell was hopelessly insolvent, in other words that he owed the defendant more than his whole assets would pay, under whatever circumstances they might be disposed of. The letter of the statute requires nothing more. Reason to believe the debtor was insolvent, and reason to believe that he was intending a fraud on the act, are separated by the disjunctive "or." In other words, two circumstances are stated, either one of which renders the sale or conveyance void. First, reason on part of the creditor or vendee to believe that the debtor intended a fraud on the act. Second, reason on his part to believe that the debtor was insolvent. The fact is found that the defendant knew that the debtor was insolvent, or, in other words, knew that he owed him more than he had the means or ability to pay. But before accepting this literal interpretation of this clause of the statute, it is important to look at the thirty-fifth section of the same act. Judge Blatchford has held, in Re Black [Case No. 1,457], that "the two sections are in pari materia, and must be construed together." He says also that "there is, however, no conflict between them, and they are of the same purport and tenor." The thirty-fifth section deals with fraudulent preferences and conveyances, and provides "that if any person being insolvent, or in contemplation of his insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to a creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the value from the person so receiving it, or so to be benefited; and if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, or conveyance, or other disposition of any part of his property, to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of his insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent the same from being distributed under the provision of this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or evade the provisions of this act, the sale, assignment, transfer, or conveyance shall be void and the assignee may recover the property or the value thereof as assets of the bankrupt. And if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact should be prima facie evidence of fraud." It will be seen at a glance that this thirty-fifth section renders the transfer of the property of the insolvent debtor void only when the party benefited by such transfer, or receiving it, has reason to believe both that the debtor is insolvent, and that a fraud on this act was intended.

These two aspects of the debtor's condition and intent, must concur or present themselves to the view of the creditor or vendee. The propriety of this is obvious, for by any other rule it would be extremely dangerous for any person, however upright his intentions, to deal with another who is embarrassed in his affairs, and, temporarily even, deprived of the ability to meet his engagements. Insolvency, as used in the law, when referring to debtors, does not mean absolute inability ultimately to pay, but present inability to meet engagements in the course of business. Thompson v. Thompson, 4 Cush. 127; Lee v. Kilburn, 3 Gray, 594. A man may purchase property in perfect good faith of one in embarrassed circumstances, and thereby aid him in relieving himself from the pressure of his claims. The very purchase may save the debtor from final bankruptcy, and restore him at least to temporary solvency. For this reason sales made by one known to be insolvent are, by this thirty-fifth section, left un-

der the protection of law, unless the purchaser has reason to believe that the object of the debtor is to prefer a creditor, or in some way work a fraud on the law by preventing an equal distribution of his assets among his creditors generally. In this section, purchasers who are strangers, and creditors who received the property of the insolvent in payment or part payment of debts, are placed upon the same footing. It is true, that courts of justice should look with scrutiny into the transactions of insolvents, which immediately precede their final bankruptcy, especially transactions with their creditors relating to the transfer of property. But, under this section of the bankrupt act, they have no authority to declare a transfer void, unless the party who receives it has reason to believe that it was intended to prefer one creditor over another, or in some way to defeat or delay the operation of the act. And this section is the one which relates particularly to fraudulent preferences and conveyances, and undoubtedly was intended to declare precisely under what circumstances any appropriation of the property of an insolvent debtor for the benefit of any person, whether to a creditor or by way of a sale to a stranger, should be defeated. As I have already stated, the thirty-ninth section of the act defines what acts of the debtor shall be considered sufficient grounds for declaring him a bankrupt on petition of a creditor. Certain dispositions of the debtor's property are included among these acts, and the right of the assignee to recover from the person to whom the transfer may have been made is again declared, in substantially the same terms as in the thirty-fifth section, except that the word "or" is used instead of "and," when referring to the reason the creditor may have to believe in the insolvency of the debtor, and in the intent with which he disposes of his property in the given case. In one section the conveyance can only be defeated by proof that the creditor or vendee had reason to believe that the debtor was insolvent, "and" intended a preference or a fraud, while in the other, proof of either one is sufficient.

After a careful consideration of the question, I cannot bring my mind to the conclusion that any such distinction was intended by the legislature. No good reason has been shown in support of the claim beyond the literal reading, and none is perceived by the court. I therefore conclude that they should be construed as speaking the same language on this point; and as the rule prescribed by the thirty-fifth section is more consonant to reason and security in the transaction of business, I hold that it is the one intended, and the distinction raised by the letter of the twenty-ninth section must yield. It follows, from the facts found, that the assignee can recover nothing in this action. The evidence upon which these facts have been found is somewhat peculiar, and does not bring the case within the ordinary range of controversies between the creditors of a bankrupt. The debts alleged to be due creditors other than the defendant, almost wholly grew out of transactions having no connection with the coal business in which the bankrupt was engaged, and there is no proof that the defendant had any knowledge of the existence of these claims. The evidence is that he arrested the business of the bankrupt, and took the property into his possession, not to defeat the claims of other creditors, but to save what he could from the imprudence and mismanagement of the bankrupt, whom he had aided, and with whose irregularities and follies he had long borne. He did this in pursuance of an agreement entered into long before this law was passed. Still, I have regarded the transfer of the coal, and the taking possession of it by the defendant, as out of the regular course of business, and as making a prima facie case against him, agreeable to the thirty-fifth section of the act, and I think he has overcome the legal presumption by such proof as entitles him to judgment. Let judgment be entered for the defendant.

WADY (SWIFT v.). See Case No. 13,699.

Case No. 17,033.

WAGENER v. MINOT.

[Hask. 313.] [1]

District Court, D. Maine. Nov., 1870.

CHASTISEMENT OF SEAMEN.

The master of a vessel is never justified in chastising a seaman at the wheel, howsoever flagrant his demeanor may be.

In admiralty. Libel in personam, for assault and battery committed by the master of a vessel upon a seaman while on duty at the wheel, on a voyage to Portland. Answer, that the violence used was reasonable chastisement for insolence and insubordination.

It appeared at the hearing, that on October 18th the libellant [Alfred Wagener] was at the wheel, that the sea was rough, and that it was almost a gale. The libellant not keeping the brig upon her course, the master [James A. Minot] testified that he reprimanded him, and after some hard words between them, he told libellant to "heave the wheel up," to which he replied, "I will do it when I get ready;" that thereupon he struck the libellant a back handed blow in the face with sufficient force to break the skin of the nose and to knock him over the wheel, catching the wheel as the man fell. The testimony of the master was corroborated by the steward. The testimony presented for the libellant by three of the seamen tended to prove that the beating was much more severe than the master admitted it to have been, and that the man was badly bruised in both eyes, and was repeatedly struck and kicked by the master. The libellant was not examined as a witness, being now deranged; but it was not claimed that this condition was occasioned by the assault.

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

James D. Fessenden, for libellant.
Thomas B. Reed, for respondent.

FOX, District Judge. In cases of this nature, it is a general rule of the court, that when it is manifest that the seaman deserved punishment, the court will not award him damages, unless the punishment was excessive. The present case is not subject to this rule, as under the circumstances the master can not be justified in any court, for committing any assault whatever on the libellant. The weather was at the time quite bad, almost a gale, with a heavy sea; the libellant was alone at the wheel, and the lives of all on board were in his charge, dependent on his being able to retain the control and management of the ship with the wheel. An assault upon the man at the wheel is never justifiable, for in such a case the lives of all are put in jeopardy. However flagrant at the moment might be the language or behavior of the wheels-man, the only course for the master to pursue is to relieve him from his position, put another of the crew at the wheel, and then administer to the guilty party such punishment as he might have merited for his misconduct.

The damages therefore, in the present case, will be somewhat heavier than are usually awarded, as the court feels called upon to express its most decided censure of the conduct of the master, and to admonish him and all other officers of vessels, that they must never assault the helmsman, however provoking and exasperating his language or conduct may be.

Decree for libellant for $100.00 and costs.

WAGER (BUSSEY v.). See Case No. 2,231.
WAGER (HALL v.). See Case No. 5,951.

Case No. 17,034.

WAGER v. LEAR.

[2 Cranch, C. C. 92.] [1]

Circuit Court, District of Columbia. Dec. Term, 1813.

SPECIAL BAIL.

Special bail will be required in an action of covenant for rent, upon a proper affidavit.

Covenant for rent arrear. The plaintiff [Wager's administratrix] had not filed his declaration, but had filed the lease, and an account, with the plaintiff's affidavit that it was just and true.

Mr. Jones, for defendant, offered an appearance without bail. The paper filed is not a lease, but an agreement for a lease. No action of covenant for the non-payment of rent will lie upon it. No lease in Virginia for more than five years is good, unless acknowledged or proved by three witnesses and recorded. There are only two witnesses to this deed. The only action which can be supported in this case, is for actual use and occupation from year to year.

F. S. Key, contra. The account and affidavit are sufficient to hold the defendant to bail, without the lease.

THE COURT ruled the defendant to give special bail.

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

Case No. 17,035.

WAGGENER et ux. v. CHEEK et al.

[2 Dill. 560.] [1]

Circuit Court, E. D. Arkansas. 1873.

REMOVAL OF CAUSES—FINAL HEARING OR TRIAL—REMOVAL FROM APPELLATE COURT.

1. Whether, under the act of March 2, 1867 [14 Stat. 558], which requires the application for the removal of a cause from the state court to the federal court to be made "before the final hearing or trial of the suit," a suit in equity can be removed when pending in an appellate tribunal, quære?

[Cited in Sharp v. Gutcher, 74 Ind. 363.]

2. Such a suit cannot be removed from the appellate court after it has been finally submitted to it.

3. Nor can it be removed by the plaintiff as to one of several necessary defendants.

This cause comes before the court on the transcript of a record certified by the clerk of the supreme court of the state of Arkansas. Upon the question, whether this court has jurisdiction of it, the following are the material facts as shown by the record: The suit, which was in equity, was originally brought in one of the state courts, and the complainants [John H. Waggener and wife] sought to be relieved from the obligation to pay the purchase price ($75,000) of certain property which the complainant (Waggener) purchased from the executor of Elijah Cheek, deceased, and for which, except the sum of $10,000, paid in cash, the complainants made notes to the executor, and, to secure the same, executed a deed of trust to [Oliver P.] Lyles, one of the defendants. The ground of complaint in the bill is, that the executor had no power to make the sale, because the probate court had no authority in law to probate and establish a lost will, and because the decree of the chancery court establishing said lost will was void, for the reason that such of the heirs at law of the said Elijah Cheek as were not provided for therein were not notified of the proceeding. The bill makes defendants the executors of Elijah Cheek, the heirs at law, several in number, of the said Elijah, and also Lyles, the trustee in the deed of trust to secure the purchase money. Answers were filed to the merits by the various defendants, and made cross-bills. Pending the proceedings in the state court, two injunctions against the sale of the property by the trustee under the deed of trust were granted and dissolved, and a receiver was appointed with power to lease

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

the property. Finally, at the October term, 1869, the cause came on for hearing on the bill and exhibits, and the answers and cross-bills, and the court decreed that the proof of the will in the probate and chancery court and the grant of letters testamentary were not void; that the executor had full power to make the sale to the complainant, and thereupon dismissed the complainant's bill; but on the cross-bill rendered a decree of foreclosure in favor of the estate of Elijah Cheek against the complainant for the balance of the purchase money and interest, then amounting to $88,333.98, and ordered a sale of the property embraced in the deed of trust. From the decree the complainants prayed an appeal (which was granted) to the supreme court of the state.

The record of the proceedings in the supreme court shows that on the 3d day of January, 1871, "the parties, by their respective attorneys, submitted the cause to the court on briefs, and that it was by the court taken under advisement." The clerk of the supreme court certifies that "Afterwards, at the December term, 1871, said appellants, through the clerk of this (the supreme) court, presented to said court the following petition and bond, which said court failed to order filed, or to take any action upon whatever." The petition referred to is one by the complainants for the removal of the cause into the circuit court of the United States for the Eastern district of Arkansas, and states that the plaintiffs are citizens of Tennessee,, and that defendant, Mark R. Cheek, administrator of the estate of Elijah Cheek, is a citizen of the state of Arkansas; that the amount exceeds, &c.; that they have filed their affidavit under the act of congress of March 2, 1867, for the removal of the cause, stating, &c. and offering surety, &c. The affidavit for removal is in these words: "That plaintiffs are citizens of the state of Tennessee; that Mark R. Cheek, administrator, &c. is a citizen of Arkansas: that administration upon said estate is had and conducted in the state of Arkansas, of which state the deceased was, at the time of his death, a citizen; that the matter in dispute exceeds the sum of $500; and the plaintiffs have reason to believe that from prejudice or local influence they will not be able to obtain justice in this honorable court." This was sworn to January 4, 1872. A bond was also filed for the removal of the cause, conditioned as required by the act of congress. The clerk of the supreme court certifies a complete transcript of the record of the cause as it remains in that court, but it contains no entry of any further action by it in respect to the same.

U. M. Rose and B. C. Brown, for complainants.

O. P. Lyles and Clapp, Vance & Anderson, for defendants.

DILLON, Circuit Judge. From a decree against the complainants on the merits in the inferior state court, they took an appeal to the supreme court of the state and fully submitted the cause to that court, by which it was taken under advisement. While it was in this situation, the complainants filed their petition and affidavit for the removal of the cause to this court under the act of congress of March 2, 1867 (14 Stat. 558). Do the petition and affidavit present a case entitling the complainants to a removal of the cause to this court? This depends upon a proper construction of the act of congress just mentioned. It is our opinion that the case is not one of which, upon the showing made for the removal, this court can take cognizance. The ground of this conclusion is two-fold:—

1. The application for the removal was not made in time. The statute requires the petition for the removal to be made "before the final hearing or trial of the suit." The statute which it purports to amend uses the words, "before the trial or final hearing of the cause." 14 Stat. 307. The word "hearing" refers to equity suits; the word "trial" to actions at law. This cause was in equity, and the requirement of the statute is that the application for the removal must be made "before the final hearing." In a case at law it must be before the trial. Where the suit is properly removed, the provision of the act is that it shall "proceed," in the federal court, "in the same manner as if it had been brought there by original process." There is ground to contend that the statute does not apply in any case when the suit is in the appellate court, but the circumstances of the cause in hand do not require us to decide that point. Suppose there had been a trial at law, a judgment, a bill of exceptions, and a writ of error, and the plaintiff in error, after the cause is filed and when it is pending in the appellate court, removes it to this court, can we review the alleged errors? Surely not. Is the party who effected the removal to have a new trial here as of right? Clearly not. It would appear, then, that a law case cannot be transferred to this court while it is still pending in the state appellate tribunal. This is certainly so where the trial was by jury. Justices v. Murray, 9 Wall. [76 U. S.] 274. Under the words applied to both classes of cases, "final hearing or trial," will it be held that a law action cannot be transferred from the state appellate tribunal, while an equity suit may be? The argument in favor of the right to transfer an equity cause while it is pending on appeal is, that it is there to be heard de novo, and that an appeal in chancery cases is only a re-hearing in a higher court. 3 Daniell, Ch. Pl. & Prac. 1602. But the question turns on the intention of congress in the use of the words, final hearing; and did it not mean by this language the trial of an equity cause upon the merits in the court of original jurisdiction, rather than the re-hearing in an appellate tribunal? But, as above observed, it is not necessary in this case to decide the question, and we pass it without

further remark. It may be conceded, that where a suit has been remanded by the appellate court to the inferior state court for a new trial or hearing on the merits upon further testimony, that the cause may be removed from that court to the federal court, as in Akerly v. Vilas [Case No. 119; 24 Wis. 165], or that an equity cause may be thus removed directly from the appellate court while it is still pending therein and before it has been there finally heard, as in Sneed v. Brownlow, 4 Cold. 254. This may be conceded, and yet the removal in the case before us be unauthorized. Clearly the application to remove must be made before the final hearing. Granting that the final hearing is the hearing in the appellate court, when must the application for the removal be made? The answer of the statute is before the final hearing. But this cause was submitted to the supreme court on the merits, on briefs, and by the court taken under advisement months before the petition and affidavit for removal were presented to that court. Taking the most liberal view for the complainants, the cause was finally heard when it was submitted to the court for decision upon the merits. The language of the statute is not that the application for removal shall be before final judgment or decree, but before final hearing, and in an equity suit, the word "hearing" means a trial upon the merits.

2. The cause was not properly removable on the affidavit and petition, for other reasons. It was sought to be removed only as to one of the defendants, namely: Mark R. Cheek, the administrator of Elijah Cheek, deceased. But there were other defendants, and necessary defendants, to the bill. Not to mention others, it is sufficient to refer to the trustee, Lyles, who would be a necessary party to the relief sought. Again, some of the defendants had a cross-bill upon which substantial relief was prayed. The decree of the state court passed upon all these matters, and from that decree the complainants appealed to the supreme court of the state, in which, as to all these parties, the suit was pending at the time the application for removal was made. Now the complainants ask for a removal as to one of the defendants only, or rather show cause for removal as to one only. What becomes of the cause as to the other defendants? Under the act of 1867 there seems to be no authority to a plaintiff to remove a case as to part of several defendants; certainly there is no authority for such removal where the other defendants, not named in the affidavit or petition for removal, are necessary parties to the final determination of the controversy.

An order will be entered dismissing the case out of the court for want of jurisdiction. Ordered accordingly.

NOTE. As to act of March 2, 1867, see Johnson v. Monell [Case No. 7,399]; Sands v. Smith [Id. 12,305]; Case v. Douglas [Id. 2,491]; Allen v. Ryerson [Id. 235]. In The Justices v. Murray, 9 Wall. [76 U. S.] 274, the supreme court held that it was not competent for congress, under the seventh amendment of the constitution, to provide for the removal of a judgment in a state court in which the cause had been tried by a jury to the federal court for a retrial on the facts and law.

Case No. 17,036.

Ex parte WAGGONER.

[The case reported under above title in 1 Gaz. 77, is the same as Case No. 17,037.]

WAGNER, Ex parte. See Case No. 14,174.

Case No. 17,037.

In re WAGGONER.

[1 Ben. 532; 1 Gaz. 77.] [1]

District Court, E. D. New York. Nov., 1867.

SPECIFICATIONS OF OBJECTION TO A BANKRUPT'S DISCHARGE.

If a creditor opposing a bankrupt's discharge would have a trial under section thirty-one of the bankruptcy act [of 1867 (14 Stat. 532)], his specification of objections must be sufficiently definite to enable the court to see that there exists a fair question of fact, necessary to be determined upon evidence outside of the papers, before the discharge can be granted.

In this case a creditor filed specifications of objections to the bankrupt's discharge, charging: First. That the bankrupt [Samuel D. Waggoner] has not conformed to his duty. 1. In that he has omitted to make a proper statement of the judgments against him referred to in the schedules annexed to his petition. Also the same as to particulars and consideration of the debts owing by him. 2. In that he has omitted to state the places of residence of several of his creditors, with sufficient accuracy to enable them to receive the notices required by said act to be given to them. Second. That he has concealed a large, and the greater part, of his estate and effects, and omitted to state the same in the schedules annexed to his petition. On these specifications the creditor applied for a trial before the court.

BENEDICT, District Judge. To enable an opposing creditor to obtain an order for a trial at a stated session of the district court, under section thirty-one of the bankruptcy act, the specifications must be sufficiently definite and certain to enable the court to see that there exists a fair question of fact, necessary to be determined upon evidence outside the papers, before the discharge can be granted. In the present case the specifications are too general and indefinite, and do not entitle the party to an order for a trial at the stated session; nor do they raise any definite issue upon which

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

a summary hearing and adjudication could be had. Some grounds of opposition to the discharge, set forth with sufficient definiteness to enable the court at least to see that the objections taken are not frivolous, or interposed merely for purposes of delay, should appear in the specifications before the court can be called upon to pass upon them. The objections therefore must be stricken out, with leave, however, to the creditors to file more definite specifications within three days.

Case No. 17,038.

In re WAGNER.

[McA. Pat. Cas. 510.]

Circuit Court, District of Columbia. March, 1857.

ISSUANCE OF PATENTS — POWERS AND DUTY OF COMMISSIONER—NOVELTY IN COMBINATIONS—APPLICANT'S OATH.

[1. When all the conditions prescribed by Act 1836, § 6 (5 Stat. 119), exist, the commissioner is bound prima facie to issue a patent. It is his duty, however, to decide whether the invention is new, and whether it is the proper subject of a patent.]

[2. The oath of the applicant is prima facie evidence of the novelty of the invention. But the commissioner has power, and it is his duty, to resort to any circumstances legitimately in his possession for the purpose of repelling the presumption.]

[3. The fact that one or even all the elements in a combination claimed are old is not sufficient proof of want of novelty; for if the combination thereof is substantially new, and especially if the result is to make a machine capable of producing an article of a new and useful character, then patentable novelty is shown to exist.]

[4. The combination in a brick machine of a mold box, with a core, and an annular bottom or piston for discharging the brick, *held* to show patentable novelty, though the separate elements were in use before.]

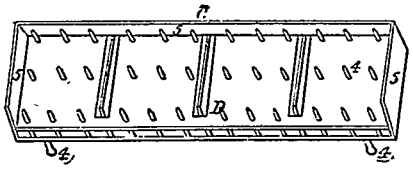
[This was an appeal by J. Z. A. Wagner from the refusal of the commissioner of patents to grant him a patent for an improvement in brick machines.]

P. H. Watson, for appellant.

MORSELL, Circuit Judge. Appeal from the decision of the commissioner of patents refusing to grant him a patent for his invented new and useful improvements in brick machines or presses. The claim is set forth in these words: "Having thus described my improved machine for making tubular bricks, what I claim therein as new, and desire to secure by letters-patent, is the combination of the mold box with a core and an annular bottom or piston, the whole constructed and operating substantially as therein set forth." The description alluded to makes the drawings filed a part thereof, and is sufficiently special to distinguish the old and new parts of the machine; and the oath of the party, as the law directs, stating that he verily believes himself to be the original and first inventor of the improvement, &c., accompanies the same. This application was rejected by the commissioner upon the general ground of want of patentable novelty. The letter of rejection is dated 29th of July, 1852. The commissioner says: "The combination of the core with the perforated discharging plunger is very common in cracker machines and other machines, and its application in forming a perforated brick cannot be regarded as a new invention. An example of the device in question may be seen in the cracker machine of William Carr, patented July 22d, 1843." [1] In his letter of the —— day of October, 1852, (after the amended specification,) affirming the decision which he had already made, among other things, he says: "The combination specified in your claim for molding tubular bricks mechanically runs through the features of known machines, particularly that formerly patented by you, with the exception of the fixed core in the molds and the annular bottom or plunger for expelling the tubular brick. If a patent be granted, it must be based on that point of difference. Now, it must be remembered that fixed cores are a well-known mode of molding hollow or annular or tubular articles, and that they have been used in molding bricks. One or more brick molds may be referred to in the office in which the core extends to half way, more or less, through the thickness of the brick. The idea, therefore, after the suggestion of a tubular brick, of molding the brick in that form in your (Wagner's) machine, by putting a core into the mold of the same thickness with the brick, appears to me to be obviously suggested by the well-known use of cores, as above stated, and not to be a new invention or discovery; and if that idea be not a new invention, I am clearly of opinion that the idea in connection therewith of using the perforated plunger where the solid one was used is not, since that follows ex necessitate, being no more than the accommodation of the form of the plunger to that of the brick; more especially is this the case of perforated plungers in bread and cracker machines, as referred to in the communication of the 29th ultimo. The expulsion of the brick from the mold without breaking off the corners is not a property peculiar to the perforated plunger, for its action in this respect is like that of the solid plunger."

In his appeal from this decision the appellant filed nine reasons of appeal, the substance of which is: The first is almost in the words of the seventh section of the act of 1836. In the

[1] [The following is a drawing of Carr's cutter, published from the records of the United States patent office:



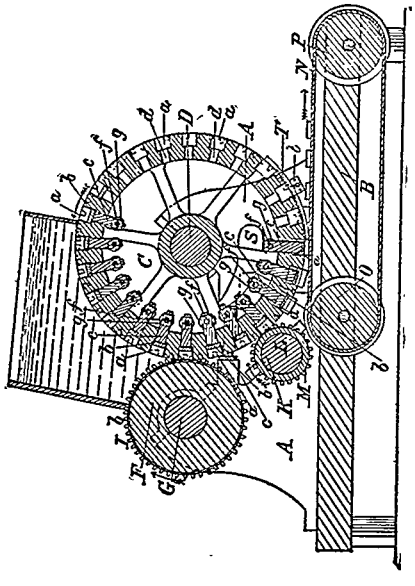
second, there is nothing sufficiently specific. Third. The commissioner erred in rejecting the application upon the ground that other machines are susceptible of being so altered as to become capable of operating like the combination invented and claimed by the applicant. Fourth. Because the commissioner's admission that the features of the fixed core in the mold and the annular bottom in appellant's combination do not run through the features of any known machines, amounts to an admission that the whole invention claimed is new. Fifth. Because there is no evidence in this cause to justify the decision that cores have been used in molding tubular bricks. Sixth. Because Carr's cracker machine is no applicable reference, being designed for rolling, and not designed either for molding anything nor adapted to molding bricks. Seventh. Because he decided appellant's combination of three elements to be old, because each of said elements is suggested by something in other machines, or follows ex necessitate from the tubular form of the brick to be molded. Eighth. Because the facts stated upon the face of the commissioner's decision itself do not justify the refusal of a patent as asked for, but, on the contrary, furnish a legal presumption that the appellant is in fact what he claims to be—the first who ever invented automatic machinery for molding tubular bricks, &c. The ninth is general.

The commissioner's report in reply to said reasons is in substance as follows: The appellant took out a patent under date of April 8th, 1851, (No. 8024,)[2] for a brick machine, consisting in a certain manner of combining a mold wheel, a press wheel, and pistons for expelling the molded bricks. Subsequently he applied for a patent for a machine in which, the combination being otherwise the same, the shape of the molds and expelling pistons was adapted to the production of a perforated or tubular brick instead of a solid one. This variation of the patented machine was decided by the office not to be patentable, the reasons for which decision were fully given in the official letter addressed to the applicant under date of October 2d, 1852. It is from this decision that the applicant now appeals.

The doctrine of the decision is that the patented machine is not confined in its application to the production of bricks of the one form shown in the patent, but that it may, without the exercise of invention, be adapted to the production of other forms by simply changing the shape of the molds and expelling pistons. The only limitation of its application is to the production of forms that are prismatic or nearly so. If one desired to use it for the production of bricks of a hexagonal shape, he would only have to make the molds in the machine of that shape, and of course the pistons of the same shape as the molds, and there would be no more invention in this than for a founder to make a mold of the same shape as the desired casting. So, also, if one desired to produce a brick of the form of a cross, he would of course make the molds and pistons of that shape. And the perforated or tubular brick is only another of the different prismatic forms to which the patented machine may be adapted by making its molds and pistons of that shape. But if it should be objected that this requires invention, because all perforated or tubular forms have a character that distinguishes them from all non-perforated forms, and that it would not occur to one without invention that a mold could be adapted to such perforated form, because it involves a core, nor that a piston could be adapted to a mold of that shape,—this objection, if any weight, is neutralized by the fact that nothing is more common than molds with a core for perforated prismatic forms, and that, besides this, pistons have been adapted to such forms. Molds with cores have been used in forming perforated bricks. This is not called in question, and a reference would be unnecessary. One may be found, however, in the brick press of Mercy Wright, patented May 15th, 1841, No. 2093.

Some of the reasons of appeal are not specific, only amounting to an assertion that the decision of the commissioner is erroneous. They do not call, therefore, for any special notice. The fourth reason of appeal takes the same view of the main point on which the claim of the applicant is based as the office has done. In reference to the sixth reason of appeal, it is true that in cracker machines there is a difference in the manner of operating upon the material, because the material is of a different nature; but the case referred to is in point to show that it is not a new thing to adapt a piston to that shape of mold; for,

[2] [The following is a drawing of Wagner's brick machine, in longitudinal vertical section, published from the records of the United States patent office:



notwithstanding the different manner of operating upon the material, it may be properly termed a mold in which a core is used. And here the office will make a remark which has an important bearing upon the whole case; that is, that the question is not only whether the machine in question differs from every other one machine, but whether what difference or differences there are are the product of invention. No doctrine is better settled by the courts than that it is not all differences that are patentable. The difference must be one that is produced by invention; and whether it be such, is to be determined by an examination of the nature of its relation to things that have preceded it. The points made by the office are intended to show that while there is in this case, in some sense, a difference from any one prior machine, there is no difference that has been produced by invention. Due notice having been given of the time and place for hearing, the commissioner laid before me all the original papers in the case, together with his decision, the reasons of appeal, and his report in reply to said reasons. An examiner appeared on the part of the office, and the appellant by his attorney; and the said agent on the part of the office being examined as to the nature of the said invention, the first interrogatory put to him by appellant's counsel was: Question: "Does any brick machine to which you made reference in the examination of Wagner's application contain the entire combination which he claims?" Answer: "No; of course it does not." Question: "Do you know of any machine whatever capable of producing a brick like the one now before you by the mode of operation by which Wagner's machine produces such a brick? If so, please to state where the machine is to be found." Answer: "I do not know of any machine that would produce a perforated brick automatically by the same mode of operation."

I have deemed it proper thus to make a full statement, that all the points of objection, with the manner in which they are met, might appear. Summarily, then, it will be observed that the commissioner concedes that the machine with its improved combined invention, for which a patent is asked is different from any other machine which he knows of in respect to its contrivance for the production of a perforated brick automatically by the same mode of operation, and that the brick machine to which he made a reference in the examination of Wagner's application does not contain the entire combination which Wagner now claims; and that no other known machine contains the said combination specified in the appellant's claim for molding tubular bricks mechanically of a fixed core in the molds, and the annular bottom or plunger for expelling the tubular brick. This, then, is a conceded difference, and there has been no denial that the so improved machine is capable of producing a successful, new, and useful result. But the honorable commissioner supposes that the difference is merely in form, and without amounting to invention; and his reasons, as understood, are: First. Because the same is substantially covered by the appellant's patent dated the 8th of April, 1851. But as no more can be supposed covered by the patent than is embraced by the specification, and such upon examination appearing not to be the case, as so stated by the patentee himself, together with his declaration that he made no such claim under said patent, the objection, therefore, as to this reference cannot be considered as sustained in point of fact. Second. For the like purpose of proving an analogous use, various cases or instances are referred to to show that molds with a core for perforated prismatic forms were in common use, and that pistons have been adapted to such forms; also that molds with cores have been used in forming perforated bricks. The cracker machine was also referred to. As to this, I cannot discover much, if any, analogy; and the commissioner himself admits that there is a difference in the manner of operating upon the material, because it is of a different nature; from all which the commissioner concludes the improvement to be a difference without invention. Without being more particular as to the application of those instances in point of fact to the present case, I shall proceed to consider the case with respect to the rules of law applicable to the objections so raised by the commissioner. And the first in order is that which is involved in the first reason of appeal, which is the limit of the power and the duty of the commissioner under the seventh section of the act of 1836. The words of the law are very plain and clear, and would seem not to require a reference to any authority; but I prefer referring to the opinion of Judge Cranch in the case of Heath v. Hildreth [Case No. 6,309], in the year 1841, and ever since acquiesced in by the office. He says: "It appears by the proceedings before the commissioner that Mr. Heath regularly filed his application, description, and specification, and paid the duty; that the commissioner made the examination, and that upon such examination it did not appear to him that the same had been invented or discovered by any other person, or had been patented or described in any printed publication in this or any foreign country prior to the alleged invention or discovery thereof by the applicant, or that it had been in public use or on sale with the applicant's consent or allowance prior to his application. The commissioner was therefore prima facie bound to issue the patent to Mr. Heath."

It is, however, I think, the duty of the commissioner to decide whether the invention is new and whether it is the proper subject of a patent. In connection herewith, I will also state that the oath of the party is to be considered in the character of prima facie evidence of the novelty of the invention. Alden v. Dewey [Case No. 153]. According to this admitted construction, it may be properly insisted that

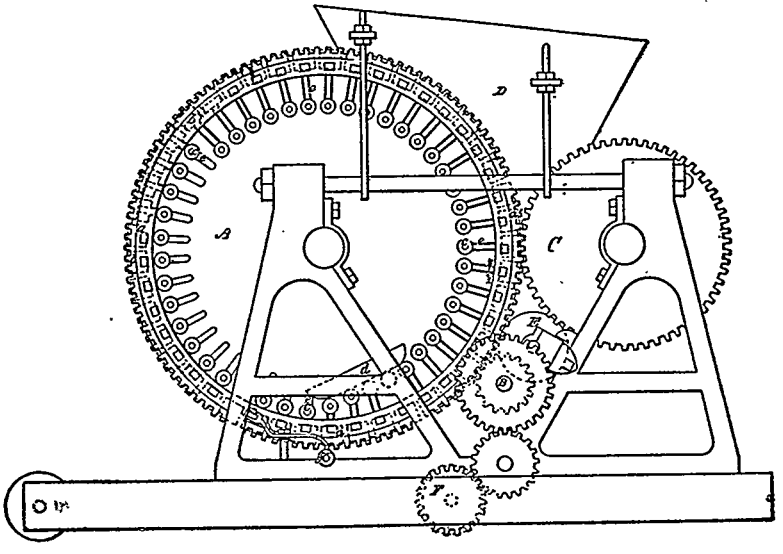
it is the commissioner's duty and power to resort to any circumstances legitimately in his possession for the purpose of repelling the presumption; and that brings me to the consideration of the next point in the case, and that is as to the various instances of supposed analogous use referred to to show want of invention.

It will be remembered that the claim in this case is rested upon the ground of the combination of the three elements—the mold box with a core, and an annular bottom or piston in the construction of the machine, as particularly described in the specification. The commissioner appears to be in error in supposing that if any of the elements forming the claimed invention had been used before for other purposes, that this was sufficient proof of the want of novelty. The books abound with cases to show that such is not the rule. Let a reference to one suffice. Mr. Justice Story, in Ryan v. Goodwin [Case No. 12,186], says: "It is certainly not necessary that every ingredient, or indeed that any one ingredient, used by the patentee in his invention should be new or unused before for the purpose of making matches. The true question is whether the combination of materials by the patentee is substantially new. Each of these ingredients may have been in the most extensive and common use, and some of them may have been used for matches or combined with other materials for other purposes. But if they have never been combined together in the manner stated in the patent, but the combination is new, then, I take it, the invention of the combination is patentable." Again, the result was successful in being capable of producing a brick of a new and useful character. In Curt. Pat. § 15, the rule as a test is stated thus: "The utility of the change is the test to be applied for this purpose. As there cannot be a decidedly useful new result without some degree of invention in producing the change which effects that result, when a real utility is seen to exist, a sufficiency of invention may be presumed."

I have thus endeavored to apply the principles applicable to this case, and I am brought to the conclusion to think that the decision of the commissioner is erroneous in not having duly adverted to them, and that said decision ought to be reversed and a patent granted to the appellant as prayed.

[NOTE. Wagner's application was afterwards, August 11, 1857, granted, as patent No. 17,999. The following drawing of the brick machine is published from the records of the United States patent office:

Fig. 1.



WAGNER (GARDENER v.). See Case No. 5,218.

Case No. 17,039.

WAGNER v. The JUANITA.

[Newb 352.] [1]

District Court, E. D. Louisiana. Nov., 1846.

WAR—CONFISCATION OF ENEMY PROPERTY—LEGISLATIVE AND JUDICIAL FUNCTIONS.

1. Enemy property found within our territory on the breaking out of war, cannot be confiscated without an act of congress authorizing such confiscation.

2. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all questions of policy, it is one proper for the consideration of the legislative department of the government, not of the executive or judiciary.

3. There being nothing in the act of congress recognizing the existence of war between the United States and Mexico, which authorizes the confiscation of the property of the enemy found within our territory upon the breaking out of the war, this court has no power to confiscate such property.

In admiralty.

Mr. Wilde, for plaintiff.

Mr. Benjamin, for respondent.

McCALEB, District Judge. The libelant [W. F. Wagner] in this case alleges, that actual hostilities having been committed upon the United States by the republic of Mexico, and a state of war existing between the two countries, the schooner Juanita, being a Mexican vessel, owned in whole or in part by citizens of Mexico, together with her cargo, tackle and apparel, likewise the property of citizens of Mexico and enemies of the United States, are in the port of New Orleans, and within the jurisdiction of this court: that said schooner with her cargo, was proceeding to the port of Matamoras within the Mexican republic, when they were taken possession of by an officer and men from the United States schooner Flirt, and ordered to New Orleans; the captain and several or all of the crew of the Juanita, being brought on board of the Flirt to this port.

The libel further alleges, that the Juanita was commanded by one Francisco de Astegula, as master, and navigated by a crew of nine men, mariners, citizens of Mexico, and that she and her cargo being property of citizens of Mexico, are good prize of war: that she was at the time of her seizure proceeding with her cargo, consisting of provisions, ammunition and munitions of war, to the relief of Matamoras, then in a state of blockade by the forces of the United States: that since her arrival in the port of New Orleans, her cargo has been transshipped on board of other vessels in this port, but about to sail immediately for places unknown to the libelant: that the United States schooner Flirt, after remaining in the port of New Orleans several days, sailed on a cruise, and that no proceedings whatever were instituted on behalf of the original captors: that the Juanita has been libeled in this court on the instance side thereof in admiralty, upon a pretended claim of Francisco Tio for advances and repairs. The libel then concluded with a prayer for process against the vessel, cargo and apparel, and for their condemnation as prize.

A claim and answer is filed by Francisco Tio, who denies the right of the marshal to act in behalf of the United States, and alleges that he (the claimant) is a citizen of the United States: that he has for a long time past, been in commercial correspondence with José Lopez a subject of the queen of Spain, and vice-consul of her majesty for the port of Matamoras; and that in the months of December and January last, he was the consignee in New Orleans, of the schooner Juanita; and at the request of said Lopez, who was the consignor, advanced various sums of money for the expenses, repairs and refitting of the schooner, as the whole is fully detailed in his libel filed in this court. He further alleges, that by various letters received by him from Lopez, bearing date at Matamoras on the 19th of February, and 2d, 3d and 5th of March last, the purchase of a cargo was requested by said Lopez to be made on his account, to be shipped by the respondent to Matamoras; and the respondent was requested to advance the price of the merchandise upon the promise of Lopez to reimburse the same on the arrival of the goods at the port of destination: that accordingly he purchased merchandise to the value of $7,000, and caused it to be shipped on board the Juanita, and obtained insurance upon it in his own name and for whom it might concern, in the office of the general mutual insurance company in New York: that the schooner thus laden, was duly cleared at the custom-house in this city, and departed on her voyage for Matamoras. He further alleges that at the time of her departure and long afterwards, peace existed betwen the United States and Mexico, and the voyage was in all respects open, public and lawful: that on the 11th of April, the schooner arrived off Brazos St. Jago, and was detained several days in endeavoring to cross the bar, in the vicinity of Point Isabel, where certain forces of the United States, both naval and military, were stationed: that on or about the 25th of April, the commanding officer of these forces sent an officer and soldiers on board the schooner to examine her manifest, and instructed the soldiers to remain on board; and the schooner was thus detained until the 5th of May, when by permission of General Taylor, the commander in chief, the soldiers were withdrawn and the schooner was permitted to return to New Orleans, where she arrived on or about the 13th of May; and after duly reporting at the custom-house, was permitted to discharge her cargo. He alleges that upon the return of the schooner and the breaking up

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

of the voyage by the causes here detailed, he determined to abandon the adventure, and accordingly ordered the discharge of the schooner, and caused the cargo to be landed and stored partly in the custom-house and partly in public stores, and resumed possession of the goods as owner: that he also filed his libel against the schooner on the instance side of this court, to recover the amount of his charges and disbursements: that the marshal of this court well knew the premises, and was in the actual possession of the schooner, her tackle and apparel, in his official capacity, under the process issued at the instance of him (the respondent) when he caused the libel in this cause most unjustly to be filed.

The respondent most positively denies, that the cargo belonged to any citizen of Mexico; and that the schooner was captured by the forces of the United States. He denies that the captain and crew were brought to New Orleans, on the Flirt, or that the cargo consisted of ammunition or munitions of war, or that said cargo was intended for the relief of Matamoras. He denies that that port was on the arrival of the schooner at the Brazos St. Jago, in a state of blockade, or that any blockade had been declared. He denies that any part of the cargo was shipped on other vessels to be sent away. He maintains that his claims against the Juanita for which his libel was filed, are just and legal, and avers that the restraint and detention of the authorities of the United States, ceased entirely on the 5th of May, and that the schooner returned to the port of New Orleans under the control of her own officers and crew, free of any further restraint. He also avers, that the voyage and adventure were in all respects peaceable and lawful: that it commenced during the continuance of peace, and the arrest, detention and return of the schooner, occurred before hostilities had been declared or commenced: that his proceedings after the return of the schooner, were open, public, and notorious, and in every respect lawful and just, while the proceedings of the marshal have been wholly unwarranted, unfounded and illegal. He therefore prays for a restitution of the cargo and for permission to prosecute, without further hindrance, his claim for repairs and advances, on the instance side of the court.

A replication to this answer and claim, was filed on the part of the libelant, alleging that the respondent by his own showing, admits, that the seizure of the schooner by the United States force, was abandoned, and therefore it can in no wise interfere with, or prevent the present subsequent seizure, or affect the rights of libelant under the same. It avers that the pretended claim of the respondent, is unfounded in law and fact, and absorbed and destroyed by the law of war: that a blockade was rigorously enforced at the time the Juanita arrived off the Brazos St. Jago. It further avers, that the answer is evasive and disingenuous, in not stating the national character of the vessel, and in not stating whether the cargo did at the time of shipment and at the time of capture, belong to the claimant.

As cases of this kind are new in this court, I have considered it due to the parties in this action, to set forth distinctly the grounds upon which each has rested his claims for a favorable decision. It will be apparent, however, from the facts developed upon the trial, that many points have been presented by the pleadings and discussed in argument, which are not material to a correct conclusion. The most important allegations in the libel are not sustained by those facts. There was indeed a seizure of the vessel at the mouth of the Rio Grande, by the forces of the United States there stationed, but as appears by the admission in both the answer and the replication, that seizure was abandoned. The Juanita, therefore, did not return to the port of New Orleans in charge of the Flirt, as alleged in the libel, but under the control of her own master and crew.

It is due to the claimant that I should state that, after an attentive examination of the evidence, I have not been able to satisfy my mind that there has been anything unfair or improper in his conduct. There is nothing in the papers of the vessel, against which this proceeding has been instituted, that implicates him in a transaction at all inconsistent with fair dealing, or the rules which govern an open and honest commercial intercourse. His correspondence with his consignor, has disclosed nothing like a fraudulent design to carry on a contraband or other trade with an enemy. He seems simply to have acted in accordance with his instructions, in the purchase and shipment of the cargo, and at a time when it does not appear that war prevailed between this country and Mexico. It is not proven that at the time he cleared the vessel for Matamoras, that port was in a state of blockade, nor does it appear that any blockade was declared or enforced until after the arrival of the vessel off Brazos St. Jago. His answer is not as explicit as it should be on the subject of the national character of the vessel, but as it was made under oath, and contains so full, and what appears to me, so candid a statement of the official character of his consignor, and the relations which existed between that person and himself, that I do not feel myself at liberty to presume that his omission to give the national character of the vessel, was prompted by a willful design to evade, when perhaps he was ignorant of the true owners. But regarding the omission in the light of an evasion, I can only give the libelant the full benefit of it, by considering it as an admission of the fact that the vessel was Mexican property, a fact, in my opinion, sufficiently proven by the testimony elicited by the examination in preparatorio.

Proceeding upon the assumption that hostilities commenced between the American and Mexican forces after the arrival of the vessel off the Brazos, and that war existed at the time she was seized by order of the commanding general, I need not inquire how far this

court would have been compelled to proceed to condemnation under that seizure, if those who made it had chosen to prosecute to an adjudication. That question cannot arise in the cause. We have seen that the seizure was merely temporary. The schooner was released, and permitted to return to this port. She was found here when the libel in this case was filed, and when the act of congress recognizing the existence of the war was passed, and the proclamation of the president on the subject was received. Admitting, then, that both vessel and cargo belonged to Mexican citizens, and became enemy property on the breaking out of the war, the only question which can arise is that which has already received the consideration of the supreme court of the United States, to wit: Can enemy property, found within our territory at the breaking out of war, be confiscated by a judgment of this court without an act of congress authorizing a confiscation? So far as the cargo in this case is concerned, this cannot be considered an open question. There is no doubt that when the libel was filed the cargo had been landed; and in the case of Brown v. U. S., 8 Cranch [12 U. S.] 110, the very questions at issue were: 1st. May enemy property, found on land at the commencement of hostilities, be seized and condemned, as a necessary consequence of the declaration of war? 2d. Is there any legislative act which authorizes such seizure and confiscation?

Both these questions were answered in the negative by the court, and although the reasoning of Chief Justice Marshall, who delivered the opinion, was directed to the questions here stated, the principles of law which he has recognized as rules of decision in cases of this nature, are believed to be sufficiently broad to cover the case of vessels found in our ports at the breaking out of war. "Respecting the power of government," say the court, "no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask, is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power? The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation. Between debts contracted under the faith of laws, and property acquired in the course of trade on the faith of the same laws, reason draws no distinction. Although, in practice vessels, with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace, in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The inquiry is whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will; and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts, being precisely the same with the right to confiscate other property found in the country; the operation of a declaration of war on debts and on other property found within the country, must be the same."

After quoting the authority of Vattel, that "the sovereign can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration of war," the chief justice thus proceeds: "It is true that this rule is, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applies equally to things in action and things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest property of the enemy in the sovereign, his presence could not exempt it from this operation of war. Nor can a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others. Chitty, after stating the general right of seizure, says: 'But in strict justice, that right can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities.'" On this authority the supreme court remark: "The modern rule, then, would seem to be that tangible property, belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted, stipulating for the right to withdraw such property. This rule appears to be totally incompatible with the idea that war does, of itself, vest the property in the belligerent government. It may be considered as the opinion of all who

have written on the jus belli, that war gives the right to confiscate, but does not, itself, confiscate the property of the enemy; and their rules go to the exercise of this right. The constitution of the United States was framed at a time when this rule, introduced by commerce, in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property which may enable the government to apply to the enemy the rule that he applies to us. If we look to the constitution itself, we find this general reasoning much strengthened by the words of that instrument. That the declaration of war has only the effect of placing two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers which accompanies that of declaring war. "Congress shall have power"—"to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water is to be confined to captures which are ex-territorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to congress of the power in question, as an independent substantive power, not included in that of declaring war. The acts of congress furnish many instances of an opinion that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found at the time within the territory. War gives an equal right over persons and property; and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war."

The court then examine the acts of congress relating to the war with Great Britain, and especially that by which war was declared with that country, and after quoting that portion which authorizes the president to issue to private armed vessels letters of marque and reprisal, it thus continues: "That reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of the nation, has been admitted; but it is not admitted that in the declaration of war the nation has expressed its will to that effect. It cannot be necessary to employ argument in showing that when the attorney for the United States institutes proceedings at law for the confiscation of enemy property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel."

It was urged in the case of Brown v. U. S., [supra], as well as in the case now under consideration by the proctor for the libelant, that in executing the laws of war the executive may seize and the courts condemn all property, which, according to the modern law of nations is subject to confiscation, although it may require an act of the legislature to justify the condemnation of that property, which according to modern usage, ought not to be confiscated. The language of the chief justice in answer to this argument is too strong and explicit to be misunderstood. "This argument," says he, "must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed; this usage is a guide which the sovereign follows or abandons at his will. The rule like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. This rule is in its nature flexible; it is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary. Commercial nations in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country? is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary. It appears to the court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our own territory at the declaration of war." I make no apology for the copious extracts I have taken from this able and lucid opinion. As an exposition of the law, it is obligatory upon the tribunal, and settles all the material points of controversy in the case now under consideration. The remarks of the chief justice in exposing the want of authority in the district attorney to file a libel under the law of congress, declaring war with Great Britain, apply with full force to the libelant in the present action. The question how far a seizure of enemy property found on land upon the declaration of war,

can be made without an act of congress, has been determined in terms too clear to leave any doubt on the mind of the court; and the rights of the owner to the cargo of the Juanita, are fully established, even admitting that owner to be an enemy. In respect to the vessel herself, now in the port of New Orleans, I consider the reasoning of the court equally strong against the claim of the libelant; she is to all intents and purposes property as much infra-territorial, within the limits of the United States, as the cargo placed in store a few hundred yards from the shore where she is moored; and she can with no more reason be said to be beyond the territorial limits of the United States, than the river upon whose waters she is now floating.

It is not pretended that there is anything in the act of congress recognizing the existence of war with Mexico, that confers on this court the power to confiscate enemy property, found within our territory upon the declaration of war; and without such power, it is clear this seizure cannot be maintained. But it was contended by the learned counsel of the libelant in his concluding argument, that the decision of the supreme court of the United States, in the case of Brown v. U. S., was rendered at a period when the law of prize was new in that court and its principles imperfectly understood; and that the rules therein recognized, are inconsistent with the principles laid down in subsequent decisions, which emanated from the same high tribunal, as well as the well established principles of the practice of the high court of admiralty, in England. In the course of my anxious investigation into the merits of this cause, I have looked in vain for any rule or principle in the decisions of the supreme court, subsequent to that of Brown v. U. S., which can justly be regarded as inconsistent with, or in anywise militating against their judgment previously rendered; on the contrary, I find in a decision by them subsequently rendered, a distinct recognition and affirmation of the principles which had been their guide in the case here relied on. That a different rule, so far as relates to vessels in port, prevailed in the high court of admiralty, in England, during the time the bench was occupied by Sir William Scott, seems to be admitted by the court, in the case of Brown, and must be evident to all who have examined the opinion of that eminent judge, in the case of The Rebeckah, 1 C. Rob. Adm. 227, and Id. 230, note. Whether this difference arose from a strong inclination on the part of Sir William Scott, in favor of captors, or a disposition on the part of our supreme tribunal to adhere closely to the provisions of a written constitution, and their forbearance to exercise power not delegated by the legislative department of the government, it is unnecessary for me to decide, but that the difference exists, is beyond a doubt. "I respect Sir William Scott," says Chief Justice Marshall, in delivering, not a dissenting, but a separate opinion, in the case of The Venus, 8 Cranch [12 U. S.] 299, "as I do every truly great man, and I respect his decisions; nor should I depart from them on light grounds, but it is impossible to consider them attentively, without perceiving that his mind leans strongly in favor of captors. * * * In a great maritime country, depending on its navy for its glory and its safety, the national bias is perhaps so entirely in this direction, that the judge, without being conscious of the fact, must feel its influence. However this may be, it is a fact of which I am fully convinced, and on this account it appears to me to be the more proper to investigate rigidly the principles on which his decisions have been made, and not to extend them, where such extension may produce injustice."

The proctor of the libelant has also urged upon my attention the dissenting opinion of Mr. Justice Story, in the case of Brown v. U. S. Whatever may be my veneration for the memory of that illustrious jurist, whatever may be my respect for all that has emanated from his vigorous and comprehensive mind, and especially for the learning and ability he has displayed in the opinion he delivered in the very case referred to, it is unnecessary for me to say that I cannot permit his single dissenting opinion to operate as my guide in opposition to that of the majority of the court with Marshall at their head.

If the views of the court, conveyed in the lucid language of the venerable chief justice, require any confirmation, it will be found in the excellent treatise of Wheaton on International Law (page 366): "As the property of the enemy is in general liable to seizure and confiscation as prize of war, it would seem to follow as a consequence, that the property belonging to him and found within the territory of the belligerent state, at the commencement of hostilities, is liable to the same fate with his other property, wheresoever situated. But there is a great diversity of opinion upon this subject among institutional writers, and the tendency of modern usage between nations seems to be, to exempt such property from the operations of war."

After a learned and able review of the opinion of Grotius, Bynkershoek and Vattel, the writer concludes: "It appears, then, to be the modern rule of international usage, that property of the enemy found within the territory of the belligerent state, or debts due to his subjects by the government, or individuals, at the commencement of hostilities, are not liable to be seized and confiscated as prize of war. This rule is frequently enforced by treaty stipulations, but unless it is thus enforced, it cannot be considered an inflexible though an established rule. 'The rule,' as it has been beautifully observed, 'like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign. It is a guide which he follows or abandons at his will; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations, which may continually vary.' Among these considerations is the conduct observed by the enemy; if he confis-

cates property found within his territory, or debts due to our subjects, on the breaking out of war, it would certainly be just, and it may under certain circumstances, be politic to retort upon his subjects by a similar proceeding. This principle of reciprocity operates in many cases of international law."

The opinion of the supreme court of the United States, in the case of Brown v. U. S., is afterwards referred to and quoted at length as establishing the rule which prevails in our own country. If a different rule had been subsequently prescribed by the court itself, it would hardly have escaped the vigilant researches of the distinguished author.

For the reasons here given, I am clearly of opinion that the vessel and cargo should both be restored; and I do hereby decree restitution accordingly, without the payment of costs.

WAGNER (U. S. v.). See Case No. 16,630.

Case No. 17,040.

WAGNER v. WATTS.

[2 Cranch, C. C. 169.] [1]

Circuit Court, District of Columbia. June Term, 1819.

COMPETENCY OF WITNESSES—INTEREST—MORTGAGE OF STOCK OF GOODS.

1. In a suit between contending mortgagees, the mortgagor is a competent witness for the first mortgagee, to identify the goods described in the first mortgage.

2. A mortgage of "the whole of my stock of books and stationery now remaining in my possession, and also such additions thereto as I may hereafter make from time to time to the same," is not void for uncertainty, but conveys only the stock on hand at the date of the mortgage.

Assumpsit for $3,000, money had and received by the defendant to the plaintiff's use, being the proceeds of the sale of the stock of books and stationery of Mr. Richards, a bookseller in Georgetown, under a mortgage made by him to the defendant, dated 3d of May, 1817, and upon which the plaintiff claimed to have a prior mortgage, dated 1st of February, 1817. The property conveyed by the mortgage to the plaintiff was thus described: "The whole of my stock of books and stationery now remaining in my possession, and also such additions thereto as I may hereafter make from time to time to the same." And the mortgage provided, that, whereas the plaintiff had indorsed and thereafter might indorse various promissory notes of Richards, the plaintiff might from time to time sell at public sale, such part of the said stock of books and stationery as should be necessary to take up any of the said notes which Richards should fail to pay when due. This mortgage was duly acknowledged and recorded agreeably to the act of Maryland respecting secret sales. The subsequent mortgage to the defendant, by Richards, was of all his books and stationery, and stock in trade, &c., and provided that Richards should retain the possession, and carry on the trade until default should be made by Richards in not paying certain notes which the defendant also had indorsed for him, with power to the defendant to take possession of the whole and proceed to sell, &c. This mortgage was also duly acknowledged and recorded. Under this power, the defendant seized the goods and sold them, to the amount of $4731.62; of which sum $1101 were paid over to the plaintiff. The stock thus sold consisted, in part, of the original stock at the date of the first mortgage, and in part of other books and stationery purchased with the proceeds of the original stock, or exchanged for the same.

This action was brought to recover the residue of the proceeds of sale of the whole stock. All the notes indorsed by the plaintiff previous to the 10th of April, 1817, had been paid; and on that day the plaintiff indorsed a new note for Richards for $1550, and on the 16th of April, 1817, another for $1600, and on the 1st of May, 1817, another for $450, all of which were discounted at some of the banks, and $800 of the proceeds were applied to the use of the plaintiff, and the notes themselves were still lying over unpaid and dishonored, and the plaintiff held accountable therefor. Richards continued in possession of the books and stationery from the date of the first mortgage, and continued to exercise acts of ownership over them, carrying on the business in a retail shop, selling and exchanging in the usual course of business, until the defendant took possession of the shop and goods. Richards, while in possession, was in the habit of buying other books and stationery with the proceeds of sale of the original stock, so that it was uncertain what portion of the original articles remained when the defendant took possession on the 10th of June, 1817.

Upon the trial, the plaintiff offered to examine Mr. Richards, as a witness, to identify the goods which were part of the original stock on hand at the date of the first mortgage.

Mr. Swann and Mr. Taney, for defendant, objected that he was interested.

But THE COURT (MORSELL, Circuit Judge, not sitting), not perceiving his interest, overruled the objection, and the defendant took a bill of exceptions.

The defendant's counsel then prayed the court to instruct the jury that the mortgage to the plaintiff was void upon the face of it, for uncertainty, both as to the debts intended to be secured, and the property intended to be conveyed by it; and cited 4 Com. Dig. 296, tit. "Grant," D, and 3 Bac. Abr. 382, 384.

Mr. Jones, contra, cited Hodgson v. Butts, 3 Cranch [7 U. S.] 140.

THE COURT refused to give the instruction.

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

The counsel for the defendant then moved the court to instruct the jury that, upon the evidence, the plaintiff had no right to recover any money for the books and stationery thus sold by the defendant, unless they were the property of Richards at the date of the first mortgage.

Mr. Swann and Mr. Taney, for defendant, cited 3 Bac. Abr. (Gwillim's Ed.) 307, note from Cowp. 434; Ryall v. Rolle, 1 Wils. 261; 1 Bac. Abr. 467; Yelverton v. Yelverton, Cro. Eliz. 402.

Mr. Jones and Mr. Key, for plaintiff, cited Hooe v. U. S., 1 Cranch [5 U. S.] 318; Com. Dig. tit. "Grant," C, p. 295; Pow. Cont. 156; Shep. Touch. 241.

THE COURT gave the instruction as prayed, and further instructed the jury, that the plaintiff could not recover for any part of the stock of goods which was acquired by Richards subsequently to the date of the first mortgage, whether such additions to the original stock of goods consisted of goods bought with the proceeds of the sales of the said original stock, or of goods exchanged for the same as aforesaid.

The plaintiff took a bill of exceptions, but no writ of error.

Verdict for defendant.

But see 2 Eq. Cas. Abr. 479, 480, and Bucknal v. Roiston, Prec. Ch. 285.

WAGNER (WOODHULL v.). See Case No. 17,975.

Case No. 17,041.

In re WAHL.

[15 Blatchf. 334.] [1]

Circuit Court, S. D. New York. Oct. 30, 1878.

EXTRADITION PROCEEDINGS—COMMISSIONER'S POWERS.

Where a commissioner has jurisdiction of extradition proceedings, and has before him legal and competent evidence as to the criminality of the accused, he is made the judge of the weight and effect of the evidence, and this court has no power to review his action.

[Cited in Re Fowler, 4 Fed. 317.]

[Application of Michael Wahl for a writ of habeas corpus.]

Salomon & Burke, for German government.

Abram J. Dittenhoefer, for accused.

BLATCHFORD, Circuit Judge. The commissioner in this case had jurisdiction of the extradition proceedings. He had before him legal and competent evidence as to the question whether the signature to the power of attorney was forged. If such signature was forged, the act was forgery, within the treaty. The commissioner also had before him legal and competent evidence as to whether such forgery was committed by the accused. The commissioner is made the judge of the weight and effect of the evidence, on those points. This court has no power to review his action in exercising such judgment on such legal and competent evidence. The commissioner might very properly have decided that he was satisfied that the signature to the power of attorney was forged, and forged by the accused, and have disbelieved the story of the accused that the signature was genuine, on the ground that he was not worthy of credit, because on his direct-examination he represented the paper used as a power of attorney which had been signed in blank by Levi, and stated that powers of attorney, of which this was one, were left in his custody, signed and executed by Levi in blank, to be used as required during his absence, while, on his cross-examination, he stated that the paper was not partly printed, but was a blank sheet of paper with the name of Levi written at the bottom, thus showing that it was no power of attorney, as signed by Levi. The commissioner might well have discredited all the testimony of the accused on this subject, and probably did. At all events he had before him evidence on the weight of which it was his province to pass, and it must be presumed that he did pass on it, and that he did find that the signature was a forgery and forged by the accused. Under the decisions of this court, in Re Stupp [Case No. 13,563], and in Re Vandervelpen [Id. 16,844], this court cannot review the judgment of the commissioner in this case holding the accused for extradition, and the writs must be discharged, and the accused be remanded to custody under the commitment under which he was held.

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

WAHL (HINE v.). See Case No. 6,517.

Case No. 17,042.

WAIGHT v. UNITED STATES.

[Hayw. & H. 189.] [1]

Circuit Court, District of Columbia. June 4, 1844.

CRIMINAL LAW—EVIDENCE OF PREVIOUS OFFENCES—FALSE PRETENSES.

Where a prisoner is indicted for obtaining money under false pretenses, it is not competent to allow evidence to go to the jury that the prisoner had previously obtained money by means of other false representations; but it is competent to show that he had made previous false representations to others for the purpose of obtaining money from them.

James Hoban, for defendant.

Philip R. Fendall, for the United States.

The prisoner [William S. Waight] was indicted in the criminal court for the county of Washington, District of Columbia, for obtaining money under false pretenses, and found guilty. The points raised, and decided by the circuit court, will be found in the following bill of exceptions: Upon the trial of this cause the

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

United States offered in evidence, by the testimony of Mr. Hawley, a competent witness, that the prisoner borrowed ten dollars from him about seven years ago, upon statement of the prisoner that he had shipped large quantities of cotton to the North; that he was the son of the collector of the port of St. Johns, Nova Scotia; that he was very intimate with a number of clergymen, and spoke familiarly of them and concerning them; and that he knew several bishops, among them the bishops of Nova Scotia, of Massachusetts, and of South Carolina, with all of whom Doctor Hawley was acquainted; on the strength of which asserted acquaintance of the prisoner, the witness, Doctor Hawley, lent the money; that the money never was repaid him; that he does not know whether these statements were true or false. And further evidenced by J. M. Cutts, a competent witness, that the prisoner called on him to borrow money some two years ago, and said that he had certain papers and deeds of Mr. Madison, which he had lost, and that he was out of money; that he does not know whether those statements were true or false; that he called himself Scott; that witness gave him no money. To the admissibility of this evidence, the prisoner, by his counsel, objected, but the criminal court overruled the objection and admitted the evidence; to which admittance the prisoner excepted.

This cause being argued by counsel, THE COURT gave the following opinion:

That the criminal court did not err in allowing evidence to go to the jury that the prisoner had represented himself to the Rev. Dr. Hawley, a witness in the cause, as a son of the collector of the port of St. Johns, Nova Scotia, or that the prisoner had represented himself to James M. Cutts, another witness in the cause, as being named Scott. But the criminal court erred in allowing evidence to go to the jury that the prisoner had obtained money from the said Dr. Hawley by means of the representations set out in the bill of exceptions. The judgment of the criminal court was reversed, and the cause remanded with directions to award a venire facias de novo.

WAILES (McDANIEL v.). See Case No. 8,746.

Case No. 17,043.

WAIT v. BULL'S HEAD BANK.

[19 N. B. R. 500.] [1]

District Court, S. D. New York. July 15, 1879.

SUIT BY BANKRUPT ASSIGNEE—FRAUDULENT MORTGAGE—EVIDENCE.

[1. A mortgage given by a firm is not fraudulent as to creditors because it in terms adopts a debt incurred by one of the partners in behalf of the firm, and includes that in the mortgage.]

[2. If a mortgage given by a debtor is void under the state law, the property passes to the debtor's assignee in bankruptcy.]

[3. A mortgage of manufacturing property was given to secure a pre-existing debt, under an agreement that the mortgagors should remain in possession, and go on with the business, purchasing and working up the necessary materials, and should apply the proceeds first to the expenses of the business, and then to the mortgage debt. The materials to be purchased were a substantial part of the resulting product, and there was no outward showing of a change of possession, nor anything to lead other creditors to suspect that the mortgagors were not working for themselves. *Held*, that the mortgage was void as to other creditors, as delaying them for the sake of giving the mortgage creditor a possibility merely of payment out of the property.]

J. V. V. Olcott and E. E. Anderson, for complainant.

John H. Glover and R. L. Sweezy, for defendants.

CHOATE, District Judge. The debt for which the mortgage was given was not the individual debt of one of the partners. At the time of the giving of the mortgage, if not before, his obligations to the bank for the use of the firm were adopted by the firm. The mortgage in terms so adopts them. This was no fraud upon creditors any more than a payment by the firm of moneys advanced by a partner for its use would be. If the mortgage was void under the laws of New York, as given to defraud and delay creditors, the property described in it undoubtedly passed to the assignee under the bankrupt law, although the mortgage might not be voidable as made in violation of the provisions of the bankrupt law [of 1867 (14 Stat. 517)]. Platt v. Preston [Case No. 11,219].

The question whether or not the mortgage was void as delaying and defrauding creditors is one of fact to be determined upon all the circumstances of the particular case. In this case I cannot escape the conclusion that it was fraudulent. There was no obvious or apparent change of possession, and the acts of the parties, as shown by the accounts and papers, and the testimony of the officers of the bank, show that, contemporaneously with the execution of the mortgage, it was agreed that the mortgagors should remain in possession, go on with the business so far as to employ workmen, purchase materials and parts of pianos necessary for completing the unfinished pianos, and work up the materials on hand with those thus purchased into new pianos, sell those to be finished, with the approval of the mortgagees, on credit or for cash, and apply the proceeds, first, to the expenses of this business, and then, if any remained, to the mortgage debt. The materials and new parts required to be thus purchased were a substantial part, both in amount and value, of the resulting product. Although the mortgagors agreed to do this as the mortgagees' agents, there was no outward manifestation of a change of possession, nor anything to lead other creditors to suspect that the mortgagors were not working on their own account. The fatal objection to the arrangement was, that it did not secure the application of the mortgaged property to the payment of the

[1] [Reprinted by permission.]

debt immediately, or within a reasonable time. If the business to be carried on with this in view proved unsuccessful, no part of the debt might be paid, and yet all the property be disposed of, and, meanwhile, all other creditors would be delayed for the sake of giving this creditor a possibility, merely, of payment out of the property. Such an arrangement is necessarily void as to creditors, and as any other creditor could before and at the time of the filing of the original bankruptcy petition break it up, the assignee in bankruptcy can recover the property for the benefit of the creditors at large.

It is unnecessary to determine now what part, if any, of the money received by the defendants from the sale of pianos, beyond the sum of five hundred and ninety-four dollars credited by them, should be regarded as paid to them in discharge thereof. They claim to have applied the rest of the money according to the agreement with the mortgagors. If they have not, it of course must be credited on the mortgage debt, and the evidence of such application is insufficient; but the question will more directly arise if the defendant shall offer to prove its debt.

Decree adjudging the mortgage void, terms of the decree to be settled on notice.

WAIT (GOODYEAR v.). See Case No. 5,587.

Case No. 17,044.

In re WAITE et al.

[1 Lowell, 207;[1] 1 N. B. R. 373 (Quarto, 84).]

District Court, D. Massachusetts. Feb., 1868.

PARTNERSHIP — ACTIVE AND SILENT PARTNERS — PROMISSORY NOTE—ACTS OF BANKRUPTCY —FRAUDULENT PREFERENCE.

1. Where a firm consisting of two partners carried on business in the name of the active partner, a promissory note given by him to the silent partner, for the amount of capital contributed by the latter to the joint stock, is the separate note of the active partner.

[Cited in Re Batchelder, Case No. 1,098; Re Redmond, Id. 11,632; Re Lane, Id. 8,044.]

2. Where such a firm, being insolvent, and known by the partners to be so, is dissolved, and the silent partner conveys all his interest in the joint property to the active partner, who on the same day, and as part of the same transaction, mortgages the whole stock in trade to secure the pre-existing debt of a separate creditor of each partner, and neither partner had any separate estate: *held*, this transaction is fraudulent throughout, in the sense of the bankrupt law, as a preference; and both partners are liable to be adjudged bankrupt on the petition of a joint creditor, seasonably filed.

[Cited in Re Johnson, Case No. 7,369; Mattocks v. Rogers, Id. 9,300; Re Sauthoff, Id. 12,380.]

In bankruptcy.

This was a petition by joint creditors of Walter H. Waite and E. J. Crocker, lately partners, trading under the name of Waite alone, that they might be adjudged bankrupts, and was filed October 15, 1867. The evidence showed that E. S. Jaffray & Company, the petitioning creditors, had encouraged Waite to set up in Boston a business in which he had had long experience as a clerk and salesman, and had lent him five thousand dollars as his capital, on his promise to procure a partner who should put in an equal amount; and they further promised, if this should be done, to give the firm a large "line" of credit. Crocker put in six thousand four hundred dollars, which he borrowed of Mrs. Badger, his wife's mother, and took Waite's notes therefor, on demand, which he at once indorsed to Mrs. Badger; and he wrote the petitioners that he was a general partner, though his name would not appear, "at first," in the firm, for reasons which he gave. The petitioners sold a large amount of goods to Waite, on credit, the price of which was admitted to be the joint debt of the firm, and their debt was larger than those of all others together.

Crocker took no active part in the business, and had no property of his own, and no experience in this kind of business. Nor had Waite any separate estate. A short time before the joint debt to the petitioners came due, Crocker urged Waite to take an account of stock, and make an exhibit of the state of the partnership business. Waite did this, after much importunity on Crocker's part, and the account was finished and examined by the parties on the twenty-third of September, 1867. Crocker testified that on seeing the account he was dissatisfied with the small amount of sales, and the large amount of Waite's personal expenses, and proposed a dissolution of the firm, which was agreed to. Waite's statement was that Crocker said he was unwilling to let the money lie longer without security, and that, hoping to get a new partner, he agreed to give security. They went immediately to the office of Crocker's attorney, where a formal dissolution of the firm was drawn up and executed, by which the whole stock, &c., was made over to Waite, and he agreed to pay the joint debts. On the same day and as part of the same transaction, Waite's notes, held by Mrs. Badger, were given up, and he made out new notes directly to her for the whole amount of the old notes and the interest due on them, payable one-third on demand, one-third in four months, and one-third in eight months, with interest, and secured them by a mortgage on the whole stock in trade, furniture, and fixtures. This mortgage was the act of bankruptcy relied on by the petitioners.

T. H. Sweetser and E. H. Abbot (T. F. Nutter with them), for the petitioners.

B. F. Brooks, for Crocker, and A. A. Ranney, for Waite. Partners may dissolve their connection when they please, and whether they are insolvent or not, and their acts in this respect will be upheld by the courts. Ex parte Ruffin, 6 Ves. 119; Ex parte Williams, 11 Ves.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

3; Howe v. Lawrence, 9 Cush. 553; Robb v. Mudge, 14 Gray, 534.

There was no fraud in fact intended in this case.

LOWELL, District Judge. It is evident that the defendants were insolvent in the technical sense on the twenty-third of September, for they had no ready means to meet the large debts presently to fall due; and they were fully aware of this state of things, and discussed the means for obtaining an extension of time. If so, a mortgage of the whole stock in trade to a pre-existing creditor would be prima facie a preference. In England such a mortgage to a pre-existing creditor has always been held to be fraudulent per se, where it is of the whole stock, or of so much as will produce insolvency. Worseley v. De Mattos, 1 Burrows, 647; Newton v. Chantler, 7 East, 138; Siebert v. Spooner, 1 Mees. & W. 714; Lindon v. Sharp, 6 Man. & G. 895; Graham v. Chapman, 12 C. B. 85; Smith v. Cannan, 2 El. & Bl. 35. I do not say that under our statute such a mortgage is conclusive evidence of a technical fraud; but it is very strong evidence, because it is out of the ordinary course of business, and is of itself enough, if duly recorded, to destroy the credit of any trader, and therefore would not be resorted to by one who had readier means of paying the debt.

There is the further circumstance that Mrs. Badger was not a joint creditor as to the larger part of her debt. Crocker says he does not know whether the notes given him by Waite were intended to be joint or separate; but Waite says they were separate; and they must have been so, because they were given for capital contributed by Crocker, and he would not promise himself to repay it. The notes, being on demand, were subject, by the law of Massachusetts, to the same equities in the hands of Mrs. Badger that would have affected them in Crocker's, and as he was her agent, she would be bound by his knowledge, whatever had been the form of the notes. Here there is a mortgage of all the joint estate to secure a separate debt, neither partner having any separate property. This appears a preference on the face of the transaction, and the evidence rather confirms the inference than removes it. But it is said that partners may lawfully dissolve their firm, even if they are insolvent, and that their creditors will be bound by their action, though it should have the effect to convert joint into separate property to the injury of a large class of creditors. The courts have certainly gone a great way in sanctioning the dissolution of partnerships, and have held to what appear to be the logical consequences of the dissolution. But every such judgment which I have seen is qualified by the condition that the act itself should have been done in good faith. Here the evidence is very strong that good faith was wanting. The partnership articles have been destroyed, and their contents, excepting in one particular, have not been disclosed. It appears, however, that Crocker urged the taking of the account before the regular time of accounting according to the articles had come; that he acted throughout not as a partner, but as agent for Mrs. Badger, and with a view to her interests; and I consider it the fair result of the whole conduct of the parties, that he never intended to risk his mother's capital, but intended to get security for it, whenever he should have occasion to fear an eventual loss. He had no property of his own, and no interest to dissolve the firm, but some interest to continue it with a view to possible profits.

Under the peculiar circumstances of this case, the dissolution of the partnership was a fraud on the statute, and rather an incident to a scheme for giving one creditor a preference, than a bona fide copartnership act. Indeed the mere dissolution itself would work a preference to the separate creditors of Waite, by converting the joint into separate assets; and where such a result is contemplated, and is the motive or one of the motives of the act of dissolving a firm, the act is voidable by the joint creditors, whether the result must be worked out through a bankrupt law or through the attachment laws of a state. Ex parte Shouse [Case No. 12,815]; Ferson v. Monroe, 1 Fost. (N. H.) 462.

Under the bankrupt act of 1841 [5 Stat. 440], a transaction which was relied on as a preference by a debtor, must have been done in contemplation of becoming bankrupt under the statute; though such contemplation might have been inferred from circumstances like those which this case discloses. Buckingham v. McLean, 13 How. [54 U. S.] 150. The law of 1867 [14 Stat. 517] is not thus limited, and requires only that the debtor, being insolvent, should do the act, with intent to prefer (see sections 29, 35, 39); which implies, undoubtedly, that the debtor expected that some advantage would accrue to the favored creditor over the rest; that is, he must have thought it probable or possible that he should not pay all in full. Under every system of bankruptcy, such facts as appear in this case would be ample proof of the intent.

Such a mortgage, given with the intent to prefer, may be charged either as a preference or a conveyance to delay and hinder creditors, for it is both. And the creditors may well enough rely on the mortgage or on the dissolution of the firm, or on both; for it was all one transaction, and all fraudulent in the technical sense, as a preference in bankruptcy, though at common law and in equity the securing a just debt is no fraud.

This case does not raise the question whether partners can be adjudged bankrupt for any thing done or omitted after they have dissolved their connection, because the act of bankruptcy was contemporaneous with the dissolution and a part of the same transaction. I have no doubt that a joint voluntary petition may be maintained so long as there are joint debts outstanding, but here it is only necessary to decide that a fraudulent dissolution will not

oust the jurisdiction of a joint petition in invitum, and that I decide. Adjudication ordered.

[See Case No. 7,170.]

WAITE, In re. See Case No. 7,170.

Case No. 17,045.

WAITE et al. v. The ANTELOPE.

[Bee, 233.] [1]

District Court, D. South Carolina. Jan., 1807.

SALVAGE—RESCUE OF NEUTRAL VESSEL FROM BELLIGERENT.

Salvage is not due for rescuing the vessel of a neutral out of the hands of a belligerent who took possession of her for a supposed breach of treaty or of the law of nations.

In admiralty.

BEE, District Judge. The brig Antelope, an American bottom, and owned by American merchants residing in Baltimore, on her return from St. Thomas, a neutral island, to Baltimore, with a cargo belonging to American citizens, was, on the 6th day of December last, on the high seas, taken possession of by the British frigate Hebe. Six of the crew were removed into the frigate, and an officer and seven men of the latter were put on board of the Antelope, with orders to carry her to Jamaica for adjudication, upon the ground of having no certificate of the cargo signed by an American consul. Two days afterwards, the remainder of the crew of the Antelope, assisted by a number of passengers, overpowered the officer and men of the Hebe, and on the 20th December, brought the brig into the harbour of Charleston. They now libel for salvage. The owners, by their agent, have filed a plea in bar to the suit, alleging that this is not such a case as entitles to salvage, as a right. The court is called upon to decide whether this is a valid plea. The case is new, and important, both as respects these parties, and as tending to establish a precedent. Attempts are frequently made to extend the doctrine of salvage to cases where it does not apply. Salvage is due for assistance in dangerous situations at sea, and for property preserved, after having been cast on shore. So where it is rescued from enemies or pirates. But in all these instances it must be shewn that the thing saved was in danger, without such aid, of being lost, or materially injured. It cannot be denied that, according to the acknowledged law of nations, neutral vessels navigating the high seas are liable to examination and search; and, in some cases, to be carried into port for adjudication. All the modern treaties between maritime nations recognize this doctrine, and it has been expressly acceded to in the treaties to which the United States have, at any time, been a party. If on such investigation it appear that the neutral vessel was improperly detained, the tribunals of the belligerent are bound to restore her, with damages for loss and detention, and with costs of suit. But have the crew of a vessel so detained, a right to resist search in the first instance, or to recover the vessel by force of arms previously to adjudication? If lives are lost in attempting this, and the parties are afterwards retaken, may they not be proceeded against for murder? And will not confiscation of vessel and cargo be the consequence of merely an endeavour to rescue?

These are questions which I shall not enter into at present; but they ought to be seriously examined before attempts of this sort are made, and before claim of salvage is set up as being in all cases matter of right. That commerce has sustained very great injury by the wanton exercise of this power of the belligerents, every day's experience proves. Government, in this country, does not sleep over the violated rights of the citizens, and redress is sometimes obtained. It has much oftener been denied; but does this authorize individuals to take the law into their own hands, and by endeavouring to redress themselves, to expose the peace and happiness of their country? Certainly not. The same mode of reasoning will apply to the courts of the neutral power. In this country, they are bound, by the constitution of the United States, to determine according to treaties and the law of nations, wherever they apply. It would ill become them, then, to exercise jurisdiction expressly taken away by these treaties, and by this law; which, I apprehend, I should do, if I were to decree salvage in the present case as matter of right.

The cases quoted by the advocates on both sides relate wholly to recaptures of neutral vessels by one belligerent from another. In these instances it was the established practice to restore neutral property, without salvage, previously to the war produced by the French revolution. This was said to be a reasonable rule, no service of importance being rendered by the recaptor to the unoffending neutrals, who must be released with costs for seizure and detention, as soon as the original captor should bring the matter before the tribunals of his own nation. For it must be presumed that those tribunals know and respect the obligations laid upon them by the laws of nations. 2 Rob. Adm. 200. This doctrine is further recognized in 4 Rob. where it was decided that salvage was not due generally on a recapture of neutral property. It must be shewn that by some edict, or uniform practice, such property would have become subject to condemnation in the courts of prize of the capturing belligerent: in which case, salvage might be demanded. If this holds with respect to recaptures of neutrals among belligerents, it

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

must certainly apply with more force in the present case; and the plea in bar must be sustained. Let the libel be dismissed; but the costs must be paid by the claimants: for though I cannot give salvage as a legal right, I think the actors are entitled to liberal compensation for their zealous, though mistaken endeavours to serve the owners. Whether this court could lend its aid in any other shape need not, I hope, be inquired; and I am persuaded, from the declaration made on behalf of the owners, that all further interference on my part will be unnecessary.

WAITE (CAMPBELL v.). See Case No. 2,374.

Case No. 17,046.

WAITE v. TRIBLECOCK.

[5 Dill. 547; [1] 1 Cent. Law J. 570.]

Circuit Court, D. Iowa. May Term, 1874.[2]

REPLEVIN FOR PROMISSORY NOTE — EFFECT OF JUDGMENT—RES JUDICATA.

Judgment in an undefended action of replevin for a note in favor of the maker, which action was brought upon the ground that the note had been obtained by fraud, and in which only the banker having the note for the collection of interest thereon was made a defendant, was held, under the circumstances, not to bar the owner of the note (an indorsee thereof for value before maturity) from maintaining an action thereon against the maker.

The defendant [J. D. Triblecock] gave his negotiable note, secured by mortgage, for twenty per cent. of stock subscribed in the Great Western Insurance Company, of Chicago—that being the cash payment required by the company. This note and mortgage were sold and assigned by the company to the complainant [Charles B. Waite], a citizen of Illinois, before due, and, as the court decided, for value. The note was sent by the complainant to one Ellis, a banker in Iowa, for collection of interest. While in the possession of the banker for that purpose, the defendant brought an action of replevin in the state court against the banker as defendant, for the note, and, on the writ of replevin, obtained possession thereof. The ground of the replevin action was that, as the note had been obtained by fraud, the maker was entitled to its possession. The present complainant did not appear to the replevin action, nor was he made, nor did he make, himself a party to it. Judgment was given in the replevin action for the plaintiff therein. In the present bill to foreclose the mortgage, the defendant pleaded specially the judgment in the replevin action as a conclusive bar to the complainant's right to foreclose the mortgage.

Clark & Harbert, for complainant.

H. H. Trimble, for defendant.

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

DILLON, Circuit Judge, in disposing of this question, said, in substance:

The special defence, that the plaintiff is concluded by the judgment in replevin in the state court, is not well founded in law. The pleadings in that case go upon the idea that the Great Western Insurance Company was the owner of the notes, and that the defendant therein, Ellis, was the agent of the company. The findings in the judgment of the state court as to Waite, the present complainant, are outside of the issues and void. Waite was the owner of the note, and the indorsement on the note so disclosed, and, if he was to be bound, should have been made a party to the replevin action. Besides, his claim of ownership to the notes was known to the plaintiff in replevin long before the cause was tried, and he refused to make Waite a party.

Ellis was in the interest of the plaintiff in that suit, and no defence in fact was made, and there was no trial on the merits as respects Waite, the real owner. Jones was employed as an attorney in the replevin suit by the insurance company, and not by Waite.

Whether the validity of the note could have been tried in an action of replevin in the manner sought, had the real owner been a party, need not be decided. The action of replevin is not one in rem, and to give jurisdiction over the person he must be a party. Ellis sustained no such relation to the note or to Waite as to make the judgment against him, which he did not defend for Waite, conclusive on him. It is res inter alios acta as to Waite.

Decree for plaintiff.

An appeal was prayed and allowed, and afterwards the decree was affirmed [unreported].

WAITZ (UNITED STATES v.). See Case No. 16,631.

Case No. 17,047.

In re WAITZFELDER et al.

[8 Ben. 423.] [1]

District Court, S. D. New York. May, 1876.

EXAMINATION OF BANKRUPT—POWER OF REGISTER.

On a meeting of creditors in composition proceedings, while the register may fix a day before which the vote shall not be taken, he has not the power, while the debtor is under examination and the inquiries made of him are not irrelevant, to limit the inquiry, or to prescribe a time at which it must be terminated.

[In the matter of Ezekiel Waitzfelder and others, bankrupts.]

The register certified to the court, in this case, that, in the proceedings, which were in composition, and in which the first meeting was called and continued by several adjournments, several days being occupied in taking the examination of one of the debtors, he had been requested to terminate the inquiry or to state

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

[2] [Affirmed by supreme court; unreported.]

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

to the examining creditor that the inquiries proposed to be submitted by him to the debtors must be concluded by a certain day; and he gave his opinion, that, while he might fix a day before which the vote would not be taken, he had not any authority, so long as the inquiries made of the debtor under examination were not irrelevant, to limit the inquiry or to prescribe a time at which it must be terminated.

BLATCHFORD, District Judge. I concur in the views of the register.

[See Case No. 17,048.]

Case No. 17,048.

In re WAITZFELDER et al.

[18 N. B. R. 260.] [1]

District Court, S. D. New York. Sept. 3, 1878.

JURISDICTION IN BANKRUPTCY—COMPOSITION PROCEEDINGS—QUESTIONS OF TITLE.

The bankrupt court has no jurisdiction, under its summary power to enforce compositions, to take cognizance of and determine questions of title between the debtor and persons not parties to the proceedings; so, where composition proceedings were instituted without an adjudication and the resolution by its terms provided that upon payment of the composition all the debtor's property which he had before the commencement of the proceedings assigned for the benefit of his creditors should be restored to him, no suit having been brought to set aside such assignment, *held*, that the court had no jurisdiction to compel the voluntary assignee to deliver the property to the debtor.

[In the matter of Ezekiel Waitzfelder, Michael Waitzfelder, and Leopold Waitzfelder, bankrupts. See Case No. 17,047.]

M. H. Regensburger, for debtor.

W. T. Putney, contra.

CHOATE, District Judge. This is an application to the court under the 17th section of the act of June 20, 1874 [18 Stat. 178], for the enforcement of the terms of a composition. The statute provides: "The provisions of any composition may be enforced by the court, on motion made in a summary manner by any person interested and on reasonable notice, and any disobedience of the order of the court made on such motion shall be deemed a contempt of court." In this case the terms of the composition provided that upon payment of the composition notes the property, heretofore belonging to the alleged bankrupt, which was in the possession of an assignee holding under a voluntary assignment for the benefit of creditors executed before the filing of the petition in bankruptcy, should be restored to the debtor. Upon affidavit that all the creditors have received payment of the composition and that there are no other creditors entitled to any benefit under the voluntary assignment, and that the debtor has demanded the property, and that it has been refused, notice has been served on the voluntary assignee, citing him to appear and show cause why he should not be ordered to deliver the property to the debtor. The voluntary assignee has appeared by attorney, and makes no question of the fact alleged in the petition as to the full payment of all the creditors entitled to the composition, states that he knows of no other creditor entitled under the voluntary assignment, but suggests that the court has no jurisdiction to make the order. No adjudication has been made, and no suit has been brought to set aside the voluntary assignment.

There is no decision directly in point that the court has power, under this grant of jurisdiction to enforce the terms of the composition in a summary way, to adjudicate upon the rights or obligations of parties other than the debtor or the creditors, or by its summary order direct affirmative action on the part of such third party in furtherance of the objects of the composition. It is clear that the debtor and the creditors, as parties before the court in the proceedings, and as the two parties to the agreement to be enforced, are, both for the purpose of directing their positive action and for the purpose of restraining their actions in violation of the agreement, within the jurisdiction and directing and restraining power of the court. But as to third parties the objection is that they are not parties to the proceeding, nor parties to the agreement. How, then, can they be directed by the court in a summary manner to make a certain disposition of property in their possession, in which their claim or title or interest is adverse in any respect to that of the debtor or of the creditors? Notwithstanding the use of terms in the statute which seemed to imply the power of the bankrupt court to determine in a summary manner claims of third parties adverse to the claims of the assignee in bankruptcy, a strict construction in this respect has been put upon the act by the supreme court in favor of and for the protection of the rights of third parties as against the summary jurisdiction of the bankrupt court, and the powers at first assumed and exercised in this respect have been very much narrowed and restricted, and controversies between the assignee and hostile claimants remitted to other jurisdictions provided for in the act, where their adverse rights might be determined with all the proper safeguards which are ordinarily deemed essential for the proper trial of such questions. Although the act makes no special provision for the determination otherwise of questions of right and title that may arise between third parties and the debtor or the creditors as the same are affected by composition proceedings, I think the same principle of construction applies to such a case, and that there is not enough in the provision cited above to show that such controversies were intended to be remanded into this court to be summarily disposed of under the power of enforcing a composition.

Thus a state assignee not being a party to the proceeding, holds under a conveyance which creates a trust, imposing on him rights

[1] [Reprinted by permission.]

and obligations which indeed the debtor and the creditors may by the force and effect of their agreement of composition modify, but which they cannot by their agreement or by their separate or joint action otherwise affect. A state assignee may or may not cease by force of the composition to have any duty or trust to perform as to the creditors who were originally the beneficiaries under the trust. Thus if a creditor is omitted from the debtor's statement he would not cease to have an interest under the trust of the assignment, even though by the composition all the other creditors may have in effect assigned all their right to the debtor on payment of the composition. There would be no power in the bankrupt court in such a case, whatever were the terms of the composition, to deprive this outside creditor of his equitable interest in the property held by the assignee in trust for his benefit, which trust has, in the case supposed, not been annulled nor affected by the proceedings in bankruptcy. The bankrupt court has no summary jurisdiction to annul and set aside a voluntary assignment. Such action must be effected, if at all, by a suit in equity brought for that purpose. Where then is the grant of summary jurisdiction to determine as between the voluntary assignee and the debtor, or the creditors, whether the trust of the assignee is or is not fully performed towards all the creditors? Such a question is not properly a question of enforcing the terms of an agreement between the debtor and creditor.

These observations will serve to illustrate the difficulties that surround the attempt to coerce third parties in their actions under color of enforcing a composition. This term of the composition, that the property shall be restored to the debtor by the state assignee, may be a reasonable term of the agreement as between the debtor and creditors, and may be enforced so far as they are concerned, and so far as it is competent for them to make any agreement on the subject, on the basis of dealing with interests and rights of property which they are able to deal with by agreement, it seems to be equivalent to an assignment or transfer by the creditors of all their equitable interests under the trusts of the assignment. If now, in violation of that agreement, any creditor should undertake to enforce for his own benefit the trust of the assignment by proceeding to call the assignee to an account in a state court, it would be competent for this court to restrain him by summary order under its power to enforce the composition. But, as between the debtor and such assignee, if the rights which have accrued to the debtors are obstructed or denied by such assignee, there are courts to which he can resort to enforce his rights in a due and orderly way, and if any right acquired under authority of the laws of congress, he has his remedy in the ultimate resort to the supreme court of the United States.

It is not intended herein to question the power of this court in proper cases to restrain by injunction third parties from interfering with the property of the debtor, or from other acts that may be restrained under the bankrupt law, but what is held is that this court has no jurisdiction, under its summary power to enforce compositions, to take cognizance of and determine questions of title between the debtor and parties not parties to the proceeding. The reference in this provision of the statute to the power to punish, as for a contempt, disobedience of its orders made under this provision tends to the same conclusion. It is referred to as applying to all such cases, and it cannot properly apply to any parties except the debtor and the creditors, who alone are the parties before the court. In this case the state assignee appeared voluntarily on notice, and seems to be not unwilling that the order should be made, but as the court is without jurisdiction, the motion must be denied. It is hardly necessary to add that the intimations in the cases cited apparently sustaining the power of the court are mere dicta, and this question was not before the court, or under consideration of the learned judges. In re Hinsdale [Case No. 6,526]; Poole v. McDonald [Id. 11,268]. Motion denied.

Case No. 17,049.

WAKEFIELD et al. v. The GOVERNOR.

[1 Cliff. 93.] [1]

Circuit Court, D. Maine. Sept. Term, 1858.

COLLISION—STEAMER AND SAIL.

1. When a steamer and sailing vessel are approaching each other, and the sailing vessel is put on a new course, she is bound to keep it, and it is the duty of the steamer to keep out of the way.

[Cited in The Free State, Case No. 5,090; McWilliams v. The Vim, 12 Fed. 913.]

2. In the daytime, in good weather, in a place where there is no want of sea-room, and no obstructions to the navigation, the sailing vessel must hold her course, and the steamer must adopt the necessary precautions to avoid a collision.

[Cited in The Johnson, 9 Wall. (76 U. S.) 153; Creevy v. Eclipse Tow-Boat Co., 14 Wall. (81 U. S.) 203; Miner v. The Sunnyside, 91 U. S. 209.]

3. Precautions must be seasonable in order to be effectual, and if not so, and a collision ensues in consequence of the delay, it is no defence to say that the necessity of precautionary measures was not perceived until it was too late to render them availing.

[Cited in Judd Linseed, etc., Co. v. The Java, Case No. 7,559; The Sunnyside, Id. 13,620.]

[Cited in Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co., 32 Ohio St. 144.]

Admiralty appeal from the district court of Maine, in a cause of collision.

The schooner Pennsylvania sailed from Boston on the 25th of May, 1856, laden with a cargo of merchandise, and bound on a voyage to Bath. While beating up the Kennebec river, about six o'clock in the afternoon of the following day, and when she was within two miles of her place of destination,

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

the master discovered the steamer Governor approaching in a southerly direction. At that time the wind was fresh from the northeast, and the schooner was close-hauled on the larboard tack. The usual course of steamers was to pass to westward of the schooner; and the master of the schooner, supposing the steamer would pursue the usual track, kept his course until the steamer, notwithstanding she was heading directly for the schooner, approached within speaking distance. He then motioned for the steamer to pass to the westward, of which no notice was taken by the master of the steamer, and, finding that she would inevitably run into the schooner, he put his helm hard up; but the steamer struck the schooner on her larboard bow, occasioning considerable damage. Such was the case as alleged by the complainants [James Wakefield and others]. The answer set forth the circumstances as follows: Soon after the steamer left the wharf at Bath,—about six, p. m.,—the master discovered the schooner in the river some two miles below, beating up against the wind, which was fresh from the north, and when thus discovered she was near the eastern shore on her starboard tack, heading towards the western shore. Supposing the schooner would keep on that tack until she approached near the western shore, a direction was given to the steamer such as to carry her astern of the schooner. There was ample room for the steamer to do this, and it would have been safely accomplished if the schooner had kept her course and completed her starboard tack; but when the two vessels were no more than a quarter or a third of a mile apart, the schooner suddenly put about before she had approached as near to the western shore as it was her duty to have done; and after putting about, instead of hauling close to the wind, she paid off several points, thus throwing herself directly in the track of the steamer and across her path. Upon discovering the management of the schooner, the master of the steamer instantly caused the whistle to be sounded, and by voice and gesture endeavored to warn the schooner to change her course; and he also ordered the engines to be reversed, so that the speed of the steamer was retarded, if not wholly checked. Upon these statements in the pleadings and the evidence in the case a decree was entered for the libellants, in the district court. [Case unreported.]

Shepley & Dana, for libellants.

It is a general rule that a steamer is to be considered as a vessel having the wind free. 1 Pars. Mar. Law, 197, 198. When a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precaution to avoid a collision. Oregon v. Rocca, 18 How. [59 U. S.] 570; New York & L. U. S. Mail S. S. Co. v. Rumball, 21 How. [62 U. S.] 372.

George Evans, for respondents, argued orally, but filed no brief.

CLIFFORD, Circuit Justice. All the witnesses who were on board the schooner testify that she was going in stays when they first saw the steamer, and that the steamer was then just leaving the wharf, which is on the western side of the river. Prior to tacking, the schooner had been standing in the opposite direction, heading to the shore from which the steamer started. When she tacked she headed to the eastern shore; and the witnesses of the libellants say that the wind was northeast, and that the two vessels were about a mile and a half apart at the time the steamer left the wharf. Some fifteen minutes elapsed after the steamer started before the collision occurred; and the witnesses on both sides agree that she was standing on a course inclining in a diagonal direction towards the eastern shore. She never changed her course from the time she left the wharf until the collision took place, although her master admits that the schooner had sailed a quarter of a mile on the larboard tack, and that at the time it occurred she was two thirds of the way across the river from the western shore. Among other things, he also states that the steamer left the wharf at six o'clock, that as she rounded the wharf he stepped forward into the pilot-house and saw the schooner midway the river, more than a mile distant, beating up against the wind. As he represents, the wind was then fresh from the north, and the schooner was on her starboard tack heading to the western shore.

Steamers, as it seems from the pleadings and evidence, usually pass down the western side of the channel; but the master testifies that, after seeing the position and course of the schooner, he made up his mind to go past her stern, and he complains, that after running a short distance, and before she had approached as near to the western shore as she might have done, she went about and headed in the opposite direction. Having tacked, he insists that she ought to have kept close to the wind, and he affirms, instead of doing so, her main sheet was eased, causing her to pay off. Other witnesses, examined by the claimants, testify to the effect that the schooner paid off immediately after she came about near the western shore. But the master testifies, without qualification, that it was necessary for him to ease her mainsail sheet in consequence of her crippled condition, and that he kept her within five points of the wind, which was as near as she would conveniently lay. Before tacking, the schooner was heading towards the western shore near Trufant's rock, and the weight of the testimony clearly shows that she proceeded as far on that tack as it was prudent for her to do. Most of the witnesses agree that she was going in stays when the steamer left the wharf; but even if the ac-

count of the matter as given by the master of the steamer be correct, that she had not then quite completed her starboard tack, still he must have known, when he set the course of the steamer, that the schooner would presently find it necessary to come about and proceed upon the other tack. He knew what the course of his own vessel was, and there is no good reason for believing that he was misled in regard to the direction of the schooner. Whatever alteration was made in her mainsail sheets took place immediately after she came about, and it is not believed that it was of a character to affect the question in dispute between these parties. After the schooner came about and was put upon the new course, she was bound to keep it, and it was the duty of the steamer to keep out of the way. The Genesee Chief, 12 How. [53 U. S.] 443; New York & L. U. S. Mail S. S. Co. v. Rumball, 21 How. [62 U. S.] 372. But the defence, as stated in the answer, is rested chiefly upon the ground that the schooner might have avoided the collision by coming up into the wind, or by paying off and heading south. Suggestions of that kind, under the circumstances of this case, are entitled to very little weight. Occurring as the collision did in the daytime, and in good weather, and at a place where there was no want of sea-room and no obstructions to the navigation, it is clearly a case where the rule applies that the sailing vessel shall keep her course and leave it to the steamer to adopt the necessary precautions to avoid a collision. That rule has been established upon great consideration, and will be enforced in every case where it applies. Repeated decisions of the supreme court have sanctioned the rule, and it is vain to suppose that it will now be relaxed or overlooked. Expert witnesses were examined by the respondents to show that it was not possible to sheer the steamer while she was under way, so as to have avoided the schooner in a less distance than a quarter or a third of a mile. Theoretical opinions must often be received with some qualification, but it is not necessary on the present occasion to determine whether those opinions were well or ill founded, for the reason that the schooner was seen by those on board the steamer at a much greater distance, and in ample time to have adopted every necessary precaution to have avoided the collision. Precautions must be seasonable in order to be effectual; and if they are not so, and a collision ensues in consequence of the delay, it is no defence to say that the necessity for precautionary measures was not perceived until it was too late to render them availing. Inability to avoid a collision usually exists at the time it occurs; but it is generally an easy matter to trace the cause of the disaster to some antecedent omission of duty on the part of one or the other or both of the colliding vessels. Suppose it to be true that the steamer, after she had approached within a certain distance of the schooner, was not then able to sheer so as to avoid the collision, still, the proof of that fact only constitutes no defence in this case, because the fault consisted in unnecessarily placing herself in that situation. Those in charge of her well knew that, by the rules of navigation, the schooner was bound to hold her course, and that it was the duty of the steamer to keep out of the way. They had every facility before them to enable them to perform that duty, and it is no defence to say that they did not commence their efforts in season to render them effectual, because it is that very delay which renders the vessel liable. For these reasons I am of the opinion that the decision of the district court was correct, and the decree is accordingly affirmed with costs.

WAKEFIELD (LAMB v.). See Case No. 8,024.

Case No. 17,050.

WAKEFIELD v. ROSS.

[5 Mason, 16.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1827.

BOUNDARIES—CONSENT AND ACQUIESCENCE—DEEDS—DESCRIPTION—QUIT-CLAIM BY PERSON DISSEIZED—COMPETENCY OF WITNESSES.

1. Where a boundary is disputed between parties who own adjoining tracts of land, and they agree to erect a fence on what is supposed to be the true boundary, and the possession continues according to that line for twenty years, in the absence of all counter proof of any other actual boundary, that line ought to be deemed the true one, and to conclude persons claiming under them by subsequent conveyances.

[Cited in Tolman v. Sparhawk, 5 Metc. (Mass.) 476; Abbott v. Abbott, 51 Me. 585; O'Donnell v. Penney, 17 R. I. 166, 20 Atl. 306.]

2. Where A. owned the head lot No. 18, and sold to B. forty acres on the east end of that lot, and afterwards sold to C. by the following description; "a certain tract or parcel of land situate, &c. and contains thirty acres by measure," being "the west part of the head lot No. 18," it not being shown, that the parties at that time knew, that the whole lot contained more than seventy acres, although in fact it did contain more; it was *held*, that the deed to C. conveyed all the land in the lot, not conveyed to B., and was not limited to thirty acres at the west end of the lot. There being actual boundary lines afterwards stated in the same deed, it was farther *held*, that those boundary lines must govern, even if they included more than thirty acres.

[Cited in Eaton v. Rice, 8 N. H. 381; Orr v. Hadley, 36 N. H. 578.]

3. Where a party is disseized, he cannot convey by a quitclaim deed his title to the premises of which he is disseized.

4. Persons who do not believe in the existence of a God, or in a future state of existence, are not competent witnesses.

[Cited in Scott v. Hooper, 14 Vt. 539.]

[Cited in Thurston v. Whitney, 2 Cush. 110.]

Ejectment [by Ebenezer Wakefield] for lands situate in Rhode Island. The defendant [Lemuel Ross] pleaded, 1. not guilty: 2. the stat-

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

ute bar of twenty years' possession under the statute of Rhode Island for quieting possessions. To the last plea there was a replication denying the twenty years' possession. Issues being joined on both pleas, the cause was tried at this term, when the material facts and evidence were as follows:

The plaintiff's demand was for two contiguous parcels of land, one of which he claimed as owner of the south part of the head lot No. 17, and the other as the owner of the east part of the head lot No. 18, of which last the defendant owned the west part. These head lots are lots which were set off to the original proprietors of lands in Providence county after a revision of the boundary line between Rhode Island and Connecticut, and lying between the line first erroneously drawn for a boundary between the two states and the line since established.

The titles and claims of the parties to the first parcel of land, viz. the south part of the head lot No. 17, were as follows: In 1788, Samuel Eddy, under whom the plaintiff claimed the first parcel of land above mentioned, purchased a tract of land lying in the southwest corner of head lot No. 17, of one Stephen Bowen, and subsequently conveyed the same to his son Samuel Eddy, Jun., bounding him on the land of Bradley Greene, the defendant's grantor, then the owner of the whole head lot No. 18, lying south of No. 17. The validity of the title deeds exhibited in this part of the case admitted of no controversy; the plaintiff deduced his title through several mesne conveyances, from Samuel Eddy, on the one side; the defendant, on the other, proved his deed from Bradley Greene conveying the west part of lot No. 18, dated December 5th, 1801, and the question here was wholly in relation to the boundaries between lot No. 17, and lot No. 18, and the possession of the parties. Previous to the last mentioned conveyance, and while Eddy and Greene were respectively owners and in possession of these contiguous lots, a dispute arose between them in regard to the western part of their dividing line. It did not appear at that time to be controverted, that a certain black-birch tree on the east side of the head lots was a dividing boundary between Nos. 17 and 18, and that the line was thence a straight course westerly to a large rock; but the remainder of the line from that rock out to the state line was in dispute, Greene contending, that he was entitled to go farther north than a fence that stood there, and Eddy insisting, that the line was farther south. One of the sons of Eddy (who was produced on the trial as a witness by the defendant) was thereupon called in to assist the parties in adjusting and settling the line. Upon his decision and advice the line was then settled, and the fence was placed accordingly. No farther controversy in respect to this line appeared to have arisen until the plaintiff, having become possessed of the Eddy title, brought an action against the present defendant in the state court of common pleas in the year 1824, and therein claimed a quantity of land south of the above line. This action was discontinued without a trial; and after taking a deed from Bradley Greene of another piece of land, as hereinafter stated, the plaintiff commenced this suit. To support his claim south of the defendant's fence, and of the line between the rock and birch tree, he produced extracts from the proprietors' records, and the copy of an ancient plat, showing, that lot No. 17 was originally of greater width from north to south than the adjoining lots, an allowance being made on account of a body of water, called Long pond, contained within it. He did not, however, prove the original boundaries of the north side of that lot, but examined several witnesses who testified, that the former owners of the south part of it, under whom he claimed, had anciently sowed a field south of the abovementioned rock, and, in some instances within twenty years, had cut young wood, for hoop-poles and other purposes, south of the line between the rock and birch tree.[2] This testimony was relied on as proof of the original boundaries and of interruptions to the defendant's possession.

It was answered on the part of the defendant by proof, that the sowing of the field was before the settlement of the line; that the cutting referred to was not with the intention to dispute the line from the birch tree to the rock, but from ignorance or mistake as to where that line, when drawn through the whole extent of the woodland, would fall; and that when the error was discovered, no claim of right was pretended, but the persons by whom or by whose authority the cutting was done (one of them a grantor of the plaintiff) paid the defendant for the wood so cut. The defendant also proved all the exterior bounds of lot No. 18,

[2] With respect to two of the witnesses, a father and son of the name of Richardson, the counsel for the defendant objected to their admission, as witnesses, upon the ground of their want of any religious belief; and to establish the fact a witness was called, who swore that he knew the persons well, that he had often heard the son say, that he did not believe in the existence of a God, or of a future state. As to the belief of the father, he said, that he had heard him declare, that he did not believe in a future state; that he had read Tom Paine's works; and did not know, whether he (the father) believed any thing. In answer to a question from the court whether the father believed in a state of rewards and punishments, the witness answered only as before, adding, that from the statements of the father he did not seem to believe any thing. It was then suggested on the part of the plaintiff's counsel, that the father and son might be examined personally as to their belief, for the father might be an Universalist. To this suggestion the court answered, that the defendant's counsel, who took the objection, were not bound to rely on the testimony of these persons for proof of incompetency. The court said: "We think these persons are not competent witnesses. Persons who do not believe in the existence of a God, or of a future state, or who have no religious belief, are not entitled to be sworn as witnesses. The administration of an oath supposes, that a moral and religious accountability is felt to a Supreme Being, and is the sanction which the law requires upon the conscience of a person, before it admits him to testify."

as claimed by him; that the birch tree and rock had been known as bounds more than thirty years by the witnesses sworn: and that his fence had remained in the place where it now stood ever since the settlement of the line by Eddy and Greene, which was more than twenty years before the commencement of the plaintiff's first suit. The copy of the ancient plat introduced by the plaintiff was also relied on by the defendant as showing, that the north line of lot No. 17 was originally much farther north than now supposed by the plaintiff, as appeared by the platted distance of that line from the northern margin of Long pond, and that the whole width of that lot might be found by going to that original line from the aforementioned birch tree.

The other parcel of the demanded premises, lying within lot No. 18, was claimed by the plaintiff as grantee of Bradley Greene, by a quitclaim deed, executed in August, 1825, and hereinafter mentioned. It appeared in evidence, that on the 24th of August, 1801, Bradley Greene, then being the owner of the whole of lot No. 18, much of which was wild and uncultivated, conveyed to one Jacob Woodland, a parcel thereof at the east end, by the following description, viz.: "One certain tract or parcel of land, situate &c., it being part of the head lot, so called, belonging to the said Bradley, and No. 18, bounded as follows, beginning at the southeast bound of said lot, thence northerly sixty rods, then west the same width, bounding on the south line of said lot, to extend so far west, as to include forty acres by measure." Under this deed, Woodland went into possession up to a ridge called "Ridge Hill," extending across the lot from north to south, as his western boundary, and improved and occupied the land to that boundary until A. D. 1810, when he sold it; and the same after several intermediate conveyances came to the plaintiff Wakefield, in April, 1824, by a quitclaim deed from William Ross, by which Ross released to him the same, by the following description, viz.: "All the right, title, and interest, that I have, or ever had, in one certain tract of land, situated &c., containing forty acres, and being the easterly part of lot No. 18, bounded as follows: beginning at a white-oak tree, a bound of David Allen and Ziba Ross, then westerly joining Ziba Ross's land 80¾ rods to a stake and stones; thence northerly, 73 rods to No. 17, to a stake and stones; thence easterly, joining No. 17, to a black-birch 80¾ rods; thence southerly, straight to the first bound." On the 5th of December, 1801, Bradley Greene conveyed to the defendant, Ross, another parcel of the lot No. 18, on which he now resides. The description in the deed is as follows: "One certain tract or parcel of land, situate &c., and contains thirty acres by measure, being the west part of the head lot, called 'No. 18,' and bounded as follows: viz. beginning at a stump of a staddle with stones about it, standing on the state line, and being the southwest corner bound of the 17th head lot; thence east, adjoining said lot, eighty rods to a stake and stones; thence south sixty rods to a stake and stones, thence west eighty rods to the state line; thence north on said line, to the first mentioned bound." Under this deed the defendant, Ross, took immediate possession, and occupied, and cut wood up to the same Ridge hill, as the boundary between him and Woodland, and assented to by both. The contiguous land on the north, in some of the deeds, under which the plaintiff holds his title thereto, is described as bounded on the south by the defendant's land, and the said Woodland's lot, without any intimation of, or any reference to, any strip of land intervening between them. There was no proof, that Bradley Greene, after his conveyance to the defendant in 1801, was, or claimed to be, in possession of any part of lot No. 18, or that he did any act indicating ownership, or a belief on his part that he had not conveyed the whole of that lot, until the deed of 1825, mentioned below. On the contrary, it appeared, that he became poor; that he was not assessed for any property in the town in which the lot lay; and in the year 1823, being confined in gaol for debt, he made his complaint to a magistrate in conformity with the statute of Rhode Island, setting forth that he had no property wherewith to support himself in prison, or pay prison fees, and was thereupon admitted to the poor debtor's oath and discharged. It was ascertained, that the lot No. 18 really contained more than the quantity of seventy acres; and sometime in August, 1825, the said Bradley Greene executed a quitclaim deed to the plaintiff, Wakefield, of sixteen acres and 100 rods of land, describing it as lying between the land conveyed by his former deeds to the defendant, Ross, and that conveyed to Jacob Woodland, in lot No. 18. The deed was proved to have been signed at the plaintiff's house in Connecticut, a short time before the death of Greene, but it was not dated nor acknowledged, and although the consideration expressed in it was seventy dollars, that was not shown to have been paid; but the plaintiff proved, that on signing the deed, Greene received of him two pigs and five sheep. Under this last deed the plaintiff claimed to recover of the defendant, the land described therein, the same being in the defendant's possession.

Mr. Steere, for plaintiff.
J. L. Tillinghast, for defendant.

For the plaintiff it was contended, as to the south part of lot No. 17, that there had not been 20 years' exclusive possession sufficient to introduce the bar of the statute. That the possession was mixed, and was intended to be according to the true boundaries between lots No. 17 & 18. Bradley Greene sold by metes and bounds, and measure. If the possession was not mixed, the evidence established that the possession was in the plaintiff at the time of the defendants' purchase from Bradley Greene. As to the other parcel of land, part

of lot No. 18, it was contended, that Bradley Greene was the owner of the whole. He sold at the east end of it forty acres only to Woodland. Afterwards, he sold only thirty acres at the west end to Ross. The whole lot contained sixteen acres more than the seventy acres sold; and this intermediate strip, the residuum of the lot between the parts sold on the eastern and western ends, was left in Bradley Greene, and the plaintiff by his purchase from Greene, in August, 1825, was entitled to recover it. The defendant contested both points; and argued, that the plaintiff had shown no title to a recovery for either parcel of the land now demanded.

STORY, Circuit Justice (charging jury). The question, as to the first parcel of land in controversy, turns upon a mere point of boundary between the lots No. 17 and No. 18.—The question is, whether the land now possessed by the defendant, Ross, as the northern boundary of lot No. 18, includes any portion of the land belonging to lot No. 17. It is often matter of extreme doubt, how the exact boundaries run in cases of laying out lots of this nature. If the black-birch tree on the east side of the lot, No. 17, was an ancient boundary, and was so deemed by the respective owners in former times, and the line ran from thence west in a straight line to the large rock, spoken of, then we have arrived at some certainty. The question in dispute will then be narrowed down to the running of the boundary from that rock to the west line of the lot.—There is evidence in the case that at the time when Samuel Eddy was owner of the part of lot No. 17, now owned by the plaintiff, and Bradley Greene was the owner of lot No. 18, a dispute arose between them as to the boundary line on this part of their lots; and it was then adjusted and settled between them by one of Eddy's sons, and the fence put up accordingly; and that the possession has remained in the respective occupiers of the lots according to that line ever since. This was before the year 1801, when the defendant purchased from Bradley Greene. Now if this evidence is believed it is decisive of this part of the case. In the first place, as mere evidence of the true boundary, in a case like the present, what can be so satisfactory as such a settlement of boundaries made more than twenty years ago by the parties interested, and acquiesced in by themselves, and those, who claim under them, ever since. It would seem of itself almost conclusive as a presumption of right in the absence of all circumstances to rebut it. In the next place, if the parties have been ever since that period in exclusive possession and seizin of the lots according to this boundary, then the persons, under whom the plaintiff, Wakefield, claims title, were at the time of the conveyance to him disseized of the land now in controversy, even if they had a title to it; and consequently the deed conveyed nothing to him in the land, of which his grantors were then disseized. This is a plain principle of the common law. But what is quite conclusive is, that such an exclusive possession for twenty years is a clear bar to any recovery, and is of itself a good title, by the express provisions of the statute of Rhode Island. The jury will therefore consider, whether this evidence is overthrown by any counter evidence in the case; and if not, whether it establishes such an exclusive possession. If so, their verdict ought to be for the defendant on this part of the case.

Then as to the other parcel of land, the intermediate strip, as it is called, in lot No. 18. It is true, that the deed of Bradley Greene to Jacob Woodland conveys so much only of the east end of the lot No. 18, as would include forty acres. This conveyance was made in August, 1801; and under it Woodland, if the evidence is believed, occupied and possessed up to the "Ridge Hill," so called, as his true boundary, without objection; and it has not been disputed, that his possession was then deemed rightful. William Ross, by mesne conveyances, held it as owner in 1824, and then conveyed it to the plaintiff, who has ever since his purchase continued to occupy and possess it up to the Ridge hill. In December, 1801, Bradley Greene conveyed a part of the same lot to the defendant, Ross, describing it in his deed as "a tract or parcel of land situate, &c., and contains thirty acres by measure, being the west part of the head lot called 'No. 18;'" and then specified its boundaries. The question is, what part of the lot is intended by this description? It is said, that thirty acres only was intended to be conveyed; but there is no evidence to show, that the parties at that time knew or supposed, that the whole lot No. 18 contained more than seventy acres. No boundaries are stated in the deed, which establish any reservation to Bradley Greene of any strip on the eastern side of this part of the lot. No claim was ever made by him to any such strip, until he executed the quitclaim to the plaintiff in August, 1825. He never was assessed for it in the town taxes; he did not, when he was liberated from gaol on account of his insolvency, assert it to be his property; but swore generally, that he had no property to support himself in gaol. The defendant has always possessed and occupied the whole of that part of the lot to the Ridge hill without objection, and cut wood there, as a part of the land conveyed by his deed. I state these, as facts, only upon the supposition, that the evidence in the case is believed by the jury; and of that they will judge; but if these are the facts, then they establish an exclusive possession in the defendant for more than twenty years, and consequently the statute of Rhode Island, of twenty years' possession, applies as a bar. Independently of that, the quitclaim of 1825 could not operate, because the defendant, Ross, was then in possession under a claim of right, and if he had no right, he was in under a disseizin. But I am by no means satisfied, that the deed from Bradley Greene to the defendant in December, 1801, requires such a construction, as the plaintiff seeks to give it. The grantor had already conveyed forty acres on the east end of

the lot. He does not in his conveyance undertake in terms to convey thirty acres and no more at the west end of the lot. The words of the deed are, "a certain tract or parcel of land situate &c., and contains thirty acres by measure, being the west part of the head lot called 'No. 18;'" the measurement is, therefore, not the whole, but a part only of the description. It was not thirty acres, but "the west part of the head lot," which was intended to be conveyed. The east part was already sold; and it appears to me, that the true meaning of the deed, if the description had stopped here, would be, that it conveys the west part of the lot, as contradistinguished from the east part of the lot already sold. It would be a conveyance of all that part of the lot not already sold as the east part. The measure of thirty acres is not a limitation upon the extent of the grant, but a mere description of its supposed contents. If the words "contains thirty acres by measure" had been left out, the construction of the deed must have been, such as I have intimated. The insertion of them does not, in my judgment, justify a change of that construction in a legal point of view. But the description of the premises sold does not stop here. The deed goes on to state the boundaries of the west part of the lot so sold. Now it is a general rule, that where there is a specific description by natural or artificial boundary lines, distances and quantity of contents must yield, if mistaken, to such lines. The parties are presumed to contract with reference to such known lines or objects; and the insertion of distances or measure of acres is understood to be no more than a conjectural or probable estimate. In the present case, there is no evidence to establish, that the boundary lines stated in the deed do not include the whole land in the lot No. 18 not conveyed to Woodland, or in other words, the whole land west of the Ridge hill. On the contrary, it seems tacitly admitted, that, so far as those lines can now be traced, they are coincident with the defendant's claim and seizin. The whole difficulty, that has arisen, is from the supposed error in fixing the southeastern and northeastern boundaries of lot No. 18. If these are the white-oak and black-birch tree referred to by the witnesses, then much of the difficulty vanishes. The stress of the argument, therefore, for the plaintiff, necessarily rests on the ground, that by the true construction of the deed from Bradley Greene to the defendant, Ross, no more than thirty acres of land were intended to pass; and that consequently, as lot No. 18 actually contains eighty-six acres and one hundred rods, the intermediate strip, of sixteen acres and one hundred rods, being the surplus beyond the forty acres conveyed in 1801 to Woodland, and the thirty conveyed to the defendant, Ross, remained in Bradley Greene, and were well conveyed by the quitclaim deed of August, 1825, to the plaintiff. Now it is incumbent upon the plaintiff to establish the fact of such a strip remaining in Bradley Greene at the time of that conveyance. He has not shown, that the boundary lines stated in the conveyance from Greene to the defendant, Ross, would not include all the land to the Ridge hill, of which the defendant, Ross, is in possession. He has been obliged, therefore, to resort to a construction of the deed to Ross, which would limit the conveyance to him to thirty acres only by admeasurement, rejecting all the accompanying parts of the description of the premises. In this construction also he has failed. And in the last place the objection of a disseizin of Bradley Greene at the time of the conveyance in 1825 is decisive against any right of recovery under that conveyance, even if every other objection were removed.

Verdict for the defendant on both pleas, and judgment accordingly.

WAKEMAN, In re. See Case No. 17,051.

Case No. 17,051.

WAKEMAN v. HOYT.

[5 Law Rep. 309; 1 N. Y. Leg. Obs. 132.]

Circuit Court, D. Connecticut. Sept. 24, 1841.

BANKRUPTCY — WHO ARE MERCHANTS — ACTS OF BANKRUPTCY—FRAUDULENT CONVEYANCES.

1. Any person engaged in business requiring the purchase of articles to be sold again, either in the same, or in an improved shape, must be regarded as "using the trade of merchandise," within the intent of the bankrupt law [of 1841 (5 Stat. 440)].

[Cited in Re Smith, Case No. 12,981.]

[Cited in Daniels v. Palmer, 35 Minn. 350, 29 N. W. 164.]

2. If a trader willingly procures himself to be arrested or his goods to be attached, it is an act of bankruptcy, although such attachment was not fraudulent on his part.

3. The term "fraudulent conveyance," as used in the bankrupt act, does not necessarily imply moral turpitude, but is satisfied with a fraud in law, counteracting the policy of the act, and preventing a general distribution of his property, among the creditors of a bankrupt.

4. A conveyance or assignment by a creditor of all his property to secure a preference to particular creditors, is of itself, a fraud upon the act of congress and an act of bankruptcy.

[Cited in Ashby v. Steere, Case No. 576; Gassett v. Morse, Id. 5,264.]

5. Where a debtor, being deeply embarrassed and pressed for security by a creditor, executed to certain family connections, mortgages and assignments of all his property, it was *held* to be an act of bankruptcy, although there was no evidence that the debtor had, at the time, any intention of applying for the benefit of the bankrupt act.

This was an application by [David Wakeman] the petitioning creditor for a decree of bankruptcy against Rufus Hoyt, a manufacturer and vender, at his establishment in Fairfield county, and elsewhere, of carriages, sleighs, and other vehicles. On the 15th of June, 1842, Hoyt being deeply embarrassed and pressed for security by the petitioning creditor, executed to certain family connections to whom he was indebted, mortgages and assignments of all his property, including the stock, tools, &c., in his

carriage establishment, for the purpose of securing to the mortgagees a preference over his general creditors. There was no evidence or pretence that at the time of making the mortgages on which the petitioning creditor relied as constituting acts of bankruptcy, Hoyt had any intention of applying for the benefit of the bankrupt act. The application was opposed on two grounds: (1) That Hoyt was not "a merchant or using the trade of merchandise, or a retailer of merchandise," within the meaning of the act; and (2) that the mortgages, &c., though made with the intent to secure a preference to particular creditors, were not fraudulent, and did not constitute acts of bankruptcy.

The case was argued before Judson, J., in the district court, on the 31st of August, by R. Booth and R. S. Baldwin, for the petitioning creditor, and by H. Dutton for Hoyt, and the two questions above stated were adjourned into the circuit court by the district judge, and were reargued on Thursday, the 23d inst. in that court, by R. S. Baldwin, for the petitioning creditor, and by R. I. Ingersoll, for the bankrupt.

THOMPSON, Circuit Justice, delivered the opinion of the court, in substance as follows: The first question presented for the opinion of the court is, whether this party is a trader or dealer in merchandise, within the meaning of the act of congress. We think the meaning to be attached to the words used, is, that when the party is engaged in a kind of business that necessarily requires the purchase of articles for the purpose of carrying on that business, he is a pe son "using the trade of merchandise" within the intention of the act. The great object is, to provide for cases where credit is required. The case of a handicraftsman whose business is confined to the produce of his own labor merely, is different. The words of the act are, "a merchant or using the trade of merchandise." If a person is engaged in a business requiring the purchase of articles to be sold again, either in the same, or in an improved state, he must be regarded as "using the trade of merchandise." This person was a carriage maker, carrying on an extensive business, in the manufacture and sale of carriages. These may be fairly considered as merchandise; and in the transaction of his business it was necessary for him to contract debts, and use credit. When a person sells the mere produce of his own labor, he is only a seller. His business requires no purchases, and he has no occasion for credit. But Mr. Hoyt, in the transaction of his business, was necessarily both a buyer and seller. We think, therefore, that he is liable to a decree of bankruptcy, if his conduct has been such as to subject him to it.

The next question is, whether he has committed an act of bankruptcy? In order to be so declared, he must be in one of the five predicaments specified in the act of congress. These are either (1) departing from the state, &c., with intent to defraud his creditors; (2) concealing himself to avoid being arrested; (3) willingly or fraudulently procuring himself to be arrested, or his goods and chattels, lands, &c., to be attached or taken in execution; (4) removing or concealing his goods, &c., to prevent their being levied upon; or (5) making any "fraudulent conveyance, assignment, sale, gift or other transfer of his lands, tenements, goods or chattels, credits or evidences of debt." In the case of an attachment in which the debtor willingly aids, it is not necessary that it should be fraudulent, in order to render it an act of bankruptcy. "Willingly or fraudulently" is the language of the act. The debt secured by the attachment or execution may be bona fide and justly due. Nevertheless, if the debtor being a merchant, &c., willingly procures himself to be attached, or his property to be taken in execution, it is an act of bankruptcy. What is there in such a transaction that partakes of fraud? Nothing, if it is an honest debt. All that the debtor does is to procure the execution to be levied on his goods, &c. Why is this an act of bankruptcy? It can be for this reason only, that he thereby does an act contrary to the policy of the bankrupt law. That policy is, in cases of hopeless insolvency, to cause an equal distribution of the trader's effects. It is on no other principle that it is made an act of bankruptcy, for a trader to aid a creditor in securing his debt, by attachment or execution. He gives thereby a preference to the creditor whom he so assists, over his general creditors. Then, if that be so, how does it differ from the act of bankruptcy last specified, in making a "fraudulent conveyance, assignment, &c." Does the word "fraudulent" there used, necessarily import moral turpitude? or may it be satisfied with a fraud in law, counteracting the policy of this act, and preventing a general distribution of his property among the creditors of the bankrupt, by applying it exclusively to the benefit of such of them as he may choose to prefer? Whether such preference is given to a single creditor, or to two or more, is wholly immaterial. It equally counteracts the policy of the law.

If we look to the second section, it appears to me that it serves to explain what shall be deemed the kind of fraud which may render a conveyance fraudulent, within the meaning of the first section. "All future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupt, &c., shall be deemed utterly void, and a fraud upon this act." From the argument as to the meaning of the word "bankrupt" a little doubt was at first created in my mind whether this applied to involuntary bankrupts at all. But I do not think the word "bankrupt," as there used, can be confined to a person who has been declared a bankrupt. It means the same as if the word "person" had been used

instead of "bankrupt," so that it would read, "all future payments, securities, &c., made by any [person] in contemplation of bankruptcy and for the purpose of giving any creditor, &c., any preference, &c. The preference is made by a person in contemplation of bankruptcy, and not by a bankrupt after he has been declared such. And all such conveyances are declared to be "utterly void, and a fraud upon this act." This must refer to the acts before specified as "acts of bankruptcy." Why is giving a preference to be considered a fraud on this act? Because the act contemplates an equal distribution. It is a fraud because it counteracts the policy of the law. Though it may not be fraudulent in a moral point of view, it must be fraudulent if it contravenes the policy of the law. So when the trader procures the levy of an execution on his property, it is favoring one creditor over the others. This would not be a fraud, if it were not for the bankrupt law. It is precisely as honest an act for the debtor to procure an attachment or execution, to be levied on his property by a creditor, as it is to secure to him a preference by means of a conveyance. It is fraudulent only because it counteracts the policy of the law; and this is equally true in the one case as in the other. I am, therefore, in this view of the case, of opinion, that a conveyance or assignment by a trader of all his property, to secure a preference to particular creditors, is, per se, a fraud upon the act of congress and an act of bankruptcy. When a part only of a trader's property has been paid or secured to a creditor, whether or not it shall be deemed an act of bankruptcy, will depend on the motive with which such payment or security was made, and the circumstances attending the transaction.

The circuit court therefore, advise that under the circumstances of this case, Rufus Hoyt has committed acts of bankruptcy, and ought to be declared a bankrupt by the district court.

WAKEMEN (TALBOT v.). See Case No. 13,731.

WALBRUN (BABBITT v.). See Cases Nos. 694, 695.

Case No. 17,052.

WALCOTT v. ALMY et ux.

[6 McLean, 23.] [1]

Circuit Court. D. Michigan. June Term, 1853.

FRAUDULENT CONVEYANCES — PRIMA FACIE EVIDENCE—CONSIDERATION.

1. Conveyances executed, under whatever pretences, by an individual insolvent or unable to pay his debts, will be held prima facie void in the hands of the grantee against creditors, especially when the grantee has knowledge of the facts.

[Cited in Pursel v. Armstrong, 37 Mich. 331.]

2. Where the consideration passed from the grantor to the grantee, with the view of covering the property, by a conveyance to the wife of the grantor, it is a strong circumstance to show fraud.

[Suit by Horatio G. Walcott against John Almy and wife.]

Davidson & Holbrook, for complainant.

T. B. Church, for defendants.

McLEAN, Circuit Justice. This is a bill filed to aid an execution at law which has been levied on certain property, charged to have been fraudulently conveyed to defeat the claims of creditors. The proof clearly shows that at the time the deed to Mrs. Morse was executed by John Almy, he was in embarrassed circumstances, and unable to pay his debts. In addition to the fact proved by the witnesses, the defendant, by his letters to the complainant, admitted his insolvency. There can be no doubt that a deed executed under such circumstances, known to the grantee, who was the sister of his wife, on the pretence that he was indebted to the estate of Mr. Morse, deceased, with the intent of reserving it from the grantor's creditors, is void. The consideration stated in the deeds to Mrs. Almy, for there were more than one, was paid by John Almy, and he thereby became the equitable owner. Neither love nor affection, nor a gift, can support a deed, given fraudulently, though a moneyed consideration be named in it. 1 Story, Eq. Jur. p. 393, § 353. The conveyance by John Almy to Frances Morse, was fraudulent and without consideration, as the grantor was unable to pay his debts at the time. The testimony of Mrs. Lester, late Mrs. Morse, contradicts the facts stated in the answer. The consideration of the deed of Mrs. Morse to Mrs. Almy, they being sisters, was for her support, and money furnished by John Almy; and he collected the rents for the house, which he did not occupy, and rendered no account of the same. And the defendants and Mrs. Morse continued to occupy the other house, from the time the conveyance was executed. Under the circumstances, we cannot doubt, the conveyances were executed to protect the property from the claims of Almy's creditors, and that they were fraudulent. The court, therefore, order the execution to issue, and so much of the property to be sold as shall be necessary to satisfy the judgment on which the execution was issued and levied.

Case No. 17,053.

WALCOTT v. WILCUTT.

District Court, D. Massachusetts. May, 1858.

SHIPPING — ABDUCTION OF MINOR BY MASTER — LIABILITY OF OWNERS.

[Cited in 2 Pars. Shipp. & Adm. 11, to the point that the owners of a whaling vessel are liable for damages for the abduction of a minor by the captain, although they had no personal knowl-

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

edge of the fact; the act held to be within the scope of the authority of the master as agent of the owners.]

[See Sherwood v. Hall, Case No. 12,777; Luscom v. Osgood, Id. 8,608.]

[Nowhere reported; opinion not now accessible.]

WALCOTT (SLACK v.). See Case No. 12,932.

Case No. 17,054.

In re WALD et al.

[12 N. B. R. 491; 7 Chi. Leg. News, 26; 1 N. Y. Wkly. Dig. 174; 1 Cent. Law J. 531.] [1]

District Court, W. D. Missouri. 1874.

BANKRUPTCY—COMPOSITION PROCEEDINGS.

Creditors whose debts do not exceed fifty dollars are to be disregarded in computing the majority who must pass a resolution of composition, as well as in ascertaining the number of those who are required to sign the confirmatory statement.

[In the matter of Wald and Aehle, bankrupts.]

KREKEL, District Judge. Under the 43d section of the amended bankrupt act of June 22, 1874 [18 Stat. 178], providing for the composition with creditors, the court made an order directing a meeting of creditors to be held to act upon a composition proposed by the bankrupts. The meeting was held, and the resolution passed as well as the confirmatory signatures of creditors are now before the court for its action. From the number of creditors who were present and represented at the meeting which passed the resolution, as well as the number signing the confirmatory statement, it becomes necessary to determine what is meant by language employed in the following part of the section referred to: "And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor, assembled at such meeting, either in person or by proxy, and shall be confirmed by the signature thereto of the debtor, and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority, for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars, shall be reckoned in the majority in value, but not in the majority of number."

The question is, what creditors shall be counted, in order to ascertain the majority spoken of, and are creditors whose claims do not exceed fifty dollars, to be disregarded in computing the majority who must pass the resolution, as well as in ascertaining the number of those who are required to sign the confirmatory statement. The court holds that all creditors whose claims do not exceed fifty dollars, must be disregarded in arriving at the majorities required in both cases,—that is to say, in passing the resolution there must be a majority of the creditors assembled at such meeting, either in person or by proxy, excluding all whose claims do not exceed fifty dollars, to make the resolution operative, and in the confirmatory statement the number of signers required must be two-thirds after excluding from the whole number of creditors all whose claims do not exceed fifty dollars. It may be admitted that this construction will, in some cases, cause hardship, as it increases the trouble or difficulty on part of bankrupts to obtain the requisite number. It must be remembered, however, that the whole of the requirements of the bankrupt act in some sense may be called a forced proceeding, so far as the creditor is concerned, for the failing circumstances of the debtor largely interfere with his freedom of action.

A creditor may, under compulsion, as it were, attend the meeting of creditors provided for, but, suppose he does not, on account of the expense he must incur, which, though small, may be large when compared with the amount offered in composition, or he fails from any other cause to attend, the law should not, on that account, be construed against him, and favorable to the debtor who makes the offer. Throughout the whole section from which the quotation is made, greater regard is had to amounts than number. To illustrate; in providing for the taking of bankrupt estates out of the hands of the courts, and placing them in the hands of trustees selected by the creditors, amounts are exclusively regarded by providing that three-fourths in value of the creditors whose claims shall have been proven, shall pass the resolution.

The bankrupts will be required to bring themselves within the views of the court here expressed, in order to have their case passed upon favorably.

WALD (WEHL v.). See Case No. 17,356.

Case No. 17,055.

WALDEN v. CHAMBERLAIN.

[3 Wash. 290.] [1]

Circuit Court, D. Pennsylvania. April Term, 1814.[2]

BOTTOMRY BONDS—AUTHORITY OF MASTER—PROOF OF NECESSITY.

1. Libel on a hypothecation bond, executed by the former master of the vessel at Calcutta, the

[1] [Reprinted from 12 N. B. R. 491, by permission. 1 N. Y. Wkly. Dig. 174, contains only a partial report.]

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

[2] [Affirmed in 1 Wheat. (14 U. S.) 96.]

Aurora being about to proceed to Philadelphia. The captain chartered the vessel to the libellant, for the voyage to Philadelphia, under another master; and at the same time executed the bond, part of the consideration of which was to obtain funds for the payment of a hypothecation of the vessel at Port Jackson (of the necessity of executing which, there was no proof), and part for repairs to be made of the vessel at Calcutta. The payment of the hypothecation given at Port Jackson, is not a valid consideration for the bond executed at Calcutta, as there is no proof of the necessity for executing it.

[Cited in Greely v. Smith, Case No. 5,750.]

2. The obligee in a bottomry bond ought always to prove the necessity for the advances, and that they were made to enable the master to prosecute his voyage. The necessity for such advances, and that they were made on the credit of the vessel, are never to be presumed. If the master has or can command other funds, he has no authority to subject the property of the owner to the payment of a premium beyond legal interest.

[Cited in The William & Emmeline, Case No. 17,687.]

3. Another conclusive objection to the validity of this bond, is, that before the advance was made and the bond given, the master had resigned his command of the vessel, and another master, appointed by the libellant, had succeeded to it.

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

This is the case of a libel filed in the district court by the appellees, stating, that the brig Aurora, being in the year 1811 at Port Jackson, in New South Wales, and being in want of necessaries for the prosecution of the residue of her voyage; none of her owners being there, O. Smith, the master, having no other means to obtain money to enable him to prosecute his voyage, borrowed of Lord & Williams, for this purpose, £1482. 6s. 1¼d. sterling, on a bottomry hypothecation of the said brig, her tackle, &c., at a premium of 10 per cent. for the voyage from Port Jackson to Calcutta; that the brig arrived in safety at Calcutta, and the libellants being willing to charter the brig, to bring out a cargo to the United States, which she could not do, being again in want of necessaries to enable her to prosecute such voyage, and to free her from the bottomry to Lord & Williams; the master applied to them for a loan of money for these purposes, which they granted him to the amount of 18000 Sicca rupees, for which they took a bottomry bond on the said brig, on a voyage from Calcutta to Philadelphia, at the rate of 20 per cent. premium; which bond was executed by said Smith, on the 23d of December, 1811; that the libellants accordingly paid off the amount of the bottomry bond to Lord & Williams, amounting to 10713 Sicca rupees, 2 annas, and received the said bond from the agent of Lord & Williams, with a receipt thereon; that the brig arrived in safety at Philadelphia, whereby the said sum of 18000 Sicca rupees, with the stipulated premium, became due. The prayer of the libel is, that the brig may be seized, and condemned to be sold, for payment of this debt. The answer of the owners of the brig, not confessing any of the allegations of the libel, states, that on the 23d of December, 1811, the said Smith chartered the said brig to the libellants, for the voyage from Calcutta to Philadelphia, for the sum of 12000 Sicca rupees, which the libellants agreed to advance to the said Smith, as soon as the cargo should be laden on board; and it was further agreed by the charter party, that the libellants should hold the entire possession and command of the brig, during the continuance of the charter party, and should navigate her to the United States; that the said Smith had no authority from the respondents, to enter into the said charter party. Nevertheless, the libellants took possession of the brig, paid the said freight to Smith, and dismissed him from the command of the brig; and placed her under the command of another master, who navigated her to Philadelphia; that the libellants paid the said freight to Smith, knowing that he was addicted to intoxication and profligacy, instead of applying the same to the necessities of the vessel; no part of which, has Smith paid or accounted for to the respondents. They aver, that the whole 18000 rupees, were advanced without any justifiable cause whatever. The district court confirmed the claim of the libellants, to the amount of the Port Jackson bottomry, as well as to the residue of the consideration of the bottomry bond given at Calcutta; deducting from the 18000 rupees, the 12000 rupees paid by the libellants to Captain Smith, considering that that sum should have been applied to the necessities of the vessel, and not paid over to Smith; and decreed in favour of the libellants for the balance. [Case unreported.]

Chauncey & Binney, for appellants, contended, that this was not a good maritime hypothecation; the bond given at Port Jackson, which forms a part of the consideration of it, not being proved to have been given for necessaries for the vessel, nor given at the time the advances were made, or in consequence of an agreement to give such a security at the time the advances were made; nor was it given to enable the master to complete his voyage, as described by his owners, that being to Canton, and not to Calcutta; and consequently, it was not given with a view to the interest of the owners; all which circumstances should concur, to make a valid maritime hypothecation. Park. Ins. 413; 2 Marsh. Ins. (Condy's Ed.) 740, 1 note; Rucher v. Conyngham [Case No. 12,106]; Tunno v. The Mary [Id. 14,237]; Boreal v. The Golden Rose [Id. 1,658]; Ld. Raym. 157, 346; 2 Browne, Civ. & Adm. Law, 124. As to the residue of the consideration, the 12000 rupees paid for freight, furnished funds for the supply of necessaries at Canton, and the obligee should have so applied them. Again, the bond should express that the money is loaned for the necessities of the ship, or it is not good. 2 Emerig. Mar. Loans, 434, 439; 2 Marsh. Ins. (Condy's Ed.) 740. Another objection was made, that Smith was not master when he gave the bond; and of course, could not bind his owners by it.

Hopkinson & Rawle, for appellees.

The bond is prima facie evidence, that the advances were made for the necessities of the vessel; besides, it is proved, by a witness, that the vessel required, and received repairs at Port Jackson, though the amount expended for them is not proved. So, it is to be presumed, that a promise to secure advances made for the necessities of a vessel, was made when the advances were made. As to the form of the bond, this is not objectionable. Abb. Shipp. 103, 299; 1 C. Rob. Adm. 173, 176; 2 Emerig. Mar. Loans, 9. But the powers given to the master by his letter of instructions, authorized the master to bind the owners, by giving a security on the vessel, in cases where, as master, he might not have had such authority. These instructions state, that he is to proceed with his cargo, amounting to 8927 dollars, to the coast of Brazil; there to sell, and take on board another cargo, and to proceed with it to New-Holland; and there to sell the second cargo. Having thus got on board furs, specie, or good government bills, to proceed to the Pegus, and load with sandal wood; and if this can be got, to proceed to Canton. If only part of a cargo can be obtained there, he is to proceed to the Sooloo islands or others, for trade in pearls, birds' nests, and other articles, suited for Manilla or Canton; "at one of which ports," they say, "we expect you to close the first part of your adventure, by remitting to us all the funds accumulated, reserving only enough for your operations in those seas. The first adventure being thus ended, we leave to your judgment the future destination of the brig, and the kind of trade proper to be adopted —either to continue trade to the Pegus, Sooloos, or other islands, or to engage in trade between Canton and the north-west coast of America; but Canton should be the place to conclude all your adventures. Finally, notwithstanding all that is stated, as orders, we do not intend to embarrass your proceedings in any way; and therefore, confiding in your judgment, we leave you free in all situations, to act as you may think best for our interest. We will add, however, that you have no authority to draw on us, nor to negotiate for us, farther than as relates to the vessel, cargo, and proceeds thereof, in your hands; so that in any event, you are not to engage us in any responsibility. Hence, the negotiating the bills, as well as every other transaction during the voyage, must be done on your responsibility only, as though you were the owner of vessel and cargo. You will understand, that we are known to you only as persons with whom you are hereafter personally to account for the property now embarked in vessel and cargo, and are not to be made responsible for any thing more."

WASHINGTON, Circuit Justice. The question which arises in this cause is, whether the bond given at Calcutta, constitutes a valid hypothecation of the vessel? To decide this, the consideration of the bond, and the circumstances under which it was given, must be inquired into. The legal principles which apply to maritime hypothecations, have been frequently stated in this court. It has been laid down, that to give validity to such a bond, the necessity of raising money in this way, should be clearly shown by the obligee; and it should also appear to have been obtained, in order to enable the master to prosecute his voyage. If the master has, or can, command other funds, he has no authority to subject his owners' property to the payment of a premium, beyond the legal interest of money. It is also necessary, that the loan should be made upon the credit of the vessel, and not that of the master or owner; because in the latter case, the necessity for giving such an hypothecation, could not exist. Consequently, the master has no authority to hypothecate in this way, for antecedent advances made, not upon the faith of such a security. How do these principles apply to the consideration of the bond given to the libellants? That is composed of a bottomry bond, given by Captain Smith to Lord & Williams, at Port Jackson, which was discharged at Calcutta by the libellants; and of advances made by the libellants to Captain Smith, at Calcutta, for the purpose of enabling the Aurora to perform her voyage to the United States. No evidence has been offered to prove the consideration for which the Port Jackson bond was given, except a general statement made by Clark, in his deposition, that the brig was in want of necessaries at that place, and that she received repairs there. But no account is furnished, nor proof exhibited, to show, whether the whole, or what part of the consideration of that bond, was required for the necessities of the vessel, or that they were such as might probably require such a sum to relieve them. This, however, is not the objection which we deem most fatal to this bond. It does not appear, that the loan was made on the credit of a hypothecation of the vessel; and unless it was, the master had no authority to bind his owners or their property, by giving such a security. It is contended, that this ought to be presumed, the bond itself being prima facie evidence of that fact. However this might be, in a case fairly open to presumption, the argument is inadmissible upon general principles, where the recitals in the bond contradict the presumption. Now, in this case, it is expressly stated in the bond, that the necessaries for the Aurora, had been furnished at various times and places, as well previous to her sailing from Port Jackson, in September, 1810, as at various times since; and, also, on the present voyage. Where the advances are made at one time, and the security is taken long afterwards, particularly after the vessel has been exposed to sea risks, by having performed an intermediate voyage, as happened in this case, the presumption is, that the advances were made on the personal credit of the master or owners, or else the security would have been taken at or about the time when

the debt was incurred. But there is no room for presumption, in this case, for another reason, which is, that it is proved by Clark, that Captain Smith was imprisoned for the debts he had incurred on account of the vessel; and also, that the brig received nearly all the repairs put upon her, before the first voyage which she made from Port Jackson. This evidence shows strongly, that the master had obtained from other persons than Lord & Williams, what articles were necessary for his vessel, upon his personal responsibility; and that the advances made by Lord & Williams, were not to enable the vessel to prosecute her voyage to Canton, but principally to relieve the captain from confinement, and to enable him to accommodate Lord & Williams, by transporting a corgo for them to Calcutta.

As to the advances said to have been made at Calcutta, to Captain Smith, for the necessities of the Aurora, to enable her to perform a voyage thence to the United States, many reasons have been assigned, why they cannot constitute a consideration for a maritime hypothecation. One of them, we think, is conclusive; and consequently, the others need not be examined. No person is authorized to give such a bond, but the master of the vessel; and it is most obvious, that on the 23d of December, 1811, when this bond bears date, Lee, and not Smith, was the master. It is impossible to be so blind, as not to see that the bond and charter party, though dated on different days, were simultaneous, if not in their execution, at least in relation to the contract which formed the basis of those instruments. The circumstance which proves this fact incontestibly, is, that Captain Lee (the master appointed by the libellants, and not substituted by Smith), both by his affidavit, and by his account of the disbursements made for the vessel at Calcutta, proves, that he assumed the command on the 17th of December, six days before the bottomry bond bears date, and before any advances even were made for the necessities of the vessel. These advances, therefore, were made to a master appointed by the very persons who made them, and not to the one who hypothecated the vessel. The affectation of Smith, in giving sailing instructions to Lee, in January, 1812, is too thin to conceal the real nature of this transaction. If, then, this be not a valid hypothecation, under the general authority of Smith, as master, is it so in virtue of any powers given to him by the instruction of his owners? These instructions contemplate two objects—the employment of the vessel, and the means of accomplishing it. As to the first, the powers given to Smith were unlimited. The voyages marked out by the owners, seem to have been intended merely as hints, suggested in the way of advice; and lest he should be led to construe them otherwise, the writers add the following explanatory clause —"Finally," &c. See ante. Seeming, however, to apprehend, that this sweeping sentence might be understood to extend to the means of accomplishing the objects of the trade, in which he was to engage, they express themselves immediately as follows:—"We will add, however," &c. See ante. This latter clause, is to be considered rather as a limitation, than an extension of the authority which, as master, Smith would have possessed. As master, he would have had power to bind, not only the vessel and cargo by an hypothecation of them, but also the owners personally, which latter power is here denied him. The authority, therefore, of Smith, to hypothecate the vessel, remained precisely as it stood under his general authority as master; and not only so, but it was connected with his character as such. The moment he threw off that character, or bound himself to do so, and resigned the management of his vessel to another master, his power to bind his owners, or their property, in virtue of his instructions, as well as of his general authority as master, ceased; and although the libellants may have a very just claim for advances fairly made for the use of this vessel, and in order to enable her to return to the United States, yet it is not such a one, as a court of admiralty can enforce. Decree reversed, with costs, and libel dismissed.

Affirmed, on an appeal to the supreme court [1 Wheat. (14 U. S.) 96.]

Case No. 17,056.

The WALDO.

[2 Ware (Dav. 161) 165;[1] 4 Law Rep. 382.]

District Court, D. Maine. Dec. Term, 1841.

SHIPPING—LOSS OR DAMAGE TO CARGO—STOWAGE ON DECK—AUTHORITY OF MASTER—CONSIGNMENT TO MASTER FOR SALE.

1. The master of a vessel is bound to secure the cargo under deck. If he carries goods on deck they are at his own risk, and if they are lost or damaged he cannot protect himself under the usual exception of the dangers of the seas, at least, unless the accident by which they are lost would have been equally fatal if they had been under deck.

[Cited in The Wellington, Case No. 17,384; Chubb v. 7,000 Bushels of Oats, Id. 2,709; The Delaware, 14 Wall. (81 U. S.) 605.]

2. A shipper, whose goods are lost or damaged by the fault or neglect of the master, has for his damages a remedy against the owners, and a lien on the ship.

[Cited in The Hendrik Hudson, Case No. 6,358; Dupont v. Vance, 19 How. (60 U. S.) 169.]

3. But it is only those acts of the master which are within the scope of his duty as master, that bind the owners and create a lien on the vessel.

[Cited in The Illinois, Case No. 7,005.]

[Cited in Thompson v. Hermann, 47 Wis. 610, 3 N. W. 583.]

4. If the shipper consign his goods to the master for sale, the master, in all that relates to the safe stowage and transportation of the goods, acts in his quality as master. He is the agent of the owners, and his acts bind the owners of the ship.

[Cited in The Flash, Case No. 4,857.]

5. But in what relates to the sale and disposition of the goods, after they are carried to the port of destination, he acts as agent of the ship-

[1] [Reported by Edward H. Daveis, Esq.]

per, and neither the owners nor the ship are responsible.

[Cited in The New Hampshire, 21 Fed. 927; The Maiden City, 33 Fed. 717.]

This was a libel in rem, brought for the non-performance of a contract entered into with the master by a bill of lading. The libellant shipped at Bath, on board the schooner Waldo, bound for Atakapas in Louisiana, 144 barrels of potatoes, to be delivered at that port, at the freight of fifty cents a barrel, and consigned to T. H. Merrill, the master, who signed the bill of lading. It is in the common form and is dated Nov. 23, 1840. The potatoes were stowed on deck and well secured there and covered with boards. About the time they were laden, the master was taken sick and unable to go the voyage, and after the vessel was prepared for sea, she was delayed some days before another master was engaged. She sailed December 2d, under the command of W. C. Wyman, the new master. A few days after leaving port they met with heavy gales. The sea run high and broke over the vessel and wet everything that was exposed to the water on deck. When about ten days out, the weather having become more moderate, the potatoes were partially overhauled and found to be wet and many of them rotten. On their arrival at Key West, there was a more thorough examination; the rotten potatoes were separated from the sound and thrown away, and forty barrels of sound ones were repacked. With these, and forty barrels more, which had not been examined, they sailed for Atakapas. When they arrived there, it was found that all the potatoes were rotten and spoiled, except fifteen barrels, which were sold at two dollars a barrel, and pay taken in molasses. On the return of the vessel, no account of sales was rendered to the shippers, and this libel was brought against the vessel for the non-performance of the contract.

Sewall & Howard, for libellant.
Mr. Groton, for respondents.

WARE, District Judge. In a contract, by a bill of lading, for the transportation of merchandise, the master and owners of a vessel take upon themselves the responsibilities of common carriers. They can excuse themselves for the non-delivery of the goods, only by showing that it was prevented by some fatal accident, against which human prudence could not provide, by an act of the public enemy, or by some event expressly excepted in the instrument itself. 3 Kent, Comm. 216. The master is bound to take the greatest care of the goods, so that they shall not be liable to injury by the motion or leakage of the vessel, or exposed to damage by the weather. Abb. Shipp. 224. In respect both to the lading and carriage of the goods, he is chargeable with the most exact diligence. In all cases he is bound to have the cargo safely secured under deck, unless he is authorized by some local or particular usage, or by the consent of the shipper, to do otherwise. In all other cases, if he carries the goods on deck, he does it at his own risk, and he becomes an insurer against the usual perils excepted by the bill of lading.

If the goods of the shipper are lost, or receive any damage through the fault or neglect of the master or of the crew, his remedy is not confined to a personal action against the master or owners. The ship in specie stands as his security, and is by the maritime law hypothecated to him for his indemnity. But then it is not every wrongful act of the person who acts as master that will bind the owners, or will operate an hypothecation of the ship. It is only those which fall within the legitimate range of his authority, as master, that have this effect. While acting within these limits he binds the owners, because he is their authorized agent, and he binds the ship directly, because the policy of the maritime law has given to the shipper this additional security. The duties of the master as carrier extend to all that relates to the lading, transportation, and delivery of the goods. But when they are carried to the place of destination and delivered, his duties and responsibilities as carrier terminate. His functions as master are then accomplished.

If the shipper consigns his goods to the master for sale and returns, in proceeding to dispose of them he does not act under any authority derived from his appointment as master, but in an entirely new character, that of supercargo or factor. And his duties and liabilities under these two characters are as distinct and independent as they would be if the trusts were confided to different persons. Story, Ag. § 36; 2 Liverm. Prin. & Ag. p. 215. In all that relates to the transportation of the goods and navigation of the ship, he acts as master, and all that he does in relation to the disposition of the merchandise, is referred to his character as factor. In these characters he is the agent of different principals; in the first he is the agent of the ship-owners, and his acts are imputable to them; in the second he is a stranger to them, and they are no more responsible for his acts than they would be for those of a third person, to whom the shipper should consign his goods. In the transaction of that business, he is the agent of the shipper.

In the present case the goods of the libellants were consigned to the master, Capt. Merrill. It is true that he was prevented from going the voyage by sickness; but that portion of the potatoes, which arrived at the port of destination in good condition, were sold by the new master, not by virtue of his general authority as master of the vessel, but under the authority of that consignment. In the sale, therefore, he acted as the agent of the libellants and not of the ship-owners. It is clear, then, upon principle, that the owners cannot be chargeable for so many of the potatoes as were sold. With respect to them, all was done which the master had contracted to do, as master. They were carried to the

port of destination and delivered; that is, the master had transported them as the agent of the ship-owners, and he had sold them as the agent of the shippers. The precise question which arises in this part of the case, was presented in the case of Williams v. Nichols, 13 Wend. 58, and it was decided, on the grounds that have been stated, that when goods are consigned to the master for sale, and he sells them, and neglects to account for the proceeds, no action will lie against the ship-owners. It is an affair exclusively between the shipper and the master, to which they are strangers.

If no action will lie against the owners in personam, for an equally good reason none will lie in rem against the vessel. It is only those acts of the master which come within the scope of his duty as master, that bind the vessel. When a new character is superinduced on that of master, by his being made by the shippers the consignee of the cargo, his responsibilities in this capacity are entirely distinct from his obligations as master. In the latter case he is a common carrier, in the former a factor. And for any want of fidelity in that trust, his employers have the same remedies against him that they would have against any other person, and no other. As consignee he neither represents the vessel nor its owners. Perhaps when by a known custom of a particular trade the master is intrusted with the disposal of the cargo, a different rule may apply. This was the case in Kemp v. Coughtry, 11 Johns. 107. That arose in the trade between New York and Albany. It was proved to be the usual course of the trade, to send goods with orders to the master to sell either for cash or credit, and for him to return the proceeds to the shipper. No commissions were allowed the master for this service, nor to the owners, beyond what was involved in the freight. It was decided when the master had sold the goods, and failed to pay over the proceeds to the shipper, that the owners of the vessel were liable. The liability, in that case, was not founded on the general maritime law, but arose out of the particular custom. Under that custom the ship-owners undertook to act in the character of factors, as well as carriers, and intrusting the whole business to the master as their servant, they would be answerable for him personally in one character or the other. It is another question, whether for his defaults in the character of factor the shippers would have a remedy against the vessel in rem, which it is unnecessary to consider in the present case, as in this trade no such custom is proved. The case of Emery v. Hersey, 4 Greenl. 407, turned upon the same principles, and was decided upon the ground of a similar custom prevailing in the trade between Saco and Newburyport. See, also, Emerigon, Contrats à la Grosse, c. 4, § 11, and Des Assurances, c. 12, § 3.

As to that portion of the potatoes which perished on the passage, the evidence leaves no room for doubt that the loss arose from the damage they received by exposure on deck. They appear to have been as faithfully secured in that place as they could be, but nothing could protect them from wet, when the sea was breaking over the vessel. It appears probable, also, that they were injured by the frost. The double injury, of frost and wet, will in a short time destroy so perishable an article as the potatoe. And it was accordingly found, when they were overhauled at Key West, that out of 144 barrels examined, only 40 remained sound and fit for use; and when they arrived at Atakapas there were but 15 sound and merchantable barrels left out of the whole 144. They were undoubtedly lost by sea damage, and although the damages of the seas are excepted by the bill of lading, the master, by carrying the goods on deck, waives the exemption in his favor, and takes the responsibilities of sea damage upon himself; at lease, of any damage that would not have happened to them if they had been secured under deck. It was the right of the shipper to have his goods stowed under deck, and it was the fault of the master that they were placed above. And it is a general rule, that a party will render himself liable for loss or damage, to which he would not usually be subject, by the law of the contract when this loss has been preceded by some fault on his part, without which it would not have happened. 6 Toullier, Droit Civil, No. 227; Poth. Des Obligations, No. 142. Upon general principles, therefore, there is no room for questioning the liability of the master, and through him that of the vessel, for the potatoes that were lost, unless the respondent can bring the case within some especial exception to the general rule.

The defense set up in this case claims the benefit of such an exemption. It is contended that the goods were carried on deck with the consent of the shippers. This does not appear by the bill of lading. That is what is called a clean bill; that is, it is silent as to the mode of stowing the goods, and contains no exceptions to the master's liability, but the usual one of the dangers of the seas. The usual, and only safe mode of carrying goods, is under deck, and when the contract is entered into, it is presumed to be the intention of the parties, that the goods shall be stowed and carried in the usual way, unless there is a special agreement to the contrary. This is a condition that is silently understood by the parties, and implied by the law. A bill of lading therefore imports, unless the contrary appears on its face, that the goods are to be safely secured under deck. The written contract, therefore, not only fails to show any such consent, but impliedly negatives it. 3 Kent, Comm. 206; Vernard v. Hudson [Case No. 16,921]; Curt. Merch. Seam. 212.

The respondents then proposed to prove this consent by parol evidence. The general rule is, that parol evidence cannot be received to contradict, vary or control, the ef-

fect of a written instrument. It is true that the bill of lading does not say, in express terms, that the goods shall be stowed under deck. But this is a condition tacitly annexed to the contract by operation of law; and it is equally binding on the master, and the shipper is equally entitled to its benefit, as though it was stated in express terms. The parol evidence is offered, then, to control the legal operation of the bill of lading, and it is as inadmissible as though it were to contradict its words.

But, admitting this rule of evidence, it is contended that the bill of lading was executed under such circumstances that it is not legally binding upon the master, as a written contract. The testimony is, that when he signed it, he was confined to his bed by sickness, and was so feeble as to be unable to sit up, but was supported by others while he wrote his name; and that he had been delirious before, and was after it was signed. The papers were brought to his house, filled up, and ready for his signature. His friends objected to his being called upon to execute them, on account of his sickness, but when he was informed that the shippers were in the house, and of the purpose for which they had come, he said it was proper that the papers should be signed by him, and they were accordingly brought to him and signed. It is not pretended that he was in a state of mental alienation at that time. On the contrary, his physician, who was present, states that he was in the possession of his faculties, and that he perfectly understood the nature of the business he was doing. The agreement had been made with the shippers before he was taken sick, and he had himself directed the manner in which the goods should be stowed. It appears, that at the time when he executed the papers, he recollected and understood what had been done.

Although, upon the whole evidence, it does not appear that the master was laboring under such a degree of mental debility as to be legally incompetent to an act of this kind, yet it is true that he was in a state of extreme weakness, with the powers of his mind probably enfeebled by disease. And if there was anything in the evidence, which looked like a design, on the part of the shippers, to take advantage of his condition, and draw him into different engagements from what had been understood and intended, I have no question but it would be the right of the court, and I think its duty, to look into the matter with great care. A court of admiralty is not, in such cases, governed by the narrow doctrines of the common law, which will not allow a man to plead his own disability, or, in the ungracious language of that law, to stultify himself. Co. Litt. 247a, 247b; 2 Bl. Comm. 291; 1 Story, Eq. Jur. § 225. But the only circumstance that has the slightest tendency to awaken such a suspicion is, that the shippers brought the bill of lading ready filled up, and this alone, when the state of the master's health is considered, would be a very narrow foundation for supporting a charge of fraud. But still, under the circumstances of the case, the court may have a right to look into the evidence, as it will probably be most satisfactory to the parties that it should. It seems hardly proper for a court, which is, by the constitution, required to decide between parties ex æquo et bono upon the most liberal principles of equity, to close its ears against evidence on technical objections, if it be doubtful whether the objection be fairly applicable to the facts; and being less restrained in its course of proceedings by technical and arbitrary rules, it is perhaps its habit to be less rigorous in upholding such objections.

I have, therefore, looked into the whole evidence to see if there is any satisfactory ground of belief, that there was any agreement or understanding between the parties that the goods should be carried on deck. In the first place, it is to be observed that the presumption in every contract of affreightment is, that the goods shall be secured under deck. It is for the master who would exempt himself from the risks of a deck passage, to remove that presumption. The ordinary and proper evidence would be a memorandum to that effect on the face of the bill of lading. But in the present case the only evidence, which has any tendency to prove the fact, is the testimony of the mate and one of the crew. The mate says that the libellants were on board the vessel on the 23d of November, after the goods were laden; that they were then on deck, carefully covered with two thicknesses of boards on the top and at the sides, and as well secured from the weather as they could be in that situation, and that the libellants expressed themselves satisfied with the manner in which they were secured. On a further examination he said that he did not understand them as expressing themselves satisfied with the fact that the potatoes were on deck, but only that he had done his duty in securing them well in that place. The other witness said merely that they knew that the potatoes were on deck, and made no objection to it. It appears also, that when the bill of lading was executed, no complaint was made to the master on this subject. If this evidence stood alone, it might justify the inference that the shippers assented to their goods going on deck, and in that case the risk of a deck passage would be shifted from the master to them. But although there is no testimony directly contradicting it, there is evidence leading to an opposite conclusion. The contract of affreightment was made several days before the goods were actually received and laden, and the price of the freight settled. The potatoes were taken by the master in his boats at Bath, and carried to Phippsburg,

where the vessel lay, several miles from the residence of the shippers. When they went to get their bill of lading, the vessel was completely loaded and ready for sea, and it was evident that the goods must go as they were, or not go at all. Now there is no evidence that when the agreement was made anything was said of the goods being carried on deck, or that any thing was said between the master and shippers at any subsequent time. The bill of lading was executed in pursuance of this previous agreement, and no objection to it was made by the master. And if it be said that the state of the master's health will account for his not giving particular attention to the form of the bill of lading, it will equally account for the shippers not making the lading on deck a matter of discussion at that time. Now it is very material to be remarked that the full under deck freight was agreed to be paid, and was secured by the bill of lading. Certainly, it is not easily to be believed, that any prudent merchant would consent to take upon himself all the risks of a deck passage, after agreeing to pay full freight. The most, then, that can be said of the parol evidence is, that part of it leads to the inference that the shippers may have consented that their goods should go on deck, and another part, of quite as much stringency, leads to an opposite conclusion. Indeed, it seems to me that it would be putting the case quite as favorably to the master as the facts would warrant, if it stood on this testimony alone, to say that it was a balanced case. And then the common presumption which arises in the absence of any special agreement, that the goods are to be secured and carried in the usual manner, turns the scale in favor of the shipper; because this presumption must prevail until it is removed by the master.

There can be no doubt from the evidence, that the potatoes were destroyed by being wet by the sea breaking over the deck of the vessel, and in part probably by being touched by frost. The bill of lading contains the usual exceptions of the master's liability for the dangers of the seas. But, as has been already observed, this will not excuse him if he carries the goods on deck, unless the calamity by which they are lost would have been equally fatal, if they had been properly secured below deck. But if this had been done it is plain that they would have gone safely, as was the case with the rest of the cargo. Some evidence was introduced to show that potatoes are as liable to rot under as above deck. That may be the case if the vessel has uniformly moderate and dry weather, but it cannot be if they are exposed as these were to wet and frost. It is to secure goods from such dangers, as well as for other reasons, that the master is required to have the cargo put under deck. If after filling the hold he chooses to encumber his deck with goods, in order to increase the amount of his freight, he voluntarily assumes the responsibility upon himself. The additional expected profits of the voyage constitute the premium for the risk of the deck load.

The damage which the libellants have sustained is the value of the potatoes which were lost, at the port of delivery, deducting the freight. The testimony of the mate is, that the potatoes which arrived sound were sold for two dollars a barrel; and 129 barrels, the amount that perished on the voyage, after deducting 50 cents for freight, will amount to $193.50; for which sum a decree is to be entered for the libellants.

[For a libel in personam founded on a bill of lading against the master and owners of the Waldo, and arising out of the same voyage as the above libel, see Case No. 13,460.]

Case No. 17,057.

WALDORF et al. v. The NEW YORK.

[1 Flip. 49;[1] 3 West. Law Month. 249.]

District Court, N. D. Ohio. 1862.

COLLISION—STEAMER AND SAIL—RULES OF NAVIGATION.

1. The navigation of sailing vessels, and those propelled by steam, applicable in cases of collision, is governed by this rule: The sailing vessel is to pursue her course; the duty of those managing the steam vessel being to so direct its course, or modify its speed, as to avoid a collision. It follows that a change of the sailing vessel, though made with the view of preventing a collision, is a mismanagement of the vessel.

2. But this rule is not so imperative as to forbid a change in the course of the sailing vessel, should it be manifest that a collision cannot otherwise be prevented, or that such change is made because the danger of such collision is imminent and impending. In such circumstances, whether such change in the course of the sailing vessel tended to an avoidance of the collision or not, is not of legal importance.

[This was a libel by Frederick Waldorf and others against the propeller New York (S. D. Caldwell, claimant) to recover for damages sustained in a collision.]

WILLSON, District Judge. This is a proceeding in rem in a cause of collision. The libellants were the owners of the schooner Dawn, a vessel of over two hundred tons burthen, which vessel was run into and immediately sunk, in Lake Erie, by the propeller New York, at about five o'clock in the morning of the 21st of October, 1859.

It is averred in the libel that the schooner was on a voyage from Buffalo to the port of Monroe, in the state of Michigan, with a cargo of salt and assorted merchandise. That during the voyage, between five and six o'clock in the morning of the 21st of October, 1859, the said schooner being then about twelve miles westerly of Port Stanley, in Canada, having a good northerly sailing breeze, and standing on a steady course of S. W. by W.,

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

the first mate, who then had watch and was commanding officer of the deck, discovered the white light of a steam propeller approaching the vessel, and bearing about one point on her starboard bow; that at that time there were on the deck of the schooner, with the mate, two able-bodied seamen—one at the wheel, and one in the bow—on the lookout; that the attention of the mate was immediately called to the light of the propeller, which was thus first seen by the lookout on board of the vessel about ten minutes before the collision; that the schooner was kept steadily on her course of S. W. by W. until just before the collision, when the mate, being satisfied that the propeller would strike the schooner, and knowing that he could get to the windward of the propeller, ordered the vessel's helm to be put hard up, which order was promptly executed, and almost immediately thereafter the propeller struck the schooner in or near the main chains, cutting her to the water's edge, so that she immediately filled with water and sunk. It is further alleged in the amended libel that the schooner was tight, staunch, and well manned and provided, and that at the time of, and just before the collision, she had her starboard tacks aboard, going off large, with a white light burning brightly upon her pall bit, and that the sky was clear, with no fog or haze upon the water to obstruct the vision.

Stephen D. Caldwell, as claimant and sole owner of the propeller New York, has filed his answer, setting forth, among other things, that the said propeller, at the time of the casualty, was on her way from Toledo to Dunkirk, and was following the north shore of the lake on account of the wind, which blew fresh from the N. N. W.; that she was steering her course E. N. E., when about eight miles from the north shore, and some twelve miles to the westward of Port Stanley; that in that vicinity, and while steering the course last aforesaid, the second mate, who was the officer having command of the propeller, saw the light of the Dawn nearly ahead, but bearing to the larboard of the propeller's course; that as the schooner and propeller approached, in order to give her a good berth, the second mate ordered the wheelsman of the propeller to put the wheel aport, and the order was obeyed, which was some four minutes previous to the collision; that the schooner's light continued to bear to the larboard as the two vessels approached each other, and the second mate ordered the wheelsman the second time to put the wheel more aport, so as to give the schooner ample room to pass in safety, which order was obeyed. But after this second order was given, and the propeller was steering to pass to the starboard, the helm of the schooner was suddenly put to the starboard, which, unexpectedly to the officer in command of the propeller, brought the schooner directly across the course of the propeller, and as soon as this was discovered the officer of the propeller ordered the wheel astarboard, and gave the proper signals for the stopping and backing of the engines in order, if possible, to prevent a collision, and the engineers commenced backing, but the distance between the two vessels was too short to enable the propeller to swing sufficiently to avoid the schooner or to stop; and the propeller, consequently, struck the schooner on the starboard side, abaft the main chains, and she sank in about twenty minutes; and that the disaster happened without any fault on the part of those having charge of the propeller, and solely by the improper conduct and fault of those in charge of the schooner.

Such are the detailed statements as to the movements of the two vessels placed on the record by the respective parties, and of the conduct of those in charge of them at the time of the collision. It accordingly becomes necessary to examine the proofs in the case, in order to trace the fault to the party really culpable, and on whom the loss should properly fall.

There are some leading facts disclosed by the evidence about which there can be no controversy. These are: that the wind was N. N. W. The course of the schooner, till a few moments before the collision, was S. W. by W., and the course of the propeller, E. N. E. The speed of the schooner was five miles an hour, and that of the propeller about ten miles an hour. Those on watch upon their respective vessels discovered each other's white lights one point over their weather bows about fifteen minutes before the vessels came in contact. The schooner had her starboard tacks aboard, and exhibited a bright, white light upon her pall bit, and as her course was S. W. by W., with the wind abaft the beam, she was, in technical language, "going off large." The propeller struck the hull of the schooner in the main chains stem on, the two vessels making an angle of about thirty degrees at the point of contact.

It is conceded that these important facts were fully established by the proofs made upon the hearing of the cause. In order to ascertain the fault, if any there was, let us first examine the question with reference to the management and conduct of the Dawn.

As the wind was N. N. W., and the vessel's course was S. W. by W., she properly exhibited a white signal light, and that light was put in the proper place, to-wit: on the vessel's pall bit. That this light was good and sufficient, and burning brightly before and at the time of the disaster, is clearly proved by the testimony of the three men on the deck of the Dawn, and also by that of the second mate of the propeller, who was the commanding officer of her deck at the time, and who swears that he saw the Dawn's light fifteen minutes before the collision, and that "it was a bright, white light."

Nor is there any doubt about the vessel's being suitably officered and manned. John Varrer, the mate, was the officer of the deck at the time. His experience of thirteen years as a

sailor upon the lakes, and the intelligence and apparent candor with which he testified, satisfies us, not only that he was amply qualified for the duties of his post, but also that his statement of what occurred on the vessel contains a truthful narration of facts. The man at the wheel evidently understood and faithfully performed his duties. He swears that he has followed the waters since 1851, sailing from New York to Charleston, Savannah, and the West Indies, and on Long Island Sound and the lakes.

No exception is urged against the competency or fidelity of George R. Soules, who was on watch forward of the forerigging performing the service of a "lookout," as he promptly reported to the officer of the deck the propeller's light as soon as it was visible. Indeed, we are satisfied that no fault can be justly charged to the schooner, unless it be the change in her course, which was effected a few moments before the collision; and the question now is, whether that change of course was justified by the circumstances of the case, and from a just apprehension of impending danger.

When a steamer meets a sailing vessel, the general rule is, that the vessel, whether close hauled or with the wind free, has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her. We see no objection to this rule, as applied in the case of St. John v. Paine, 10 How. [51 U. S.] 584, where it is said, that by an adherence to it on the part of the sailing vessel, the steamer, with a proper lookout, will be enabled, when approaching in opposite directions, to adopt the necessary measures to avoid the danger, as she will have a right to assume that the sailing vessel will keep her course, and that if the latter fails to do this, the fault will be attributable to her, and the master of the steamer will be held responsible only for a fair exertion of the power of his vessel to avoid the collision under the unexpected change of the course of the sailing vessel, and the circumstances of the case.

But to this general rule (as thus explained), there are exceptional cases. When, for instance, the rule cannot be followed without defeating the end for which it is established, or without producing the mischief it is designed to avert, it will have no application; and in such a case a departure from it would be both justifiable and commendable. Hence, when a sailing vessel is approaching a steamer coming from an opposite direction, and from their proximity to each other the danger of collision becomes imminent and impending, the vessel's course may be changed in any manner which, in the opinion of those navigating her, will lessen the hazards of the disaster. And in such a case, whatever may be the error of judgment on the part of those in charge of the sailing vessel, the steamer will, nevertheless, be held responsible for the consequences of the collision; and for the obvious reason that those who produced the peril and put the vessel in jeopardy should be chargeable with the fault, and respond in damages.

What, then, were the facts and circumstances attending the change of course of the Dawn? The mate of the schooner, who at the time was officer of the deck, and who gives an account of what occurred on board, from the first appearance of the propeller's light to the time of collision, says, that when the man on the lookout forward reported a light ahead one point over the weather bow, he (the mate) looked and found it to be a white light in the direction reported. He then went aft, examined the compass, and found the vessel on her regular course—S. W. by W. He told the wheelsman to keep her so. He then went forward, and paced the deck a half dozen times, watching the approaching light, which continued its bearing to the windward. The man forward then said it was a propeller. He went aft and again looked at the propeller, and became convinced his vessel was in danger of being run into. He promptly ordered the wheelsman to put the helm hard up and keep her away. The wheelsman not being able to execute the order speedily, the mate went to his assistance, and immediately thereafter ran forward, shook the cabin door as he passed, to wake up the captain, and jumped, as quick as possible, about ten feet forward of the main rigging, and at that moment the propeller struck the vessel in the main chains, stem on.

And he says not more than a minute of time elapsed before the collision, after he ascertained that the approaching vessel was a propeller, and that if the schooner had kept her course the propeller would have struck the schooner somewhere in the forerigging, as the propeller, when the vessel's helm was put hard up, was not further distant than twice her length.

This sworn statement of the mate is substantially corroborated by the testimony of the wheelsman, and also by that of the watchman, who was acting as a lookout. Nor can we see anything in the testimony of the commanding officer of the propeller which contradicts or tends to weaken this testimony of the men on the schooner. He swears that while in the pilot house, after he had given the two orders to port the propeller's wheel (the last of which orders was given about one minute before the collision), he kept looking at the schooner, and he then first saw her swinging to the southward. He reached back, rang the stopping bell, ordered the wheelsman to starboard the helm, ran to the top of the pilot house (a distance of forty feet), and before he got there the collision took place.

These are the leading circumstances as disclosed by the testimony upon which to determine the propriety of the order given to change the vessel's course to the southward. None of the witnesses are able to give the exact heading of either vessel at the time they came in contact. The execution of the last order on the propeller had simply the effect of checking her swing to the starboard. The mate does not

think it had the effect of bringing the bow of the propeller to port before she struck. And he says when the order to starboard was given a collision was inevitable.

From a careful examination of all the evidence in the case we are satisfied that the Dawn committed no fault; and that the order to port, by the execution of which she began to swing to the southward, was given under such circumstances as to be justified by the impending danger of collision, and by those prudential considerations which always characterize good seamanship.

The next inquiry is, whether this collision was a casualty for which no blame should be imputed to either party, or did it result from the carelessness and improvidence of those in charge of the propeller?

In the case of The Oregon v. Rocca, 18 How. [59 U. S.] 570, it was held, that when a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precautions to avoid a collision; and if this be not done prima facie, the steamer is chargeable with fault. This is substantially the same rule as the one laid down by the court in St. John v. Paine [supra]. It was again affirmed in the case of The Genessee Chief, 12 How. [53 U. S.] 461. And yet again, in the case of The Pacific v. Rumball, 21 How. [62 U. S.] 372.

The rule is made thus stringent upon steamers, because they possess a power to avoid a collision not belonging to sailing vessels, even with a free wind, the master having the steamer under his command, both by altering the helm and stopping the engines. Hence, greater caution and vigilance are to be exacted from those in charge of them to avoid the dangers of navigation. This (said Mr. Justice Nelson) justly results from the superior power to direct and control the course and speed of the vessel, and the serious damages consequent upon a failure to avoid the dangers.

Many of the allegations contained in the claimant's answer, in this case, are fully sustained by the proofs. Those allegations we pass over without any comment upon the evidence which supports them. It will only be necessary to refer in detail, to the testimony of the second mate of the propeller, to ascertain the true cause of the collision.

He was the commanding officer of the propeller at the time of the disaster. He says, that while in the pilot-house watching for lights, he saw the bright white light of the Dawn fifteen minutes before the collision, and it bore less than a point over the propeller's bow. He looked at the compass and found his vessel steering a quarter of a point northerly of her true course. She was then brought to her regular course of E. N. E., and kept upon it ten minutes. At the end of the ten minutes, the Dawn's light bore one point over his port bow. He then gave the order to port, and in a quarter of a minute she was steadied on a course of E. by N. and kept upon it two minutes, and the order was given to port more. This, he says, was about a minute before the collision, and up to this time the speed of the propeller had not been checked. He at once saw that a collision was inevitable; hastened to the top of the pilot house, and before he could get there the vessels collided.

This coming in such close proximity to the schooner, without any abatement of the propeller's speed, was the result of recklessness or ignorance, or of both combined. That the second mate was totally incompetent to have command of the propeller, is perfectly apparent by a reference to his own testimony.

To the question, as to "what course a sailing vessel could steer with a green light, the wind being N. N. W.," his reply is: "Cannot tell, exactly; she could sail S. E. by E. Can't tell whether she could steer any other course or not." And to the question, "What course could a sail vessel steer and carry a red light, the wind being N. N. W.," he reveals his ignorance in the reply, and bluntly says—"The fact is, I cannot tell." He further says, on cross-examination, that if he had been approaching a red light, when and where he saw the white light of the Dawn, he should have concluded the schooner was going across the lake, and he would have put the vessel astarboard; and he gives it as his opinion, as an expert, that such a light would not, if the wind was N. N. W., entitle a sail vessel to steer west. He finally reveals the true cause of the disaster, when he swears, that he had no idea that the course of the Dawn crossed that of the propeller, and that if he had supposed the lines of progress of the two vessels crossed each other, he would not have done as he did.

Now, the most ignorant deck hand on the propeller ought to have known, that if the wind was N. N. W., the white light of the Dawn indicated her course southerly of the point W. S. W., and that the courses of the two vessels must necessarily cross each other. The exhibition of the vessel's white light told as plainly as could the compass in the schooner's binnacle. The ignorance and unskillfulness on the part of the officer in charge of the propeller, and his incapacity to understand and perform the most important duties of his post, beyond question, brought about the collision. This view of the case renders it unnecessary for us to examine and pass upon several other points brought to our attention, and ably argued by the learned counsel on both sides.

We are clearly of the opinion that the propeller was in fault, and that, consequently, she must be held liable for the damages sustained by the owners of the schooner. It only remains to consider the question of damages.

The schooner Dawn was built at Milan, in the winter of 1846–7, and was put into commission in May, 1847. She was constructed under the immediate supervision of James P. Gay, and at a cost of $9,500.

Gay testifies that the materials used in the workmanship upon her, generally, were superior to those of other vessels of her class. That a considerable amount of money was expended in salting; and also in protecting her upper

works by means of oil and white lead. He says every precaution was taken in her construction necessary to prolong her life, and for this purpose one thousand dollars more were expended than is ordinarily bestowed on vessels of her class.

He overhauled and examined her when she was seven years old, and found her hull and masts sound. He again examined her hull about three years since, and he says he found it entirely sound, and the vessel itself in better condition than many of those of half her age. In his opinion, her value in 1859 was from $2,500 to $3,000.

In 1855, the Dawn sprung a leak in a gale and was sunk off Long Point, in Lake Erie. In about a week afterwards, she was pumped out, towed to Buffalo, and put on the dry dock for repairs. By the accident, the vessel's beams were raised off the clamps at one end, the centre box started, and some damage done to the plankshire.

Vincent Bidwell testifies that he carefully examined her hull while on the dry dock, and found no decay in her timbers, and that after the repairs were made, the vessel was in as good condition as before the accident. Charles A. Gardner, marine inspector for the board of underwriters, examined the Dawn in 1858, for the purpose of knowing what rate to charge for insurance on her hull. He reported her then value to be $3,000. But his valuation was reduced by the board, and put on the books of the association at $2,500, for the year 1859.

A large amount of testimony has been taken in this case, showing a general depreciation in the market value of vessel property since 1855, and also the ordinary depreciation from age and wear. Mr. Bidwell puts this general depreciation, from 1855 to 1859, at 35 per cent. And many of the witnesses estimate the annual depreciation from ordinary wear and age, to be about ten per cent.

Though the testimony, as to the value of the Dawn, in 1859, is conflicting, yet from a careful examination of all the evidence on this branch of the case, giving due weight to the testimony of those witnesses who have the best means of knowledge, we have come to the conclusion that her value, at the time of the collision, was $2,000. A decree will accordingly be entered in favor of the libellants for that amount.

Case No. 17,058.

WALDRON et al. v. CHASTENEY.

[2 Blatchf. 62.] [1]

Circuit Court, S. D. New York. Nov. 16, 1847.

POWERS UNDER WILL—POWER OF SALE—LEASE—DOWER—EQUITY JURISDICTION—EXECUTION OF POWER.

1. E. made his will in 1819, devising real estate to R. his wife, for life, or during her widowhood, for the support of herself, her three daughters, and one P.; and, on the death or re-marriage of R., the estate was devised to P. for his life, for the support of himself and the daughters; and, after the death or re-marriage of R. and the death of P., the estate was devised to the three daughters in fee. The will gave power to R., so long as she should remain single, and to P. after her death or marriage, to sell and convey the real estate, provided that B. should in writing, signed with his hand, approve and consent to such sale, without which approbation and consent no such sale should be valid. The moneys arising from the sale were directed to be invested in such manner as B. should direct, for the purposes of the will. R. was appointed executrix: *Held*, that R. had only a naked power in respect to the disposition of the estate, and that the power could be rightfully exercised only by a sale of the estate in fee.

2. The testator having died, and the will having been proved, R., in 1825, leased the real estate, as executrix and trustee, to N., setting forth the will at large in the lease, for 21 years, the lessee to pay to R., her heirs and assigns, yearly during the term, if she should so long live and remain the widow of E., and, after her death or marriage, during the residue of the term then unexpired, unto P., a certain rent: *Held*, that the lease, as a conveyance under the power of sale in the will, was void, as not fulfilling the intent of the testator, and not a sale of the estate for cash, or something which could be invested as its representative.

3. R., having an absolute estate for her widowhood, could lease that, independently of the power of sale, and that the lease given was good for the interest she had, and only void for any surplus of the term unexpired at her decease.

4. R. having, in 1827, sold and conveyed the same real estate in fee to H., the conveyance purporting to be made by her as executrix and trustee under the will and in pursuance of the power of sale: *Held*, that the lease to N. was no impediment to the exercise of the power of sale.

5. In ejectment brought by the remainder-men under the will, to recover the real estate, after the death of R. and P.: *Held*, that questions touching the discreet exercise of the power of sale belonged to a court of equity, and that the deed to H., if valid on its face, must operate as such at law.

6. The approbation and consent of B. to the deed to H. were given by his writing at the foot of the deed, and directly following the signature of R.: "I consent to the above," and subscribing his name thereto: *Held*, that the requirement of the proviso in the power of sale was thereby satisfied, and that the consent of B. imported his approbation.

Ejectment [by Benjamin Waldron and Sally Ann, his wife, and John L. Wilson, against Edward Chasteney] for premises in the city of New York. Medcef Eden, the younger, made his will in July, 1819, devising all his real and personal estate to Rachel his wife, for life, or durante viduitate, for the maintenance and support of herself, her daughters Sally Ann, (one of the plaintiffs,) Elizabeth, and Rebecca, and also of John Pelletreau; and, on the death or re-marriage of his wife, he devised said estates to Pelletreau, during his natural life, for the support of himself and the three daughters; and, after the death or re-marriage of his wife, and the death of Pelletreau, he devised all his said landed estates to Sally Ann, Elizabeth and Rebecca, in fee. The will then proceeded: "I give to my wife, so long as she shall remain single, and to the said John Pelletreau, after her death or marriage, full power and authority

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

to sell and convey all or any part of my real estate, provided that the said Aaron Burr shall in writing, signed with his hand, approve and consent to such sale; but no such sale shall be valid without such approbation and consent." The moneys arising from such sale were directed to be invested in such manner as Burr should direct, for the purposes of the will. He appointed his wife executrix so long as she remained single and unmarried, and declared that, after she should die or be married, Pelletreau should be his executor. On the 1st of January, 1825, the testator having died, and his will having been duly proved, Rachel Eden executed a lease of the premises in question, which were a part of those devised by the will of her husband, to one Norsworthy. The lease purported to be executed by her as executrix and trustee, and set forth the will at large. The habendum clause of the lease was: "To have and to hold the premises, from the 1st day of January, 1825, for and during the full end and term of twenty-one years thence next ensuing, yielding and paying to the said Rachel Eden, her heirs and assigns, yearly and every year during the said term of twenty-one years, if she shall so long live and remain the widow of the said Medcef Eden, and, from and after her death or marriage, yielding and paying, for and during the residue of the said term which may be then unexpired, unto the said John Pelletreau, the yearly rent," &c. On the 29th of January, 1827, Rachel Eden sold and conveyed the same premises in fee to Halsey Rogers. The conveyance purported to be made by her as executrix and trustee under the will, and in pursuance of the power of sale contained therein. The approbation and consent of Burr to this sale was given by his writing, at the foot of the deed, and directly following the signature of Rachel: "I consent to the above," and subscribing his name thereto. Rachel Eden died in 1830, and Pelletreau in 1833. Elizabeth died in 1832, intestate and without issue. The plaintiff Waldron was the husband of the plaintiff Sally Ann. The plaintiff Wilson represented the interest of Rebecca. The defendant set up the lease to Norsworthy, and the deed to Halsey. At the trial a verdict was taken subject to the opinion of the court, on a case to be made.

Ambrose L. Jordan, for plaintiffs.

George Wood and Daniel Lord, for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The points considered and decided by the court are: (1) The due execution of the power under the will, in the conveyance of the premises in question, in fee to Halsey Rogers, on the 29th of January, 1827; (2) The sufficiency of the endorsement made by Col. Burr on the deed to Rogers, as a compliance with the directions of the will.

1. We regard it as settled, by the courts of this state, on the effect of the will of Medcef Eden, that Rachel Eden had only a naked power in respect to the disposition of the estate, and that the power could be rightfully exercised only by a sale of the estate in fee. Waldron v. McComb, 1 Hill, 111; McComb v. Waldron, 7 Hill, 335; Bloomer v. Waldron, 3 Hill, 361. If the demise to Norsworthy, on the 1st of January, 1825, was intended as a conveyance under the power in the will, it would be void, as not fulfilling the declared intent of the testator, because not a sale of the estate for cash, or something which could be invested as its representative. Bloomer v. Waldron, 3 Hill, 361. But Rachel Eden, having an absolute estate for her widowhood, could lease that, independently of the power of sale; and, whether she demised it in gross by a description appropriate to her special interest, or conveyed it for a term of years which might outrun the duration of her interest, the demise would be good for the interest she had, and only void for any surplus of the term unexpired at her decease. Bac. Abr., "Leases," I, 2; 4 Com. Dig. (Day's Ed.) 63, notes; Sinclair v. Jackson, 8 Cow. 543; Clarke's Lessee v. Courtney, 5 Pet. [30 U. S.] 319. The lease purports to be executed by her, as executrix and trustee, but it also sets forth at large the will by which her personal interest is created, and the conveyance will, upon settled principles of law, be supported to the extent of her authority to make it as donee of the estate. Sugd. Powers, 298. She being tenant for life, unless she should re-marry, the demise was good for the amount of her interest, and she would never have been allowed to reclaim the premises from the lessee during her life, or before the expiration of the twenty-one years, on the allegation that she had no rightful power, as executrix and trustee, to execute a lease, even though it had been executed by her with a formal declaration that she acted solely under the power of sale in the will. But the lease, though inartificially drawn, in no way limits the grant to the power of sale. On the contrary, it indicates, with a distinctness that can leave no doubt, an intention to grant the interest of the lessor, as well as to exercise a supposed power to convey a term beyond that. There was clearly nothing in the power of sale in the will which authorized the limitations as to rent contained in the lease, and, as those limitations are in consonance with the actual interest of Rachel Eden and Pelletreau, the instrument would naturally be construed so that the grantee might be assured of all the interest the widow had in her own right, and so as to correspond with honest and fair dealing on her part. These considerations show that the lease, operating only to convey the vested interest of the lessor during her widowhood, created no impediment to the exercise of her power of sale; and that the sale in fee, on the 29th of January, 1827, to Rogers, became valid and effectual, if so executed in point of form as to give it operation under the will.

It is contended that the outstanding term of years granted by the trustee to Norsworthy was injurious to the devisees, in preventing a sale for the full value of their interests, and also that the sale to Rogers was in fact for an inadequate consideration. Questions touching the discreet and beneficial exercise of the power of sale belong to a court of chancery, and not to one of law. The devisees might, by bill, have had relief against the trustee, if she executed her trust improvidently and to their prejudice, and against the purchaser, also, if he knowingly induced such act and colluded with her in its commission. Franchot v. Leach, 5 Cow. 506; Champion v. White, Id. 510; Jackson v. Hills, 8 Cow. 290, 293; Taylor v. King, 6 Munf. 358. But, upon its face, the conveyance to Rogers is valid, in so far as Mrs. Eden's capacity to execute it is concerned, and must so operate at law against the remainder-men, unless its execution was defective for want of compliance in form with the directions of the will.

2. The power to sell is given by the will, with a proviso, "that Aaron Burr shall, in writing, signed with his hand, approve and consent to such sale, but no sale shall be valid without such approbation and consent." The argument for the defendant concedes, as broadly as the plaintiffs contend, that this power must be strictly pursued, so far as it is directory as to persons, time and mode of execution. It is needless to rehearse the authorities for this doctrine, which is fundamental on this point. There can be no question that the deed by the trustee was inoperative and void, unless Aaron Burr, in writing, signed with his hand, approved and consented to the sale. His consent and approbation in writing was made a vital part of the power. No form or method of conveyance could be devised omitting such consent, which would satisfy the special qualification of the power. No consent or approbation could be given by Col. Burr which would render the deed efficacious, except in the specific mode pointed out by the will. Sugd. Powers, 264; Hawkins v. Kemp, 3 East, 410; Taylor v. Horde, 1 Burrows, 60, 120; Daly v. James, 8 Wheat. [21 U. S.] 495; Clarke's Lessee v. Courtney, 5 Pet. [30 U. S.] 319, 349, 350; Sinclair v. Jackson, 8 Cow. 543. It is, perhaps, not going too far to say, that the cases at law demand a precise and literal exercise of the power, to satisfy the rule. Daly v. James, 8 Wheat. [21 U. S.] 495, 535; Hawkins v. Kemp, 3 East, 410; Sugd. Powers, 210, 212.

Whenever a particular form is prescribed, no other may be adopted as equivalent to it, and the only question here is, whether the will has declared the formula with which the consent and approbation of Col. Burr shall be expressed. The manner must be in writing, and the writing must be signed by him. Both of these particulars have been fulfilled in this case, and we think that these are the only directions in the will which need be literally and exactly complied with. The conveyance is perfect in all its formalities when so framed, and, if the writing, so signed, expresses the consent and approbation of Col. Burr to the sale, there is no limitation to the use of those precise words in order to convey the consent. The will manifestly shows that the testator intended to secure the concurrence of Col. Burr to the conveyance and the investment of the proceeds, and it defines the manner in which his concurrence shall be communicated. This, however, does not necessarily import that the consent and approbation itself—the assent of Col. Burr's mind—must be shown by the employment of those very expressions. Otherwise, any departure from those identical words would vacate the deed, although the consent and approbation of Col. Burr were expressed with a fullness and certainty beyond all question. Suppose Col. Burr had written and subscribed a declaration on the deed, that he well knew its terms and purpose and had advised the sale, and that it met his fullest concurrence, and was in all respects satisfactory to him—could any court deny that this was consent and approbation on his part? We are satisfied that no more is requisite on this point, than for the grantee to show that the writing signed by Col. Burr does give his consent and approbation to the sale, and that the omission to employ that precise phraseology is not decisive of the inquiry.

At the foot of the deed, and directly following the signature of the trustee, Col. Burr wrote: "I consent to the above," and subscribed his name to it. We think that "consent" in this connection involves "approbation" also, even if the two expressions are not of equal and common value. Indeed, if any distinction can be made in the import and force of the words, it would appear that the testator used "consent" as the most significant and effective. If, as the supreme court intimate in Clarke's Lessee v. Courtney, 5 Pet. [30 U. S.] 319, 350, overniceties and refinements are not to be disregarded in construing powers to sell and convey lands, certainly no more extreme rigor of construction will be applied to defeat a bona fide attempt to execute a power, than to uphold it. In both cases, the intention of the party creating the power is to control its construction, and the substantial fulfilment of that intention is all that will be required. Wilson v. Troup, 7 Johns. Ch. 25, 33; Pomery v. Partington, 3 Term R. 665; Griffith v. Harrison, 4 Term R. 737, 743, 748, 749. In view of these principles, whatever stress of interpretation is applied to "approve," no sound and satisfactory distinction can be stated carrying its meaning beyond that of "consent." Especially, as the words are used in the will—"approve and consent to such sale"—"consent to" is grammatically, if not intrinsically, the positive and operative phrase. For, "approve" can have no sense, as it is placed in the clause, without the transposition of "such sale" or of "approve" itself, so as to bring the three words in direct connection. As it stands, and literally construed, "approve" is valueless, having no grammatical connection with "sale." Al-

though the court, in effectuating the intent of the testator, and looking to the substance of the power, would certainly not suffer a fault in syntax to work its destruction, yet, upon a nice point of synonymy or tautology, the criticism made may not be without influence in indicating whether the intent and direction of the testator are not wholly conveyed by the word "consent." Aside from such hypercriticism, we think that the written "consent" of Col. Burr to the sale necessarily imports his "approbation," and that the requirements of the power are thereby satisfied. We do not perceive that any further significance would be afforded by using both words. No import or effect is pointed out as legally applicable to both terms, which "consent," as employed, does not of itself express. We are to assume that the trustee and Col. Burr acted in good faith towards the grantee, and intended that the deed should be executed conformably to the power, and the "consent" of Col. Burr to the sale and conveyance for that purpose must be regarded as involving his "approbation" of both. Judgment for defendant.

WALES (THAYER v.). See Cases Nos. 13,871 and 13,872.

Case No. 17,059.

WALING v. The CHRISTINA.

[Deady, 49; [1] 1 Ore. 430.]

District Court, D. Oregon. Feb. 8, 1862.

SEAMEN'S WAGES—VOYAGE IN BALLAST—SHIPPING CONTRACT—MODIFICATION AT SEA.

1. In a suit for seaman's wages the maxim that "freight is the mother of wages" does not apply to a voyage commenced and intended to be made in ballast, for in such case it was not expected that freight would or could be earned.

2. A contract to ship as seaman on a trading voyage on the coast, without any definite stipulation as to the time or place of termination of the voyage, when justice to the seaman requires it, will be held void.

3. A contract entered into between master and seaman, at sea, changing the terms or duration of the original contract, should be closely scrutinized, and if prejudicial to the seaman's interest, disregarded.

In admiralty.

Edward W. McGraw, for libellant.

J. H. Mitchel, for claimant.

DEADY, District Judge. This is a suit by David Waling for seaman's wages. The libel alleges that the libellant shipped, without signing articles, on the sloop Christina, at Port Townsend, W. T., on October 28, 1861, on a voyage via Bellingham Bay to Portland and back, upon the agreement that at Portland the master would purchase a cargo of apples and carry them to Port Townsend, and give the libellant one third of the profits as his wages; that the sloop proceeded to Portland via Bellingham Bay in ballast, where she arrived about November 20; that the master did not purchase the cargo of apples, but after remaining at Portland until December 17, sailed for Shoalwater Bay and elsewhere, without notice to libellant, and without payment of his wages; and that libellant remained on said sloop and did his duty as seaman thereon between October 28 and December 17, aforesaid. The master, George Thompson, intervening for the interest of the owner, J. K. Thorndyke, answered the libel, denying the allegations thereof, and alleging that libellant shipped at Port Townsend on a general coasting voyage, to go wherever the interests of trade might require; that the libellant was to have one third of the profits of the voyage for his wages; that the master gave libellant notice of the sailing of the sloop from Portland, and libellant refused to go; that the sloop Christina is a coasting vessel of 13 $^{32}/_{95}$ tons burden, and up to the time libellant left her she had not earned expenses, and therefore the libellant is not entitled to any sum as wages. The master and two seamen, Quaile and Fisher, were examined as witnesses on behalf of the libellant. No testimony was offered by the claimant. Quaile sailed in the sloop from Port Townsend, and Fisher was shipped just before the sloop left Portland for Shoalwater Bay. The master is the principal witness. His statements on the stand do not agree in some material respects with the allegations of the answer. Besides, the inquiry involves the propriety of his own conduct in the transaction to such an extent that the court is inclined to take his statements with allowance. In the answer, he denies unqualifiedly that the libellant shipped for a voyage to Bellingham Bay, thence to Portland, and thence back to the port of departure or either of them. On the stand, he admits that the sloop sailed for Portland to touch at Bellingham Bay, where he expected to load with coal for Portland, but, not obtaining the coal, she proceeded in ballast for the latter port. He also admitted that he expected to meet a draft in Portland, with which he intended to buy a cargo of apples, or something else, and return with it to Port Townsend or Victoria, but that he did not receive the draft or he would have done so.

From the testimony of both the master and Quaile, it appears that when the sloop was about to sail from Port Townsend, the master asked the libellant if he would go with him on her to Portland; that the libellant replied in the affirmative and went aboard, as far as appears, without any stipulation as to the terminus of the voyage, other than that implied in the request and consent to go to Portland, or the rate or mode of payment of his wages. The master also testified, that when at sea four or five days, he told libellant that he expected money at Portland to buy a cargo of apples, which he expected to take to Port Townsend; that he was to have one third of the profits of the voyage, and he would give libellant the same which the latter assented to; but insists that this understanding was subject to his right

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

to go anywhere else, in his discretion, on a general trading voyage on the coast, and that there was no explicit understanding how long libellant was to remain on board. Quaile testifies, that after the first hiring at Port Townsend, he heard the master tell libellant that he would give him the same wages that he got himself, and that he heard the draft mentioned at same time, but nothing said about apples. When this conversation took place, the witness does not state, except that it was after the first hiring at Port Townsend. From the similarity of the circumstances, it is reasonable to infer that, so far as it goes, it is a part of the conversation testified to by the master as occurring four or five days at sea. The master testified that he did not get the draft at Portland, and in consequence did not purchase the cargo of apples and return with them to Port Townsend, as he contemplated or might have done, and that after remaining at Portland until December 17, he took a cargo of freight for Shoalwater Bay, with the intention of returning to Portland with a cargo of oysters; that on that day, in the afternoon, he informed libellant of the intended voyage—that he might sail in ten minutes or three days—but when the sloop was ready, he intended to sail, if he went alone; and that libellant might make the voyage, if he wanted to, which he refused. In the course of the evening of that day, it appears that a conversation occurred at Shelby's store, between the libellant, his proctor, the master and Shelby's clerk, from which it is pretty evident that the libellant then contemplated arresting the vessel for his wages, and that the master and clerk were aware of or suspected that such was his intention. At that time the master said, in the presence of the libellant, that he would sail in the morning, but he testifies that afterwards the clerk advised him to sail that night, which he did do—getting under way about eight o'clock. The wind was very light, and at Sauve's Island, a distance of about eight miles, he laid by until the forenoon of the next day, when he proceeded down the Columbia river with a light wind, pulling and drifting some of the time. There was a strong current in the river and no perceptible tide. At the time of sailing libellant's clothes were not on the sloop, but were left with some one on a steamboat at the wharf, nor was the libellant on the sloop that afternoon. While it appears to be true that the sloop left port in the night, without wind or tide, or other ordinary inducement for such sailing, I conclude from the evidence, that it was not for the purpose of preventing libellant from making the voyage to Shoalwater, but to avoid being arrested by him for his wages from Port Townsend to Portland. I think it sufficiently appears that libellant had already declined to make the particular voyage. Assuming this to be so, what effect does it have upon the libellant's claim for wages? This depends upon the nature of the hiring. It appears that by the first contract, at Port Townsend, the libellant simply shipped as a sailor for the voyage to Portland, without any special agreement as to the mode of payment or amount of his wages. Upon this contract or state of facts, the libellant was not bound to proceed with the sloop any farther than Portland, and was entitled to the customary wages for the voyage performed. The maxim, that "freight is the mother of wages," does not apply, for the reason that having sailed in ballast for Portland, it was not expected that any freight would be earned. True, the sloop touched at Bellingham Bay, with the intention of taking on coal for Portland, if it could be had; but I think this was a mere incident of the voyage, without changing substantially its general direction or character. It only involved a detour of about fifty miles on an inland sea or water, on a voyage of at least three hundred and fifty miles. In the application of this hard, but necessary, rule, I think it just and reasonable to regard this voyage as one made in ballast and without any expectation of earning freight.

The only remaining question to consider is the nature and effect of the agreement said to have been made at sea, by which the libellant was to have one third of the profits of the voyage to Portland and back to Port Townsend, in lieu of wages. It is very evident, that whatever might have been the ultimate intention of the master as to the nature and limit of the voyage, that he made the impression on the mind of the libellant, that he should have one third of the profits of a specific voyage from Portland to Port Townsend, with a cargo of apples, which the master was to purchase in the former place; and in this sense it must be understood and taken against the master. And, notwithstanding his testimony, it is not probable that the master had any other purpose at the time of the conversation with the libellant. Such being the case, the contemplated voyage and venture were alike prevented or broken up by the failure to purchase the cargo of apples and by the sailing of the sloop to Shoalwater. The libellant was not bound to proceed on the new voyage or take a share in the new venture for oysters. But if this alleged contract at sea, really was made as claimed and understoood by the master, then it may be called a very indefinite edition of a class of shipping contracts which have been severely animadverted upon by both the English and American courts of admiralty; as for instance, when the shipping articles specify a voyage from a certain port to another "and elsewhere." In some instances, where justice to the seaman required it, such a provision has been held void. Here, according to the master's testimony or professed understanding of the contract, notwithstanding the designation of certain ports in the agreement and the representations of specific arrangements for cargo, he was at liberty to continue this voyage as long and wherever upon this coast, as in his judgment the interests of trade might require. If such was the contract, and the law would enforce it, then the libel-

lant was in effect tied to the deck of this particular vessel, as long as she remained afloat, if the master for any reason, or without reason, saw proper to keep on coasting for trade, unless he should desert, and thereby forfeit his earnings. Again, this alleged contract is open to another objection. It does not appear to be regular or proper for a master to enter into new and special contracts with the seaman after the voyage is commenced, and while at sea. The relation between the parties is such, on board ship, at sea, that they do not deal upon equal terms. It may be that such contracts are not necessarily void, but in any event the circumstances under which they are made should be closely scrutinized, and if found, or appearing to be, prejudicial to the rights or interest of the seaman, disregarded. In any view of the case, the libellant is entitled to recover the customary wages from the time of sailing from Port Townsend—October 28, 1861—until the departure of the sloop for Shoalwater Bay—December 17, 1861. The customary wages, as appears from the proof, is $30 per month. Decree, that the libellant recover the sum of $50 and his costs.

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